



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
KA 'OIHANA O KA LOIO KUHINA
THIRTY-SECOND LEGISLATURE, 2024**

ON THE FOLLOWING MEASURE:
S.B. NO. 3034, RELATING TO PENAL LIABILITY.

BEFORE THE:
HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS

DATE: Wednesday, March 13, 2024 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 325 and Videoconference

TESTIFIER(S): Anne E. Lopez, Attorney General, or
Michelle M.L. Puu, Deputy Attorney General

Chair Tarnas and Members of the Committee:

The Department of the Attorney General (Department) strongly supports this bill.

The purpose of this bill is to re-classify nonself-induced or pathological criminal intoxication defenses in section 702-230, Hawaii Revised Statutes (HRS), as affirmative defenses. An affirmative defense, as defined, in section 701-115(b), HRS, entitles the defendant to an acquittal if the trier of fact finds by a preponderance of the evidence, that penal liability should be negated by the defense and the prosecution fails to prove otherwise thereafter.

Currently, section 702-230, HRS, Intoxication, creates inequity in the judicial system when the Defendant raises, or infers the possibility of an intoxication defense to the prosecution months after the incident has occurred, when substantive and tangible evidence could have been tampered with, lost, or destroyed. Current law allows criminal defendants to raise intoxication defenses during the trial. When this defense is raised at such a late stage, the prosecution is left at a severe disadvantage. The prosecution and law enforcement are unable to thoroughly investigate such claims and standards of reasonable doubt shroud truth and justice.

By amending section 702-230, HRS, to re-classify nonself-induced or pathological criminal intoxication defenses as affirmative defenses, the prosecution would still be required to prove its case beyond a reasonable doubt. However, the defendant's initial burden of proof would allow the prosecution to fully vet the legitimacy

of the defense and possible lack of supportive evidence. Should the prosecution not be able to meet its burden of proof, the defendant would have to be found not guilty.

The Department believes that fair and just prosecution of offenders is tantamount to its mission. This requires a thorough investigation into the legitimacy of defenses that the defendant may rely upon at trial. The characterization of these defenses as affirmative defenses would significantly increase the likelihood that related evidence would be properly preserved because both sides would have a vested interest in maintaining such evidence. This would ensure that cases are resolved based on actual evidence rather than upon the tactical delayed disclosure of defenses.

The Department respectfully asks the Committee to pass this bill. Thank you for your consideration of this request and opportunity to proffer our testimony in strong support.

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STATE PUBLIC DEFENDER

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STATE OF HAWAII
OFFICE OF THE PUBLIC DEFENDER

March 12, 2024

S.B. 3034: RELATING TO PENAL LIABILITY

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

The Office of the Public Defender OPPOSES S.B. 3034:

As articulated in the justification for S.B. 3034, the purpose of the bill is “(1) assign some burden of proof upon the accused to reasonably establish the defense, and (2) permit the prosecution to more fairly refute the defense within the parameters of factual and constitutional constraints.”

Hawaii Revised Statute (HRS) § 701-115(2) states:

- (a) If the defense is not an affirmative defense, the defendant is entitled to an acquittal if the trier of fact finds that the evidence, when considered in light of any contrary prosecution evidence, raises a reasonable doubt as to the defendant’s guilt; or
- (b) If the defense is an affirmative defense, the defendant is entitled to an acquittal if the trier of fact finds that the evidence, when considered in light of any contrary prosecution evidence, proves by a preponderance of evidence the specified fact or facts which negative penal liability.

The well-established burden upon the prosecution in criminal cases is that each element of an alleged offense be proven beyond a reasonable doubt. This

includes proving defendant's requisite state of mind, and the issue of intoxication is no different. Understandably, self-induced intoxication does not legally negate one's state of mind. For example, if an individual voluntarily consumes alcohol to the point of intoxication, existing law prohibits a defendant from asserting that they did not or could not have intentionally, knowingly, or recklessly engaged in the alleged criminal conduct because they were intoxicated. The law already protects the prosecution from having to counter such an argument because the defendant is prohibited from using such a defense. The other defenses of non-self-induced or pathological intoxication are so specific and limited, the burden should remain on the prosecution to prove the defendant had the requisite state of mind.

Justification for this bill includes additional notice to the prosecution and increased opportunity to refute the defense. However, as in every criminal case, the prosecution already has an existing opportunity to present any rebuttal evidence (Rules of the Circuit Court of the State of Hawaii, Rule 17). Support for this bill acknowledges that creating an affirmative defense will shift the burden to the defendant. The Office of the Public Defender is gravely concerned by increased efforts to erode the prosecution's existing burden of proof. Proving one's guilt beyond a reasonable doubt must remain an uncompromised tenet of the criminal justice system.

The Office of the Public Defender also opposes the new definition of "lacks substantial capacity" which would be defined as "capacity that has been impaired to such a degree that only an extremely limited amount remains." This extremely restrictive definition is confusing, misleading, and contradicts the true intent of what it means to lack substantial capacity.

The term "lacks substantial capacity" is rooted in HRS Chapter 704 which deals with Penal Responsibility and Fitness to Proceed. HRS § 704-400(1) states: [a] person is not responsible, under this Code, for conduct if at the time of the conduct as a result of physical or mental disease, disorder or defect the person lacks substantial capacity either to appreciate the wrongfulness of the person's conduct or to conform the person's conduct to the requirements of law. The commentary to HRS § 704-400 discusses the issue of capacity:

"The Code does not demand total incapacity; it requires substantial incapacity. The word 'substantial' is, of course, imprecise, but seeking precision in designating the degree of impairment that will preclude responsibility is as foolish as requiring total impairment. As the commentary to the Model

Penal Code states: ‘To identify the degree of impairment with precision, is, of course, impossible both verbally and logically. The recommend formulation is content to rest upon the term ‘substantial’ to support the weight of judgment; if capacity is greatly impaired, that presumably should be sufficient.’”

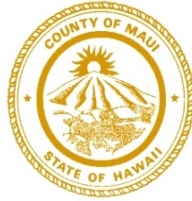
As the commentary articulates, efforts to restrict or precisely define the issue of capacity are problematic and the existing term, “lacks substantial capacity,” accurately addresses the requisite degree of impairment. The current bill narrows the definition to restrict the degree of applicable impairment which is exactly what the commentary rejected.

Thank you for the opportunity to comment on this measure.

RICHARD T. BISSEN, JR.
Mayor

ANDREW H. MARTIN
Prosecuting Attorney

SHELLY C. MIYASHIRO
First Deputy Prosecuting Attorney



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TESTIMONY ON S.B. 3034
RELATING TO PENAL LIABILITY

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

FROM: Department of the Prosecuting Attorney, County of Maui

DATE: March 12, 2024

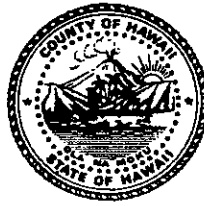
SUBJECT: **SUPPORT OF SB 3034, PENAL LIABILITY**

Thank you for the opportunity to testify in **SUPPORT** of SB 3034. This bill clarifies that defenses based on pathological or non-self-induced intoxication are affirmative defenses. We support this measure because, *inter alia*, it requires a defendant who wishes to claim that they were not responsible for committing an offense due to pathological or non-self-induced intoxication to provide advance notice of their defense and any related witnesses or evidence. This promotes judicial efficiency by allowing the government to not only gather its own evidence relevant to this defense, but to re-evaluate cases before trial commences to confirm whether a defendant has a legitimate defense to the charged offense(s).

For these reasons, the Department of the Prosecuting Attorney, County of Maui supports the passage of SB 3034. Please feel free to contact our office at (808) 270-7777 if you have any questions or inquiries.

Thank you very much for the opportunity to provide testimony on this bill.

Mitchell D. Roth
Mayor



Benjamin T. Moszkowicz
Police Chief

Reed K. Mahuna
Deputy Police Chief

County of Hawai'i

POLICE DEPARTMENT

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March 11, 2024

Representative David A. Tarnas
Chairperson and Committee Members
House Committee on Judiciary and Hawaiian Affairs
Hawai'i State Capitol, Room 325
415 South Beretania Street
Honolulu, Hawai'i 96813

Dear Representative Tarnas:

RE: SENATE BILL 3034; RELATING TO PENAL LIABILITY
HEARING DATE: MARCH 13, 2024
TIME: 2:00 P.M.

The Hawai'i Police Department **supports** Senate Bill 3034, with its purpose to explicitly categorize defenses based on intoxication that is pathological or not self-induced as affirmative defenses.

As it stands currently, a defendant has the ability to raise a defense of intoxication during the trial phase, which often takes place several months or longer, after an incident has occurred. While this is advantageous to the defense, it is a significant disadvantage to the prosecution team since critical time-sensitive pieces of evidence are likely irretrievable due to the passage of time. In instances such as these, investigators and prosecutors are left with little investigative tools and the ability to prove or disprove such a defense cannot be corroborated.

The passage of this bill will ensure equity in the judicial process as it will give investigators and the prosecution team an opportunity, in advance of the trial dates, to better investigate claims of intoxication as a defense to criminal charges.

It is for these reasons, we urge this committee to **approve** this legislation. Thank you for allowing the Hawai'i Police Department to provide comments relating to Senate Bill 3034.

Sincerely,


BENJAMIN T. MOSZKOWICZ
POLICE CHIEF