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THE HONORABLE GILBERT S.C. KEITH-AGARAN, CHAIR
SENATE COMMITTEE ON JUDICIARY AND LABOR
Twenty-Eighth State Legislature
Regular Session of 2016
State of Hawai'i

February 23, 2016

RE: SB 2247; RELATING TO SENTENCING.

Chair Keith-Agaran, Vice-Chair Shimabukuro and members of the Senate Committee on Judiciary and Labor, the Department of the Prosecuting Attorney of the City and County of Honolulu submits the following testimony, supporting the intent of S.B. 2247 and proposing S.D. 1 attached for your consideration. While the current language of S.B. 2247 attempts to address a problem that is certainly known to our Department, we believe a slightly different approach would be more effective.

The purpose of S.B. 2247 is to create a new sentencing statute that would require a court to consider the aggravating factor of an offense occurring in the presence of a minor. This new sentencing statute would cover specifically three offenses; §707-710 (assault in the first degree), 707-711 (assault in the second degree), or 707-730 (sexual assault in the first degree), H.R.S. It would require the courts to take into consideration as an aggravating factor, the fact that a minor was present contemporaneously during one of the enumerated offenses.

Hawai'i's existing statute, §706-606.4 H.R.S., Sentencing in offenses involving abuse of family or household member committed in the presence of a minor, created similar requirements for a court to consider the aggravating factor of having a minor in the presence during an offense. This statute covers scenarios where one of the enumerated offenses is committed by a defendant who is a family or household member to either the minor present or the victim of the offense.

In lieu of creating a duplicate statute which may cause further confusion, the proposed S.D. 1 sets out to reformat §706-606.4 H.R.S. to include the intent of S.B. 2247 into the general framework of the existing statute. The definition section in §706-606.4 H.R.S currently includes the offenses covered under S.B. 2247, as well as several other sections. "Offense" means a violation of section 707-710 (assault in the first degree), 707-711 (assault in the second degree), 707-730 (sexual assault in the first degree), 707-731 (sexual assault in the second degree), 707-732 (sexual assault in the third degree), or 709-906 (abuse of family or household members). By

removing the requirement in §706-606.4(b), H.R.S., that the defendant is or has been a family or household member, the proposed changes to §706-606.4 H.R.S would uphold the intent of the existing statute, while also meeting the need indicated by S.B. 2247.

In addition, the Department would recommend inputting the definition of “In the presence of a minor” within §709-906, H.R.S. In 2014, H.B. 1993 was introduced and passed, creating a class C felony for physical abuse that occurred in the presence of a minor. However, the definition for “In the presence of a minor” was not provided in §709-906 H.R.S. or anywhere in Chapter 709. So at present, courts are forced to reach for the definition set out in §706-606.4, H.R.S. which is a completely separate sentencing statute, to provide a definition.

For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu supports the intent of S.B. 2247, using the proposed S.D. 1. Thank you for the opportunity to testify on this matter.

Report Title:

RELATING TO SENTENCING

Description:

Provides that the commission of certain offenses of assault in the presence of the victim's minor child is an aggravating factor in the sentencing of the defendant convicted of the offense.

A BILL FOR AN ACT

RELATING TO SENTENCING.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Section 706-606.4, Hawai'i Revised Statutes, is amended to read as follows:

"§706-606.4 Sentencing in enumerated offenses ~~involving abuse of a family or household member~~ committed in the presence of a minor. (1) In addition to the factors considered under section 706-606, the court shall consider the following aggravating factors in determining the particular sentence to be imposed:

(a) The defendant has been convicted of committing or attempting to commit an offense ~~involving abuse of a family or household member~~; and

~~(b) The defendant is or has been a family or household member of either a minor referred to in paragraph (c) or the victim of the offense; and~~

(b)(e) The offense contemporaneously occurred in the presence of a minor

(2) As used in this section:

1 ~~"Family or household member" has the same meaning as~~
2 ~~defined in section 709-906.~~

3 "In the presence of a minor" means in the actual physical
4 presence of a child or knowing that a child is present and may
5 hear or see the offense.

6 "Offense" means a violation of section 707-710 (assault in
7 the first degree), 707-711 (assault in the second degree), 707-
8 730 (sexual assault in the first degree), 707-731 (sexual
9 assault in the second degree), 707-732 (sexual assault in the
10 third degree), or 709-906 (abuse of family or household
11 members).

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**Testimony of the Office of the Public Defender,
State of Hawaii to the Senate Committee on
Judiciary and Labor**

February 23, 2016

S.B. No. 2247: RELATING TO SENTENCING

Chair Keith-Agaran and Members of the Committee:

We support passage of S.B. No. 2247 if it is amended to include a repeal of H.R.S. § 709-906(9). We believe that this measure correctly designates, as an aggravating factor upon the imposition of sentence, the factual situation where an offender commits assault in the physical presence of a child.

The Abuse of Family or Household Member statute, H.R.S. § 709-906 currently raises a misdemeanor offense to a class C felony offense if the abuse occurs in the presence of any family or household member who is less than fourteen years of age. This approach to an offense committed in the presence of a child is problematic for two reasons. First, because the presence of the child has been made an element of the felony offense of Abuse of Family or Household Member, the prosecution must prove this fact beyond a reasonable doubt which is often difficult to do given the fragility and uncertainty of child witness testimony. Second, the child is required to become embroiled in the litigation of the case which is often an undesired effect of the case being filed in the court system.

We believe that this situation is best addressed by making the commission of an offense in the presence of a child an aggravating factor at sentencing rather than an element of the offense. S.B. No. 2247 accomplishes this.

Thank you for the opportunity to provide testimony in this matter.

From: mailinglist@capitol.hawaii.gov
To: [JDL Testimony](#)
Cc: [REDACTED]
Subject: *Submitted testimony for SB2247 on Feb 23, 2016 09:00AM*
Date: Saturday, February 20, 2016 8:33:09 PM

SB2247

Submitted on: 2/20/2016

Testimony for JDL on Feb 23, 2016 09:00AM in Conference Room CR016

Submitted By	Organization	Testifier Position	Present at Hearing
Rachel L. Kailianu	Ho`omana Pono, LLC	Support	Yes

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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