HB-1326
Submitted on: 2/19/2021 7:36:36 PM
Testimony for JHA on 2/23/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Ben Lowenthal	Individual	Oppose	No

Comments:

This hearsay exception at odds with the current interpretations of the Confrontation Clauses in the U.S. and Hawaii Constitutions.

The Judiciary, State of Hawai'i

Testimony to the House Committee on Judiciary & Hawaiian Affairs
Representative Mark M. Nakashima, Chair
Representative Scot Z. Matayoshi, Vice Chair

February 23, 2021 at 2:00 p.m.
State Capitol, Conference Room 325

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 - Relating to Domestic Violence

Purpose: Allows a hearsay exception for statements made by a victim of domestic violence within twenty-four hours of a domestic violence incident and prior to the arrest of the defendant regardless of the availability of the declarant, provided the statement was recorded or made to a law enforcement officer and is found to have sufficient indicia of reliability. Also prevents admission of 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 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.

HB 1326 also attempts to classify all statements within its purview as "non-testimonial" because it purports to define as "non-testimonial," any statement made to law enforcement within 24 hours of a domestic violence incident and before defendant's arrest.

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), and Hammon v. Indiana, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) (victim's statement to police responding to a domestic violence call, prior to defendant's arrest, found to be testimonial).

Given the above, House Bill No. 1326 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. Furthermore, the implication that all statements made within "24 hours" of a domestic violence incident and before a defendant's arrest are more reliable, without further information, appears arbitrary. The proposed exception also implies that similarly-situated victims of other crimes are somehow less reliable than domestic violence victims.

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

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 and Hawaiian Affairs**

February 23, 2021

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

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

The Office of the Public Defender respectfully opposes H.B. No. 1362, 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 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 3, line 18 to page 4, line 2) (emphasis added).

Because any out-of-court statement to the government official (presumably, a police officer) relating to the alleged domestic 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), clearly held,

> Under Hawai‘i's confrontation clause, if an out-of-court statement is testimonial, it is subject to the [Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)] analysis, which mandates that (1) the witness be "unavailable," and (2) the accused had a prior opportunity for cross-examination.

Therefore, if the alleged domestic violence victim is not available to testify, any attempt to introduce his/her statement made within twenty-four hours of an alleged domestic violence incident will be deemed inadmissible as a violation of the Hawai‘i

Constitution. Likewise, if the alleged victim is available to testify, his/her out-of-court statement will be inadmissible.

In determining whether a statement is 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 Led.2d 93, 108 (2011). Hammon v. Indiana, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) (victim's statement to police responding to a domestic violence call, prior to defendant's arrest, found to be testimonial).

Furthermore, one cannot legislate what statements are testimonial or non-testimonial when the police respond to an on-going emergency. The Hawai'i Supreme Court (citing the United States 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.

State v. Fields, 115 Hawai'i 503, 514, 168 P.3d 955, 966 (2007), 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).

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 are 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 within twenty-four hours of an incident are the most 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.

Finally, asserting that all statements made within 24 hours of an alleged domestic violence incident and before a defendant's arrest are more reliable appears arbitrary. Are statements made 25 hours late not reliable? Are statements made within 24 hours of a non-domestic violence incident not reliable?

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 United States Supreme 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 undermines the purpose of the Confrontation Clause. The exception will 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. Alleged domestic violence victims will no longer need to testify under oath and be made to understand the seriousness of the trial process. Jurors 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.

Thank you for the opportunity to comment on this measure.

DAVID Y. IGE
GOVERNOR

MAX N. OTANI
DIRECTOR

Maria C. Cook
Deputy Director
Administration

Tommy Johnson
Deputy Director
Corrections

Jordan Lowe
Deputy Director
Law Enforcement

STATE OF HAWAII
DEPARTMENT OF PUBLIC SAFETY
919 Ala Moana Boulevard, 4th Floor
Honolulu, Hawaii 96814

No. _____

TESTIMONY ON HOUSE BILL 1326
RELATING TO DOMESTIC VIOLENCE.
By
Max N. Otani, Director

House Committee on Judiciary and Hawaiian Affairs
Representative Mark M. Nakahima, Chair
Scot Z. Matayoshi, Vice Chair

Thursday, February 23, 2021; 2:00 p.m.
Via Video Conference

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

The Department of Public Safety (PSD) offers comments on House Bill (HB) 1326, which allows for a narrow hearsay exception for statements made by domestic violence victims to certain government officials within 24 hours of the domestic violence incident and prior to the arrest of the defendant. A statement will be allowed if it bears a sufficient indicium of reliability.

PSD is supportive of any measure that assists in the prosecution of domestic violence offenses and reduces crimes of such nature.

Thank you for the opportunity to provide this testimony.

HB-1326
Submitted on: 2/22/2021 2:24:10 PM
Testimony for JHA on 2/23/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
nanci kreidman	domestic violence action center	Support	No

Comments:

aloha,

this would be enormously helpful in those instances where a survivor is threatened or terrified about speaking in court, in front of her abuser. any statements made at the time of an incident can be used for trial, or pleas to enable a case to move forward.

thank you for your consideration of this Bill. we look forward to favorable action.

love, nanci kreidman

Hawai'i Association of Criminal Defense Lawyers

Testimony of the Hawai'i Association of Criminal Defense Lawyers to the House Judiciary and Hawaiian Affairs Committee

February 21, 2021

H. B. No. 1326: RELATING TO DOMESTIC VIOLENCE (Rules of Evidence; Hearsay Exceptions; Domestic Violence)

Chair Mark M. Nakashima
Vice-Chair Scot Z. Matayoshi
Honorable Committee Members

The Hawai'i Association of Criminal Defense Attorneys (HACDL) is an organization comprised of members of the bar practicing criminal defense in state, federal, and appellate courts throughout the State of Hawai'i. HACDL members include public defenders, private counsel, and other attorneys asserting the rights of the accused in criminal cases.

HACDL strongly **OPPOSES** H.B. No. 1326. The bill's exception to the hearsay rule allows prosecutors to present statements made within twenty-four hours of an incident regardless of whether the declarant is available to testify or not. Although the bill attempts to create a narrow exception that is constitutionally sound, violations of the Confrontation Clause would inevitably arise. When a witness for the prosecution is unavailable to testify and when the accused is never given the opportunity to cross-examine that witness, the Confrontation Clause forbids out-of-court statements that are "testimonial" at trial. *Crawford v. Washington*, 541 U.S. 36 (2004). Determining whether a statement is "testimonial" is a fact-intensive inquiry and does not always fit neatly within the legislative parameters laid out in H.B. No. 1326. *See Michigan v. Bryant*, 562 U.S. 344, 363 (2011).

The late Justice Ruth Bader Ginsberg, a dissenter in *Michigan v. Bryant*, wrote that the Confrontation Clause is supposed to be a

"cloak protecting the accused against admission of out-of-court testimonial statements." *Id.* at 395. This bill will inevitably invite constitutional challenges on the grounds that it violates the Confrontation Clauses of the Hawai'i and United States Constitutions. It will result in protracted litigation. Any conviction secured in part by this exception would remain unsafe and costly retrials will take their emotional and financial toll.

Prosecutors have other tools to present their case when witnesses recant and refuse to cooperate. Prior inconsistent statements have been a traditional and often-used exception to the hearsay requirement. When a prior inconsistent statement is reduced to writing or recorded—as they almost always are in domestic violence cases—the statement can be used as substantive evidence. This exception to the hearsay rule unnecessarily invites constitutional challenges and should be avoided.

HB-1326
Submitted on: 2/23/2021 9:04:00 AM
Testimony for JHA on 2/23/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Danielle Sears	Individual	Oppose	No

Comments:

This hearsay exception is unnecessary and invites confrontation clause challenges.