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**THE HONORABLE MARK M. NAKASHIMA CHAIR
THE HONORABLE SCOT Z. MATAYOSHI, VICE CHAIR
HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS
THIRTY-FIRST STATE LEGISLATURE**

Regular Session of 2021
State of Hawai'i

March 11, 2021

**RE: S.B. 412 – RELATING TO OPERATING A VEHICLE UNDER THE
INFLUENCE OF AN INTOXICANT**

Chair Nakashima, Vice Chair Matayoshi, and members of the House Committee on Judiciary and Hawaiian Affairs, the Office of the Prosecuting Attorney of the County of Kaua'i SUPPORTS S.B. 412.

The purpose of S.B. 412 is to prohibit deferred acceptance of pleas for the felony offense of Habitually Operating a Vehicle Under the Influence of an Intoxicant (HRS §291E-61.5) ("Habitual OVUII"), by adding this offense to the list of deferral-precluded offenses enumerated in HRS §853-4.

Chapter 853 allows for courts to defer acceptance of a defendant's plea if the court finds that a "defendant is not likely again to engage in a criminal course of conduct; and [t]he ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law." HRS §853-4 provides for exceptions where a deferral is specifically not applicable. The list of exclusions includes numerous crimes, abuse of family or household members, jury tampering, solicitation of prostitution, all Class A felonies, and many more. The common nexus in these exclusions is that we deem these crimes to be particularly dangerous and harmful to the community as a whole.

This bill will add to the list, Habitual OVUII the felony of driving while intoxicated after having previously been convicted of OVUII (HRS 291E-61) on at least two separate occasions, within the 10 years prior. We believe Habitual

OVUII should specifically be excluded because it is similarly dangerous and harmful to the community as those other crimes enumerated in HRS 853-4, and a Habitual OVUII offender displays a level of callousness to the law that must not be rewarded.

An offender who operates a vehicle on our roadways while impaired puts innocent lives at risk. Those offenders convicted one or two times, are given the opportunity to rehabilitate themselves and ordered to partake in education on the dangers of driving while impaired. A Habitual OVUII offender, in order to commit the crime (at least) a third time, must consciously disregard the dangers of which they have been made aware. Such offenders willingly continue to put other people's lives at risk. As such, we must ensure that habitual OVUII offenders will not be eligible for deferred acceptance of their guilty or no contest pleas.

For these reasons, the Office of the Prosecuting Attorney supports the passage of S.B. 412. Thank you for this opportunity to testify.

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THE HONORABLE MARK M. NAKASHIMA, CHAIR
HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS
Thirty-First State Legislature
Regular Session of 2021
State of Hawai`i

March 12, 2021

RE: S.B. 412; RELATING TO OPERATING A VEHICLE UNDER THE INFLUENCE OF AN INTOXICANT.

Chair Nakashima, Vice-Chair Matayoshi and members of the House Committee on Judiciary and Hawaiian Affairs, the Department of the Prosecuting Attorney of the City and County of Honolulu ("Department") submits the following testimony in strong support of S.B. 412, with recommended amendments and a proposed H.D. 1. This bill is part of the Department's 2021 legislative package, and we thank you for hearing it.

The purpose of S.B. 412, is to prohibit deferred pleas for the offense of Habitually Operating a Vehicle Under the Influence of Alcohol (HRS §291E-61.5) ("Habitual OVUII"), by adding this offense to the list of deferral-precluded offenses. Habitual OVUII offenders are those who have already been convicted of OVUII (HRS §291E-61) on two separate occasions, within the 10 years prior, and are now facing a third charge of OVUII.

Generally speaking, deferred pleas allow someone to "put off" entering an official plea for a specific length of time—commonly known as the deferral period—during which time they have to meet certain terms and conditions set by the court (e.g. remain arrest-free and conviction-free, etc); the length of the deferral period varies, based on the severity of the offense. If the defendant abides by all terms and conditions of their deferral, through the end of their deferral period, then the case will be dismissed and no conviction will ever appear on the person's record (for that particular offense). This is essentially an opportunity for someone to show the court that they have "learned their lesson"—even without a formal conviction—and will not reoffend; each person is typically allowed only one deferred plea in their lifetime. Depending on the individual, a deferral could be used to keep a person's criminal record totally clean, or it could be used to keep a felony off of their record, or for other reasons.

Section 853-4, Hawaii Revised Statutes (“HRS”), explains the process and parameters of getting a deferral, and also lists specific offenses for which deferral is not allowed (e.g. abuse of family or household member, solicitation of prostitution, all class A felonies, etc). If enacted, S.B. 412 would add Habitual OVUII to that list, thus prohibiting deferral of these offenses.

Those who repeatedly continue to drive under the influence—especially after they have already been convicted of OVUII in the past—clearly present a grave risk to public safety and welfare, and strong measures must be taken to address this type of behavior. By statute, even first-time OVUII offenders are not permitted to defer their pleas, so it simply does not make sense that a third-time offender would be permitted to do so.

In addition, the Department humbly requests that the Committee add the contents of H.B. 1379, which amends section 291E-15, H.R.S., Refusal to submit to breath, blood, or urine test, subject to administrative revocation proceedings. Based on a recent court ruling in Maui County, language from H.B. 1379 would clarify that the use of a search warrant is permitted, even after a suspected offender refuses to provide a breath or blood sample, following an OVUII arrest. The Department does not believe the implied consent law was ever intended to preclude courts from granting search warrants that meet all applicable legal standards, nor shield suspects from lawful investigation. In fact, implied consent laws were intended to facilitate the investigation and prosecution of impaired drivers. Under *State v. McNeely*¹, a well-known case regarding OVUII prosecution, the U.S. Supreme Court indicated that “States have a broad range of legal tools to enforce their drunk driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws,” such as implied consent or search warrants. The implied consent statute does not bar the State from obtaining a valid warrant to procure evidence of impaired driving – the framework is in fact complementary to that goal. The addition of H.B. 1379 to the current contents of S.B. 412 would not only clarify what the Department believes was already intended by the legislature, as it relates to implied consent laws; it would also significantly strengthen Hawaii’s OVUII laws. As such, we respectfully ask that you consider the language in our proposed H.D. 1.

For these reasons, the Department of the Prosecuting Attorney strongly supports the passage of S.B. 412 and recommends the attached Proposed H.D. 1. Thank you for this opportunity to testify.

¹Missouri v. McNeely, 569 U.S. 141, 160-61 (2013)

A BILL FOR AN ACT

RELATING TO OPERATING A VEHICLE UNDER THE INFLUENCE OF AN
INTOXICANT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. Section 853-4, Hawaii Revised Statutes, is
2 amended by amending subsection (a) to read as follows:

3 "(a) This chapter shall not apply when:

4 (1) The offense charged involves the intentional, knowing,
5 reckless, or negligent killing of another person;

6 (2) The offense charged is:

7 (A) A felony that involves the intentional, knowing,
8 or reckless bodily injury, substantial bodily injury, or serious
9 bodily injury of another person; or

10 (B) A misdemeanor or petty misdemeanor that carries a
11 mandatory minimum sentence and that involves the intentional,
12 knowing, or reckless bodily injury, substantial bodily injury,
13 or serious bodily injury of another person;

14 provided that the prohibition in this paragraph shall
15 not apply to offenses described in section 709-906(18);

16 (3) The offense charged involves a conspiracy or
17 solicitation to intentionally, knowingly, or recklessly kill

1 another person or to cause serious bodily injury to another
2 person;

3 (4) The offense charged is a class A felony;

4 (5) The offense charged is nonprobationable;

5 (6) The defendant has been convicted of any offense
6 defined as a felony by the Hawaii Penal Code or has been
7 convicted for any conduct that if perpetrated in this State
8 would be punishable as a felony;

9 (7) The defendant is found to be a law violator or
10 delinquent child for the commission of any offense defined as a
11 felony by the Hawaii Penal Code or for any conduct that if
12 perpetrated in this State would constitute a felony;

13 (8) The defendant has a prior conviction for a felony
14 committed in any state, federal, or foreign jurisdiction;

15 (9) A firearm was used in the commission of the offense
16 charged;

17 (10) The defendant is charged with the distribution of a
18 dangerous, harmful, or detrimental drug to a minor;

19 (11) The defendant has been charged with a felony offense
20 and has been previously granted deferred acceptance of guilty
21 plea or no contest plea for a prior offense, regardless of
22 whether the period of deferral has already expired;

23 (12) The defendant has been charged with a misdemeanor
24 offense and has been previously granted deferred acceptance of

1 guilty plea or no contest plea for a prior felony, misdemeanor,
2 or petty misdemeanor for which the period of deferral has not
3 yet expired;

4 (13) The offense charged is:

5 (A) Escape in the first degree;

6 (B) Escape in the second degree;

7 (C) Promoting prison contraband in the first degree;

8 (D) Promoting prison contraband in the second degree;

9 (E) Bail jumping in the first degree;

10 (F) Bail jumping in the second degree;

11 (G) Bribery;

12 (H) Bribery of or by a witness;

13 (I) Intimidating a witness;

14 (J) Bribery of or by a juror;

15 (K) Intimidating a juror;

16 (L) Jury tampering;

17 (M) Promoting prostitution;

18 (N) Abuse of family or household member except as

19 provided in paragraph (2) and section 709-906(18);

20 (O) Sexual assault in the second degree;

21 (P) Sexual assault in the third degree;

22 (Q) A violation of an order issued pursuant to
23 chapter 586;

24 (R) Promoting child abuse in the second degree;

- 1 (S) Promoting child abuse in the third degree;
- 2 (T) Electronic enticement of a child in the first
3 degree;
- 4 (U) Electronic enticement of a child in the second
5 degree;
- 6 (V) Prostitution pursuant to section 712-1200(1)(b);
- 7 (W) Street solicitation of prostitution under section
8 712-1207(1)(b);
- 9 (X) Solicitation of prostitution near schools or
10 public parks under section 712-1209;
- 11 (Y) Habitual solicitation of prostitution under
12 section 712-1209.5; [or]
- 13 (Z) Solicitation of a minor for prostitution under
14 section 712-1209.1; or
- 15 (AA) Habitually operating a vehicle under the
16 influence of an intoxicant under section 291E-61.5(a);

17 (14) The defendant has been charged with:

18 (A) Knowingly or intentionally falsifying any report
19 required under chapter 11, part XIII with the intent to
20 circumvent the law or deceive the campaign spending commission;
21 or

22 (B) Violating section 11-352 or 11-353; or

23 (15) The defendant holds a commercial driver's license and
24 has been charged with violating a traffic control law, other

1 than a parking law, in connection with the operation of any type
2 of motor vehicle."

3 SECTION 2. Section 291E-15, Hawaii Revised Statutes, is
4 amended to read as follows:

5 **"§291E-15 Refusal to submit to breath, blood, or urine**
6 **test; subject to administrative revocation proceedings.** If a
7 person under arrest refuses to submit to a breath, blood, or
8 urine test, none shall be given, except as provided in section
9 291E-21[.], or pursuant to a search warrant issued by a judge
10 upon a finding of probable cause supported by oath or
11 affirmation, or pursuant to any other basis permissible under
12 the Constitution of the State of Hawaii and laws of this
13 State. Upon the law enforcement officer's determination that
14 the person under arrest has refused to submit to a breath,
15 blood, or urine test, if applicable, then a law enforcement
16 officer shall:

17 (1) Inform the person under arrest of the sanctions under
18 section 291E-41 or 291E-65; and

19 (2) Ask the person if the person still refuses to submit
20 to a breath, blood, or urine test, thereby subjecting the person
21 to the procedures and sanctions under part III or section 291E-
22 65, as applicable; provided that if the law enforcement officer
23 fails to comply with paragraphs (1) and (2), the person shall
24 not be subject to the refusal sanctions under part III or IV."

1 SECTION 3. This Act does not affect rights and duties that
2 matured, penalties that were incurred, and proceedings that were
3 begun before its effective date.

4 SECTION 4. Statutory material to be repealed is bracketed
5 and stricken. New statutory material is underscored.

6 SECTION 5. This Act shall take effect upon its approval.

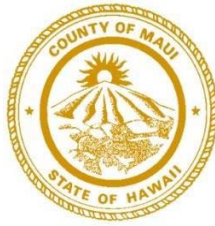
INTRODUCED BY: _____

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Mayor

ANDREW H. MARTIN
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First Deputy Prosecuting Attorney

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TESTIMONY ON
S.B. 412
RELATING TO OPERATING A VEHICLE UNDER
THE INFLUENCE OF AN INTOXICANT

March 11, 2021

The Honorable Mark M. Nakashima, Chair
The Honorable Scot Z. Matayoshi, Vice Chair
and Members of the Committee on Judiciary & Hawaiian Affairs

Chair Nakashima, Vice Chair Matayoshi, and Members of the Committee:

The Department of the Prosecuting Attorney, County of Maui submits the following comments concerning S.B. 412, Relating to Operating a Vehicle Under The Influence of an Intoxicant. Specifically, we would like to express our support for S.B. 412, and offer a proposed amendment to the bill.

H.R.S. § 853-4 should explicitly exclude Habitually Operating A Vehicle Under The Influence of an Intoxicant (H.R.S. § 291E-61.5) offenders from qualifying for deferred acceptance of a guilty or no contest plea. Offenders who are charged with a felony Habitual OUI have at least two prior convictions for Operating a Vehicle Under the Influence of an Intoxicant. These underlying petty misdemeanor convictions already do not qualify under existing law for a deferred acceptance plea. An offender who operates a vehicle on our roadways while impaired puts innocent lives at risk. Those who suffer first and second-time convictions are given the opportunity to rehabilitate themselves in a manner that, in part, educates them on the dangers of driving while impaired. The Habitual OUI offender's conscious disregard of such dangers, specifically their willingness to continue to put other people's lives at risk, is intolerable. Under such circumstances, the ends of justice and the welfare of society demands that such offenders "suffer the penalty imposed by law."

In addition, we respectfully request the following amendment to HRS § 291E-15, which also relates to OUI offenders. The amendment clarifies that law enforcement may apply to a judge for a search warrant for an OUI suspect's blood alcohol and/or drug content in order to conduct chemical testing, in the event that an OUI suspect under arrest refuses to consent to a breath, blood or urine test under Hawaii's Implied Consent Law, Chapter 291E, Part II. This amendment was previously proposed this legislative session in H.B. 1379, "Relating to

Operating a Vehicle Under the Influence of an Intoxicant:

SECTION 2. Section 291E-15, Hawaii Revised Statutes, is amended to read as follows:

"§291E-15 Refusal to submit to breath, blood, or urine test; subject to administrative revocation proceedings. If a person under arrest refuses to submit to a breath, blood, or urine test, none shall be given, except as provided in section 291E-21[.], or pursuant to a search warrant issued by a judge upon a finding of probable cause supported by oath or affirmation, or pursuant to any other basis permissible under the Constitution of the State of Hawaii and laws of this State. Upon the law enforcement officer's determination that the person under arrest has refused to submit to a breath, blood, or urine test, if applicable, then a law enforcement officer shall:

(1) Inform the person under arrest of the sanctions under section 291E-41 or 291E-65; and

(2) Ask the person if the person still refuses to submit to a breath, blood, or urine test, thereby subjecting the person to the procedures and sanctions under part III or section 291E-65, as applicable;

provided that if the law enforcement officer fails to comply with paragraphs (1) and (2), the person shall not be subject to the refusal sanctions under part III or IV."

The proposed amendment is needed to clarify the legislature's intent behind the statutory language of HRS § 291E-15 (the refusal section of the Implied Consent law). Some defense attorneys have recently argued in the Second Circuit District and Circuit Courts that police should not be able to apply for a valid search warrant from a Judge if an OUI suspect refuses to consent to a test after being arrested. At least one Second Circuit Judge has recently agreed with this interpretation of the law, an issue which is currently on appeal and may take years to resolve.

The defense attorney interpretation of the Implied Consent law is not supported by the original legislative intent of Implied Consent - which is to facilitate the prosecution and convictions of impaired drivers, not to be used as a shield by suspects to prevent lawful investigations. The Implied Consent statute should not prevent the State from obtaining a valid warrant to procure evidence of drunk driving. This interpretation would severely limit law enforcement's ability to investigate and prosecute alcohol and drug-impaired drivers, including our most dangerous felony Habitual OUI drivers, who often refuse to consent to testing to avoid prosecution and conviction.

The proposed amendment ensures that police must follow the same constitutional safeguards that are required to search a person's property or person - an officer must first provide probable cause under oath to a Judge for review. Blood samples are also already required by law to be extracted by a qualified physician, RN, or licensed phlebotomist under

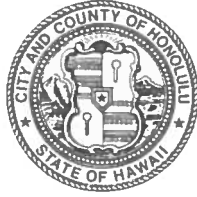
HRS § 291E-12, and this amendment would not change that requirement.

Both S.B. 412 and our proposed amendment support the overall goal of reducing the senseless deaths and injuries on our roadways that are caused by impaired drivers every year. For these reasons, the Department of the Prosecuting Attorney, County of Maui supports the passage of S.B. 412, with the suggested amendments.

Please feel free to contact our office at (808) 270-7777 if you have any questions or inquiries. Thank you very much for the opportunity to provide testimony on this bill.

POLICE DEPARTMENT
CITY AND COUNTY OF HONOLULU

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OUR REFERENCE CT-LC

March 12, 2021

The Honorable Mark M. Nakashima, Chair
and Members
Committee on Judiciary
and Hawaiian Affairs
House of Representatives
Hawaii State Capitol
415 South Beretania Street, Room 325
Honolulu, Hawaii 96813

Dear Chair Nakashima and Members:

SUBJECT: Senate Bill No. 412, Relating to Operating a Vehicle Under the Influence of an Intoxicant

I am Calvin Tong, Major of the Traffic Division of the Honolulu Police Department (HPD), City and County of Honolulu.

The HPD supports the proposal to exclude the charge of Habitually Operating a Vehicle Under the Influence of an Intoxicant (HOVUII) from qualifying for a deferred acceptance of a guilty plea or nolo contendere plea. Impaired driving is a serious problem and is the leading cause of traffic fatalities, which impacts the lives of innocent people. A person facing a charge of HOVUII clearly has not changed their irresponsible behavior and should be subject to the normal provisions set forth for prosecution.

The HPD urges you to support Senate Bill No. 412, Relating to Operating a Vehicle Under the Influence of an Intoxicant.

Thank you for the opportunity to testify.

APPROVED:

Handwritten signature of Susan Ballard in black ink.

Susan Ballard
Chief of Police

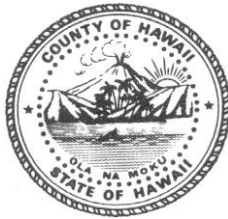
Sincerely,

Handwritten signature of Calvin Tong in black ink.

Calvin Tong, Major
Traffic Division

KELDEN B.A. WALTJEN
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OFFICE OF THE PROSECUTING ATTORNEY

TESTIMONY IN SUPPORT TO SENATE BILL 412

**A BILL FOR AN ACT RELATING TO OPERATING A
VEHICLE UNDER THE INFLUENCE OF AN INTOXICANT**

COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS

Rep. Mark Nakashima, Chair
Rep. Scot Matayoshi, Vice Chair

Friday, March 12, 2021, 2:00 p.m.

Via Videoconference & State Capitol, Conference Room 325

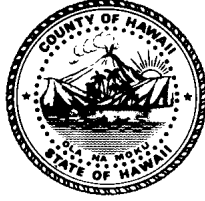
Honorable Chair Nakashima, Honorable Vice Chair Matayoshi, and Members of the Committee on Judiciary & Hawaiian Affairs, the Office of the Prosecuting Attorney, County of Hawai'i submits the following testimony in support to Senate Bill 412.

The purpose of Senate Bill 412 is to prohibit deferred pleas for the offense of Habitually Operating a Vehicle Under the Influence of an Intoxicant. A deferred plea is an opportunity that should be earned. To allow an offender an opportunity to qualify for a deferred plea after two prior convictions for Operating a Vehicle Under the Influence of an Intoxicant is unconscionable. As such, these offenders should be held accountable for their actions.

The Office of the Prosecuting Attorney, County of Hawai'i remains committed to the cause of making our community a better and safer place.

For the foregoing reasons, the Office of the Prosecuting Attorney, County of Hawai'i, Support the passage of Senate Bill No. 412. Thank you for the opportunity to testify on this matter.

Mitchell D. Roth
Mayor



Paul K. Ferreira
Police Chief

Kenneth Bugado, Jr.
Deputy Police Chief

County of Hawai`i

POLICE DEPARTMENT

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March 11, 2021

Representative Mark M. Nakashima
Chairperson and Committee Members
Committee on Judiciary & Hawaiian Affairs
415 South Beretania Street, Room 325
Honolulu, Hawai`i 96813

RE : SENATE BILL 412, RELATING TO OPERATING A VEHICLE UNDER THE INFLUENCE OF AN INTOXICANT

HEARING DATE : March 12, 2021
TIME : 2:00 P.M.

Dear Representative Nakashima:

The Hawai`i Police Department **supports** the passage of Senate Bill 412, which excludes habitually operating a vehicle under the influence of an intoxicant from qualifying for deferred acceptance of guilty plea or nolo contendere plea.

Any person who has been convicted two or more times for operating motor vehicle under the influence of an intoxicant poses a serious danger to citizens walking, riding, or driving on roadways they travel. Those drivers who have been deemed habitual offenders have had mandatory education and multiple opportunities to change their driving habits. They have shown a propensity to continue to the dangerous behavior of driving under the influence of an intoxicating substance. Additional deferrals for OVUII offenses only pose a danger to the population traveling the roadways.

Deferrals are intended as a benefit for those drivers who take the opportunity to make necessary changes to their behavior and decisions they make that place innocent people in danger. These drivers who use the opportunity the deferral provides will not likely reoffend.

It is for these reasons, we urge this committee to approve this legislation. Thank you for allowing the Hawai`i Police Department to provide comments relating to Senate Bill 412.

Sincerely,

PAUL K. FERREIRA
POLICE CHIEF