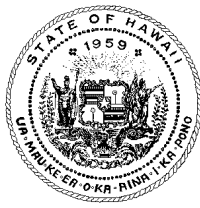


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TESTIMONY ON HOUSE BILL 125
RELATING TO CRIMINAL PROCEDURE.

By
Tommy Johnson, Director

House Committee on Judiciary and Hawaiian Affairs
Representative David A. Tarnas, Chair
Representative Gregg Takayama, Vice Chair

Tuesday, February 28, 2023; 2:00 p.m.
State Capitol, Conference Room 325 and via Video Conference

Chair Tarnas, Vice Chair Takayama, and Members of the Committees:

The Department of Public Safety (PSD) offers comments on House Bill (HB) 125, which proposes to establish circumstances in which the presence of a defendant is required for court proceedings.

The Department of Public Safety carries the responsibility of transporting inmates to court for their appearances and when allowable, assures an inmate's appearance via video conferencing. As the Hawai'i Rules of Penal Procedure already sets standards for the presence of the defendant under rule 43, PSD defers to the decision of the courts. Codifying procedures for a defendant's presence restricts judicial discretion and may prohibit the court's ability to amend rules should new circumstances present themselves such as the recent COVID-19 pandemic. PSD appreciates the ability to utilize video conferencing whenever possible as it provides a safe and economical alternative while ensuring meaningful access to the courts. Allowing the courts to have flexibility encourages new innovations to reduce the impact of having to physically transport inmates for their court appearances

Thank you for the opportunity to provide testimony to offer comments on HB 125.

STATE OF HAWAI‘I
OFFICE OF THE PUBLIC DEFENDER

Testimony of the Office of the Public Defender, State
of Hawai‘i to the House Committee on
Judiciary & Hawaiian Affairs

February 28, 2023

H.B. No. 125: RELATING TO CRIMINAL PROCEDURE

Chair Tarnas, Vice Chair Takayama, and Members of the Committee:

The Office of the Public Defender respectfully opposes H.B. No. 125.

This proposed bill adds a new section to Chapter 801 of the Hawai‘i Revised Statutes, establishing circumstances in which the presence of a defendant for court proceedings is required or may be waived. This bill codifies much of what is already present in Rule 43 of the Hawai‘i Rules of Penal Procedure (“HRPP”) entitled “Presence of the Defendant.” (Copy of HRPP Rule 43 is attached). This bill attempts to expand on HRPP Rule 43 by permitting defendants to appear by video for: arraignment, the entering of a plea, pretrial evidentiary hearings, every stage of a trial, and at sentencing. This bill also adds three circumstances where a defendant is deemed to have “*waived*” the right to be present under SECTION 1, subsection (a)(4), (5), and (6):

- (4) a defendant consents in writing to the proceeding being conducted in their absence;
- (5) a defendant’s lawyer orally represents that the defendant consented to being absent; or
- (6) the defendant is *voluntarily absent* from two consecutive court appearances and the defendant’s counsel notified the defendant of the purpose of the proceeding and if the proceeding is an arraignment, the defendant was provided a copy of the charging document.

See page 2, lines 1-12 (emphasis added).

First, this measure is unnecessary. Procedures dealing with the presence of defendants during court hearings are already controlled by HRPP Rule 43, which

has the force of law.¹ Thus, the Hawai‘i Supreme Court Standing Committee on the Hawai‘i Rules of Penal Procedure² can review and consider the proposed changes to HRPP Rule 43 envisioned by this bill.

However, if this Committee intends to pass this measure, the Office of the Public Defender specifically opposes subsection (6)(a) [*see* page 2 lines 6-12], which would allow a court to waive the presence of any defendant who is “*voluntarily absent*” from two consecutive court appearances. Being “voluntarily absent” means that a person acted freely, without compulsion, or solicitation. *See Black’s Law Dictionary* 2nd Edition. The Office of the Public Defender is concerned that this waiver provision will cause courts to waive a defendant’s presence in cases where an in-custody defendant “refuses” transport to the courthouse to attend court hearings out of fear of being held in “quarantine” upon return to his/her facility.

The Covid-19 pandemic has led our jails and prisons to implement necessary quarantine protocols for in-custody defendants who enter or re-enter a prison facility. The Halawa Correctional Facility requires that arriving or re-arriving inmates “quarantine” for a period of at least ten to fourteen days. An inmate in quarantine is not allowed to leave his prison cell, have any meaningful contact with other humans, or use the phone to communicate with relatives, or make legal calls to an attorney. Inmates who have been through quarantine have compared the experience to having been in “lockdown” or “solitary confinement, which are forms of punishment for incarcerated individuals. While there is no universally agreed definition of solitary confinement, it is commonly understood to be the physical isolation of individuals who are confined to their cells for 22 to 24 hours a day with only minimal meaningful interaction with others. The decision to leave prison to attend a court hearing, or face quarantine, often comes down to choosing the lesser of the two evils. It is no surprise then, that the majority of inmates “refuse” to be transported out of their prison facility for a court hearing only to be returned and quarantined.

A “refusal” to be transported can be remedied in situations where a facility has the capability to allow video court appearances (and the defendant consents to the video appearance). *See* HRPP Rule 43(e). However, problems arise when a facility lacks

¹ “The supreme court shall have power to promulgate rules and regulations in all civil and criminal cases for all courts relating to process, practice, procedures and appeals, which shall have the force and effect of law” Haw. Const. art. VI, § 7.

² The committee includes judges from each circuit, representatives from the Department of the Attorney General, the Office of the Public Defender, prosecuting attorneys of each county, and private attorneys from the criminal defense bar.

video capabilities. Currently, the Halawa Correctional Facility has not been able to accommodate inmates wishing to appear at their arraignment by way of video,³ and thus many inmates have consistently “refused” transport to the circuit court, or OCCC for arraignment.

The decision to “refuse” transport from the Halawa Correctional Facility is *not* being made freely or voluntarily for those who face quarantine. Rather, the decision is being made solely to avoid being placed into solitary confinement for ten to fourteen days. If this bill becomes law, we can expect that most courts will interpret a defendant’s refusal to be transported to court as a “voluntary absence,” and thus the presence of many defendants will be improperly waived.

Finally, the language of this bill requires defense counsel to provide non-transported defendants with the appropriate court documents and verify that defendants have been notified about the hearing. Many of the defendants, however, do not have counsel at the time of arraignment. For those individuals, Deputy Public Defenders (DPDs) at the arraignment court make special appearances for those who have not yet qualified legal services to aid the Judiciary. Thus, these DPDs would not be able to provide defendants with the appropriate court documents or to give them notice of the court hearings.

Thank you for the opportunity to comment on H.B. No. 125.

³ A video station at the Halawa Correctional Facility exists in a small room and can accommodate a single defendant at a time. Arraignment hearings require a much larger room to hold multiple defendants.

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THE HONORABLE DAVID A. TARNAS, CHAIR
HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS
Thirty-Second State Legislature
Regular Session of 2023
State of Hawai`i

February 28, 2023

RE: H.B. 125; RELATING TO CRIMINAL PROCEDURE.

Chair Tarnas, Vice-Chair Takayama 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 H.B. 125. This bill is part of the Department's 2023 legislative package, and we thank you for hearing it.

The purpose of H.B. 125 is to create procedures that reasonably allow for court proceedings to occur—while also protecting a defendant’s rights—when a defendant voluntarily refuses to appear in court for such proceedings. Under Rule 43, Hawaii Rules of Penal Procedure (“HRPP”), in felony cases, a defendant’s presence cannot be waived at the arraignment, time of plea, evidentiary pretrial hearings, any stage of the trial including the impaneling of the jury, return of verdict, or imposition of sentence. This requirement has some limited exceptions, but only in a few limited circumstances, and always after the defendant has made an initial appearance.¹

In recent years, the Department has seen multiple instances in which defendants in custody have voluntarily and effectively refused to leave their cells at Oahu Community Correctional Center, for transport to their respective court hearings. If the relevant circumstances don’t fall within the limited exceptions under HRPP Rule 43, the Department and the courts have virtually no options upon which to proceed with that individual’s case. There have been situations when out-of-state witnesses were flown to Hawaii for a particular hearing, only to find that the case is being continued due to the defendant’s refusal to appear. Not only does this substantially increase the level of inconvenience and frustration for victims and witnesses, it also wastes valuable resources for all state and city agencies involved.

H.B. 125 provides a reasonable mechanism for courts to proceed without the presence of unwilling defendants, while ensuring their constitutional rights remain intact. The Department hopes this bill will deter those types of unnecessary delays in the future, and remove any ill-

¹ See https://www.courts.state.hi.us/docs/court_rules/rules/hrpp.htm#Rule%2043; last accessed February 13, 2023.

intentioned tactical advantages gained by these defendants who voluntarily refuse to appear in court.

For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu strongly supports the passage of H.B. 125. Thank you for the opportunity to testify on this matter.