

STATE OF HAWAI‘I
OFFICE OF THE PUBLIC DEFENDER

**Testimony of the Office of the Public Defender,
State of Hawai‘i to the Senate Committee on Judiciary**

February 18, 2022

S.B. No. 2856: RELATING TO PRETRIAL RELEASE

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

The Office of the Public Defender respectfully opposes S.B. No. 2856, which requires a trial court to automatically extend the duration of a restraining order or protective order issued against a pretrial detainee if the detainee is granted pretrial release.

A. Extending restraining/protective orders is unnecessary.

Presuming that the pretrial case for which the defendant is in custody also involves the protected person in the restraining/protective order, this measure is simply unnecessary, as this measure duplicates a power which already exists in the courts. Prosecutors in court routinely request “No Contact” orders to protect their complainants and witnesses, and courts routinely grant these requests for “No Contact” orders, as a condition of bail or release, that the defendant have no contact, either verbal or in person, with the complainant or any other witness in the case. *See* HRS § 804-7.1.¹ The court can also place conditions on where the defendant resides and where a defendant is able to travel (geographic restrictions).

¹ HRS § 804-7.1 states, in pertinent part,

Upon the defendant’s release on bail, recognizance, or supervised release, however, the court may enter an order:

- (1) Prohibiting the defendant from approaching or communicating with particular persons or classes of persons, except that no such order should be deemed to prohibit any lawful and ethical activity of defendant’s counsel;
- (2) Prohibiting the defendant from going to certain described geographical areas or premises;
- (3) Prohibiting the defendant from possessing any dangerous weapon, engaging in certain described activities, or indulging in intoxicating liquors or certain drugs;
- (4) Requiring the defendant to report regularly to and remain under the supervision of an officer of the court;
- (5) Requiring the defendant to maintain employment, or, if unemployed, to actively seek employment, or attend an educational or vocational institution;
- (6) Requiring the defendant to comply with a specified curfew;

If this measure, however, seeks to automatically extend the duration of a restraining/protective order on behalf of a protected person that *is not related or involved* with the defendant's pretrial case, this presents several legal issues. Terms and conditions of release placed on a defendant should be related to the reason for which the defendant is in custody, i.e., the underlying case. It is unreasonable, and quite likely unconstitutional, to impose the condition of extending the expiration date of a restraining/protective order when the defendant is charged with an offense in which the protected person in the order is not involved. Just as it would be unreasonable for a judge to prohibit a defendant from being in the Waikiki District, as a condition of release, for an offense that occurred at a store located in Kapolei, it would be unreasonable to extend the expiration date of the protective/restraining order if the defendant is released for the offense of shoplifting or forgery. Discretionary conditions of release pursuant to HRS § 804-7.1 should be imposed only when the need is demonstrated by the facts of the individual case reasonably (1) to ensure appearance at court proceedings; (2) to protect the community, victims, witnesses or any other person; and (3) to maintain the integrity of the judicial process. (*See* ABA (American Bar Association) Criminal Justice Standard 10-1.4. Conditions of Release).

Moreover, the phrase "*shall automatically* extend the duration of the restraining order..." in this measure takes any and all discretion from the hands of the presiding judge and, even worse, bypasses the wishes and input of the protected person. This measure assumes that the protected person will always want the restraining/protective order extended. But what if the protected person was planning

(7) Requiring the defendant to seek and maintain mental health treatment or testing, including treatment for drug or alcohol dependency, or to remain in a specified institution for that purpose;

(8) Requiring the defendant to remain in the jurisdiction of the judicial circuit in which the charges are pending unless approval is obtained from a court of competent jurisdiction to leave the jurisdiction of the court;

(9) Requiring the defendant to submit to the use of electronic monitoring and surveillance;

(10) Requiring the confinement of the defendant in the defendant's residence;

(11) Requiring the defendant to satisfy any other condition reasonably necessary to ensure the appearance of the defendant as required and to ensure the safety of any other person or community; or

(12) Imposing any combination of conditions listed above;

provided that the court shall impose the least restrictive non-financial conditions required to ensure the defendant's appearance and to protect the public.

to allow the restraining/protective order to lapse or expire because there was a reconciliation and therefore no need for protection? What if parents reconciled with an incarcerated son with substance abuse issues and were planning to welcome him back into the family home? Should the assigned deputy prosecuting attorney or court first confer with the protected person prior to automatically extending the duration of a restraining/protective order?

B. The circuit court does not have jurisdiction to extend a family court restraining/protective order.

Although HRS §571-3 provides that “family courts shall be divisions of the circuit courts of the state...,” Part III of Chapter 603 (Circuit Courts) defines the jurisdictional boundaries of the circuit courts. HRS §603-21.5 specifically delineates instances when the circuit court possesses concurrent jurisdiction with the family court.² Furthermore, HRS §571-14 establishes that the family court shall have *exclusive original jurisdiction*: “(8) In all proceedings under chapter 586, Domestic Abuse Protective Orders.” Therefore, a judge sitting in circuit court would lack subject matter jurisdiction to alter or amend a restraining/protective order originating in family court. The circuit court judge ordering the release of a criminal defendant does not have the jurisdiction to modify or extend any existing restraining order or protective order in effect issued by the family court.

And it is only logical that a specialized court like family court would retain exclusive original jurisdiction over such matters. At the heart of the family court is protecting and safeguarding the well-being of children and the family. The family courts hear petitions for restraining/protective orders on a daily basis and not only grant, but specially tailor the restraining/protective orders to address particular family and

² HRS § 603-21.5 (b) states:

The several circuit courts shall have concurrent jurisdiction with the family court over:

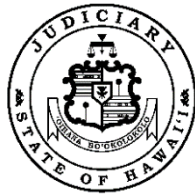
- (1) Any felony under section 571-14, violation of an order issued pursuant to Chapter 586, or a violation of section 709-906 when multiple offenses are charged through complaint or indictment and at least one other offense is a criminal offense under subsection (a)(1);
- (2) Any felony under section 571-14 when multiple offenses are charged through complaint or indictment and at least one other offense is a violation of an order issued pursuant to chapter 586, a violation of section 709-906, or a misdemeanor under the jurisdiction of section 604-8;
- (3) Any violation of section 711-1106.4 (harassment by stalking); and
- (4) Guardianships and related proceedings concerning incapacitated adults pursuant to article V of chapter 560.

individual needs. After thoughtful and thorough review of the evidence and arguments, the family court judge issues the restraining/protective order. The same thought and consideration go into how the judge determines the duration of the restraining or protective order.

C. It is virtually impossible to discern how long a “pretrial detainee would have remained in custody”

Finally, the proposed amendment seeks to extend the duration of the restraining/protective order “for a duration equal to the duration the pretrial detainee would have remained in custody.” There are an enormous set of variables that determine how long a person remains in custody as a pretrial detainee such that it is virtually impossible to predict how long a pretrial detainee will remain in custody. At this moment during the pandemic, there are defendants charged with serious offenses that have been in custody well over a year. Some defendants may change their plea very early on in the process and be released within months. Other defendants might be unexpectedly bailed out by a family member or friend or be released to a substance abuse program on supervised release. Without a crystal ball, a judge will have no idea how long a pretrial detainee “would have remained in custody” had he/she not been released pursuant to HRS §353-6.2(d).

Thank you for the opportunity to comment on this measure.



The Judiciary, State of Hawai'i

Testimony to the Thirty-First State Legislature, 2022 Session

Senate Committee on Judiciary
Senator Karl Rhoads, Chair
Senator Jarrett Keohokalole, Vice-Chair

Thursday, February 18, 2022, at 9:30 a.m.
Via Videoconference

WRITTEN TESTIMONY ONLY

By
Shirley M. Kawamura
Deputy Chief Judge, Criminal Administrative Judge, Circuit Court of the First Circuit

Bill No. and Title: Senate Bill No. 2856, Relating to Pretrial Release.

Purpose: Requires the court to extend the duration of a restraining order or protective order issued against a pretrial detainee if the detainee is granted a motion for pretrial release.

Judiciary's Position:

The Judiciary opposes the current legislation as drafted and offers the following comments for the Committee's consideration. It is the Judiciary's understanding that the bill as written would require a Court "to automatically extend the duration of the restraining order or protective order for a duration equal to the duration the pretrial detainee would have remained in custody" if a motion to modify bail is granted and there is an existing restraining order or protective order in effect governing the pretrial detainee.

First, the phrase "*would have remained in custody*" is difficult to ascertain with any specificity and is therefore an impractical temporal extension. It would be impossible for a court to determine the length of time a pretrial detainee would have remained in custody. For example, factors that may affect the length of time a person on pretrial status would have remained in custody include whether that person may post bail or bond, whether they are



accepted into a treatment program, whether the case is dismissed and refiled, or whether that person is ultimately sentenced to a term of incarceration or probation.

Second, as written, the proposed legislation purports to automatically extend any and all restraining or protective orders that might currently have been in effect against a particular defendant at the time of his pretrial release. Whether intended or not, there are several issues with the attempt to automatically extend all restraining and protective orders that may exist against a particular defendant.

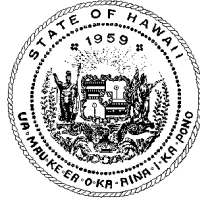
Currently, there are cases where a criminal court (either district or circuit) has granted the State's motion for *no contact order* at initial appearance, arraignment and plea, or preliminary hearing. The no contact order prohibits the named defendant from having any contact, directly or indirectly, with the complaining witness (and sometimes others) and subjects the named defendant to criminal penalties for any violation of the stay away order. The pendency of this no contact order provides that it "*shall remain in effect during the pendency of this case or until otherwise ordered by the Court.*"

Conversely, *restraining or protective orders* are issued by the family district court or district court for a duration as provided by statute or as ordered by the court. These orders apply to persons in those particular cases and do not necessarily have anything to do with the defendant and/or complaining witness in a criminal case. While they may be against the same person, the restraining or protective orders issued by family or district courts are not a part of the criminal case and may not even involve the same individuals. Any extension or enlargement of these orders requires notice and an opportunity to be heard. Further, these courts are given specific jurisdiction to hear certain matters and all courts may not have concurrent jurisdiction for the purpose of extending the duration of orders issued by other courts. Indeed, some of these orders may be issued by other circuits and have absolutely no reasonable relation to the criminal case before the court granting defendant's release.

Indeed, even if the proposed legislation would provide the court with the statutorily required grounds for extending any such restraining and protective orders, it may be impossible for the court to even be aware of the existence of such orders. For instance, if a person who has an existing protective order from an old neighbor gets arrested for an unrelated theft or unauthorized control of a propelled vehicle, neither the neighbor nor the existing restraining order would be known to the court when hearing a motion to modify bail. Further, that existing order would remain in effect under its own terms, even as the unrelated criminal case was ongoing in the courts regardless of whether the defendant was in custody or not. Moreover, it is that neighbor who is in the better position to seek an extension of the existing order if that person so required. Finally, access to a significant portion of the actual existing orders issued by the family court are confidential and may not even be accessible to the criminal court.

Thank you for the opportunity to testify on this measure.

DAVID Y. IGE
GOVERNOR



STATE OF HAWAII
DEPARTMENT OF PUBLIC SAFETY
1177 Alakea Street, 6th Floor
Honolulu, Hawaii 96813

MAX N. OTANI
DIRECTOR

Maria C. Cook
Deputy Director
Administration

Tommy Johnson
Deputy Director
Corrections

Jordan Lowe
Deputy Director
Law Enforcement

No. _____

**TESTIMONY ON SENATE BILL 2856
RELATING TO PRETRIAL RELEASE.**

by
Max N. Otani, Director

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

Tuesday, February 18, 2022; 9:30 a.m.
State Capitol, Via Video Conference

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

Senate Bill (SB) 2856, seeks to require the court to extend the duration of a restraining order or protective order issued against a pretrial detainee if the detainee is granted a motion for pretrial release.

The Department of Public Safety (PSD) provides comments regarding this measure. As PSD's mission statement includes upholding public safety, the Department appreciates the effort to address the needs of victims.

PSD further recognizes the authority of the courts and their discretion under Section 804-7.1, Hawaii Revised Statutes (HRS) to order conditions of release on bail, recognizance, or supervised release, thereby, making the integration of victims' concerns under Section 353-6.2, HRS unnecessary when it pertains to the pretrial case for which the accused is charged.

The Department suggests that mandating extensions of existing restraining orders and protective orders unrelated to pretrial matters for which bail is set, should be addressed independently by the court of competent jurisdiction, whether a pretrial defendant remains detained or not.

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The Department respectfully recommends that this measure be held, as it does not appear to be appropriate to amend HRS 353-6.2 for the purpose of requiring extended durations of restraining orders or protective orders.

Thank you for the opportunity to submit testimony on SB 2856.

SB-2856

Submitted on: 2/14/2022 11:49:42 AM

Testimony for JDC on 2/18/2022 9:30:00 AM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Dara Carlin, M.A.	Individual	Support	No

Comments:

Stand in Support.