

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 & Hawaiian Affairs**

March 12, 2021

S.B. No. 413, SD1: RELATING TO VIOLATION OF PRIVACY

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

The Office of the Public Defender respectfully opposes S.B. No. 413, SD1. This measure would prohibit defendants originally charged with the offenses of Violation of Privacy in the First Degree and certain sections of Violation of Privacy in the Second Degree from qualifying for a deferred acceptance of guilty or nolo contendere plea.

The courts should be allowed to maintain their discretion on a case-by-case basis to grant deferrals in these types of cases. Courts cannot exercise this discretion without meeting the requirements of H.R.S. § 853-1, which provides, in pertinent part:

(1) When a defendant voluntarily pleads guilty or nolo contendere, prior to commencement of trial, to a felony, misdemeanor, or petty misdemeanor; (2) It appears to the Court that the defendant is not likely to engage in a criminal course of conduct; and

* * * *

(3) The ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law, the court, without accepting the plea of nolo contendere or entering a judgment of guilt and with the consent of the defendant and after considering the recommendations, if any, of the prosecutor, may defer further proceedings.

If this measure passes, defendants originally charged with these offenses under §711- 1110.9 and various subsections in §711-1111 (misdemeanor) would be prohibited from requesting a deferral of their charges. As stated in HRS Chapter 853, the trial court, after considering the merits of the case, and hearing from the prosecutor, may or may not grant a defendant’s motion to defer the proceedings. In

order for the trial court to defer the proceedings, ***it must find that the defendant is not likely to re-offend or engage in a (further) course of criminal conduct, and that the ends of justice and welfare of society do not require the defendant receive a criminal conviction.***

Statutory eligibility does not guarantee a deferral – in fact, because of the unusually high standard for granting a deferral, many requests by defendants to defer their criminal pleas are denied by the trial courts. Defendants must still be deemed worthy of a deferral. Criminal history, seriousness of the offense, history of substance abuse, lack of employment, and previous criminal behavior (even if uncharged) are common reasons argued by prosecutors and cited by judges for a denial of a defendant’s motion to defer the acceptance of his or her guilty or no contest plea.

Why is it important that some defendants receive deferrals of their criminal proceedings? A criminal conviction follows an individual for the rest of his/her life. It will impact his/her ability to seek and maintain employment and to receive government benefits. A defendant who is youthful, immature, remorseful and is not likely to re-offend should be allowed, in limited circumstances, to be given the opportunity for a second chance -- a chance to avoid a criminal conviction. Police officers, soldiers, government and private sector employees may lose their jobs if they receive a criminal conviction.

Moreover, the possibility of requesting a deferral -- a chance to avoid a criminal conviction -- is a particularly enticing reason for a defendant to waive his right to a trial and enter a plea. Without the possibility of a deferral, a defendant is more likely to elect a trial. Defense attorneys weigh the strength of their case versus the strength of the State’s case in determining whether or not to recommend trial. The likelihood of obtaining an acquittal, favorable verdict, or an improved position for sentencing are factors that defense attorneys consider in deciding to recommend a trial or settlement. Without a deferral, defendants will often take their chances at trial. And even when a deferral is granted, a defendant must still comply with conditions in order to earn the possibility of expunging their record.

Finally, the Office of the Public Defender is unaware of any significant case statistics that indicate that the courts are inordinately granting deferrals in these kinds of cases.

We strongly oppose this measure and thank you for the opportunity to present testimony to this committee.

DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

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THE HONORABLE MARK M. NAKASHIMA, CHAIR
HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS
Thirty-first State Legislature
Regular Session of 2021
State of Hawai'i

March 12, 2021

RE: S.B. 413, S.D. 1; RELATING TO VIOLATION OF PRIVACY.

Chair Nakashima, Vice Chair Matayoshi, and members of the House Committee on Judiciary and Hawaiian Affairs, the Department of the Prosecuting Attorney of the City and County of Honolulu (“Department”) submits the following testimony in strong support of S.B. 413, S.D. 1. This bill is part of the Department's 2021 legislative package.

The purpose of S.B. 413, S.D. 1 is to exclude certain types of Violation of Privacy from being eligible for deferred pleas. Generally speaking, deferred pleas allow someone to “put off” entering an official plea for a specific length of time—commonly known as the deferral period—during which time they have to meet certain terms and conditions set by the court (e.g. remain arrest-free and conviction-free, etc); the length of the deferral period varies, based on the severity of the offense. If the defendant abides by all terms and conditions of their deferral, through the end of their deferral period, then the case will be dismissed and no conviction will ever appear on the person’s record (for that particular offense). This is essentially an opportunity for someone to show the court that they have “learned their lesson”—even without a formal conviction—and will not reoffend; each person is typically allowed only one deferred plea in their lifetime. Depending on the individual, a deferral could be used to keep a person’s criminal record totally clean, or it could be used to keep a felony off of their record, or for other reasons.

Section 853-4, Hawaii Revised Statutes (“HRS”), explains the process and parameters of getting a deferral, and also lists specific offenses for which deferral is not allowed (e.g. abuse of family or household member, solicitation of prostitution, all class A felonies, etc). If enacted, S.B. 413 would add Violation of privacy in the first degree (HRS §711-1110.9) and certain

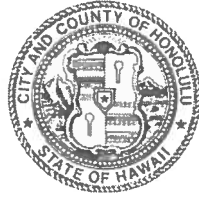
portions of Violation of privacy in the second degree (HRS §711-1111(d)(e)(f)(g) and (h)) to that list, thus prohibiting deferral of these offenses.

Please keep in mind, these particular offenses are much more than simple “peeping Tom”-type violations of privacy, and generally involve affirmative steps by the offender—sometimes using audiovisual devices or instrumentation—to observe, record, amplify and/or broadcast other people’s intimate activities, private communications, or intimate areas of the body, without consent from those depicted, under circumstances in which there would be a reasonable expectation of privacy. Given the very serious nature of these offenses, the Department does not believe they should be eligible for deferral; perpetrators should not be afforded the privilege of keeping these types of offenses off their record.

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. 413, S.D. 1. Thank you for this opportunity to testify.

POLICE DEPARTMENT
CITY AND COUNTY OF HONOLULU

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OUR REFERENCE RP-KK

March 12, 2021

The Honorable Mark M. Nakashima, Chair
and Members
Committee on Judiciary
and Hawaiian Affairs
House of Representatives
Hawaii State Capitol
415 South Beretania Street, Room 325
Honolulu, Hawaii 96813

Dear Chair Nakashima and Members:

SUBJECT: Senate Bill No. 413, S.D. 1, Relating to Violation of Privacy

I am Randall Platt, Captain of District 4 of the Honolulu Police Department (HPD),
City and County of Honolulu.

The HPD supports Senate Bill No. 413, S.D. 1, Relating to Violation of Privacy.

The unauthorized, surreptitious recording of a person in a state of undress or participating in a private sexual act is a criminal violation of a person's right to privacy. The release or threat of release of such recordings or images can cause irreparable personal, professional, and financial harm. Excluding Violation of Privacy in the First Degree and certain paragraphs of Violation of Privacy in the Second Degree from qualifying for deferred acceptance of guilt or nolo contendere pleas holds perpetrators accountable for their actions and provides a deterrent for a repeat offense.

The HPD urges you to support Senate Bill No. 413, S.D. 1, Relating to Violation of Privacy, and thanks you for the opportunity to testify.

APPROVED:

Handwritten signature of Susan Ballard in black ink.

Susan Ballard
Chief of Police

Sincerely,

Handwritten signature of Randall Platt in black ink.

Randall Platt, Captain
District 4