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

March 19, 2021

H.B. No. 1326 HD1: RELATING TO DOMESTIC VIOLENCE

Chair Rhoads, Vice Chair Keohokalole, and Members of the Committee:

The Office of the Public Defender respectfully opposes H.B. No. 1362 HD1, which would create an exception to the hearsay rule that will be unconstitutional as a violation of an accused's right to confrontation of witnesses against him/her under article I, section 14 of the Hawai'i Constitution.

H.B. No. 1326 HD1 states,

> [T]he purpose of this Act is to allow a narrow hearsay exception for statements made by a domestic violence victim to a government official within twenty-four hours of a domestic violence attack, ***even if the statement is testimonial in nature***, as long as the statement bears sufficient indicia of reliability.

(Page 4, lines 3-8) (emphasis added).

Because any out-of-court statement by an alleged domestic violence victim to a law enforcement officer responding to an alleged attack will be deemed ***testimonial***, the statement will only be admissible if the witness is unavailable and the accused had the opportunity for cross-examination, as the Hawai'i Supreme Court in State v. Fields, 115 Hawai'i 503, 565, 168 P.3d 955, 1017 (2007), unequivocally held,

> [T]the admissibility of testimonial hearsay be governed by the following standard: where a hearsay declarant's unavailability has been shown, the testimonial statement is admissible for the truth of the matter asserted only if the defendant was afforded a prior opportunity to cross-examine the absent declarant about the statement.

(Citing Crawford v. Washington, 541 U.S. 36, 134 S.Ct.1354, 158 L.Ed.2d 177 (2004). Therefore, under the Hawai'i's and the federal confrontation clause, if an out-of-court statement is testimonial, the statement is only admissible if the (1) the witness be "unavailable," and (2) the accused had a prior opportunity for cross-

examination. In other words, if the alleged domestic violence victim is not available to testify, any attempt to introduce his/her statement made "during the course of the first interaction with the responding law enforcement officers . . . and before the defendant is arrested," will be deemed inadmissible as a violation of the confrontation clause.

Furthermore, one cannot legislate what statements are testimonial or non-testimonial when the police respond to a domestic violence call. In determining whether a statement is testimonial or non-testimonial, the U.S. Supreme Court held that courts must "objectively evaluate the circumstances in which the encounter between the individual and the police occurs and the parties' statements and actions." Michigan v. Bryant, 562 U.S. 344, 359,131 S.Ct. 1143, 1156, 179 L.Ed.2d 93, 108 (2011). Moreover, the Hawai'i Supreme Court (citing the U.S. Supreme Court) has already settled the issue:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. ***They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution***.

Fields, 115 Hawai'i at 514, 168 P.3d at 966, as amended on denial of reconsideration (Oct. 10, 2007) (citing Davis v. Washington, 547 U.S. 813, 820-21,126 S.Ct. 2266, 2273-74, 165 L.Ed.2d 224 (2006) (emphasis added). Indeed, the U.S. Supreme Court, in Davis, supra, held that the victim's statement to the police officer responding to a domestic disturbance call, prior to defendant's arrest, was testimonial. The Court further found that there was no emergency in progress when the statements were given, as the alleged battery had happened before the police arrived, and that the primary, if not sole, purpose of the police investigation was to investigate a possible past crime.

The proponents of this bill significantly rely on the Oregon domestic violence hearsay exception and an article written in the Boston College Journal of Law and Social Justice, "A Call for Change: The Detrimental Impacts of Crawford v. Washington." The proponents, however, fail to take into account that the article and the Oregon law based their analysis on ***only*** the sixth amendment to the United States Constitution. Although the sixth amendment to the federal constitution and article I, section 14 is textually similar, the Hawai'i Constitution affords the people in our state more protection than required by the federal constitution when the United States Supreme Court's interpretation of a provision present in both the United States

and Hawai‘i Constitutions does not adequately preserve the rights and interests sought to be protected.

We also question several assertions set forth in the article and the proponents' justification for passage of the bill. First, is there any data to establish or support the assertion that "victim statements made during the first interaction with the first responding law enforcement officers and before the defendant being arrested is reliable? Second, the proponents assert that "statistics showing that incidents of domestic violence tend to escalate over time and sometimes culminate in the victim's death." Although we do not have hard data to contradict the "statistics" (referred to by the proponents), the majority of the defendants charged with domestic violence in the family court are first-time offenders.

The confrontation clause was intended to prevent the conviction of a defendant without the opportunity to face his or her accusers and to put their honesty and truthfulness to test before the trier of fact. In Mattox v. United States, 156 U.S. 237 (1895), the U.S. Court enunciated the three fundamental purposes that the Confrontation Clause was meant to serve:

- To ensure that witnesses would testify under oath and understand the serious nature of the trial process;

- To allow the accused to cross-examine witnesses who testify against him; and

- To allow jurors to assess the credibility of a witness by observing that witness's behavior.

The proposed exception to the hearsay rule simply attempts to undermine the purpose of the Confrontation Clause. The exception attempts to allow unfettered narrative statements to be received in evidence without the accused having the opportunity to test the credibility and veracity of the accuser's statement. Essentially, under this measure, alleged domestic violence victims will no longer need to testify under oath and be made to understand the seriousness of the trial process. Jurors or judges will no longer be able to assess the credibility of the accuser by observing his/her behavior. For these reasons, we strongly opposed H.B. No. 1326 HD1.

Thank you for the opportunity to comment on this measure.

The Judiciary, State of Hawai'i

Testimony to the Senate Committee on Judiciary
Senator Karl Rhoads, Chair
Senator Jarrett Keohokalole, Vice Chair

March 19, 2021 at 9:30 a.m.
Via Videoconference

WRITTEN TESTIMONY ONLY
By
Catherine H. Remigio, Chair
Hawai`i Supreme Court Standing Committee
on the Hawai`i Rules of Evidence

Bill No. and Title: House Bill No. 1326, HD1 - Relating to Domestic Violence

Purpose: Allows a hearsay exception for statements made by a victim of domestic violence during the course of the first interaction with law enforcement officers and prior to the arrest of the defendant regardless of the availability of the declarant, provided the statement is found to have sufficient indicia of reliability. Excludes statements objectively found to have a primary purpose that was not to enable assistance to meet an ongoing emergency.

Judiciary's Position:

The Hawai'i Supreme Court's Standing Committee on Rules of Evidence respectfully opposes House Bill No. 1326 HD 1 ("HB1326, HD1") to the extent that it violates the right to confrontation guaranteed under the Sixth Amendment of the United States Constitution, and Article 1, section 14 of the Hawai`i Constitution.

The Sixth Amendment of the United States Constitution, and Article 1, section 14 of the Hawai`i Constitution provide that "the accused shall enjoy the right ... to be confronted with the witnesses against the accused[.]" Prior to Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), federal courts declined to embrace an absolute bar on the admission of hearsay statements uttered by unavailable declarants – as long as the declarant was shown to be unavailable, and the statement bore "adequate indicia of reliability." Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).

Crawford limited Roberts "sufficient indicia of reliability" test to hearsay statements that are "non-testimonial." A statement is non-testimonial if its primary purpose is to "enable police assistance to meet an ongoing emergency." Davis v. Washington, 547 U.S. 813, 822, 126 S.Ct. 2266, 2273-2274, 165 L.Ed.2d 224 (2006). Non-testimonial statements are not subject to the Confrontation Clause, but still subject to the Roberts "sufficient indicia of reliability" test.

A statement is testimonial when "circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." State v. Fields, 115 Haw. 503, 514, 168 P.3d 955, 966 (2007), *citing* Davis, 126 S.Ct. at 2273-74 (footnote omitted). Testimonial statements are subject to the Confrontation Clause.

In determining whether the primary purpose of an interrogation is to meet an ongoing emergency (that is, whether a statement is non-testimonial), the U.S. Supreme Court has stated that courts must "objectively evaluate the circumstances in which the encounter between the individual and the police occurs and the parties' statements and actions." Michigan v. Bryant, 562 U.S. 344, 359, 131 S.Ct. 1143, 1156, 179 L.Ed.2d 93, 108 (2011). *See also* People v. Blacksher, 52 Cal.4th 769 (2011) (identifying the six factors courts should consider, under *Bryant*, in determining whether a statement is non-testimonial). This determination is a "highly context-dependent inquiry." Bryant, at 562 U.S. 344, 131 S. Ct. 1148. "An emergency focuses the participants not on `prov[ing] past events potentially relevant to later criminal prosecution,' (citations omitted) but on `end[ing] a threatening situation,' " Id., *citing* Davis, 126 S.Ct. at 2266.

While HB1326, HD1 references the term "ongoing emergency", the term is not defined in the amendment. The preface refers with approval to an Oregon policy approach that "treats domestic violence cases as a form of `ongoing emergency' ", clarifying "the mere fact that a single domestic violence attack has ended does not necessarily mean the emergency has ended[.]" and concluding that the recognition of a domestic violence incident should be recognized as part of a "larger ongoing emergency." This apparent definition of "ongoing emergency," without more, is inconsistent with a defendant's constitutional right to confrontation. The requirement that the statement be made before defendant's arrest does not in itself make it an "ongoing emergency."

HB1326, HD1 also refers to statements made by a victim of domestic violence "during the course of the first interaction with the responding law enforcement officers" and before defendant's arrest. The original version of HB1326 limited the time period to 24 hours and required that the statement be recorded, in writing, or made to a law enforcement officer. Under HD1, the "first interaction" could occur more than 24 hours after an incident. Under HD1, as

long as it made during that first interaction with law enforcement, the statement could be made to anyone, and at any time during the "course of" the interaction which could last minutes or hours.

Given the above, HB1326, HD1 runs afoul of a Defendant's right to confrontation as guaranteed by the Sixth Amendment of the United States Constitution, and Article 1, section 14 of the Hawai`i Constitution.

The Hawai`i Supreme Court has ruled:

> We read *Crawford* to unequivocally require that the admissibility of testimonial hearsay be governed by the following standard: where a hearsay declarant's unavailability has been shown, the testimonial statement is admissible for the truth of the matter asserted only if the defendant was afforded a prior opportunity to cross-examine the absent declarant about the statement.

Fields at 115 Haw 516, 168 P.2d 968. The Court also reiterated "it is fundamental that, when interpreting our own constitution, our divergence from federal interpretations of the United States Constitution may not convey less protection than the federal standard." Fields at 115 Haw. 517, 168 P.2d 969.

For the above reasons, the Committee respectfully opposes House Bill No. 1326 HD1. Thank you for the opportunity to comment on this measure.

HB-1326-HD-1
Submitted on: 3/16/2021 2:21:44 PM
Testimony for JDC on 3/19/2021 9:30:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Dara Carlin, M.A.	Individual	Support	No

Comments:

Stand in Support

HB-1326-HD-1
Submitted on: 3/16/2021 2:39:04 PM
Testimony for JDC on 3/19/2021 9:30:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Gerard Silva	Individual	Oppose	No

Comments:

This goes against the laws that we have now. The testamoney has to be Valide.