March 10, 1997

The Honorable Avery S. Chumbley
The Honorable Matt M. Matsunaga
Co-Chairs, Senate Committee on Judiciary
The Nineteenth Legislature
State of Hawaii
State Capitol
Honolulu, Hawaii 96813

Dear Senators Chumbley and Matsunaga:

Re: Constitutional Issues Relating to Jury Trials

This is in response to your memorandum dated February 12, 1997, asking whether Senate Bill No. 201, titled "A Bill for an Act Relating to Jury Trials," presents any constitutional problems.[1] Senate Bill No. 201[2] permits the court to specify by rules the required number of jurors to sit on civil and criminal trials. The bill also authorizes parties to stipulate to a jury of less than twelve, but not less than six jurors. Finally, the bill requires cases involving "non-serious crimes" to be tried by juries of six persons.

The constitutional provisions applicable to your inquiry are the Sixth and Seventh Amendments to the United States Constitution and sections 13 and 14 of article I of the Constitution of the State of Hawaii. While we see no federal constitutional objection to the use of a six-person jury in trials before the courts of this state (other than for "serious crimes," which are not covered by the proposed legislation), we believe that a constitutional amendment must be made to section 13 of article I of the State Constitution before a jury of less than twelve persons may be used for civil matters when the parties do not stipulate to a smaller jury panel. The proposed legislation does not conflict with the mandates of section 14 of article I of the Hawaii Constitution with regard to permitting a jury of six persons in cases involving "non-serious crimes." However, the existing provision in section 806-60, Hawaii Revised Statutes, that a "serious crime" triggering a right to a jury trial means a crime for which the defendant may be imprisoned for six months or more is erroneous given recent Hawaii Supreme Court caselaw. (top)

Federal Constitutional Issues

In Williams v. Florida, 399 U.S. 78 (1970), the United States Supreme Court departed from a long history of requiring a twelve-person jury as a necessary ingredient of the Sixth Amendment[3] guarantee of trial by jury in all criminal cases. See, e.g., Thompson v. Utah, 170 U.S. 343 (1889). Even though the size of the jury at common law was fixed at twelve (possibly alluding to the twelve apostles) the Williams Court perceived that particular feature to have been "a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance 'except to mystics.'" 399 U.S. at 102. The Court also held that the twelve-person panel is not a necessary ingredient of the Sixth Amendment right to "trial by jury" as applied to the states through the Fourteenth Amendment. Id. at 103. It noted that the states are free to determine the value of larger juries and smaller juries and that they are "unrestrained by an interpretation of the Sixth Amendment that would forever dictate the precise number that can constitute a jury." Id. at 103. (top)

The Williams Court dealt exclusively with jury trials in criminal cases. In Colgrove v. Battin, 413 U.S. 149 (1973), the Supreme Court ruled that "a jury of six satisfies the Seventh Amendment's guarantee of trial by jury in civil cases." Id. at 160 (footnote omitted). The Supreme Court concluded that it was the right to trial by jury, not the incidents of trial by jury, that was preserved in the Seventh Amendment.[4] It found that twelve members is not a substantive aspect of the right of trial by jury warranting preservation. Reasoned the Court, "[W]hat was said in

Williams with respect to the criminal jury is equally applicable here: constitutional history reveals no intention on the part of the Framers 'to equate the constitutional and common-law characteristics of the jury.'" 413 U.S. at 156 (citation omitted). (top)

In Ballew v. Georgia, 435 U.S. 223 (1978), the United States Supreme Court held that a five-member jury in a state criminal trial did not satisfy the jury trial guarantee of the Sixth Amendment as applied to the states through the Fourteenth Amendment. In doing so, the Supreme Court reasoned "the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members." Id. at 239. (top)

In our Opinion No. 68-10, we advised that a constitutional amendment is necessary to change the size of a jury. We noted that it may also be a violation of the Fourteenth Amendment for a state to prescribe a jury of less than twelve persons. However, that opinion was reached before the Williams, Colgrove and Ballew cases were decided. It was also written before the Hawaii Constitution was amended in 1978 to specify that twelve-person juries are required only in criminal trials involving "serious" crimes. Accordingly, to the extent the conclusions reached in this opinion are inconsistent with our Opinion No. 68-19, this opinion supersedes our previous opinion. (top)

In conclusion, Senate Bill No. 201 passes muster under the Federal Constitution. The United States Supreme Court, in interpreting the Federal Constitution, allows trials by less than twelve-member juries in civil and criminal cases and prohibits less than six-member juries in criminal cases. Thus, to the extent that Senate Bill No. 201 diminishes the number of members on jury panels in either criminal or civil trials, it does not violate any federal constitutional law. (top)

While the Federal Constitution, as interpreted by the United States Supreme Court, establishes minimum standards, the states have the power and are free to provide greater safeguards and to extend this protection through their own constitutions under both the Ninth[5] and Tenth[6] Amendments to the United States Constitutions. While the United States Supreme Court is the final arbiter of the meaning of the United States Constitution and its Amendments, the Hawaii Supreme Court is the final arbiter of the meaning of the provisions of the Hawaii Constitution. State v. Santiago, 53 Haw. 254, 265, 492 P.2d 657, 664 (1971). Nothing prevents the constitutional drafters of Hawaii's constitution from fashioning greater protections than those given by the United States Constitution. Id., citing State v. Texeira, 50 Haw. 138, 142, 433 P.2d 593, 597 (1967). It is thus necessary to analyze whether the Williams, Colgrove and Ballew trilogy, which allows trials by less than twelve-member juries, is permissible under the Hawaii Constitution. (top)

Hawaii Constitution

The Hawaii Supreme Court has noted that in interpreting the Hawaii counterpart of the Sixth Amendment to the United States Constitution (now section 14 of article I of the State Constitution), it must look to the federal case law on the subject as a guide, pursuant to the expressed intent of the draftsmen of our constitution. State v. Shak, 51 Haw. 612, 615, 466 P.2d 422, 424, cert. denied, 400 U.S. 930 (1970). However, the Court has also emphasized that in interpreting a provision of the Hawaii Constitution, it is not bound by the decisions of the United States Supreme Court that interpret similar federal constitutional provisions. See, e.g., State v. Russo, 67 Haw. 126, 681 P.2d 553 (1984), appeal after remand, 69 Haw. 72, 734 P.2d 156 (1984) (The Hawaii Supreme Court is constrained to seek primary guidance from Hawaii State Constitution and Hawaii caselaw rather than from later federal decisions in interpreting state constitutional provisions). The Hawaii Constitution can provide greater rights and protections to its citizens than are provided under similar provisions of the Federal Constitution. As the Hawaii Supreme Court noted in State v. Hutch, 75 Haw. 307, 861 P.2d 11 (1993), "[a]s the ultimate judicial tribunal with final, unreviewable authority to interpret and enforce the Hawaii Constitution, we are free to give broader . . . protection [under . . . the Hawaii Constitution] than that given by

the federal constitution." Id. at 322, 861 P.2d at 19, quoting from Baehr v. Lewin, 74 Haw. 530, 555, 852 P.2d 44, 57, reconsideration and clarification granted in part, 74 Haw. 645 and 650, 875 P.2d 225 (1993). We now turn to an analysis of the Hawaii constitutional provisions relevant to your inquiry.

Section 13 of Article I of the Hawaii Constitution

Section 13 of article I of the Constitution of Hawaii provides: "In suits at common law where the value in controversy shall exceed five thousand dollars, the right of trial by jury shall be preserved." The origin of this section is the Seventh Amendment of the United States Constitution, which is not binding upon the states. Harada v. Burns, 50 Haw. 528, 532, 445 P.2d 376, 380 (1968).

The fundamental principle in construing a constitutional provision is to give effect to the intention of the framers and the people adopting it. State v. Kahlbaun, 64 Haw. 197, 201-02, 638 P.2d 309, 314-15 (1981). There is no reference to any number of jurors in section 13 of article I. However, to those who framed and debated this provision, the number twelve was not merely of "mystical significance"; they fully expected that civil juries be constituted of twelve members -- no more and no less. In Committee of the Whole Report No. 5, the Committee noted:

> It is the universal ruling of all courts which have passed upon the subject, that a constitutional provision preserving the right to trial by jury carries with it the clear implications that the jury must consist of twelve jurors and that the verdict must be unanimous. In order, therefore, to enable the legislature to provide for majority verdicts, it is necessary to expressly so provide in the constitution. . . .
>
> Many states have also permitted, as did the constitution of the Republic of Hawaii, the legislature to provide for a reduction in the number of jurors in all or certain types of cases. Your Committee has felt that this was inadvisable, just as it has felt it inadvisable to extend the majority-verdict provision to any criminal case. (top)

1 Proceedings of the Constitutional Convention of Hawaii 1950, at 301 (1960) (emphases added).

Comments made by Delegates Yasutaka Fukushima, J. Garner Anthony, and C. Nils Tavares during debates of the Committee of the Whole of the Constitutional Convention of 1950 also reflect that use of the word "jury" in what is now section 13 of article I was understood as synonymous with a trial by a jury of twelve:

> CLERK: ". . . Jury Trial. In suits at common law where the value in controversy shall exceed one hundred dollars, the right of trial by jury shall be preserved. However, the legislature may provide for a verdict by not less than three-fourths of the members of the jury."
>
> . . . .
>
> FUKUSHIMA: To make a lot of other things straight for the record, I think there is no clear understanding [of] the composition of a jury. Do we mean . . . when we say jury, it is a jury of 12? Without any question?
>
> ANTHONY: No question about that. We adopted the federal language and that in turn adopted the common law. It is a jury of 12.
>
> TAVARES: There is not one decision of any state or the United States courts that has ever held that the word "trial by jury," or "jury trial," or the word "jury" when used without any other modification means anything but 12 men. There isn't one decision to the contrary; therefore, when we say "jury" without an amendment or without a change of what we mean, it means 12 men. 12 persons.

2 Proceedings of the Constitutional Convention of Hawaii 1950, at 44-45 (1961). (top)

The remarks of Delegate Tavares may be interpreted to indicate that his position might be different had the case of Williams v. Florida been decided two decades earlier. However, in light of Committee of the Whole Report No. 5, speculation about what the individual delegates' intent might have been had they had the benefit of later federal court opinions is not persuasive. See, e.g., Duplex Printing Press Co. v. Deering, 254 U.S. 443, 474 (1921) (In analyzing the proper scope and weight of debates on legislation, the reports of committees are entitled to consideration; statements of individual members are not. The debates express the views and motives of individual members and are not a safe guide in ascertaining the meaning and purpose of the law-making body.) (top)

Based on both the Committee of the Whole Report No. 5 and the remarks of the delegates, it is clear that the use of the word "jury" in a civil trial under section 13 of article I was meant to convey a twelve-person panel. This is also supported by the Hawaii Supreme Court decision in Carr v. Kinney, 41 Haw. 166 (1955), ruling that the "[r]ight to a trial by jury . . . means, in substance, the right as it existed at common law and requires the essential features of jury trial as known to the common law. The essential elements are that a jury shall consist of twelve impartial men." Id. at 168 (emphasis omitted). The word "jury" must thus be accorded the significance and the essential features it had at the time it was adopted. Any reduction of that number without agreement by the parties requires a constitutional amendment. (top)

We do not find any constitutional impediment to the proposed statutory amendment to section 635-26, Hawaii Revised Statutes, permitting parties to stipulate to a jury of less than twelve (but no less than six) members. The Committee of the Whole in its Report No. 5 acknowledged that the Supreme Court of the State, under rules of civil procedure, could allow "parties to waive trial by jury in all civil and criminal cases, except capital offenses, [and could permit] them to stipulate for the trial of civil or criminal cases, other than capital offenses, by a jury of less than twelve, and for a verdict of less than unanimous or less than the proportion then required by law for such cases." 1 Proceedings of the Constitutional Convention of Hawaii 1950, at 302 (1960). What is proscribed is compelling parties in a civil case to try their case before a jury of more or less than twelve members in the absence of a stipulation to that effect or a constitutional amendment permitting this to occur. (top)

Section 14 of Article I of the Hawaii Constitution

Section 14 of article I of the Constitution of Hawaii provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . . Juries, where the crime charged is serious, shall consist of twelve persons." (Emphasis added.) This provision of the Hawaii Constitution was modeled after the Sixth Amendment and was intended to incorporate it and to give the State the benefit of federal decisions construing the same language. Stand. Comm. Rep. No. 20 of the Comm. on Bill of Rights. 1 Proceedings of the Constitutional Convention of Hawaii 1950, at 164 (1960); Committee of the Whole Report No. 5, id. at 302; see also State v. Wong, 47 Haw. 361, 385, 389 P.2d 439, 452 (1964). The language specifying that "[j]uries, where the crime charged is serious, shall consist of twelve persons" was added during the 1978 Hawaii Constitutional Convention and specifically requires no more or less than twelve-person juries in criminal prosecutions involving "serious crimes." In clarifying this requirement, the Committee of the Whole elaborated in detail the factors it considered in concluding that a twelve-person jury is essential for a fair trial in such cases. See Comm. of the Whole Rep. No. 15, 1 Proceedings of the Constitutional Convention of Hawaii 1978, at 1023 (1980). (top)

Based on this specific intent of the drafters, the State Constitution's provisions must be considered in the light of applicable federal decisions, State v. Wong, id., such as Williams v. Florida, and Ballew v. Georgia, which specifically permit juries of six members (but no less) in criminal trials. The framers' specific intention that federal decisions be used in interpreting this provision and the specific language "[j]uries, where the crime charged is serious, shall consist of

twelve persons," indicate that the Hawaii Constitution does not prohibit six-member jury panels for defendants charged with "non-serious" crimes.

As a final matter, we point out what we perceive as an erroneous correlation in section 806-60, Hawaii Revised Statutes, as it presently reads. This statute specifies that persons charged with "serious crimes" are entitled to a trial by jury of twelve members. The statute defines "serious crime" as a "crime for which the defendant may be imprisoned for six months or more." This definition of "serious crime" may be interpreted to deny on a wholesale basis trial by jury to persons charged with crimes for which they may be imprisoned for less than six months. This is inconsistent with the Hawaii Supreme Court's holding in cases such as State v. Jordan, 72 Haw. 597, 825 P.2d 1065 (1992), State v. Lindsey, 77 Haw. 162, 164, 883 P.2d 83, 85 (1994), and State v. Ford, 84 Haw. 65, 929 P.2d 78 (1996). These cases hold that for purposes of section 14 of article I of the Hawaii Constitution, defendants who are not necessarily subject to imprisonment for six months may still be constitutionally entitled to jury trials. (top)

In rejecting a definition of "serious crimes" that encompasses only the penalty involved, the court in State v. O'Brien, 68 Haw. 38, 44, 704 P.2d 883, 887 (1985), noted, "In recognizing that punishments other than imprisonment exceeding six months can require the constitutional guarantees of a jury trial, we act on our belief that our interpretation of the mandate of the constitution must accord with the changing circumstances of modern times and the exigencies of life in a society dependent on technology such as the automobile." Moreover, as the court in State v. Jordan, explained:

> Six and one-half years ago in deciding that the crime of driving under the influence . . . was a serious crime entitling the persons accused thereof to a jury trial in State v. O'Brien, we quoted in our earlier decision in State v. Kasprzycki, 64 Haw. 374, 641 P.2d 978 (1982), as follows:
>
> > "Under the Federal Constitution, the United States Supreme Court has held that two criteria are relevant in determining whether an offense is petty or serious. The first is whether the offense is by its nature serious. If so, the size of the penalty that may be imposed is only of minor relevance, and the right of trial by jury attaches. See Callan v. Wilson, 127 U.S. 549 (1888). If the offense is not by its nature serious, however, the magnitude of the potential penalty set for its punishment becomes important, since it is an indication of the ethical judgments and standards of the community. [Citation omitted.]"
>
> Id. at 375, 641 P.2d at 978-79. (top)
>
> We then decided that, for the purposes of determining whether there was a right to a jury trial under section 14 of article I of the Constitution of the State of Hawaii [in driving under the influence cases], the crime created . . . was a serious one.

State v. Jordan, 72 Haw. at 600-01, 825 P.2d at 1068. See also State v. Lindsey, 77 Haw. at 163, 883 P.2d at 84 (Three factors must be considered in determining whether an offense is constitutionally serious so as to warrant a jury trial: the treatment of the offense at common law; the gravity of the offense; and the authorized penalty); State v. Ford, 84 Haw. at 70, 929 P.2d at 82 (All three factors set forth in State v. Lindsey must be present to determine if an offense is "serious" so as to trigger a constitutional right to jury trial.) (top)

In summary, because Senate Bill No. 201's proposed amendment to section 635-26, Hawaii Revised Statutes, conflicts with section 13 of article I of the State Constitution, a constitutional amendment for changing the number of jury members in civil cases, where there is no agreement by the parties, is required. The proposed amendment to section 806-60, Hawaii Revised Statutes, does not require a constitutional amendment because a jury comprised of six members in cases involving non-serious crimes tracks the language of section 14 of article I of the State Constitution. However, the definition of "serious crimes" as exclusively those crimes for which the defendant faces a possibility of imprisonment of at least six months is inconsistent with the

principle that crimes that do not carry the possibility of this specific term of imprisonment may none-the-less constitute "serious crimes" (e.g., driving under the influence) which trigger the constitutional right to a jury trial. (top)

We hope this provides assistance. If you have any questions regarding this matter please do not hesitate to call me at 586-1255.

Very truly yours,

Susan L. Gochros
Deputy Attorney General

APPROVED:

Margery S. Bronster
Attorney General

(top)

[1] This opinion addresses only the constitutional issues concerning reductions of members on jury panels. It does not address the interplay between legislative functions and the powers conferred by section 7 of article VI of the Constitution of the State of Hawaii, empowering the Hawaii Supreme Court to promulgate rules and regulations in civil and criminal cases. (*back to document*)

---

[2] We note that Senate Bill No. 201 was amended on February 14, 1997, to clarify that the provision mandating that "non- serious" crimes are to be tried by juries of six persons only applies when a defendant is actually entitled to a jury trial. (*back to document*) (top)

---

[3] The Sixth Amendment of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . ." (*back to document*)

---

[4] The Seventh Amendment provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ." (*back to document*) (top)

---

[5] The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." (*back to document*)

---

[6] The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." (*back to document*) (top)