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No. \_\_\_\_\_

TESTIMONY ON SENATE BILL 226  
RELATING TO CRIMINAL PROCEDURE

By

Tommy Johnson, Director  
Department of Public Safety

Senate Committee on Judiciary  
Senator Karl Rhoads, Chair  
Senator Mike Gabbard, Vice Chair

Tuesday, February 14, 2023; 9:40 a.m.  
State Capitol, Conference Room 16 and via Video Conference

Chair Rhoads, Vice Chair Gabbard, and Members of the Committees:

The Department of Public Safety (PSD) offers comments on Senate Bill (SB) 226, 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 SB 226.

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 14, 2023

S.B. No. 226: RELATING TO CRIMINAL PROCEDURE

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

The Office of the Public Defender opposes S.B. No. 226.

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 is required for court proceedings or may be waived. This bill codifies what is already written into Rule 43 of the Hawai‘i Rules of Penal Procedure (“HRPP”) entitled “Presence of the Defendant.” The bill expands on HRPP Rule 43 and permits defendants to appear by video at the arraignment, the entering of a plea, at pretrial evidentiary hearings, at every stage of the 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; and
- (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).

The Office of the Public Defender 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 2<sup>nd</sup> 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 inmates have "refused" transport to the courthouse to attend court hearings out of fear of being locked in "quarantine" upon return.

The Covid-19 pandemic has led our jails and prisons to implement quarantine protocols on inmates who enter in and out of a prison facility. The Halawa Correctional Facility requires that upon an inmate's arrival, the inmate must "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 on "lockdown" or "solitary confinement." "Solitary confinement" is often used by prisons across the nation as a form of disciplinary punishment. 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, and allowed 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 to the courthouse.

A "refusal" towards transport 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). Problems arise, however, when a facility lacks video capabilities. Currently, the Halawa Correctional Facility has not been able to accommodate inmates wishing to appear at their arraignment by way of video.<sup>1</sup> As such, inmates being held at the Halawa Correctional Facility have been consistently "refusing" transport to the Circuit Court for arraignment to avoid lengthy quarantine confinements.

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 is passed into law, we can expect that most courts will interpret an inmate's refusal to be transported to court as a "voluntary absence" from court proceedings, and many inmates' presence at court hearing will be improperly waived.

Thank you for the opportunity to comment on S.B. No. 226.

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<sup>1</sup> 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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**SENATE COMMITTEE ON JUDICIARY**  
**Thirty-Second State Legislature**  
**Regular Session of 2023**  
**State of Hawai`i**

February 14, 2023

**RE: S.B. 226; RELATING TO CRIMINAL PROCEDURE.**

Chair Rhoads, Vice Chair Gabbard, and members of the Senate Committee on Judiciary, the Department of the Prosecuting Attorney of the City and County of Honolulu (“Department”) submits the following testimony in **strong support** of S.B. 226. This bill is part of the Department's 2023 legislative package, and we thank you for hearing it.

The purpose of S.B. 226 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.<sup>1</sup>

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.

S.B. 226 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-

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<sup>1</sup> See [https://www.courts.state.hi.us/docs/court\\_rules/rules/hrpp.htm#Rule%2043](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 S.B. 226. Thank you for the opportunity to testify on this matter.