CHAPTER 706
DISPOSITION OF CONVICTED DEFENDANTS

Part I. Pre-Sentence Investigation and Report, Authorized Disposition, and Classes of Felonies

Section

Part II. Probation

Cross References

Corrections population management commission, see chapter 353F.

Overdose prevention; limited immunity, see §329-43.6.

COMMENTARY ON CHAPTER 706

Act 314, Session Laws 1986, amended this chapter to reflect a shift from the present policy underlying sentencing, which emphasizes rehabilitation, to one intended to achieve the goal of just punishment. Conference Committee Report No. 51-86.

Case Notes

Neither this chapter nor chapter 353 prohibits the Hawaii paroling authority from setting a prisoner's minimum term at a period equal to his or her maximum sentence. 97 H. 183, 35 P.3d 210 (2001).

Chapter not violated and pre-sentence report sufficiently complied with §706-602, where defendant asserted that court did not order or receive a pre-sentence correctional diagnosis and report as required by §706-601(1)(a), therefore, since the information required under §706-602 was not furnished to court for its consideration in imposing sentence, the sentences were not imposed in accordance with provisions of this chapter and were illegal. 10 H. App. 535, 880 P.2d 208 (1992).

Criminal contempt of court under §710-1077 is not available as a sanction for a violation of a condition of probation as there is no provision in this chapter that authorizes the use of criminal contempt as a sanction for violation of a condition of probation; the exclusive sanctions for a violation of a condition of probation in this chapter are set forth in §706-625. 120 H. 312 (App.), 205 P.3d 577 (2009).

"PART I. PRE-SENTENCE INVESTIGATION AND REPORT, AUTHORIZED DISPOSITION, AND CLASSES OF FELONIES

Law Journals and Reviews

Comments and Questions About Mental Health Law in Hawaii. 13 HBJ, no. 4, at 13 (1978).

§706-600 Sentence in accordance with this chapter. No sentence shall be imposed otherwise than in accordance with this chapter. [L 1972, c 9, pt of §1; am L 1986, c 314, §10]

COMMENTARY ON §706-600

This section establishes that dispositions for all offenses--whether defined within or outside of the Penal Code--are to be imposed in accordance with this chapter and that, except for the power of the court to impose "incidental civil sanctions such as forfeitures of property, suspension or cancellation of licenses, removal from office and the like," as provided in §706-605(4), "the only dispositions authorized are those permitted by the Code."[1]

The Penal Code, in centralizing provisions relating to the disposition of convicted defendants in one chapter, differs from previous law which provided a separate sanction (fine or imprisonment or both) for each offense. This resulted in authorized sentences which, when considered in relation to the potential danger to the person resulting from the commission of each offense, gave rise to a sense of inconsistency. An act of destruction of real or personal property with intent to hinder the United States in its military preparations was given a 20-year sentence and a $10,000 fine[2] while kidnapping was deemed worthy of a life sentence but only a $1,000[3] fine. An offense delicately called "carnal abuse" of a female child under twelve years of age was punishable by life imprisonment,[4] whereas manslaughter, defined as killing without malice aforethought, received a relatively lenient ten-year sentence.[5] Larceny from the person drew a two-year sentence and a $2,000 fine,[6] whereas simple larceny, not involving any potential danger to the person, was punished by a ten-year sentence but no fine at all.[7] None of the penalties mentioned is inherently wrong, although most are questionable, but taken together they reflect no consistent policy.

By centralizing sentencing the Code seeks to achieve an internal consistency which is lacking under previous law.

Case Notes

As §706-661 and this section do not authorize a court to impose a single sentence on a defendant who has been convicted of multiple charges, trial court did not violate plea agreement by imposing a life term for each class A felony defendant was convicted of, and then running each life term concurrently. 91 H. 20, 979 P.2d 1046 (1999).

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§706-600 Commentary:

1. M.P.C., Tentative Draft No. 2, comments at 12 (1954).

2. H.R.S. §767-2.

3. Id. §749-1.

4. Id. §768-36.

5. Id. §748-7.

6. Id. §750-22.

7. Id. §750-19.

" **§706-600.5 Definitions of terms in this chapter.** In this chapter, unless a different meaning plainly is required:

"Day" means a twenty-four-hour period of time.

"Month" means a thirty-day period of time.

"Secure drug treatment facility" means a facility employing security protocols modeled after a minimum-security detention center, including continuous direct supervision.

"Year" means a three hundred sixty-five-day period of time. [L 1987, c 202, §1; am L Sp 2009, c 4, §1]

COMMENTARY ON §706-600.5

Act 202, Session Laws 1987, clarified the time periods within this chapter by providing definitions for a "day," "month," and "year." This clarification should eliminate confusion by law enforcement personnel in regard to these time periods. House Standing Committee Report No. 556.

Act 4, Special Session Laws 2009, promoted the rehabilitation of convicted drug offenders through alternatives to incarceration by authorizing the placement of certain drug offenders in secure drug treatment facilities. Conference Committee Report No. 25. Act 4 amended this section by adding the definition of "secure drug treatment facility."

" **[§706-600.6] Time of release.** A person imprisoned whose term of imprisonment ends between the hours of 9:00 p.m. to 12:00 midnight, may be released at 9:00 p.m. A person imprisoned whose term of imprisonment ends between the hours of 12:00 midnight to 7:00 a.m. may be released at 9:00 p.m. the day before the person's scheduled release. [L 1987, c 202, §2; gen ch 1992]

COMMENTARY ON §706-600.6

Act 202, Session Laws 1987, clarified the "time of release" for prisoners. House Standing Committee Report No. 556.

" **§706-601 Pre-sentence diagnosis and report.** (1) Except as provided in subsections (3) and (4), the court shall order a pre-sentence correctional diagnosis of the defendant and accord due consideration to a written report of the diagnosis before imposing sentence where:

(a) The defendant has been convicted of a felony; or

(b) The defendant is less than twenty-two years of age and has been convicted of a crime.

(2) The court may order a pre-sentence diagnosis in any other case.

(3) With the consent of the court, the requirement of a pre-sentence diagnosis may be waived by agreement of both the defendant and the prosecuting attorney; provided that in felony cases, the prosecuting attorney shall inform, or make reasonable efforts to inform, the victim or the victim's surviving immediate family members of their rights to be present at the sentencing hearing and to provide information relating to the impact of the crime, including any requested restitution.

(4) The court on its own motion may waive a pre-sentence correctional diagnosis where:

(a) A prior pre-sentence diagnosis was completed within one year preceding the sentencing in the instant case;

(b) The defendant is being sentenced for murder or attempted murder in any degree; or

(c) The sentence was agreed to by the parties and approved by the court under rule 11 of the Hawaii rules of penal procedure. [L 1972, c 9, pt of §1; am L 1986, c 314, §11; am L 1997, c 275, §1; am L 2016, c 231, §15]

COMMENTARY ON §706-601

In any system which vests discretion in the sentencing authority, it is necessary that the authority have sufficient and accurate information so that it may rationally exercise its discretion. In our penal system which vests sentencing authority in the court, it is extremely unlikely that without a special provision providing for a pre-sentence investigation and report that the relevant information will be brought to the attention of the court. The vast majority of cases are disposed of upon pleas of guilty. It is obvious that in such cases the court has no information upon which to select between and among various sentencing alternatives. Even where the case is tried before the sentencing judge, the evidence at trial is not likely to produce information relevant to sentencing a subsequently

convicted defendant. Relevant information, such as the defendant's history of delinquency or criminality, physical and mental condition, family situation and background, economic status, education, occupation, and personal habits, are not likely to be fully explored in an adversary proceeding designed to decide the issue of guilt.

This section requires a pre-sentence investigation in the cases specified; it allows the court to order a pre-sentence investigation in any other case. In a system with unlimited resources, a pre-sentence investigation and report might be required in the case of every convicted defendant regardless of whether the offense was a felony, misdemeanor, or violation. However, realizing the limitations of the State's resources, the Code has required a pre-sentence investigation and report only in cases of felons and youthful offenders. This requirement is in substantial accord with recent studies on sentencing.[1]

This section is also in substantial accord with Hawaii rules of procedure governing criminal cases in the circuit courts,[2] which have jurisdiction over felony cases and over some misdemeanor cases (those which are tried before a jury). However, it is left to the circuit court's discretion whether a pre-sentence investigation and report is or is not ordered. In candor, it must be pointed out that as a regular practice such reports are ordered and the Code in large degree brings the law into conformity with existing circuit court practice.

District courts, which have original jurisdiction over misdemeanor cases, presently have no procedure or authorization for pre-sentence investigation. Supplemental services will have to be added to the district courts, either by legislation, court rule, or administratively, so the pre-sentence investigators (probation officers or otherwise) are available in all courts which would be required or authorized to take into consideration a pre-sentence report before imposing sentence.

Subsection (3) was added to the Code to accommodate the request of some defendants for immediate sentence. The court has sometimes granted this request where the offense is of a very minor nature and the court is inclined to impose only a fine or to suspend imposition of sentence.

SUPPLEMENTAL COMMENTARY ON §706-601

In 1972 the legislature, when enacting the Penal Code, substituted the phrase "pre-sentence correctional diagnosis" for "pre-sentence investigation," in order to conform the language to the new correctional procedures provided for with the establishment of the Correctional Diagnostic Center. The Conference Committee stated that "a 'correctional diagnosis'

will provide a more comprehensive psychiatric, social, and correctional analysis of a defendant than previously provided with a 'pre-sentence investigation'." Conference Committee Report No. 2 (1972).

Act 275, Session Laws 1997, amended this section to allow courts to waive the pre-sentence diagnosis and report under certain specified circumstances. The legislature found that under current law, a pre-sentence diagnosis and report must be prepared for all individuals convicted of a felony offense and all convicted defendants less than twenty-two years of age, unless the report is waived by both the defendant and the prosecuting attorney. However, in certain cases, the sentence to be imposed is predetermined due to plea agreements or sentencing guidelines; thus, the diagnosis and report are unnecessary. The amendment expedites the disposal of criminal cases and reduces unnecessary delays in sentencing. Conference Committee Report No. 72, House Standing Committee Report No. 1650.

Act 231, Session Laws 2016, amended subsection (3) to implement recommendations made by the Penal Code Review Committee convened pursuant to House Concurrent Resolution No. 155, S.D. 1 (2015).

Rules of Court

Plea agreements, see HRPP rule 11(f).

Case Notes

Commentary quoted in holding that it was proper to include in a pre-sentence diagnosis and report the defendant's juvenile court record for consideration by the sentencing court. 56 H. 75, 527 P.2d 1269 (1974).

In extended sentence hearing, pre-sentence report held inadmissible hearsay. 56 H. 628, 548 P.2d 632 (1976).

Cited as requiring court to consider pre-sentence report before sentencing for a felony. 60 H. 100, 588 P.2d 409 (1978).

In resentencing cases, ordering of updated pre-sentence report is within discretion of court. 61 H. 226, 602 P.2d 13 (1979).

No merit to defendant's point on appeal that contended that circuit court violated right to due process when it assumed role of prosecutor and attempted to establish a record on which to base a minimum mandatory sentence; circuit court was mandated by this section and §706-606.5 to do what it did. 9 H. App. 583, 854 P.2d 238 (1993).

Pre-sentence report sufficiently complied with §706-602 and chapter 706 was not violated, where defendant asserted that

court did not order or receive a pre-sentence correctional diagnosis and report as required by subsection (1)(a), therefore, since the information required under §706-602 was not furnished to the court for its consideration in imposing sentence, the sentences were not imposed in accordance with provisions of chapter 706 and were illegal. 10 H. App. 535, 880 P.2d 208 (1992).

Court properly relied on defendant's pre-sentence investigation report that included two prior convictions that had been dismissed fifteen years earlier, where defendant had an opportunity to object to the validity of these prior convictions as contained in the pre-sentence investigation report, but failed to do so; defendant waived the argument that the court should not have considered the two prior convictions. 129 H. 135 (App.), 295 P.3d 1005 (2013).

Cited: 73 H. 259, 831 P.2d 523 (1992).

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§706-601 Commentary:

1. American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures §4.1 (Tentative Draft, 1967) hereinafter cited in this chapter as A.B.A. Standards; National Council on Crime and Delinquency, Model Sentencing Act 2 (1963) [hereinafter cited in this chapter as M.S.A.]; and M.P.C. §7.07(1).

2. H.R.Cr.P., Rules 1, 32, and 54 (1960).

" **§706-602 Pre-sentence diagnosis, notice to victims, and report.** (1) The pre-sentence diagnosis and report shall be made by personnel assigned to the court or other agency designated by the court and shall include:

(a) An analysis of the circumstances attending the commission of the crime;

(b) The defendant's history of delinquency or criminality, physical and mental condition, family situation and background, economic status and capacity to make restitution or to make reparation to the victim or victims of the defendant's crimes for loss or damage caused thereby, education, occupation, and personal habits;

(c) Information made available by the victim or other source concerning the effect that the crime committed by the defendant has had upon said victim, including but not limited to, any physical or psychological harm or financial loss suffered;

(d) Information concerning defendant's compliance or non-compliance with any order issued under section 806-11; and

(e) Any other matters that the reporting person or agency deems relevant or the court directs to be included.

(2) The court personnel or agency shall give notice of the Crime Victim Compensation Act, the application for compensation procedure, and the possibility of restitution by the defendant to all victims of the convicted defendant's criminal acts. [L 1972, c 9, pt of §1; am L 1973, c 179, §23; am L 1975, c 89, §1; am L 1990, c 256, §1; gen ch 1992; am L 1993, c 215, §5; am L 1998, c 240, §8; am L 2012, c 51, §1]

COMMENTARY ON §706-602

This section sets forth the topics required to be covered in the pre-sentence investigation and report. The Code recognizes that these topics constitute a minimum of the information which should be before the sentencing judge. Additional matters may be included by the pre-sentence investigator. A defendant is protected against the inclusion of unfounded facts, derogatory information, statements and conclusions by the provision of §706-604 providing for notice and opportunity to controvert.

This section is in accord with existing Hawaii rules of procedure[1] and, although it is somewhat more specific, it has been approved by the Adult Probation Office of the First Circuit.

SUPPLEMENTAL COMMENTARY ON §706-602

In enacting the Code, the legislature changed the Proposed Draft by substituting the phrase "pre-sentence diagnosis" for the phrase "pre-sentence investigation". (See Supplemental Commentary on §706-601.)

Act 179, Session Laws 1973, amended this section to provide that the pre-sentence diagnosis and report shall "be made by personnel assigned to the court, intake center, or other agency designated by the court." This amendment was made as part of an extensive act implementing that portion of the Hawaii Correctional Master Plan pertaining to the management and establishment of intake service centers, correctional facilities, and programs.

Act 89, Session Laws 1975, amended this section to require that an analysis of the convicted person's ability to make restitution to the victim of the convicted person's crime be included in the pre-sentence diagnosis and report. As amended, the section further requires appropriate personnel to notify the

victim of the victim's right to restitution. The intent of the legislature was to repay the victim for the victim's loss and develop in the convicted person "...a degree of self-respect and pride in knowing that he or she has righted the wrong committed." Senate Standing Committee Report No. 789, House Standing Committee Report No. 425.

Act 256, Session Laws 1990, amended this section to require the inclusion of information on the effect of the crime to the victim in all pre-sentencing reports submitted to the courts. The legislature believed that sentencing decisions which are based solely on the circumstances of the defendant's prior history and on an abstract view of the offense are decisions made in a vacuum. The legislature was convinced that the sentencing judge should, therefore, be informed of the impact which the offense has had on the victim as a representative of the entire community because criminal proceedings are brought on behalf of and intended to protect everyone. House Standing Committee Report No. 1193-90.

Act 215, Session Laws 1993, amended this section to provide that the pre-sentence diagnosis and report shall include information concerning the defendant's compliance or noncompliance with any order issued to the defendant pursuant to §806-11, at the time of arraignment, to dispose of all firearms and ammunition within the defendant's possession in a manner in compliance with chapter 134 within forty-eight hours of the issuance of the order. Conference Committee Report No. 66.

Act 240, Session Laws 1998, renamed the criminal injuries compensation commission to the crime victim compensation commission to more accurately reflect the commission's purpose. This section was amended to conform to that name change. House Standing Committee Report No. 1060-98.

Act 51, Session Laws 2012, amended this section by deleting the Intake Service Center as an agency responsible for preparing the pre-sentence diagnosis and report for defendants and for giving notices of the Crime Victim Compensation Act and other specified restitution procedures to increase efficiency in the pre-sentence investigative process as it relates to convicted defendants. The legislature found that Act 51 updated the law relating to pre-sentence investigation process and reporting and correctly designated pre-sentence investigation and reporting duties to the Judiciary. House Standing Committee Report No. 607-12, Senate Standing Committee Report No. 3187.

Case Notes

"History of delinquency" construed to authorize use of defendant's juvenile record in pre-sentence report, and such use

is not a violation of §§571-49 and 571-84. 56 H. 75, 527 P.2d 1269 (1974).

Pre-sentence report sufficiently complied with this section and chapter 706 was not violated, where defendant asserted that court did not order or receive a pre-sentence correctional diagnosis and report as required by §706-601(1)(a), therefore, since the information required under this section was not furnished to the court for its consideration in imposing sentence, the sentences were not imposed in accordance with provisions of chapter 706 and were illegal. 10 H. App. 535, 880 P.2d 208 (1992).

Where defendants were convicted of misdemeanor offenses and were more than twenty-two years old at the time of their convictions, trial court was not statutorily required to order the preparation of a presentence investigation report for defendants before sentencing them. 117 H. 490 (App.), 184 P.3d 805 (2008).

Where record indicated that defendants were afforded their right under subsection (2) to be meaningfully heard or to controvert any "unfounded facts, derogatory information, statements and conclusions" in the partial presentence investigation report, trial court did not violate their due process right when it denied their motion to strike a paragraph from the report. 117 H. 490 (App.), 184 P.3d 805 (2008).

Cited: 73 H. 259, 831 P.2d 523 (1992).

§706-602 Commentary:

1. H.R.Cr.P., Rule 32(c)(2) (1960).

" **§706-603 DNA analysis monetary assessment; DNA registry special fund.** (1) In addition to any disposition authorized by chapter 706 or 853, every defendant convicted of a felony offense shall be ordered to pay a monetary assessment of $500 or the actual cost of the DNA analysis, whichever is less. The court may reduce the monetary assessment if the court finds, based on evidence presented by the defendant and not rebutted by the State, that the defendant is not and will not be able to pay the full monetary assessment and, based on the finding, shall instead order the defendant to pay an assessment that the defendant will be able to pay within five years.

(2) Notwithstanding any other law to the contrary, the assessment and penalty provided by this section shall be in addition to, and not in lieu of, and shall not be used to offset or reduce, any fine or restitution authorized or required by

law. All assessments and penalties shall be paid into the DNA registry special fund established in subsection (3).

(3) There is established a special fund to be known as the DNA registry special fund which shall be administered by the attorney general. The fund shall consist of:

(a) All assessments and penalties ordered pursuant to subsection (1);

(b) All other moneys received by the fund from any other source; and

(c) Interest earned on any moneys in the fund.

Moneys in the DNA registry special fund shall be used for DNA collection, DNA testing, and related costs of recording, preserving, and disseminating DNA information pursuant to chapter 844D.

(4) Restitution shall be made before payment of the monetary assessment pursuant to section 706-651. [L 1972, c 9, pt of §1; am L 1973, c 179, §24; am L 1974, c 54, §4; am L 1979, c 3, §4 and c 105, §65; am L 1980, c 232, §37; am L 1986, c 314, §12; am L 1987, c 145, §4; am L 1991, c 231, §2; am L 1998, c 271, §1; am L 2001, c 157, §35; am L 2005, c 112, §4; am L 2016, c 231, §16]

COMMENTARY ON §706-603

This section recognizes that in some, if not many, cases the court will need medical and psychiatric information not normally found within the scope of the pre-sentence investigation and report. It is clear that in deciding which of numerous sentencing alternatives should be employed--e.g., fine, suspended sentence, probation (and the conditions thereof), or imprisonment--the court will need and should be allowed to call upon the professional insights of medical experts. The need for such professional help has been well stated in the A.B.A. Standards:

> Reliance on the trial court for such significant correctional decisions suggests the imperative need for informational services beyond the normal pre-sentence report. There will inevitably be instances in which the pre-sentence report together with other information acquired during the trial will either leave the court short of desired information or will have raised additional questions which can only be answered by an examination of the defendant's physical, emotional or mental condition. The lack of access to facilities which can supply such information will force the court to an uninformed guess as to the proper disposition.
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> Too much is at stake to place the court in such a position. On occasion the simple correction of a physical defect has

altered the course of a seemingly incorrigible offender. The use of prison in such a context could reinforce the offender's anti-social tendencies. Similarly, the pattern of psychiatric study followed by appropriate treatment offers significant advantages over the simple detention which characterizes so many of our prisons. The system needs the ability to discover the cases where unusual factors may indicate the desirability of an unusual disposition. The availability of facilities such as are contemplated by this section is one step in providing that capability.[1]

The Code does not deal with the question of whether the State should establish one or more reception and diagnostic centers to meet the needs of sentencing courts or whether the court's needs should be met by the employment on a case-by-case basis of local physicians and psychiatrists.[2] That decision will have to be made eventually, however, the Code is formulated in a manner which allows for future expansion of facilities in this area.

This section represents a needed addition to Hawaii law.

SUPPLEMENTAL COMMENTARY ON §706-603

Act 179, Session Laws 1973, amended this section to permit a convicted defendant to be remanded to an intake service center or community correctional center in addition to a clinic or hospital. This amendment was part of the implementation of the Hawaii Correctional Master Plan. (See Supplemental Commentary on §706-602.)

Act 54, Session Laws 1974, amended this section to permit the use of a certified clinical psychologist in making a pre-sentence diagnosis or evaluation. (Cf. Supplemental Commentary on §§704-404, 411, and 414.)

Act 3, Session Laws 1979, amended this section by providing for a three member examination panel (to be appointed in the same manner as the examination panels in §§704-404, 411, and 414) as the sole alternative to a single examiner. This was done to allow greater flexibility in appointing mental health professionals to the panels. Act 105 amended this section to restore language inadvertently deleted by Act 54, Session Laws 1974.

Act 232, Session Laws 1980, amended this section to restore amendments made by Act 3, §4, Session Laws 1979, which were superseded by Act 105, Session Laws 1979, under a general supersession clause.

Act 314, Session Laws 1986, amended "certified clinical psychologists" to "licensed psychologists." This change was made because psychologists are licensed and not certified and the term "clinical" does not accurately describe psychologists

qualified to determine penal responsibility and fitness to proceed. Act 314 also provided an exception to the licensure requirement which recognizes that under §465-3(4), psychologists employed under government certification or civil service rules are exempt from the licensure requirement. Conference Committee Report No. 51-86.

Act 145, Session Laws 1987, permitted the department of health to set minimum standards for participation and appointment of a sanity examiner. The legislature felt this change would allow additional assurances of higher quality testimony by these examiners. Senate Standing Committee Report No. 691, House Standing Committee Report No. 1217.

Act 231, Session Laws 1991, required the court to order a defendant convicted of a sexual offense, a violent crime, or the attempt of either, to submit to blood and saliva testing to be used for a DNA identification profile which will allow law enforcement officials to identify reoffenders. The legislature weighed the balance between the defendant's right to privacy and the needs of society, and found that the needs of society to deter sexual and violent crimes outweighed the defendant's right to privacy. House Standing Committee Report No. 1018.

Act 271, Session Laws 1998, amended this section to require defendants convicted of sexual or violent offenses to provide blood samples for DNA analysis. The court is allowed to order convicted defendants to pay a monetary assessment of $500 or the actual cost of DNA analysis, whichever is less, to defray the costs of obtaining, storing, and testing the blood sample. Act 271 created a DNA registry special fund, administered by the attorney general, into which the monetary assessments are to be deposited. A person who negligently or recklessly fails to provide blood samples is guilty of a misdemeanor, and a person who intentionally or knowingly fails to provide blood samples is guilty of a class C felony.

The legislature recognized that DNA information is an increasingly valuable tool for investigating, prosecuting, and defending criminal cases. The legislature found that the development of a DNA registry is important to protect the public from further criminal acts committed by the offenders, but that the cost of the DNA sampling process is borne by police departments without state funding. The legislature agreed that convicted defendants who are required to provide DNA samples should be assessed a fee to defray the costs of testing. Conference Committee Report No. 110, Senate Standing Committee Report No. 3009.

Act 157, Session Laws 2001, amended this section, among others, to conform amendments relating to revocation of motor vehicle registrations under administrative revocation

proceedings with the comprehensive law regarding driving under the influence which is to take effect on January 1, 2002. Act 157 conformed and consolidated the provisions of Act 189, Session Laws 2000, to existing law regarding driving while under the influence of alcohol or drugs, and suspension and revocation of licenses. Senate Standing Committee Report No. 1406.

Act 112, Session Laws 2005, established a statewide DNA database and data bank identification program for all convicted felons. Conference Committee Report No. 184. Act 112 amended this section by deleting the provisions regarding blood samples for DNA analysis and by requiring every convicted felon to pay a monetary assessment of $500 or the actual cost of the DNA analysis, whichever is less.

Act 231, Session Laws 2016, amended subsection (4) to implement recommendations made by the Penal Code Review Committee convened pursuant to House Concurrent Resolution No. 155, S.D. 1 (2015).

Case Notes

Cited as authorizing a pre-sentence psychiatric examination. 60 H. 100, 588 P.2d 409 (1978).

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§706-603 Commentary:

1. A.B.A. Standards, comments at 229.

2. Cf. A.B.A. Standards, comments at 229-231.

" **§706-604 Opportunity to be heard with respect to sentence; notice of pre-sentence report; opportunity to controvert or supplement; transmission of report to department.** (1) Before imposing sentence, the court shall afford a fair opportunity to the defendant to be heard on the issue of the defendant's disposition.

(2) The court shall furnish to the defendant or the defendant's counsel and to the prosecuting attorney a copy of the report of any pre-sentence diagnosis or psychological, psychiatric, or other medical examination and afford fair opportunity, if the defendant or the prosecuting attorney so requests, to controvert or supplement them. The court shall amend or order the amendment of the report upon finding that any correction, modification, or addition is needed and, where appropriate, shall require the prompt preparation of an amended report in which material required to be deleted is completely removed or other amendments, including additions, are made.

(3) In all circuit court cases, regardless of whether a pre-sentence report has been prepared or waived, the court shall afford a fair opportunity to the victim to be heard on the issue of the defendant's disposition, before imposing sentence. The court, service center, or agency personnel who prepare the pre-sentence diagnosis and report shall inform the victim of the sentencing date and of the victim's opportunity to be heard. In the case of a homicide or where the victim is a minor or is otherwise unable to appear at the sentencing hearing, the victim's family shall be afforded the fair opportunity to be heard.

(4) If the defendant is sentenced to imprisonment, a copy of the report of any pre-sentence diagnosis or psychological, psychiatric, or other medical examination, which shall incorporate any amendments ordered by the court, shall be transmitted immediately to the department of public safety. [L 1972, c 9, pt of §1; am L 1986, c 314, §13; am L 1987, c 338, §10; am L 1988, c 305, §10; am L 1989, c 211, §8; gen ch 1992; am L 1993, c 216, §1; am L 2006, c 230, §16; am L 2016, c 231, §17]

COMMENTARY ON §706-604

Subsection (1) is a restatement of the existing rule of procedure[1] and practice.

Subsection (2) is addressed to one of the most troublesome problems in the area of pre-sentence investigation: the question of whether the pre-sentence investigation report should be disclosed to the defendant. The right of the defendant to controvert the pre-sentence report is meaningless to the extent that the report, or a part thereof, is not made available to the defendant.

The Model Sentencing Act allows the court discretion in making the pre-sentence report available in ordinary felony cases, but with respect to murderers and dangerous offenders the report is made available in its entirety. The Act further provides that "Subject to the control of the court, the defendant shall be entitled to cross-examine those who have rendered reports to the court."[2]

The Model Penal Code provides that "the Court shall advise the defendant or his counsel of the factual contents and the conclusions of any pre-sentence investigation or psychiatric examination and afford fair opportunity, if the defendant so requests, to controvert them. The sources of confidential information need not, however, be disclosed."[3]

The applicable Hawaii rule of criminal procedure takes the same position as the Model Penal Code. It reads:

> The court shall upon request seasonably made disclose the information contained in the report to the prosecution or to the defendant's attorney or the defendant without disclosing any source of information which was received in confidence, and in such event the court shall make the same disclosure to the other party.[4]

The right to controvert is meaningless unless the report itself, rather than the factual contents and conclusions, is made available to the defendant. Even more ludicrous would be the insertion into the report of information the source of which is regarded as confidential. The defendant, under such circumstances could not be expected to controvert such information by showing, for example, that the source was unreliable or biased. The question of whether the defendant should be sentenced to imprisonment or to probation is no less significant than the question of guilt and the defendant should not have this decision made on the basis of information which the defendant is not allowed an opportunity to challenge.

The A.B.A. Standards have, for the most part, accepted this approach.[5] In rejecting the M.S.A. and M.P.C. positions, the commentary to the A.B.A. Standards states:

> The view which is reflected in subsection (b) [of 4.4] is based upon both an assessment of the values which are served by non-disclosure and a balance of these values against basic fairness to the defendant. Specifically, the argument that sources of information will dry up if the defendant's attorney is permitted to examine the report falters on two grounds.
>
> The first is based on the experience of those members of the Committee who have lived under a system in which disclosure is routine, and is supplemented by the Committee's examination of sample reports produced under such a system. The conclusion is that there is little factual basis for the fear that information will become unavailable if the report is disclosed. The quality and value of a pre-sentence report will turn to an infinitely greater extent on the skill of the probation service and the availability of adequate supporting facilities than it will on whether its contents remain a secret....
>
> The second reason is more fundamental. One of the basic values underlying the manner in which the guilt phase of a criminal case proceeds is that the defendant is entitled to know the details of the charge against him and is entitled to an opportunity to respond. It is believed that this value is subverted by a system which does not require disclosure of the information contained in the pre-sentence report.[6]

The Code takes the position that full disclosure is necessary to protect the defendant and the court from inaccuracies which secret reports breed. Anything less than full disclosure is inconsistent with the truth-seeking function of the judicial process and the rehabilitative function of penal sentences. "Long since exploded is the theory that a defendant who has been convicted of crime no longer has any rights, or that any sentence less than the maximum is the result of an act of grace."[7]

The A.B.A. Standards include the following provision for nondisclosure in certain "extraordinary cases":

> In extraordinary cases, the court should be permitted to except from disclosure parts of the report which are not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, or sources of information which has been obtained on a promise of confidentiality. In all cases where parts of the report are not disclosed under such authority, the court should be required to state for the record the reasons for its action and to inform the defendant and his attorney that information has not been disclosed. The action of the court in excepting information from disclosure should be subject to appellate review.[8]

The Code rejects this exception, even in its limited form. The Code takes the position that it would be better to delete such information from the pre-sentence report--information which by its very nature is questionable because of its secrecy--than to allow the information to be included in the report and not be made available to the defendant. Although not dealt with specifically in the A.B.A. Standards, the decision to except a part of the pre-sentence report from disclosure would be essentially an ex parte proceeding, thus further excluding the defendant from participation in the resolution of issues which affect the defendant's rights. The entire exception, and its attendant procedure, seems at best to be a compromise solution on the part of A.B.A.'s Advisory Committee whose commentary reads in part:

> By endorsing a general policy in favor of disclosure, by making non-disclosure of specific items a burdensome task to be justified as an exception, and by providing for review to determine whether non-disclosure was justified, the majority believes that the danger will be minimized, but that an outlet will be available to accommodate justifiable fears in particular cases. In a very few cases, this position will result in disclosure of information which the advocates of secrecy would prefer not

to disclose. Such is the price of a system which derives value from the fairness with which it operates.[9]

In Honolulu a copy of the pre-sentence investigation report when ordered by the court is routinely furnished to defense counsel. It does not appear from current practice that the untoward results feared by the advocates of secrecy result from full disclosure. Furthermore, the Office of Adult Probation, as a matter of administrative practice, excepts from its reports information given by an informant who seeks to remain anonymous. Even when the probation authorities were charged with investigating custody matters in domestic relations cases, a practice which no longer obtains, they refrained from this utilization of confidential information. The actual procedure in Hawaii appears to be more advanced than its laws in this area. The Code brings the law into step with current practice.

SUPPLEMENTAL COMMENTARY ON §706-604

Act 305, Session Laws 1988, included licensed psychologists among the professionals which may provide offender examination services to the Hawaii criminal justice system. The legislature stated that the present laws, which permit only psychiatric evaluation, are inconsistent with the many and varied uses the court has found for the services of licensed psychologists. Senate Standing Committee Report No. 2153.

Act 216, Session Laws 1993, amended this section to afford a fair opportunity to a victim, or in certain cases, the victim's family, to be heard on the issue of the defendant's disposition before sentence is imposed. The legislature anticipated that, in those instances in which the victim or family may be unable to personally attend a hearing, the court would accept and consider written statements for the purpose of allowing an opportunity to be heard. Conference Committee Report No. 60.

Act 230, Session Laws 2006, amended this section to require the court to amend an examiner's report upon finding that any correction, modification, or addition is needed. House Standing Committee Report No. 665-06.

Act 231, Session Laws 2016, amended subsection (3) to implement recommendations made by the Penal Code Review Committee convened pursuant to House Concurrent Resolution No. 155, S.D. 1 (2015).

Case Notes

This is a companion provision to §706-602, and affords defendant opportunity to controvert or supplement the report. 56 H. 75, 527 P.2d 1269 (1974).

Error to refuse defendant an opportunity to be heard and to supplement pre-sentence report. 56 H. 292, 535 P.2d 127 (1975).

Court is not restricted to the information in the pre-sentence report in considering the sentence to be imposed. 59 H. 1, 575 P.2d 448 (1978).

Defendants have no right to examine probation officer's sentencing recommendation. 67 H. 408, 689 P.2d 754 (1984).

A sentencing court must afford a defendant his or her right of pre-sentence allocution before ruling on the applicability of the young adult defendants statute. 90 H. 280, 978 P.2d 718 (1999).

The alleged inaccuracy in defendant's pre-sentence investigation report did not rise to the level of plain error because, among other things, the record indicated that the circuit court based its imposition of a consecutive sentence on defendant's "extensive" criminal record as a whole, and not solely on the specific convictions that defendant claimed were invalid. 131 H. 94, 315 P.3d 720 (2013).

Where defendant argued that the pre-sentence investigation report listed convictions that were allegedly dismissed, because defendant did not raise a good faith challenge on the record stating, as to each challenged conviction, the basis or bases for the challenge, the circuit court did not err in relying on the report. 131 H. 94, 315 P.3d 720 (2013).

Denial of a fair opportunity to be heard on a defendant's disposition before imposing sentence violated clear mandate of subsection (1) and HRPP rule 32(a); misdemeanors and violations fell within scope of subsection (1). 77 H. 241 (App.), 883 P.2d 663 (1994).

Where defendant was not sentenced to imprisonment, court did not abuse discretion in denying defendant's request to examine adult probation officer regarding pre-sentence report. 83 H. 280 (App.), 925 P.2d 1104 (1996).

Where record showed that prior to imposing sentence, the trial court gave defendant the opportunity to speak and that defendant made an extensive statement to the court, and ended by telling the court "and that's basically all I have to say, sir", which was followed by the trial court's comments and denial of defendant's request to "say something else", trial court did not deny defendant's right of allocution and did not err in its refusal to afford defendant a second allocution in response to the court's comments. 120 H. 480 (App.), 210 P.3d 3 (2009).

Cited: 60 H. 100, 588 P.2d 409 (1978).

Cited: 131 H. 537, 319 P.3d 456 (2014).

§706-604 Commentary:

1. H.R.Cr.P., Rule 32(a) (1960).

2. M.S.A. §4.

3. M.P.C. §7.07(5).

4. H.R.Cr.P. Rule 32(c)(3) (1960).

5. A.B.A. Standards §4.4.

6. A.B.A. Standards, comments at 219-220.

7. Id. at 221.

8. Id. §4.4(b) (in part).

9. Id. comments at 225.

" **§706-605 Authorized disposition of convicted defendants.** (1) Except as provided in parts II and IV or in section 706-647 and subsections (2), (6), and (7), and subject to the applicable provisions of this Code, the court may sentence a convicted defendant to one or more of the following dispositions:

(a) To be placed on probation as authorized by part II;

(b) To pay a fine as authorized by part III and section 706-624;

(c) To be imprisoned for a term as authorized by part IV; or

(d) To perform services for the community under the supervision of a governmental agency or benevolent or charitable organization or other community service group or appropriate supervisor; provided that the convicted person who performs such services shall not be deemed to be an employee of the governmental agency or assigned work site for any purpose. All persons sentenced to perform community service shall be screened and assessed for appropriate placement by a governmental agency coordinating public service work placement as a condition of sentence.

(2) The court shall not sentence a defendant to probation and imprisonment except as authorized by part II.

(3) In addition to any disposition authorized in subsection (1), the court may sentence a person convicted of a misdemeanor or petty misdemeanor to a suspended sentence.

(4) The court may sentence a person who has been convicted of a violation to any disposition authorized in subsection (1) except imprisonment.

(5) The court shall sentence a corporation or unincorporated association that has been convicted of an offense in accordance with section 706-608.

(6) The court shall impose a compensation fee upon every person convicted of a criminal offense pursuant to section 351-62.6; provided that the court shall waive the imposition of a compensation fee if it finds that the defendant is unable to pay the compensation fee. When a defendant is ordered to make payments in addition to the compensation fee, payments by the defendant shall be made in the order of priority established in section 706-651.

(7) The court shall order the defendant to make restitution for losses as provided in section 706-646. In ordering restitution, the court shall not consider the defendant's financial ability to make restitution in determining the amount of restitution to order. The court, however, shall consider the defendant's financial ability to make restitution for the purpose of establishing the time and manner of payment.

(8) This chapter does not deprive the court of any authority conferred by law to decree a forfeiture of property, suspend or cancel a license, remove a person from office, or impose any other civil penalty. Such a judgment or order may be included in the sentence. [L 1972, c 9, pt of §1; am L 1975, c 89, §2; am L 1978, c 96, §1; am L 1980, c 93, §1; am L 1986, c 226, §1 and c 314, §14; am L 1990, c 100, §1; am L 1995, c 215, §1; am L 1998, c 206, §4, c 240, §6, and c 269, §4; am L 2005, c 144, §2; am L 2006, c 230, §17; am L 2016, c 231, §18]

COMMENTARY ON §706-605

This section states the various sentencing alternatives that are available to the court upon conviction of a defendant for an offense. With the exceptions of civil commitment in lieu of sentence and mandatory life imprisonment for murder, the authorized dispositions for crimes are: suspension of sentence, fine, probation, imprisonment, probation with limited imprisonment, fine and probation, and fine and imprisonment. Subsection (2) makes clear that, with respect to violations, only suspension of sentence or a fine are authorized.

The Code departs from previous practice in that it authorizes suspension of the sentence but does not authorize imposition of sentence and suspension of its execution.[1] If suspension of sentence works out badly and the court subsequently determines that a sentence must be imposed upon the defendant, the correct

sentence ought to be determined at the time of imposition rather than at the prior time when the court ordered its suspension. The facts which give rise to the need for imposition and execution of sentence should, of course, be made the subject of an up-to-date pre-sentence investigation and report. The judge ordering suspension of sentence (or suspension of execution) cannot be expected at the time of suspension to formulate a contingent sentence which will account for subsequent facts.

Probation is treated as a specific sentence rather than being treated as "the accompaniment of suspension."[2] Previous practice was to suspend either imposition or execution of sentence and to place the defendant on probation. As the Model Penal Code commentary points out: "The matter is of relatively minor moment but may serve in some respects to focus thought upon probation as an independent sanction, a result we think important to achieve."[3]

With the exception of murder (see §706-606), the Code does not exclude the possibility of suspension of sentence or probation in cases of offenses thought to be particularly heinous. This is contrary to previous law which provided mandatory imprisonment in cases of murder in the first or second degree, rape, carnal abuse of a female under the age of twelve, incest between parents and children or stepchildren, arson, kidnapping, robbery in the first degree, burglary in the first degree when armed with a deadly weapon, embezzlement of public moneys, and the giving or accepting of a bribe or extortion by a public officer, agent or employee.[4] Although imprisonment would most likely be warranted upon conviction on these types of serious offenses, the Code takes the position that, with the exception of murder, the legislature should not compel imprisonment for any crime before the circumstances of the crime and facts concerning the defendant are known to the sentencing authority.

> This provision rests on the view that no legislative definition or classification of offenses can take account of all contingencies. However right it may be to take the gravest view of an offense in general, there will be cases comprehended in the definition where the circumstances were so unusual, or the mitigations so extreme, that a suspended sentence or probation would be proper. We see no reason to distrust the courts upon this matter or to fear that such authority will be abused.[5]

Subsection (3) indicates that the special problems presented by corporate or associational defendants are dealt with in §706-608.

Subsection (4) reserves for the court the authority which has been conferred upon it by law to declare forfeiture, suspend or cancel licenses, remove persons from office and impose other

penalties which are civil in nature. The court in a criminal case retains its power to impose, in addition to authorized penal sanctions, any civil sanction authorized by law which is warranted by the facts of the committed offense.

SUPPLEMENTAL COMMENTARY ON §706-605

Act 89, Session Laws 1975, amended this section by adding subsection (1)(e), empowering the court to order the convicted person to make restitution to the victim of the crime. The purpose of this change was to repay the victim for loss and develop in the convicted person "...a degree of self-respect and pride in knowing that he or she has righted the wrong committed." Senate Standing Committee Report No. 789, House Standing Committee Report No. 425.

Act 96, Session Laws 1978, added subsection (1)(f) to provide an alternative sentence for convicted persons for whom fines or imprisonment may not be deemed appropriate and to remove any doubt as to the authority of the court to impose a sentence requiring community service. Senate Standing Committee Report No. 974-78, House Standing Committee Report No. 586-78.

Act 93, Session Laws 1980, amended subsection (2) to make it clear that the courts have the authority to sentence persons convicted of violations to perform community service. House Standing Committee Report No. 131-80. The Act also substituted sex-neutral words for gender-based terms.

Act 100, Session Laws 1990, amended subsection (1)(e) to require mandatory screening for persons sentenced to perform community service to reduce instances of inappropriate placements which jeopardize the safety of the agency, the public, or the offender. House Standing Committee Report No. 1191-90.

Act 215, Session Laws 1995, amended subsection (1) to authorize the court to order a convicted defendant to pay restitution to the criminal injuries compensation commission if the victim of the crime has been granted a compensation award by the commission. Prior to the amendment, the law was unclear as to whether the court had authority to order that restitution be paid directly to the criminal injuries compensation commission. The amendment also will provide additional revenues for the criminal injuries compensation commission, thus allowing the commission to compensate victims promptly for losses. The legislature found it "appropriate and fiscally responsible" to require a convicted criminal to reimburse the commission when the commission granted an award to the crime victim. Senate Standing Committee Report No. 1356.

Act 206, Session Laws 1998, amended this section to, among other things, require the imposition of a fee against convicted criminals. The monetary assessment of convicted criminal defendants is to fund disbursements made by the criminal injuries compensation commission. The legislature found that state compensation of victims of criminal acts is well-founded in public policy and is the law in every state of the Union. The legislature also found that thirty-four states administered compensation programs that were financially self-sufficient and funded from fees, fines, penalties, civil recoveries, and/or restitution. Adoption of such a program would be prudent and consistent with the legislature's objective of cutting government costs, considering the State's economic situation. Conference Committee Report No. 156.

Act 240, Session Laws 1998, amended this section by changing the name of the criminal injuries compensation commission to the crime victim compensation commission. The legislature found that the purpose of the criminal injuries compensation commission is to aid victims of crime by providing them compensation for their victimization, and further, that the change would more clearly reflect the purpose of the commission to the public. Senate Standing Committee Report No. 726.

Act 269, Session Laws 1998, amended this section to allow victims of crime to enforce a criminal restitution order in the same manner as a civil judgment. Conference Committee Report No. 89.

Act 144, Session Laws 2005, amended this section by establishing the order of priority for a defendant to make payments in addition to the compensation fee. The priority schedule ensures that the victim of a defendant's crime receives the first amount of compensation paid by the defendant. Conference Committee Report No. 161, Senate Standing Committee Report No. 1210.

Act 230, Session Laws 2006, amended this section to, among other things, require that when restitution is ordered, the amount of restitution is not based on the defendant's financial ability to make restitution, but the defendant's financial ability to make restitution [shall] be considered in establishing the time and manner of payment. House Standing Committee Report No. 665-06.

Act 231, Session Laws 2016, amended subsection (6) to implement recommendations made by the Penal Code Review Committee convened pursuant to House Concurrent Resolution No. 155, S.D. 1 (2015).

Case Notes

Restitution order may not be enforced against money earned from prison labor. 63 H. 12, 621 P.2d 334 (1980).

Purpose and intent is to have convicted person make restitution for criminal acts; court can delegate function of making recommendations regarding restitution but cannot delegate sentencing function. 68 H. 292, 711 P.2d 1295 (1985).

A suspended sentence may only be conditioned upon the offender remaining free from further convictions; a formal hearing is not required to revoke a suspended sentence. 70 H. 597, 778 P.2d 716 (1989).

Restitution order failed to comply with subsection (1)(d) and was illegally imposed; sentencing court failed to make any finding that $122,248.95 was an amount that defendant could afford to pay in restitution and to prescribe manner of payment; court expressly and improperly delegated judicial function of determining manner of payment to an administrative body, the Hawaii paroling authority. 78 H. 127, 890 P.2d 1167 (1995).

Court did not order defendant to pay restitution in amount that exceeded defendant's ability to pay under subsection (1)(d) where defendant's testimony indicated defendant would have ability to fully satisfy amount of ordered restitution. 83 H. 105, 924 P.2d 1211 (1996).

Trial court was not authorized, under this section, to order defendant to pay restitution to the Honolulu police department for its drug "buy money" expenses where (1) it was unlikely that ordering defendant to pay restitution would aid defendant in developing a degree of self-respect and pride in knowing that defendant has righted the wrong committed; and (2) department did not qualify as a "crime victim" under chapter 351 and defendant's offenses did not qualify as a "violent crime" under §351-32. 93 H. 34 (App.), 995 P.2d 335 (2000).

Trial court was required to comply with Hawaii supreme court's instructions and enter findings and conclusions specifically illustrating that defendant could afford to pay $20,000 in restitution pursuant to subsection (1)(d), and determine the relevant time period, defendant's gross income and necessary expenses during that time period. 93 H. 290 (App.), 1 P.3d 760 (2000).

Trial court erred by improperly ordering restitution without expressly determining defendant's ability to pay and by delegating the authority to determine the payment amounts and timing to the department of public safety; restitution order vacated. 103 H. 68 (App.), 79 P.3d 686 (2003).

Because there was no provision in this section for the imposition of anger management or other treatment programs, but §706-624(2)(j) authorized the imposition of, inter alia, mental health treatment as a discretionary term of probation, district

court erred by sentencing defendant to both the thirty-day term of imprisonment (the maximum term of imprisonment for a petty misdemeanor) and anger management classes for defendant's harassment conviction (a petty misdemeanor). Defendant could have been sentenced to a thirty-day term of incarceration or a six-month term of probation, but not both, and thus defendant's sentence was illegal. 130 H. 332 (App.), 310 P.3d 1033 (2013).

_____

§706-605 Commentary:

1. See, e.g., H.R.S. §711-77.

2. M.P.C., Tentative Draft No. 2, comments at 13 (1954).

3. Id.

4. H.R.S. §711-77.

5. M.P.C., Tentative Draft No. 2, comments at 13-14 (1954).

" **§706-605.1 Intermediate sanctions; eligibility; criteria and conditions.** (1) The judiciary shall implement alternative programs that place, control, supervise, and treat selected defendants in lieu of a sentence of incarceration.

(2) Defendants may be considered for sentencing to alternative programs if they have not been convicted of a non-probationable class A felony.

(3) A defendant may be sentenced by a district, family, or circuit court judge to alternative programs.

(4) As used in this section, "alternative programs" means programs that are created and funded by legislative appropriation or federal grant naming the judiciary or one of its operating agencies as the expending agency and that are intended to provide an alternative to incarceration. Alternative programs may include:

(a) House arrest, or curfew using electronic monitoring and surveillance, or both;

(b) Drug court programs for defendants with assessed alcohol or drug abuse problems, or both;

(c) Therapeutic residential and nonresidential programs, including secure drug treatment facilities; and

(d) Similar programs created and designated as alternative programs by the legislature or the administrative director of the courts for qualified defendants who do not pose significant risks to the community. [L Sp

1995, c 25, §4; am L Sp 2009, c 4, §2; am L 2016, c 231, §19]

Cross References

Similar provisions, see §§353-10.5 and 353-63.5.

COMMENTARY ON §706-605.1

Act 25, Special Session Laws 1995, added this section, which requires the judiciary to implement alternative programs that place, control, supervise, and treat selected defendants in lieu of an incarceration sentence. The legislature addressed the problem of prison overcrowding by, inter alia, providing for the implementation of alternatives to incarceration that do not undermine public safety. House Standing Committee Report No. 23-S, Senate Standing Committee Report No. 2-S (1995 Special Session). See also Conference Committee Report No. 122, Senate Bill No. 82 (vetoed).

Act 4, Special Session Laws 2009, amended this section, authorizing the placement of certain drug offenders in secure drug treatment facilities, to promote the rehabilitation of convicted drug offenders through alternatives to incarceration. The legislature found that providing convicted drug offenders with drug rehabilitation programs in a secure drug treatment facility would reduce the offenders' rate of recidivism upon release and help the offenders develop an important and meaningful role in society. Senate Standing Committee Report No. 1285, Conference Committee Report No. 25.

Act 231, Session Laws 2016, amended this section to implement recommendations made by the Penal Code Review Committee convened pursuant to House Concurrent Resolution No. 155, S.D. 1 (2015).

Law Journals and Reviews

Report on the Success of the Maui/Molokai Adult Drug Court: Proven Successful, the New Paradigm for our Criminal Justice System? 34 UH L. Rev. 423 (2012).

" **§706-605.5 REPEALED.** L 2016, c 231, §30.

" **§706-606 Factors to be considered in imposing a sentence.** The court, in determining the particular sentence to be imposed, shall consider:

(1) The nature and circumstances of the offense and the history and characteristics of the defendant;

(2) The need for the sentence imposed:

(a) To reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense;
(b) To afford adequate deterrence to criminal conduct;
(c) To protect the public from further crimes of the defendant; and
(d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) The kinds of sentences available; and

(4) The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. [L 1972, c 9, pt of §1; am L 1976, c 92, §8; am L 1981, c 27, §1; am L 1986, c 314, §15]

Cross References

Imprisonment for murder, see §§706-656 and 706-657.

COMMENTARY ON §706-606

[Section 606 of the Proposed Draft of the Penal Code provided that a person convicted of murder would be sentenced to an indeterminate term of imprisonment the maximum length of which would be life or twenty years as determined by the court. The legislature revised §706-606 and added the provision for mandatory life imprisonment without parole (but subject to commutation) now contained in subsection (a). The following commentary is based on the original proposal.]

The crime of murder is the most serious offense in the penal law; because of this the Code departs from the general policy underlying §706-605 and makes murder a non-probationable offense in all cases.

The flexible mode of disposition provided by §706-605 is premised on the rationale that, although most class A felons will, perhaps, be sentenced to an indeterminate term of imprisonment, no legislative classification can take account of unusual circumstances or extreme mitigations which would indicate that a sentence to probation, rather than to imprisonment, is warranted. The case is even stronger for defendants convicted of less serious offenses. However, in providing a bar to probation for persons convicted of murder (i.e., intentionally or knowingly causing the death of another person), the Code takes the

position that, regardless of the information obtained by pre-sentence procedure, the court's options ought to be limited to which maximum, life or twenty years, will be applicable to the convicted defendant's term of imprisonment. The actual time of release from imprisonment will then be determined by the board of paroles and pardons, which will have more time and resources to devote to a more deliberate determination of the defendant's fitness to return to open society.

SUPPLEMENTAL COMMENTARY ON §706-606

When the legislature adopted the Code in 1972, it revised §706-606 to provide for life imprisonment without the possibility of parole in the four enumerated cases specified in subsection (a). However, the legislature provided that upon the Governor's commutation, parole would be possible at the end of twenty years of imprisonment. Subsection (b) essentially derived from the Proposed Draft.

The Conference Committee Report specifically provides that: "It is the intent of your Committee that the term 'peace officer' [see subsection (a)(i)] includes judges and prosecuting attorneys. It is also the intent of your Committee that §701-101 of the Penal Code shall apply to prisoners presently serving sentences of life without parole who are, after twenty years of imprisonment, subject to the same review as provided in §706-606." Conference Committee Report No. 2 (1972).

Act 27, Session Laws 1981, eliminated the court's discretion under subsection (b) to impose a sentence of either life imprisonment with possibility of parole or twenty years imprisonment. As amended the subsection requires the court to impose the same indeterminate sentence in all cases.

Act 314, Session Laws 1986, deleted the provisions concerning sentencing for murder and replaced it with criteria to be considered by a court in imposing any sentence, including the need to afford deterrence to criminal conduct and to impose just punishment. Conference Committee Report No. 51-86.

Law Journals and Reviews

Risky Business: Assessing Dangerousness in Hawai‘i. 24 UH L. Rev. 63 (2001).

Case Notes

Murder contract not element of offense of murder; only relevant for purpose of sentence enhancement. 807 F.2d 805 (1987).

Not unconstitutionally vague. 751 F. Supp. 853 (1990).

The better rule is to include in indictment the aggravating circumstances which result in application of statute enhancing the penalty for the crime committed. 59 H. 625, 586 P.2d 250 (1978).

Subsection (b) not unconstitutional. Judge must impose sentence of life imprisonment with possibility of parole, but allowed to reduce it to twenty years if factors or circumstances warrant lesser sentence. 64 H. 193, 638 P.2d 307 (1981).

Sentencing court abused discretion by finding defendant committed murder by hire. 67 H. 573, 698 P.2d 287 (1985).

Trial court abused its discretion in rigidly applying family court sentencing guidelines promulgated without legislative authority. 72 H. 521, 824 P.2d 837 (1992).

Sentencing court may properly consider criminal convictions that occurred subsequent to original illegal sentence when applying §706-606 factors on resentencing. 79 H. 281, 901 P.2d 481 (1995).

Where no evidence that group engaged in or endorsed illegal activities, insufficient evidence to establish any reasonable correlation between defendant's association with group and imposition of consecutive prison sentences under paragraph (1). 81 H. 309, 916 P.2d 1210 (1996).

No abuse of discretion in court sentencing defendant to extended terms of imprisonment under §§706-661 and 706-662 where, inter alia, court considered each of the factors enumerated in this section and all the mitigating factors raised by defendant. 83 H. 335, 926 P.2d 1258 (1996).

The January 1, 1987 repeal of language in subsection (b) (pre-1986 amendment) authorizing a court to impose a sentence of life imprisonment with the possibility of parole for murder in cases other than described in subsection (a) (pre-1986 amendment) did not invalidate any such sentence imposed prior to the repeal date. 102 H. 282, 75 P.3d 1173 (2003).

A sentencing court may not impose discretionary conditions of probation pursuant to §706-624(2) unless there is a factual basis in the record indicating that such conditions "are reasonably related to the factors set forth in this section" and insofar as such "conditions involve only deprivations of liberty or property", that they are reasonably necessary for the purposes indicated in paragraph (2). 103 H. 462, 83 P.3d 725 (2004).

The circuit court's statement regarding defendant's "extensive criminality": (1) related directly to the history and

characteristics of the defendant and identified the specific facts or circumstances within the range of statutory factors that the court considered in imposing a consecutive sentence; and (2) provided the conclusions drawn by the court after consideration of all the facts that pertain to the statutory factors, and confirmed for defendant, the public, and the court that the decision to impose consecutive sentences was deliberate, rational, and fair. 131 H. 94, 315 P.3d 720 (2013).

Where the determination by the intermediate court of appeals (ICA) that the circuit court, in imposing a consecutive sentence, "likely concluded" that defendant was dangerous to the safety of the public or posed an unacceptable risk of re-offending, and that rehabilitation appeared unlikely, arguably could be read as speculating as to the circuit court's reasoning, it appeared that the ICA was rather attempting to link the circuit court's express reasoning to the examples in State v. Hussein, and to the extent doing so constituted error by the ICA, the error did not warrant vacating defendant's convictions. 131 H. 94, 315 P.3d 720 (2013).

Seven-day term of imprisonment was not unreasonably related to factors set forth in this section, considering nature of offense and circumstances presented by the record. 10 H. App. 381, 876 P.2d 1331 (1994).

Trial court did not abuse its discretion in sentencing defendant to consecutive terms of imprisonment under §706-668.5 where, taking into consideration all of the factors set forth in this section, the court pointed to the high level of cruelty, violence, and viciousness involved in the commission of the offenses, that most of the offenses took place in front of defendant's two-year-old son, defendant's lack of remorse, the clear and present danger defendant posed to complainant and the community, and the poor prospects for defendant's rehabilitation. 106 H. 365 (App.), 105 P.3d 242 (2004).

Where trial court's rationale for imposing jail time reflected the factors listed in this section, and the jail time imposed did not exceed the maximum jail term authorized by §706-663, trial court did not clearly exceed the bounds of reason nor disregard rules or principles of law or practice to defendant's substantial detriment in imposing a jail term; thus, trial court did not abuse its discretion in sentencing defendant to 120 days' imprisonment. 116 H. 403 (App.), 173 P.3d 550 (2007).

Family court did not abuse its discretion by requiring defendant to attend domestic violence counseling as a condition of defendant's probation; where defendant was charged with endangering the welfare of an incompetent person under §709-905 based on substantial evidence that defendant assaulted complainant, under §706-624(2), the court was free to impose

discretionary conditions of probation that are reasonably related to the factors set forth in this section and to the extent that the conditions involve only deprivations of liberty as are reasonably necessary for the purposes indicated in paragraph (2). 121 H. 228 (App.), 216 P.3d 1251 (2009).

Court did not abuse its discretion in sentencing defendant to consecutive terms of imprisonment under §706-668.5 because it considered the factors set forth in this section; defendant's extensive record and the fact that defendant caused a lot of harm in the community were specific circumstances that led the court to conclude that a consecutive sentence was appropriate. 129 H. 135 (App.), 295 P.3d 1005 (2013).

Cited: 73 H. 81, 829 P.2d 1325 (1992).

Discussed: 78 H. 127, 890 P.2d 1167 (1995); 81 H. 421 (App.), 918 P.2d 228 (1996).

" **§706-606.1 REPEALED.** L 1986, c 314, §16.

" **§706-606.2 Special sentencing considerations for arson; other actions not prohibited.** (1) In addition to any other penalty imposed, a person convicted of arson involving fire set to brush, grass, vegetation on the land resulting in damage to ten thousand square feet or more of property, may be required to:

(a) Pay any costs associated with extinguishing the fire, which shall include, but are not limited to:
  (i) Personnel salary, benefits, and overtime;
  (ii) The operation, maintenance, and repair of apparatus, aircraft, and equipment;
  (iii) Supplies expended, damaged, or lost; and
  (iv) Rehabilitation supplies during firefighting operations; and

(b) Perform community service work in the region in which the property damage occurred.

With regard to any fine or monetary penalty that may be imposed on a minor convicted or adjudicated for an offense of arson, the parents or legal guardians of the minor shall be liable for the percentage of costs associated with extinguishing the fire based upon the apportionment of fire damage to real or personal property caused by the minor as a result of committing the offense of arson, regardless of whether the property is publicly or privately owned.

(2) Nothing in this section shall prohibit a separate criminal action being brought by the State or a civil action being brought by the State or a third party for conduct that constitutes an offense of arson. [L 2006, c 182, §1; am L 2007, c 9, §18 and c 11, §1; am L 2008, c 17, §1]

Cross References

Arson, see chapter 708, pt XIII.

COMMENTARY ON §706-606.2

Act 182, Session Laws 2006, added this section, creating special sentencing considerations for arson. The section allows the assessment of the costs associated with putting out a fire and community service against the person who set the fire. The section also holds a parent or guardian of a minor who sets a brush fire liable for the cost of damages attributable to the minor. The legislature found that making parents and legal guardians of minor defendants liable for damages would be a strong incentive for them to take a more proactive approach in regulating the actions of their children. The section also states that a separate criminal or civil action is not prohibited. Conference Committee Report No. 48-06, House Standing Committee Report No. 1124-06, Senate Standing Committee Report No. 2569.

Act 9, Session Laws 2007, amended this section by deleting the brackets around the word "fine" to ratify the revisor's substitution of the word "fine" for "fire" in the section, and by adding subsection designations to conform to the style of the Hawaii Penal Code. House Standing Committee Report No. 807.

Act 11, Session Laws 2007, amended this section to clarify that special sentencing provisions for arson apply to persons convicted of arson resulting in damage to more than ten thousand square feet of property. The current law states that the damage to property must be exactly ten thousand square feet to qualify for special sentencing considerations. Act 11 provided that the damage be ten thousand square feet or more. House Standing Committee Report No. 773, Senate Standing Committee Report No. 1128.

Act 17, Session Laws 2008, amended subsection (1), clarifying the costs associated with extinguishing a brush fire that a person convicted of arson may be required to pay to include personnel salary, benefits, and overtime; the operation, maintenance, and repair of apparatus, aircraft, and equipment; supplies expended, damaged, or lost; and rehabilitation supplies during firefighting operations. The court lacked guidance as to the costs the court could require an arsonist to pay for starting a brush fire. The legislature found that the Act was just, would reduce the counties' financial burden incurred for firefighting expenses, and would serve as a deterrent to those

who would commit arson. House Standing Committee Report No. 1522-08, Senate Standing Committee Report No. 2557.

" **§706-606.3 Expedited sentencing program.** (1) A person who has committed intra-family sexual assault may be considered for the expedited sentencing program in accordance with this section. As used in this section, "intra-family" sexual assault means any criminal offense of felony sexual assault under section 707-730, 707-731, or 707-732, or incest, as defined in section 707-741, in which the victim of the offense is related to the defendant by consanguinity or marriage, or resides in the same dwelling unit as the defendant, and the victim was, at the time of the sexual assault, under the age of eighteen.

(2) The police department of the county in which the sexual assault took place or any other appropriate investigative law enforcement agency shall confer with the appropriate prosecuting authority. If the prosecuting authority determines that it is appropriate to provide notice of the expedited sentencing program to the defendant, the police department or other appropriate investigative law enforcement agency shall give the defendant written notice of the existence of the expedited sentencing program provided in this section. The notice provision shall not be a prerequisite to questioning the defendant. The notice provision shall not obligate the prosecuting authority to issue a statement of "no objection" when considering the defendant for the expedited sentencing program.

(3) The written notice shall state:

> "YOU ARE ADVISED TO SEEK LEGAL COUNSEL IMMEDIATELY. IF YOU CANNOT AFFORD PRIVATE COUNSEL, CONTACT THE OFFICE OF THE PUBLIC DEFENDER. FAILURE TO CONTACT AN ATTORNEY MAY DISQUALIFY YOU FROM THIS PROGRAM. A copy of section 706-606.3, Hawaii Revised Statutes, is attached to this notice. You are under investigation for a felony sexual assault against a minor. Upon completion of this investigation, if there is sufficient basis to believe that you have committed a sexual assault, the case will be referred to the appropriate prosecuting authority for review and possible institution of criminal charges. Hawaii law provides for a range of ordinary prison sentences for felony sexual assault ranging from five years up to twenty years, or life imprisonment, depending upon the offense. However, section 706-606.3, Hawaii Revised Statutes, provides that a person who commits a sexual assault upon a minor but who admits guilt, cooperates with the prosecuting authority, and participates in appropriate assessment and

treatment may be considered for the expedited sentencing program. A person who is sentenced in accordance with the expedited sentencing program may be sentenced to a term of probation. Probation may be revoked, however, for failure to comply with the terms of the probation pursuant to section 706-625. To qualify for consideration for the expedited sentencing program, your legal counsel first must request from the office of the prosecuting authority named in this notice a written statement as to whether that office has any objection to your being considered for the expedited sentencing program. THE COURT WILL NOT CONSIDER YOU FOR THE EXPEDITED SENTENCING PROGRAM UNDER SECTION 706-606.3, HAWAII REVISED STATUTES, UNLESS YOUR LEGAL COUNSEL HAS RECEIVED A WRITTEN STATEMENT THAT THE APPROPRIATE PROSECUTING AUTHORITY HAS NO OBJECTION TO YOUR BEING CONSIDERED FOR THE EXPEDITED SENTENCING PROGRAM AND THE REQUEST FOR THAT WRITTEN STATEMENT WAS MADE WITHIN FOURTEEN DAYS OF YOUR RECEIPT OF THIS NOTICE. FURTHER, THE COURT WILL NOT CONSIDER YOU FOR THE EXPEDITED SENTENCING PROGRAM UNDER SECTION 706-606.3, HAWAII REVISED STATUTES, UNLESS, ONCE YOUR LEGAL COUNSEL HAS RECEIVED THIS NOTICE, YOU HAVE MADE A GOOD FAITH EFFORT TO AVOID THE NECESSITY OF THE CHILD BEING REMOVED FROM THE FAMILY HOME, INCLUDING BUT NOT LIMITED TO MOVING AND REMAINING OUT OF THE FAMILY HOME UNTIL OTHERWISE ORDERED BY THE COURT."

The written notice also shall provide:

(a) Instructions on how to contact the appropriate prosecuting authority, including any necessary addresses and telephone numbers; and

(b) The name of the person delivering the notice and the date it was given to the alleged offender.

(4) A defendant shall not be considered by the court for the expedited sentencing program under this section unless the defendant's legal counsel requests within fourteen days of the defendant's receipt of the written notice, that the defendant be considered for the expedited sentencing program, and defendant's counsel subsequently receives a written statement from the appropriate prosecuting authority stating that it has no objection to the defendant being considered for the expedited sentencing program in accordance with this section. Additionally, each of the following criteria shall be met:

(a) After receiving the required written notice, the defendant made a good faith effort to avoid the necessity of the child being removed from the family home, including but not limited to moving and

remaining out of the family home until otherwise ordered by the court;

(b) The victim of the sexual assault was under the age of eighteen when the sexual assault was committed;

(c) The defendant was never previously sentenced under this section and has never been convicted of felony sexual assault under section 707-730, 707-731, or 707-732, or incest under section 707-741;

(d) A guardian ad litem appointed in a family court proceeding, or a person assigned by the Children's Advocacy Center to serve as guardian ad litem, agreed that it would be in the best interest of the child for the defendant to be considered for the expedited sentencing program. No prosecuting authority shall issue a statement of no objection without this prior agreement; and

(e) The defendant has complied with the requirements for consideration for the expedited sentencing program as established in subsection (6); provided that at sentencing the prosecuting authority may oppose the defendant's participation in the expedited sentencing program if the prosecuting authority determines that the defendant has failed to satisfy the criteria under subsection (6).

(5) The prosecuting authority and the child's guardian ad litem may consult with any other appropriate agency or individual to assist in a decision whether to provide a written statement of "no objection" prior to the defendant being considered for sentencing under the expedited sentencing program.

(6) Within seven business days of receipt of the written notice stating that the appropriate prosecuting authority has no objection to the defendant being considered for the expedited sentencing program in accordance with this section, unless the prosecuting authority waives compliance with the time limit, the defendant shall:

(a) Continue to make a good faith effort to avoid the necessity of the child being removed from the family home, including but not limited to moving and remaining out of the family home until otherwise ordered by the court;

(b) Admit to commission of the sexual assault to the police department of the county in which the assault took place or other appropriate investigative law enforcement agency;

(c) Provide to the appropriate prosecuting authority a written waiver of indictment and preliminary hearing

for any criminal charges arising from the sexual assault; and

(d) Enter a voluntary plea of guilty to the charge or charges alleged upon or following arraignment.

(7) Notwithstanding sections 706-606.5, 706-620, 706-659, 706-660, and 706-660.2, a defendant considered for the expedited sentencing program under this section when sentence is imposed may be sentenced to a term of probation pursuant to section 706-624; provided that if the defendant is sentenced to a term of imprisonment as a condition of probation, the term of imprisonment may allow for the defendant's retention of employment.

(8) The term of probation under this section shall be as follows:

(a) For an offense under section 707-730 or 707-731, twenty years; and

(b) For an offense under section 707-732 or 707-741, ten years.

(9) In addition to the conditions of probation provided under section 706-624, a sentence under this section shall include that the defendant shall:

(a) Participate in court approved, appropriate sex offender assessment and treatment that shall conform to the guidelines developed by the adult probation division of the appropriate circuit court, until clinically discharged; provided that:

(i) The prosecuting authority shall be provided notice and the opportunity for a hearing prior to any authorization for treatment discontinuance by the court or the adult probation division;

(ii) The defendant shall pay for the cost of the assessment and treatment to the extent that the defendant has the ability to do so; and

(iii) A lack of assessment and treatment resources shall result in the defendant not being considered for the expedited sentencing program;

(b) Provide a written waiver of confidentiality for any assessment, treatment, counseling, therapy, or other program ordered as a condition of probation;

(c) Comply with all orders entered in a proceeding pursuant to chapter 587A; and

(d) Comply with other condition deemed by the court to be reasonably necessary for the protection of the victim of the sexual assault or the rehabilitation of the defendant.

(10) There shall be a rebuttable presumption in favor of the court imposing a sentence in accordance with this section

when a defendant qualifies for the expedited sentencing program, and written notice of "no objection" is issued by the prosecuting authority. The court shall provide written findings of fact setting forth specific reasons justifying imposition of a sentence that is not in accordance with this section. [L 1993, c 316, §§1, 6; am L 1995, c 157, §1; am L 2001, c 127, §§2, 3; am L 2010, c 135, §7]

Cross References

Children's justice program, see chapter 588.

COMMENTARY ON §706-606.3

Act 316, Session Laws 1993, added this section to create an option for expedited sentencing of persons who have committed intra-family sexual assault. The legislature found that this section offers a new approach to removing obstacles that delay and hinder the successful prosecution of certain sex offenders, offers prosecutors an option to encourage offenders to plead guilty and accept treatment early in the proceedings, and offers hope that treatment and intensive monitoring will minimize the chance of further abuse. The intent is to accomplish an increase in criminal convictions, punishment, and deterrence, while providing better protection for potential victims, not only from sexual assault but from the trauma of being the primary witness against a family member. House Standing Committee Report No. 1174, Senate Standing Committee Report No. 849.

Act 157, Session Laws 1995, extended the sunset date of this section from June 30, 1995 to June 30, 2001. The legislature found that the expedited sentencing program served as "a viable alternative in a small number of select cases" and that the program should continue to be available within the criminal justice system. However, the legislature believed that there was insufficient basis to determine whether the program should be made permanent. Conference Committee Report No. 62.

Act 127, Session Laws 2001, repealed the sunset date for the expedited sentencing program of the family court. The purpose of the program was to allow for the expeditious removal of the offender from the family home, in cases of intra-family felony sexual assault or incest, thus allowing the child to remain in the home. The legislature found that the program applied only to those offenders found to be "safe to probate" and minimized the possibility of revictimizing the child by eliminating the need to testify and requiring treatment and supervision of all members of the child's family. The legislature further found

that the program had been effective and beneficial to the families concerned. Senate Standing Committee Report No. 1453, Conference Committee Report No. 114.

Act 135, Session Laws 2010, created a new Child Protective Act [chapter 587A] to make paramount the safety and health of children who have been harmed or are in life circumstances that threaten harm, and to ensure that the Child Protective Act was in conformity with Federal Title IV-E provisions. Conference Committee Report No. 112-10. Act 135 amended this section by replacing the reference to chapter 587 with a reference to the new chapter.

" **§706-606.4 Sentencing in enumerated offenses 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; and

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

(2) As used in this section:

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

"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). [L 1999, c 268, §2; am L 2003, c 3, §16; am L 2016, c 157, §1]

COMMENTARY ON §706-606.4

Act 268, Session Laws 1999, added this section to require judges, when imposing a sentence, to consider the fact that the crime was committed in the presence of a minor as an aggravating factor of the crime; the court shall consider the aggravating factors in addition to the factors to be considered under §706-606. The legislature found that children who witness domestic violence are harmed in many ways, and acknowledged that domestic violence is a perpetuation of a violent cycle, as children of abuse grow up to be abusers themselves. Studies have documented multiple problems among children that have witnessed continual assaults by one parent on another in the home, including psychological and emotional distress, cognitive functioning

problems, and physical problems. Because of the high social and financial costs resulting from domestic violence, the legislature agreed that more serious penalties should be imposed for both their deterrent and punitive effects. Conference Committee Report No. 26.

Act 3, Session Laws 2003, made a technical amendment to this section, by deleting the brackets around the word "or" in the phrase "abuse of family or household members."

Act 157, Session Laws 2016, amended this section to provide that the commission of certain offenses of assault, sexual assault, and abuse of a family or household member in the presence of a minor is an aggravating factor to be considered in the sentencing of the defendant convicted of the offense. The legislature found that research has shown that children who witness assault or domestic violence can suffer severe emotional and developmental difficulties that are similar to those of children who are victims of direct physical and mental abuse. By broadening the application of the aggravating factor considered by the courts when sentencing defendants convicted of committing certain crimes in the presence of a minor pursuant to this section to include the commission of assault and sexual assault offenses regardless of the preexisting legal relationship between the defendant and the victim or the child, Act 157 recognized the impact that witnessing an assault has on a child. The use of the aggravating factor for sentencing does not elevate the seriousness of the offense charged. Conference Committee Report No. 13-16.

" **§706-606.5 Sentencing of repeat offenders.** (1) Notwithstanding section 706-669 and any other law to the contrary, any person convicted of murder in the second degree, any class A felony, any class B felony, or any of the following class C felonies:

(a) Section 134-7 relating to persons prohibited from owning, possessing, or controlling firearms or ammunition;
(b) Section 134-8 relating to ownership, etc., of certain prohibited weapons;
(c) Section 134-17 only as it relates to providing false information or evidence to obtain a permit under section 134-9;
(d) Section 188-23 relating to possession or use of explosives, electrofishing devices, and poisonous substances in state waters;
(e) Section 386-98(d)(1) relating to fraud violations and penalties;
(f) Section 431:2-403(b)(2) relating to insurance fraud;

(g) Section 707-703 relating to negligent homicide in the second degree;
(h) Section 707-711 relating to assault in the second degree;
(i) Section 707-713 relating to reckless endangering in the first degree;
(j) Section 707-716 relating to terroristic threatening in the first degree;
(k) Section 707-721 relating to unlawful imprisonment in the first degree;
(l) Section 707-732 relating to sexual assault in the third degree;
(m) Section 707-752 relating to promoting child abuse in the third degree;
(n) Section 707-757 relating to electronic enticement of a child in the second degree;
(o) Section 707-766 relating to extortion in the second degree;
(p) Section 708-811 relating to burglary in the second degree;
(q) Section 708-821 relating to criminal property damage in the second degree;
(r) Section 708-831 relating to theft in the second degree;
(s) Section 708-835.5 relating to theft of livestock;
(t) Section 708-836 relating to unauthorized control of propelled vehicle;
(u) Section 708-839.55 relating to unauthorized possession of confidential personal information;
(v) Section 708-839.8 relating to identity theft in the third degree;
(w) Section 708-852 relating to forgery in the second degree;
(x) Section 708-854 relating to criminal possession of a forgery device;
(y) Section 708-875 relating to trademark counterfeiting;
(z) Section 710-1071 relating to intimidating a witness;
(aa) Section 711-1103 relating to riot;
(bb) Section 712-1221 relating to promoting gambling in the first degree;
(cc) Section 712-1224 relating to possession of gambling records in the first degree;
(dd) Section 712-1247 relating to promoting a detrimental drug in the first degree; or
(ee) Section 846E-9 relating to failure to comply with covered offender registration requirements,

or who is convicted of attempting to commit murder in the second degree, any class A felony, any class B felony, or any of the class C felony offenses enumerated above and who has a prior conviction or prior convictions for the following felonies, including an attempt to commit the same: murder, murder in the first or second degree, a class A felony, a class B felony, any of the class C felony offenses enumerated above, or any felony conviction of another jurisdiction, shall be sentenced to a mandatory minimum period of imprisonment without possibility of parole as provided in subsection (2).

(2) A mandatory minimum period of imprisonment without possibility of parole during that period shall be imposed pursuant to subsection (1), as follows:

(a) One prior felony conviction:

(i) Where the instant conviction is for murder in the second degree or attempted murder in the second degree--ten years;

(ii) Where the instant conviction is for a class A felony--six years, eight months;

(iii) Where the instant conviction is for a class B felony--three years, four months; and

(iv) Where the instant conviction is for a class C felony offense enumerated above--one year, eight months;

(b) Two prior felony convictions:

(i) Where the instant conviction is for murder in the second degree or attempted murder in the second degree--twenty years;

(ii) Where the instant conviction is for a class A felony--thirteen years, four months;

(iii) Where the instant conviction is for a class B felony--six years, eight months; and

(iv) Where the instant conviction is for a class C felony offense enumerated above--three years, four months; and

(c) Three or more prior felony convictions:

(i) Where the instant conviction is for murder in the second degree or attempted murder in the second degree--thirty years;

(ii) Where the instant conviction is for a class A felony--twenty years;

(iii) Where the instant conviction is for a class B felony--ten years; and

(iv) Where the instant conviction is for a class C felony offense enumerated above--five years.

(3) Except as provided in subsection (4), a person shall not be sentenced to a mandatory minimum period of imprisonment

under this section unless the instant felony offense was committed during the period as follows:

(a) Within twenty years after a prior felony conviction where the prior felony conviction was for murder in the first degree or attempted murder in the first degree;

(b) Within twenty years after a prior felony conviction where the prior felony conviction was for murder in the second degree or attempted murder in the second degree;

(c) Within twenty years after a prior felony conviction where the prior felony conviction was for a class A felony;

(d) Within ten years after a prior felony conviction where the prior felony conviction was for a class B felony;

(e) Within five years after a prior felony conviction where the prior felony conviction was for a class C felony offense enumerated above;

(f) Within the maximum term of imprisonment possible after a prior felony conviction of another jurisdiction.

(4) If a person was sentenced for a prior felony conviction to a special term under section 706-667, then the person shall not be sentenced to a mandatory minimum period of imprisonment under this section unless the instant felony offense was committed during that period as follows:

(a) Within eight years after a prior felony conviction where the prior felony conviction was for a class A felony;

(b) Within five years after the prior felony conviction where the prior felony conviction was for a class B felony;

(c) Within four years after the prior felony conviction where the prior felony conviction was for a class C felony offense enumerated above.

(5) Notwithstanding any other law to the contrary, any person convicted of any of the following misdemeanor offenses:

(a) Section 707-712 relating to assault in the third degree;

(b) Section 707-717 relating to terroristic threatening in the second degree;

(c) Section 707-733 relating to sexual assault in the fourth degree;

(d) Section 708-822 relating to criminal property damage in the third degree;

(e) Section 708-832 relating to theft in the third degree; and

(f) Section 708-833.5(2) relating to misdemeanor shoplifting,

and who has been convicted of any of the offenses enumerated above on at least three prior and separate occasions within three years of the date of the commission of the present offense, shall be sentenced to no less than nine months of imprisonment. Whenever a court sentences a defendant under this subsection for an offense under section 707-733, the court shall order the defendant to participate in a sex offender assessment and, if recommended based on the assessment, participate in the sex offender treatment program established by chapter 353E.

(6) The sentencing court may impose the above sentences consecutive to any sentence imposed on the defendant for a prior conviction, but the sentence shall be imposed concurrent to the sentence imposed for the instant conviction. The court may impose a lesser mandatory minimum period of imprisonment without possibility of parole than that mandated by this section where the court finds that strong mitigating circumstances warrant the action. Strong mitigating circumstances shall include, but shall not be limited to the provisions of section 706-621. The court shall provide a written opinion stating its reasons for imposing the lesser sentence.

(7) A person who is imprisoned in a correctional institution pursuant to subsection (1) shall not be paroled prior to the expiration of the mandatory minimum term of imprisonment imposed pursuant to subsection (1).

(8) For purposes of this section:

(a) Convictions under two or more counts of an indictment or complaint shall be considered a single conviction without regard to when the convictions occur;

(b) A prior conviction in this or another jurisdiction shall be deemed a felony conviction if it was punishable by a sentence of death or of imprisonment in excess of one year; and

(c) A conviction occurs on the date judgment is entered.

[L 1976, c 181, §1; am L 1979, c 98, §1; am L 1980, c 284, §1; am L 1981, c 69, §1; am L 1986, c 314, §17; am L 1987, c 181, §3; am L 1990, c 28, §2; am L 1996, c 87, §1; am L 1997, c 277, §2; am L 1999, c 195, §10 and c 244, §1; am L 2006, c 80, §1 and c 139, §4; am L 2007, c 49, §2; am L 2008, c 80, §2; am L 2009, c 149, §6; am L 2014, c 114, §1; am L 2016, c 231, §20]

Cross References

Former conviction in another jurisdiction, see §706-665.
Negligent homicide in the first degree, see §707-702.5.

COMMENTARY ON §706-606.5

This section was added by Act 181, Session Laws 1976. Finding a clear danger to the people of Hawaii in the high incidence of offenses being committed by repeat offenders, the legislature felt it necessary to provide for mandatory terms of imprisonment without possibility of parole in cases of repeated offenses by prior offenders. House Conference Committee Report No. 32, Senate Conference Committee Report No. 33.

Act 98, Session Laws 1979, amended this section to provide that persons convicted of any of the crimes enumerated be punished as repeat offenders if they are subsequently convicted of any of the enumerated offenses within the time of the maximum sentence of the prior conviction. Under the prior law, a person had to be convicted of the same enumerated crime on more than one occasion. The legislature felt this amendment was needed to alleviate concerns that the repeat offender problem be dealt with seriously. Conference Committee Report No. 11.

Act 284, Session Laws 1980, completely revised this section. It expanded the list of offenses carrying the possibility of mandatory minimum sentences and divided the offenses into the two classes enumerated in subsections (1) and (2). Further, it introduced a degree of flexibility into the sentencing procedure by allowing the court, upon written opinion, to set a lesser minimum sentence than that prescribed if there were strong mitigating circumstances to warrant such action.

Act 314, Session Laws 1986, amended the repeat offender law so that mandatory minimum terms of imprisonment are increased as the severity of the repeat offense increases. Thus, the mandatory minimum term for a class A repeat offender is greater than that term for a class B repeat offender. The period of time during which a felon is considered to have a prior felony conviction is dependent on the seriousness of the prior felony; the more severe the prior crime, the longer it remains a prior conviction.

Only certain class C felonies were made subject to the repeat offender law since the legislature intended to have some latitude as to which of those crimes should fall within the repeat offender category. Conference Committee Report No. 51-86.

Act 181, Session Laws 1987, added felony convictions of another jurisdiction to the list of crimes ("prior felonies") which are considered in the sentencing of repeat offenders. The Act also added, to the list of applicable periods, that the period within which the repeat offender statute applies is the maximum possible prison term of the prior felony conviction of

another jurisdiction. The Act repealed subsection (4)(a) to clarify that this section requires only one felony conviction prior to the felony for which the defendant is sentenced pursuant to this section. Senate Standing Committee Report No. 1130.

Act 87, Session Laws 1996, added the crime of unauthorized control of propelled vehicle to the class C felonies subject to repeat offender sentencing. The legislature found that vehicle thefts and property taken from the vehicles was a serious problem in the State, and that this kind of theft affected a significant number of visitors and residents. The Act also amended the section to prohibit the parole of repeat offenders prior to the expiration of their mandatory minimum terms of imprisonment. Senate Standing Committee Report No. 2598.

Act 277, Session Laws 1997, amended this section by including the offense of trademark counterfeiting in the list of offenses for repeat offenders. The legislature found that trademark counterfeiting was a recurring problem in Hawaii for retail boutiques and trademark products of the University of Hawaii, and that tourists are often the target for the scams. The legislature believed that the Act would safeguard not only consumers from the sale of counterfeit products, but would also protect the reputation and quality of trademarks and ensure that trademarks are used for their legitimate and intended purposes. House Standing Committee Report No. 1620, Senate Standing Committee Report No. 759.

Act 195, Session Laws 1999, amended this section to include §188-23 as an offense subject to repeat offender sentencing. Senate Standing Committee Report No. 1487.

Act 244, Session Laws 1999, amended this section by, among other things, providing: (1) that the multiple offender of assault in the third degree, terroristic threatening in the second degree, sexual assault in the fourth degree, criminal property damage in the third degree, theft in the third degree, or misdemeanor shoplifting, shall be sentenced to no less than nine months of imprisonment in cases where a person is convicted on at least three prior and separate occasions of any of the specified misdemeanor offenses within a three-year period; and (2) that the court shall order a defendant sentenced under §707-733, relating to sexual assault in the fourth degree, to participate in a sex offender assessment and participate in the sex offender treatment program, if necessary and appropriate.

The legislature found that there are many criminals who repeatedly commit misdemeanor offenses; these persons know that under current law, if caught, the consequences of their conduct will be relatively minor. As such, there is currently no serious deterrent to their repeated criminal behavior. A

mandatory sentence will send a strong message that repeated criminal behavior will not be tolerated. Conference Committee Report No. 42, House Standing Committee Report No. 1466.

Act 80, Session Laws 2006, added electronic enticement of a child in the second degree to the list of class C felonies subject to repeat offender sentencing. Act 80 provided a means to ensure the safety of Hawaii's children, enhance enforcement efforts, and impose significant penalties against those who prey on the most vulnerable members of the community. Conference Committee Report No. 10-06, House Standing Committee Report No. 1520-06.

Act 139, Session Laws 2006, increased the protection of personal information by providing for repeat felony offender sentencing of offenders with prior felony convictions who are convicted of unauthorized possession of confidential personal information or of identity theft in the third degree. Hawaii law enforcement has found it difficult to curb the rise in identity theft-related crimes when identity thieves in possession of personal information who have not yet caused a monetary loss to the victim cannot be prosecuted for crimes other than petty misdemeanor thefts. The legislature found that increasing the penalties for identity theft by amending the law to make identity theft an enumerated offense within the repeat offender statute would help to deter identity theft crimes. Senate Standing Committee Report No. 2636, House Standing Committee Report No. 1295-06.

Act 49, Session Laws 2007, amended this section to deter insurance fraud by including felony insurance fraud relating to workers' compensation, accident and health or sickness, and motor vehicle insurance, and insurance provided by mutual benefit societies and health maintenance organizations, among the offenses subject to repeat felony offender sentencing. The legislature found that while insurance [fraud] is often perceived as a nonviolent and victimless crime, the ramifications of insurance fraud affect everyone through higher insurance premiums. House Standing Committee Report No. 913, Senate Standing Committee Report No. 1589.

Act 80, Session Laws 2008, amended subsection (1) by including the offense of failure to comply with covered offender registration requirements. Conference Committee Report No. 82-08.

Act 149, Session Laws 2009, which amended subsection (1), established an insurance fraud investigations branch to replace the insurance fraud investigations unit, with expanded authority to prevent, investigate, and prosecute insurance fraud to include all lines of insurance except workers' compensation. Act 149 also established criminal and administrative penalties

for insurance fraud in all covered lines of insurance and for different types of insurance fraud. The legislature found that because insurance fraud occurs in every line of insurance, the State's insurance fraud law should be expanded accordingly. Conference Committee Report No. 26, Senate Standing Committee Report No. 1338.

Act 114, Session Laws 2014, amended this section by, among other things, deleting the conviction of theft in the first degree and promoting prostitution in the second degree from the class C felony offenses enumerated in this section. Senate Standing Committee Report No. 3249, Conference Committee Report No. 41-14.

Act 231, Session Laws 2016, amended this section to implement recommendations made by the Penal Code Review Committee convened pursuant to House Concurrent Resolution No. 155, S.D. 1 (2015).

Case Notes

Not applicable to defendant who had no prior conviction for any offense for which now charged. 800 F.2d 861 (1986).

Where defendant contended, inter alia, that federal sentencing guidelines preempted use of Hawaii repeat offender statute, defendant's conviction was subject to the statute, which applied to offenses committed on federal enclaves; district court did not err in applying the statute. 105 F.3d 463 (1997).

"Prior conviction" includes convictions which occurred before the effective date of statute. 61 H. 262, 602 P.2d 914 (1979).

Sentencing under section--procedural requirements. 61 H. 262, 602 P.2d 914 (1979).

Statute as it applies to burglary in the first degree is not unconstitutional as violative of the cruel and unusual punishment, equal protection, due process, or ex post facto clauses. 61 H. 262, 602 P.2d 914 (1979).

Proof of legal representation. 61 H. 281, 602 P.2d 927 (1979).

Sufficiency of evidence of prior conviction. 61 H. 281, 602 P.2d 927 (1979).

Mandatory minimum sentence for repeat offenders of §712-1242 not constitutionally proscribed. 61 H. 285, 602 P.2d 930 (1979).

Requirement of notice of intended application of section. 61 H. 285, 602 P.2d 930 (1979).

State must show defendant was represented by counsel at prior conviction or had waived such representation. 61 H. 285, 602 P.2d 930 (1979).

Conviction on multiple counts considered as one prior conviction. 63 H. 509, 630 P.2d 633 (1981).

Lesser mandatory minimum sentence under subsection (3) may be imposed for persons convicted prior to effective date of 1980 amendment but sentenced after it. 64 H. 210, 638 P.2d 319 (1981).

Not ambiguous. 66 H. 182, 658 P.2d 882 (1983).

Section does not apply to attempted felonies. 67 H. 476, 691 P.2d 1169 (1984).

Sentence is illegal if not imposed on repeat offender in compliance with statute's requirements. 67 H. 531, 696 P.2d 344 (1985).

Mandatory minimum sentence may not run consecutively to sentence for underlying conviction. 67 H. 616, 699 P.2d 988 (1985).

"Conviction" refers to judgment entered upon finding of guilt. Two sentences on the same day for separate offenses charged in two indictments are two convictions. 68 H. 124, 706 P.2d 1293 (1985).

Defendant's prior four-year sentence as young adult is the "maximum sentence of the prior conviction". 68 H. 169, 706 P.2d 1304 (1985).

Defendant's two prior convictions did not merge into one prior conviction. 71 H. 153, 785 P.2d 1314 (1990).

A sentencing court may order that a mandatory minimum term of imprisonment imposed under §706-660.1 be served consecutively to a mandatory period of imprisonment imposed under this section in connection with a separate felony conviction arising out of a charge contained in the same indictment or complaint. 84 H. 476, 935 P.2d 1021 (1997).

Section divests sentencing court of authority to impose consecutive mandatory minimum periods of imprisonment on a defendant convicted of multiple felony counts charged in the same indictment or complaint. 84 H. 476, 935 P.2d 1021 (1997).

Trial court's refusal to find strong mitigating circumstances pursuant to subsection (4) (1998) and imposition of concurrent mandatory minimum ten-year terms not unconstitutional where defendant could have reasonably been deemed to pose a danger to society, more serious crimes by repeat offenders may be punished in Hawaii by longer mandatory minimum terms, and other jurisdictions permitted significantly lengthier sentences for repeat offenders. 93 H. 87, 997 P.2d 13 (2000).

Inasmuch as the plain and unambiguous language of this section requires application of the repeat offender statute over "any other law to the contrary", the circuit court did not err in sentencing defendant as a repeat offender pursuant to this section; in all cases in which this section is applicable, including those in which a defendant would otherwise be eligible for probation under §706-622.5, the circuit courts must sentence

defendants pursuant to the provisions of this section. 103 H. 228, 81 P.3d 408 (2003).

By its plain language, Act 44, L 2004, prospectively permitted greater discretion to sentencing courts confronted with conflicts between this section and §706-622.5 than they previously possessed; thus, based on the legislative intent reflected in Act 44, the Act 161, L 2002 version of §706-622.5, under which defendant was sentenced, did not trump the repeat offender statute. 106 H. 1, 100 P.3d 595 (2004).

Trial court properly sentenced defendant as a repeat offender based on defendant's conviction of promoting a dangerous drug in the third degree under §712-1243, an enumerated class C felony under this section. 106 H. 146, 102 P.3d 1044 (2004).

A defendant is entitled, by timely HRPP rule 35 motion to correct sentence or by HRPP rule 40 petition, to move for correction of an enhanced sentence once the defendant has successfully attacked a prior conviction on which the sentence was based in whole or part because that conviction no longer constitutes a proper basis for increased punishment for a subsequent offense under this section. 109 H. 458, 128 P.3d 340 (2006).

Where defendant was a convicted felon subject to a mandatory minimum sentence for a repeat offense as of the date the judgment was entered, the trial court properly relied on the prior conviction in sentencing defendant because the prior conviction had not been vacated at the time of sentencing. 109 H. 458, 128 P.3d 340 (2006).

Because defendant was charged on January 5 and April 13, 2004, prior to L 2004, Act 44's effective date of July 1, 2004, the trial court erred in applying Act 44's ameliorative amendments to defendant's sentence by failing to observe the statutory command of Act 44, §29; thus, as defendant conceded that defendant qualified as a repeat offender under this section in light of a prior conviction of unauthorized control of a propelled vehicle, the trial court was required to apply this section to sentence defendant to a mandatory minimum sentence of one year and eight months. 115 H. 79, 165 P.3d 980 (2007).

By virtue of the directive "notwithstanding ... any other law" present in this section, where mandatory minimum terms are imposed consecutively in the discretion of the court, indeterminate maximum sentences must also run consecutively despite §706-668 (repealed 1986) because mandatory minimums are part of, and incorporated within, the period or term of the indeterminate maximum sentence involved, and indeterminate maximum terms must run consecutively in order for the mandatory minimum sentence to be imposed consecutively as permitted by this section. 118 H. 210, 188 P.3d 724 (2008).

In considering how the term "maximum term of imprisonment possible" in subsection (2)(f) should be applied to sentencing schemes that do not fit the Hawaii mold, the words of the statute should be strictly applied, with the focus on "terms of imprisonment"; thus, appellate court erred in interpreting the mandatory parole term required by Colorado law to be served after the term of imprisonment as part of the "maximum term of imprisonment possible", even though reincarceration could subject a parolee to additional time in prison. 118 H. 425, 193 P.3d 341 (2008).

The term "maximum term of imprisonment possible" in subsection (2)(f) refers to the maximum term of imprisonment to which a court in a foreign jurisdiction may possibly sentence a convicted defendant. 118 H. 425, 193 P.3d 341 (2008).

Where, in light of defendant's stipulation, the combined evidence should have "reasonably satisfied" the trial court as to the prior conviction and its sentence date, the trial court abused its discretion in failing to accord the evidence its proper weight; thus, because defendant committed the promoting a dangerous drug offense within the "maximum term of imprisonment possible" after defendant's Colorado conviction, which was six years, application of the mandatory minimum term under subsection (2)(f) was appropriate. 118 H. 425, 193 P.3d 341 (2008).

A sentencing judge may consider imposing a defendant's mandatory minimum sentence consecutively to the shortest of any sentence previously imposed. 122 H. 495, 229 P.3d 313 (2010).

Imposing a prison sentence consecutively to "any sentence" pursuant to subsection (5), including the lesser of such sentences, is a novel, but accurate view of the statute; thus, henceforth, the circuit court must state on the record its reasons for imposing a consecutive as opposed to a concurrent sentence under §706-668.5 or this section. 122 H. 495, 229 P.3d 313 (2010).

In determining voluntariness of guilty plea, judge should have established that petitioner was aware of mandatory minimum sentence to same extent as petitioner's awareness of maximum sentence. 9 H. App. 122, 826 P.2d 440 (1992).

No merit to defendant's points on appeal that contended that: (1) circuit court violated right to due process when it assumed role of prosecutor and attempted to establish a record on which to base a minimum mandatory sentence; and (2) imposition of mandatory minimum sentence was unauthorized because circuit court's finding that defendant had prior felony conviction was not supported by sufficient evidence. 9 H. App. 583, 854 P.2d 238 (1993).

Trial court did not err in granting the State's motion for sentencing of repeat offender and ordering that defendant was subject to the repeat offender sentencing provisions of this section where defendant committed the offense of promoting a dangerous drug in the second degree within the maximum term of imprisonment possible after defendant's conviction in federal district court and the maximum term of imprisonment came from the United States Code. 125 H. 497 (App.), 264 P.3d 676 (2011).

" **§706-606.6 Repeat violent and sexual offender; enhanced sentence.** (1) Notwithstanding any other provision of law to the contrary, any person who is convicted of an offense under section 707-701.5, 707-702, 707-730, 707-731, 707-732, 707-733.6, 707-750, 708-840, 712-1202, 712-1203, or 712-1209.1, after having been convicted on at least three prior and separate occasions of an offense under section 707-701.5, 707-702, 707-710, 707-711, 707-730, 707-731, 707-732, 707-733.6, 707-750, 708-840, 712-1202, 712-1203, or 712-1209.1, or of an offense under federal law or the laws of another state that is comparable to an offense under section 707-701.5, 707-702, 707-710, 707-711, 707-730, 707-731, 707-732, 707-733.6, 707-750, 708-840, 712-1202, 712-1203, or 712-1209.1, shall be sentenced to an extended term of imprisonment as provided in section 706-661.

(2) A conviction shall not be considered a prior offense unless the conviction occurred within the following time periods:

(a) For an offense under section 707-701.5, 707-702, 707-730, 707-733.6, 707-750, 708-840, 712-1202, 712-1203, or 712-1209.1, within the past twenty years from the date of the instant offense;

(b) For an offense under section 707-710 or 707-731, within the past ten years from the date of the instant offense;

(c) For an offense under section 707-711 or 707-732, within the past five years from the date of the instant offense; or

(d) For an offense under federal law or the laws of another state that is comparable to an offense under section 707-701.5, 707-702, 707-710, 707-711, 707-730, 707-731, 707-732, 707-733.6, 707-750, 708-840, 712-1202, 712-1203, or 712-1209.1, within the maximum term of imprisonment possible under the appropriate jurisdiction. [L 1999, c 286, §1; am L 2006, c 60, §4; am L 2014, c 114, §2]

COMMENTARY ON §706-606.6

Act 286, Session Laws 1999, added this section, mandating an extended term of imprisonment for multiple offenses, to heighten penalties for habitual violent and sexual offenders. The legislature found that repeat violent and sexual offenders deserve some degree of enhanced sentencing. Conference Committee Report No. 89.

Act 60, Session Laws 2006, amended this section by deleting the references to §707-733.5, repealed by Act 60, and substituting references to §707-733.6, added by Act 60. Act 60 reenacted provisions that define the behavior that constitutes the crime of continuous sexual assault of a minor under the age of fourteen years and the unanimity that is required to convict a person of the crime. House Standing Committee Report No. 150-06.

Act 114, Session Laws 2014, amended this section to include the offenses of promoting prostitution in the first and second degrees, and solicitation of a minor for prostitution. Senate Standing Committee Report No. 3249, Conference Committee Report No. 41-14.

" **§706-607 Civil commitment in lieu of prosecution or of sentence.** (1) When a person prosecuted for a class C felony, misdemeanor, or petty misdemeanor is a chronic alcoholic, narcotic addict, or person suffering from mental abnormality and the person is subject by law to involuntary hospitalization for medical, psychiatric, or other rehabilitative treatment, the court may order such hospitalization and dismiss the prosecution. The order of involuntary hospitalization may be made after conviction, in which event the court may set aside the verdict or judgment of conviction and dismiss the prosecution.

(2) The court shall not make an order under subsection (1) unless it is of the view that it will substantially further the rehabilitation of the defendant and will not jeopardize the protection of the public. [L 1972, c 9, pt of §1]

COMMENTARY ON §706-607

This section extends the concept of involuntary hospitalization in the penal context beyond its classic use in cases of irresponsible defendants.[1] The section does not itself create the authority for the involuntary hospitalization of certain types of offenders, but rather it acknowledges that where the defendant is subject by law to involuntary hospitalization, the court may order the hospitalization in lieu

of prosecution or sentence. In the terminology of the Model Penal Code:

> This section does not authorize civil commitment in any case but rather pre-supposes that authority for the commitment is otherwise conferred by law. Only in that event is the commitment authorized in lieu of sentence.[2]

The Code allows the court, in its discretion, to order hospitalization in three limited situations: where a person prosecuted for a class C felony or lesser grade of crime is (1) a chronic alcoholic, (2) a narcotic addict, or (3) a person suffering from a mental abnormality not amounting to an excusing condition under chapter 704. The commitment in each case is to a medical institution for rehabilitative treatment.

The section is in accord with the trend of the law favoring medical and para-medical incarceration rather than incarceration which is largely, but not solely, punitive.[3]

It should be noted that the section is not restricted to crimes directly related to the defendant's physical or mental condition. Rather, the court is empowered to order hospitalization, if authorized by civil law, in cases where the crime is only tangentially related to the defendant's abnormality.

> ...[W]hen the method of subjecting narcotic users to treatment is commitment, it makes small sense to deny that authority if the addict is not guilty of possession merely but has also committed a larceny, for example, to find the means for getting his supply.[4]

The same example might be used in the case of chronic alcoholics.

Subsection (2) provides a statutory guideline for the exercise of judicial discretion. The court should, of course, refrain from ordering civil commitment unless such commitment will substantially further the rehabilitation of the defendant without jeopardizing the protection of the public.

Finally, it should be noted that this section is not a self-executing one. It does not solve the difficult problem of determining in what cases of physical or mental illness or abnormality involuntary hospitalization ought to be authorized. The resolution of that question can only result from a complete reevaluation of the laws authorizing involuntary hospitalization.

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§706-607 Commentary:

1. Cf. Chapter 704.

2. M.P.C., Proposed Official Draft 105 (1962).

3. See H.R.S., chapter 334, as amended.

4. M.P.C., Tentative Draft No. 2, comments at 31 (1954).

" §706-608 **Penalties against corporations and unincorporated associations; forfeiture of corporate charter or revocation of certificate authorizing foreign corporation to do business in the State.** (1) The court may sentence a corporation or an unincorporated association which has been convicted of an offense to be placed on probation as authorized by part II of this chapter or to be fined as authorized by part III of this chapter.

(2) When a corporation is convicted of a crime or a high managerial agent of a corporation, as defined in section [702-229], is convicted of a crime committed in the conduct of the affairs of the corporation, the court, in sentencing the corporation or the agent, may order the charter of a corporation organized under the laws of this State forfeited or the certificate of a foreign corporation authorizing it to do business in this State revoked upon finding:

(a) That the board of directors or a high managerial agent acting in behalf of the corporation has, in conducting the corporation's affairs, intentionally engaged in a persistent course of criminal conduct[;] and

(b) That for the prevention of future criminal conduct of the same character, the public interest requires the charter of the corporation to be forfeited and the corporation to be dissolved or the certificate to be revoked.

(3) The proceedings authorized by subsection (2) shall be conducted in accordance with the procedures authorized by law for the involuntary dissolution of a corporation or the revocation of the certificate authorizing a foreign corporation to conduct business in this State. Such proceedings shall be deemed additional to any other proceedings authorized by law for the purpose of forfeiting the charter of a corporation or revoking the certificate of a foreign corporation. [L 1972, c 9, pt of §1; am L 1986, c 314, §18]

COMMENTARY ON §706-608

Subsection (1) provides for the ordinary disposition in cases of convicted corporations and unincorporated associations, i.e., suspended sentence or fine.

Subsection (2) provides for further sanctions in cases of corporate crime; dissolution of the corporate entity in the case of domestic corporations and revocation of a foreign corporation's right to do business within the State. Such sanctions are obviously severe and should be reserved for cases involving (1) intentional and persistent misconduct, and (2) a need for public protection which cannot be otherwise met. However, "persistent misconduct need not be restricted to prior convictions of the corporation or its agents for criminal offenses."[1]

The concentration of corporate wealth would tend to indicate that sanctions involving merely a fine may not be sufficient. However, although the Code authorizes forfeiture of the corporate charter and revocation of a foreign corporation's right to do business in the State, these sanctions are not automatic upon conviction or even a finding of persistent misconduct. Here, as in other areas, the Code provides a flexible approach by vesting discretion in the court.

Subsection (3) provides that involuntary dissolution in a penal case shall follow procedures authorized by law for involuntary dissolution in a civil context.

Unlike the Model Penal Code, which provides for institution of separate proceedings for forfeiture or revocation, this Code authorizes the sentencing court to decree forfeiture of a domestic corporate charter or revocation of a certificate of foreign corporation authorized to do business in this State. Unlike many jurisdictions in the United States, which the Model Penal Code was drafted to accommodate, criminal cases in Hawaii are not handled by courts of limited jurisdiction. The criminal calendar is rotated annually and neither lack of judicial expertise nor lack of judicial power would suggest that in Hawaii forfeiture or revocation should be handled by a separate court.

§706-608 Commentary:

1. M.P.C., Tentative Draft No. 4, comments at 203 (1955).

" **§706-609 Resentence for the same offense or for offense based on the same conduct not to be more severe than prior sentence.** When a conviction or sentence is set aside on direct or collateral attack, the court shall not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence. [L 1972, c 9, pt of §1]

COMMENTARY ON §706-609

This section is derived from the American Bar Association's Standards Relating to Sentencing Alternatives and Procedures.[1] The section is self-explanatory. The reasons which compelled the American Bar Association Project to recommend this section have been well stated in the commentary to the Standards. We yield to the temptation to quote that commentary at length:

> There are three reasons which have led the Advisory Committee to this view. The first relates to the selection process which leads to the possibility of an increased sentence. The only argument which can justify an increase following a re-trial is that the original sentence was too light, either because the first judge was too lenient or because new facts have been presented. However, the only class of persons who are vulnerable to this argument consists of those who have exercised the right to challenge their convictions. There is no basis for believing that there exists any rational correspondence between this group and those offenders who may indeed deserve an increase....
>
> The second argument is closely related. The risk of a greater sentence as the result of the assertion of the right of review necessarily acts as a deterrent to the exercise of the right. The issue thus posed is whether this is a desirable result. The Advisory Committee believes that it is not. The extent of the pressure placed on an individual defendant bears no relation to the degree of injustice which may have been perpetrated. A system which fears the assertion of error to a degree that it must place artificial deterrents in the path which leads to review is not a healthy system. There can also be adverse effects on the rehabilitative effort of the individual defendant who believes that he was wronged but is told that he may have to subject himself to the possibility of a greater wrong in order to assert any error.
>
> The third reason which leads the Advisory Committee to this view begins with the difficulties which a contrary position would invite. It is a matter of record that some judges have imposed harsher sentences because of lack of sympathy with the constitutional rights asserted by some defendants, and in a frank attempt to minimize the numbers who will assert such rights in the future. Yet it is at least clear that greater punishment should not be inflicted on the defendant because he has asserted his right to appeal. The only justification for an increased sentence, as noted above, is either that the first judge was too lenient or that new facts have been discovered. A position

> contrary to the standard proposed here would thus necessitate in every case a factual inquiry to determine the motivation of the judge who imposed the new sentence. As the Fourth Circuit recently pointed out, it is "impossible, and most distasteful" for other courts to be required to make that kind of inquiry. Patton v. North Carolina, 381 F.2d 636, 641 (4th Cir. 1967). If the system can avoid such a result at a cost which is not prohibitive, it most certainly should do so. In the Advisory Committee's view, the cost in this instance particularly in light of the other reasons advanced above is not significant.
>
> Finally, it should also be noted that there are substantial constitutional arguments which can be made against a practice contrary to the proposed standard. The First and Fourth Circuits have recently held an increased sentence after a re-trial to be unconstitutional. See Marano v. United States, 374 F.2d 583 (1st Cir. 1967); Patton v. North Carolina, 381 F.2d 636 (4th Cir. 1967). The Third Circuit has disagreed. See United States ex rel. Starner v. Russell, 378 F.2d 808 (3d Cir. 1967), cert. denied, 36 U.S. Law Week 3148 (Oct. 9, 1967)....[2]

The Code finds the reasoning of the commentary to the Standards persuasive and accordingly, in this section, accepts the recommendation purposed.

Case Notes

Section inapplicable to cases where a new sentence, which is not more severe than a prior sentence, adversely affects a defendant's parole status. 79 H. 281, 901 P.2d 481 (1995).

This section applies to a situation where the first sentence was imposed after a trial and the second sentence was imposed after a retrial, or, where the first sentence was imposed after an unbargained plea and the second sentence was imposed after a trial. 102 H. 346 (App.), 76 P.3d 589 (2003).

Section does not directly apply to the Hawaii paroling authority's setting of a defendant's minimum term of incarceration. 126 H. 555 (App.), 273 P.3d 1241 (2012).

Discussed: 83 H. 507, 928 P.2d 1 (1996).

§706-609 Commentary:

1. A.B.A. Standards.

2. Id. Comments at 198-200.

" **§706-610 Classes of felonies.** (1) Apart from first and second degree murder and attempted first and second degree murder, felonies defined by this Code are classified, for the purpose of sentence, into three classes, as follows:

(a) Class A felonies;

(b) Class B felonies; and

(c) Class C felonies.

A felony is a class A, class B, or class C felony when it is so designated by this Code. Except for first and second degree murder and attempted first and second degree murder, a crime declared to be a felony, without specification of class, is a class C felony.

(2) A felony defined by any statute of this State other than this Code shall constitute for the purpose of sentence a class C felony, except if another provision of law specifically defines a felony to be of a specified class as defined by this Code, such felony shall be treated for the purpose of sentence as provided by this chapter for that class of felony. [L 1972, c 9, pt of §1; am L 1986, c 314, §19; am L 1987, c 181, §4]

COMMENTARY ON §706-610

The chapter takes the general position that authorized sentences must take into consideration two things: (1) the seriousness of the crime, and (2) the character of the defendant. The Penal Code divides crime into three grades--felonies, misdemeanors, and petty misdemeanors--according to their seriousness. This section further subdivides felonies into three classes. With the exception of special provisions calling for the possibility of lifetime imprisonment for the offense of murder, the Code thus provides five categories of crimes "which should exhaust the possibilities of reasonable, legislative discrimination."[1]

The prior Hawaii criminal law provided for two categories of crimes: felonies and misdemeanors.[2] However, within each category, the legislature had fixed a multitude of different sentences which are not necessarily consistent with one another or adequately correlated to the relative seriousness of the offense.[3]

> The number and variety of the distinctions of this order found in most existing systems is one of the main causes of the anarchy in sentencing that is so widely deplored. Any effort to rationalize the situation must result in the reduction of distinctions to a relatively few important categories.[4]

Subsection (2) reduces to a class C felony, those felonies defined by a statute not within this Code. This reflects the "judgment that the [Penal] Code should deal at least with any area of criminality involving crimes so serious that classification as a [class A or class B] felony for sentence purposes is justified."[5]

SUPPLEMENTAL COMMENTARY ON §706-610

Act 314, Session Laws 1986, amended this section so that non-Code statutes enacted since 1973 may designate felonies as class A or B felonies, rather than automatically being deemed class C felonies under present law. Conference Committee Report No. 51-86.

Act 181, Session Laws 1987, added language to this section to reflect the recently created statutory murder and attempted murder crimes. These crimes are murder in the first and second degree and attempted murder in the first and second degree. Senate Standing Committee Report No. 1130.

Case Notes

Because criminal solicitation to commit first degree murder is a crime declared to be a felony without specification of class within meaning of this section, it is a class C felony for sentencing purposes, subject to the sentencing provisions of §706-660. 84 H. 229, 933 P.2d 66 (1997).

For sentencing purposes, conspiracy to commit second degree murder is a class C felony under this section and subject to the sentencing provisions of §706-660, not §706-656. 84 H. 280, 933 P.2d 617 (1997).

As an attempt to commit a crime is an offense of the same class and grade as the offense which is attempted, and second degree murder committed under the "aggravated circumstances" set forth in §706-660.2 is expressly distinguished from classified felonies and, pursuant to this section, from unclassified felonies thus, attempted second degree murder is not an "unclassified" offense for purposes of sentencing and is not treated as a class C felony pursuant to §706-660.2. 96 H. 17, 25 P.3d 792 (2001).

Section 291C-12 failure to stop offense committed prior to its 1992 amendment was outside of this code and constituted a class C felony for purposes of sentencing. 9 H. App. 333, 839 P.2d 1186 (1992).

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§706-610 Commentary:

1. M.P.C., Tentative Draft No. 2, comments at 10 (1954).

2. H.R.S. §701-2.

3. Cf. commentary on §706-600.

4. M.P.C., Tentative Draft No. 2, comments at 10-11 (1954).

5. Id. at 11.

"PART II. PROBATION

Note

Part heading amended by L 1986, c 314, §20.

Law Journals and Reviews

The Abandonment of Punishment. 16 HBJ, no. 2, at 63 (1981).

§706-620 Authority to withhold sentence of imprisonment. A defendant who has been convicted of a crime may be sentenced to a term of probation unless:

(1) The crime is first or second degree murder or attempted first or second degree murder;
(2) The crime is a class A felony, except class A felonies defined in chapter 712, part IV, and by section 707-702;
(3) The defendant is a repeat offender under section 706-606.5;
(4) The defendant is a felony firearm offender as defined in section 706-660.1(2);
(5) The crime involved the death of or the infliction of serious or substantial bodily injury upon a child, an elder person, or a handicapped person under section 706-660.2; or
(6) The crime is cruelty to animals where ten or more pet animals were involved under section 711-1108.5 or 711-1109. [L 1972, c 9, pt of §1; am L 1986, c 314, §21; am L 1988, c 89, §2; am L 1990, c 67, §8; am L 1994, c 229, §1; am L 1996, c 197, §1; am L 2013, c 210, §1]

COMMENTARY ON §706-620

The broad discretion vested in the court by §706-605 with respect to choosing between and among various authorized dispositions necessitates some statutory guidelines for the exercise of that discretion. This section states a policy in favor of withholding a sentence of imprisonment unless, as stated, there is (1) undue risk by repetitive criminal behavior, (2) need for institutionalized correctional facilities, or (3) need to reflect the seriousness of the crime which, under the circumstances of the case, can only be accomplished by imprisonment. The general policy of this section is supplemented by a statement in the following section of grounds which, while not controlling the discretion of the court, should be accorded weight in favor of withholding a sentence of imprisonment.

Previous Hawaii law, while favoring probation or suspension of sentence by implication, gave the court a free hand--but no guidance--in selecting the proper sentence or disposition.

> Every circuit court, when it appears to its satisfaction that the ends of justice and the best interests of the public as well as of the defendant in a criminal case will be subserved thereby, may after conviction or after a plea of guilty or nolo contendere (except in cases of [certain specified crimes[1]]) suspend the imposition or execution of sentence, in full or in part, and place the defendant upon probation for such period and upon such terms and conditions as it may deem best.[2]

The Code seeks to provide more definitive criteria for the exercise of the broad discretion vested in the court.

SUPPLEMENTAL COMMENTARY ON §706-620

Act 89, Session Laws 1988, amended this section for the purpose of mandating harsher penalties for crimes against victims who are less able to protect themselves. The legislature found that passage of these amendments afforded a greater measure of protection for the groups enumerated in this section. House Standing Committee Report No. 459-88, Senate Standing Committee Report No. 2544.

Act 229, Session Laws 1994, amended this section to allow the court discretion to sentence a defendant convicted of a class A felony drug offense (as defined in chapter 712, part IV) to probation. The legislature believed that, in certain instances, the public is better served by allowing judges some discretion in evaluating all appropriate sentencing and treatment alternatives available for drug offenders. Conference Committee Report No. 62.

Act 197, Session Laws 1996, amended this section to retain probation for the offense of manslaughter, which the Act made a class A felony. The legislature believed that courts should still be given the discretion to sentence a person to probation in "extremely rare circumstances where strong mitigating circumstances exist." Conference Committee Report No. 71.

Act 210, Session Laws 2013, amended this section to prohibit sentencing a defendant to a term of probation if the defendant is convicted of cruelty to animals in the first or second degree involving ten or more pet animals. Conference Committee Report No. 74.

Case Notes

Exercise of court's discretion in applying these standards is not reviewable on appeal in absence of abuse. 60 H. 314, 588 P.2d 929 (1979).

Defendant's arrest and conviction for two petty misdemeanors while awaiting sentencing for another conviction demonstrates "undue risk" justifying imprisonment. 4 H. App. 566, 670 P.2d 834 (1983).

Cited: 73 H. 81, 829 P.2d 1325 (1992).

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§706-620 Commentary:

1. Cf. commentary on §706-605.

2. H.R.S. §711-77.

" **§706-621 Factors to be considered in imposing a term of probation.** The court, in determining whether to impose a term of probation, shall consider:

(1) The factors set forth in section 706-606 to the extent that they are applicable;

(2) The following factors, to be accorded weight in favor of withholding a sentence of imprisonment:

(a) The defendant's criminal conduct neither caused nor threatened serious harm;

(b) The defendant acted under a strong provocation;

(c) There were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;

(d) The victim of the defendant's criminal conduct induced or facilitated its commission;

(e) The defendant has no history of prior delinquency or criminal activity or has led a law-abiding

life for a substantial period of time before the commission of the present crime;

(f) The defendant's criminal conduct was the result of circumstances unlikely to recur;

(g) The character and attitudes of the defendant indicate that the defendant is unlikely to commit another crime;

(h) The defendant is particularly likely to respond affirmatively to a program of restitution or a probationary program or both;

(i) The imprisonment of the defendant would entail excessive hardship to the defendant or the defendant's dependents; and

(j) The expedited sentencing program set forth in section 706-606.3, if the defendant has qualified for that sentencing program. [L 1972, c 9, pt of §1; am L 1980, c 165, §1; am L 1986, c 314, §22; gen ch 1992; am L 1993, c 316, §§2, 6; am L 1995, c 157, §1; am L 2001, c 127, §3]

COMMENTARY ON §706-621

This section states grounds or the types of factors which, while not controlling the court in the exercise of its discretion, should be accorded weight in favor of withholding the sanction of imprisonment. The exercise of discretion by different judges cannot be expected to lead to precisely uniform sentences; however, legislative guidelines such as the Code proposes will promote consistency in sentencing.

> Such guides, if properly defined, should serve to promote both the thoughtfulness and consistency of dispositions, while distributing responsibility between the legislature and the court. This is the normal procedure in other fields involving large discretionary powers; there seems no reason why it should not be attempted here.[1]

These factors suggest that the court's first concern might be to determine the future danger threatened by the defendant's continued presence in open society, and that it minimize its concern for the purely deterrent purposes of the sanction of imprisonment.

SUPPLEMENTAL COMMENTARY ON §706-621

Act 165, Session Laws 1980, deleted former paragraphs (2) and (6) and amended paragraph (8). After reviewing the section, the legislature "decided to leave a great deal of discretion with the trial court to allow for the greatest possible leeway in

dealing effectively with convicted persons." Conference Committee Report No. 35-80 (53-80).

Act 316, Session Laws 1993, amended this section to provide that the court, in determining whether to impose a term of probation, shall consider the expedited sentencing program set forth in §706-606.3 if the defendant has qualified for that program. House Standing Committee Report No. 1174, Senate Standing Committee Report No. 849.

Act 157, Session Laws 1995, extended the sunset date of the amendment to this section made by Act 316, Session Laws 1993, from June 30, 1995 to June 30, 2001. The legislature found that the expedited sentencing program served as "a viable alternative in a small number of select cases" and that the program should continue to be available within the criminal justice system. However, the legislature believed that there was insufficient basis to determine whether the program should be made permanent. Conference Committee Report No. 62.

Act 127, Session Laws 2001, repealed the sunset date for the expedited sentencing program of the family court, and in doing so, also prevented the possibility of the inadvertent repeal of important probation laws established in connection with the program. The purpose of the program was to allow for the expeditious removal of the offender from the family home, in cases of intra-family felony sexual assault or incest, thus allowing the child to remain in the home. The legislature found that the program applied only to those offenders found to be "safe to probate" and minimized the possibility of revictimizing the child by eliminating the need to testify and requiring treatment and supervision of all members of the child's family. The legislature further found that the program had been effective and beneficial to the families concerned. Senate Standing Committee Report No. 1453, Conference Committee Report No. 114.

Case Notes

These grounds may be accorded great weight, but do not control the discretion of the court. 60 H. 314, 588 P.2d 929 (1979).

Although "drug use" is not a prerequisite to eligibility for probation under §706-659, the legislature contemplated, consistent with the factors enumerated in this section, that the trial court would grant probation in cases where strong mitigating circumstances favored it. 97 H. 440, 39 P.3d 567 (2002).

Upon revocation of probation pursuant to §706-625(3), in light of the record, §706-660 and this section, trial court did not abuse its discretion in sentencing defendant to imprisonment

"for a term of not more than ten years with credit for time served". 97 H. 135 (App.), 34 P.3d 1034 (2001).
Cited: 73 H. 81, 829 P.2d 1325 (1992).
Mentioned: 76 H. 408, 879 P.2d 513 (1994).

§706-621 Commentary:

1. M.P.C., Tentative Draft No. 2, comments at 34 (1954).

" **§706-622 Requirement of probation; exception.** When a person who has been convicted of a felony is not sentenced to imprisonment, the court shall place the person on probation. Nothing in this part shall prohibit the court from suspending any sentence imposed upon persons convicted of a crime other than a felony. [L 1972, c 9, pt of §1; am L 1986, c 314, §23; gen ch 1992]

COMMENTARY ON §706-622

Once the decision has been made to withhold a sentence of imprisonment, some criteria must be stated for choosing between suspending sentence and sentencing the defendant to probation. The Code favors placing the defendant on probation if the defendant needs "the supervision, guidance, assistance, or direction that the probation service can provide." In the case of defendants convicted of serious crimes, probation will be the usual sentence (if imprisonment is withheld). For those defendants convicted of minor crimes (especially first offenders), a suspended sentence may suffice.

" **§706-622.5 Sentencing for drug offenders; expungement.** (1) Notwithstanding section 706-620(3), a person convicted for the first or second time for any offense under section 329-43.5 involving the possession or use of drug paraphernalia or any felony offense under part IV of chapter 712 involving the possession or use of any dangerous drug, detrimental drug, harmful drug, intoxicating compound, marijuana, or marijuana concentrate, as defined in section 712-1240, but not including any offense under part IV of chapter 712 involving the distribution or manufacture of any such drugs or substances and not including any methamphetamine offenses under sections 712-1240.7, 712-1240.8 as that section was in effect prior to July 1, 2016, 712-1241, and 712-1242, is eligible to be sentenced to probation under subsection (2) if the person meets the following criteria:

(a) The court has determined that the person is nonviolent after reviewing the person's criminal history, the factual circumstances of the offense for which the person is being sentenced, and any other relevant information;

(b) The person has been assessed by a certified substance abuse counselor to be in need of substance abuse treatment due to dependency or abuse under the applicable Diagnostic and Statistical Manual and Addiction Severity Index; and

(c) Except for those persons directed to substance abuse treatment under the supervision of the drug court, the person presents a proposal to receive substance abuse treatment in accordance with the treatment plan prepared by a certified substance abuse counselor through a substance abuse treatment program that includes an identified source of payment for the treatment program.

(2) A person eligible under subsection (1) may be sentenced to probation to undergo and complete a substance abuse treatment program if the court determines that the person can benefit from substance abuse treatment and, notwithstanding that the person would be subject to sentencing as a repeat offender under section 706-606.5, the person should not be incarcerated to protect the public. If the person fails to complete the substance abuse treatment program and the court determines that the person cannot benefit from any other suitable substance abuse treatment program, the person shall be subject to sentencing under the applicable section under this part. As a condition of probation under this subsection, the court may direct the person to undergo and complete substance abuse treatment under the supervision of the drug court if the person has a history of relapse in treatment programs. The court may require other terms and conditions of probation, including requiring that the person contribute to the cost of the substance abuse treatment program, comply with deadlines for entering into the substance abuse treatment program, and reside in a secure drug treatment facility.

(3) For the purposes of this section, "substance abuse treatment program" means drug or substance abuse treatment services provided outside a correctional facility by a public, private, or nonprofit entity that specializes in treating persons who are diagnosed with having substance abuse or dependency and preferably employs licensed professionals or certified substance abuse counselors.

(4) Upon written application from a person sentenced under this part or a probation officer, the court shall issue a court

order to expunge the record of conviction for that particular offense; provided that a person has successfully completed the substance abuse treatment program and complied with other terms and conditions of probation. A person sentenced to probation under this section who has not previously been sentenced under this section shall be eligible for one time only for expungement under this subsection.

(5) Nothing in this section shall be construed to give rise to a cause of action against the State, a state employee, or a treatment provider. [L 2002, c 161, §3; am L 2004, c 44, §11; am L 2006, c 230, §18; am L Sp 2009, c 4, §3; am L 2012, c 140, §2; am L 2016, c 231, §21]

COMMENTARY ON §706-622.5

Act 161, Session Laws 2002, added this section to require, among other things, that first-time nonviolent drug offenders be sentenced to undergo and complete drug treatment instead of incarceration. The legislature found that the link between substance abuse and crime is well-established. The legislature did not wish to diminish the seriousness of crime, but looked to approaching crime as being the result of addiction that is treatable. The treatment route was expected to produce a reduction in crime and recidivism. The legislature intended to promote treatment of nonviolent substance abuse offenders, rather than incarceration, as being in the best interests of the individual and the community at large. Conference Committee Report No. 96-02.

Act 230, Session Laws 2006, amended subsection (1) to exclude the offenses of methamphetamine trafficking in the first and second degrees from the offenses for which first-time drug offenders may be eligible to be sentenced to probation.

Act 4, Special Session Laws 2009, amended subsection (2) authorizing the placement of certain drug offenders in secure drug treatment facilities, to promote the rehabilitation of convicted drug offenders through alternatives to incarceration. The legislature found that providing convicted drug offenders with drug rehabilitation programs in a secure drug treatment facility would reduce the offenders' rate of recidivism upon release and help the offenders develop an important and meaningful role in society. Senate Standing Committee Report No. 1285, Conference Committee Report No. 25.

Act 140, Session Laws 2012, amended this section by: (1) allowing for the sentence of probation for certain second time drug offenses; and (2) clarifying that a person sentenced to probation as a first time drug offender who has not been previously sentenced to probation as a drug offender shall be

eligible for expungement only once. The legislature found that the rates of crime, victimization, and arrests and felony convictions for violent and property crimes had declined, while the number of persons incarcerated or under probation supervision, in some cases, had increased. The legislature also found that existing law required the courts to impose a prison sentence for an offender who had a second felony conviction for drug possession. Act 140 amended the law to allow for second time drug offenders to be eligible for probation. Senate Standing Committee Report No. 3352, Conference Committee Report No. 130-12.

Act 231, Session Laws 2016, amended subsections (1) and (4) to implement recommendations made by the Penal Code Review Committee convened pursuant to House Concurrent Resolution No. 155, S.D. 1 (2015).

Case Notes

Inasmuch as the plain and unambiguous language of §706-606.5 requires application of the repeat offender statute over "any other law to the contrary", the circuit court did not err in sentencing defendant as a repeat offender pursuant to §706-606.5; in all cases in which §706-606.5 is applicable, including those in which a defendant would otherwise be eligible for probation under this section, the circuit courts must sentence defendants pursuant to the provisions of §706-606.5. 103 H. 228, 81 P.3d 408 (2003).

Defendants with prior felony convictions of drug offenses are disqualified from sentencing pursuant to this section, even if the convictions occurred in other jurisdictions and therefore not "under part IV of chapter 712", so long as the offenses would implicate part IV of chapter 712 if committed in Hawaii. 104 H. 71, 85 P.3d 178 (2004).

By its plain language, Act 44, L 2004, prospectively permitted greater discretion to sentencing courts confronted with conflicts between this section and §706-606.5 than they previously possessed; thus, based on the legislative intent reflected in Act 44, the Act 161, L 2002 version of this section, under which defendant was sentenced, did not trump the repeat offender statute. 106 H. 1, 100 P.3d 595 (2004).

As section is ameliorative in its intent and effect and its application would neither be detrimental nor materially disadvantageous to the defendant, retrospective application of this section as established by Act 161, L 2002, was not prohibited; where defendant did not qualify as a first-time drug offender, the trial court did not err in sentencing defendant

pursuant to §712-1243(3) (2002). 107 H. 215, 112 P.3d 69 (2005).

Consistent with §706-625(1), because petitioner, who was sentenced to probation under subsection (1), had completed petitioner's probation term and was subsequently discharged and thus "satisfied the disposition of the court", as provided by §706-630, petitioner had, in effect, complied with the terms and conditions of probation for purposes of expungement under subsection (4). 129 H. 363, 300 P.3d 1022 (2013).

" **[§706-622.8] First-time drug offender prior to 2004; probation; expungement.** A person sentenced prior to July 1, 2004, for a first-time drug offense, pursuant to section 706-622.5, and who otherwise meets all the requirements of section 706-622.5, may apply to the court for expungement of the record of conviction for the drug offense. The court shall issue a court order to expunge the record of conviction for the drug offense; provided the person has successfully completed a substance abuse treatment program and has complied with the other terms and conditions set by the court. A person granted an expungement of conviction under this section or section 706-622.5(4) shall not be eligible for another expungement of conviction under this section or section 706-622.5. [L 2006, c 58, §1]

COMMENTARY ON §706-622.8

Act 58, Session Laws 2006, added this section to allow a person sentenced prior to July 1, 2004, for a first-time drug offense pursuant to §706-622.5, who completed a drug treatment program and complied with the terms set by the court, to apply for expungement of the record of conviction. Act 58 corrected a drafting error in Act 161, Session Laws 2002, which authorized an expungement of the record of arrest rather than the record of conviction. Act 44, Session Laws 2004, corrected the error, authorizing the expungement of the record of conviction, but only prospectively from its effective date, July 1, 2004. This led to the inconsistent result of some defendants being permitted to expunge their record of conviction and others not being able to do so. Act 58 permitted defendants sentenced prior to Act 44, Session Laws 2004, to expunge their record of conviction. Senate Standing Committee Report No. 3212.

" **§706-622.9 Sentencing for first-time property offenders; expungement.** (1) Notwithstanding section 706-620(3), a person convicted for the first time of any class C felony property offense under chapter 708 who has not previously been sentenced

under section 706-606.5, section 706-622.5, or this section is eligible to be sentenced to probation under subsection (2) if the person meets the following criteria:

(a) The court has determined that the person is nonviolent after reviewing the person's criminal history, the factual circumstances of the offense for which the person is being sentenced, and any other relevant information;

(b) The person has been assessed by a certified substance abuse counselor to be in need of substance abuse treatment due to dependency or abuse under the applicable Diagnostic and Statistical Manual and Addiction Severity Index;

(c) The court has determined that the offense for which the person is being sentenced is related to the person's substance abuse dependency or addiction;

(d) The court has determined that the person is genuinely motivated to obtain and maintain substance abuse treatment, based upon consideration of the person's history, including whether substance abuse treatment has previously been afforded to the person, and an appraisal of the person's current circumstances and attitude; and

(e) Except for those persons directed to substance abuse treatment under the supervision of the drug court, the person presents a proposal to receive substance abuse treatment in accordance with the treatment plan prepared by a certified substance abuse counselor through a substance abuse treatment program that includes an identified source of payment for the treatment program.

(2) A person eligible under subsection (1) may be sentenced to probation to undergo and complete a substance abuse treatment program if the court determines that the person can benefit from substance abuse treatment and, notwithstanding that the person would be subject to sentencing as a repeat offender under section 706-606.5, the person should not be incarcerated to protect the public. If the person fails to complete the substance abuse treatment program and the court determines that the person cannot benefit from any other suitable substance abuse treatment program, the person shall be sentenced as provided in this part. As a condition of probation under this subsection, the court may direct the person to undergo and complete substance abuse treatment under the supervision of the drug court if the person has a history or relapse in treatment programs. The court may require other terms and conditions of probation, including requiring that the person contribute to the

cost of the substance abuse treatment program, comply with deadlines for entering into the substance abuse treatment program, and reside in a secure drug treatment facility.

(3) Upon written application from a person sentenced under this part or a probation officer, the court shall issue a court order to expunge the record of conviction for that particular offense; provided that a person has successfully completed the substance abuse treatment program and complied with other terms and conditions of probation. A person sentenced to probation under this section shall be eligible for expungement under this subsection only if the person has not been previously convicted of a felony offense in this or another jurisdiction.

(4) Nothing in this section shall be construed to give rise to a cause of action against the State, a state employee, or a treatment provider.

(5) For the purposes of this section, "substance abuse treatment program" means drug or substance abuse treatment services provided outside a correctional facility by a public, private, or nonprofit entity that specializes in treating persons who are diagnosed with having substance abuse or dependency and preferably employs licensed professionals or certified substance abuse counselors. [L 2006, c 230, §1; am L Sp 2009, c 4, §4; am L 2016, c 231, §22]

COMMENTARY ON §706-622.9

Act 230, Session Laws 2006, added §706-622.9, to provide guidelines for the sentencing of first-time property offenders and the expungement of records. House Standing Committee Report No. 665-06.

Act 4, Special Session Laws 2009, amended subsection (2) authorizing the placement of certain drug offenders in secure drug treatment facilities, to promote the rehabilitation of convicted drug offenders through alternatives to incarceration. The legislature found that providing convicted drug offenders with drug rehabilitation programs in a secure drug treatment facility would reduce the offenders' rate of recidivism upon release and help the offenders develop an important and meaningful role in society. Senate Standing Committee Report No. 1285, Conference Committee Report No. 25.

Act 231, Session Laws 2016, amended subsection (3) to implement recommendations made by the Penal Code Review Committee convened pursuant to House Concurrent Resolution No. 155, S.D. 1 (2015).

" **§706-623 Terms of probation.** (1) When the court has sentenced a defendant to be placed on probation, the period of

probation shall be as follows, unless the court enters the reason therefor on the record and sentences the defendant to a shorter period of probation:

(a) Ten years upon conviction of a class A felony;

(b) Five years upon conviction of a class B or class C felony under part II, V, or VI of chapter 707, chapter 709, and part I of chapter 712 and four years upon conviction of any other class B or C felony;

(c) One year upon conviction of a misdemeanor; except that upon a conviction under section 586-4, 586-11, or 709-906, the court may sentence the defendant to a period of probation not exceeding two years; or

(d) Six months upon conviction of a petty misdemeanor; provided that up to one year may be imposed upon a finding of good cause.

The court, on application of a probation officer, on application of the defendant, or on its own motion, may discharge the defendant at any time. Prior to the court granting early discharge, the defendant's probation officer shall be required to report to the court concerning the defendant's compliance or non-compliance with the conditions of the defendant's probation and the court shall afford the prosecuting attorney an opportunity to be heard. The terms of probation provided in this part, other than in this section, shall not apply to sentences of probation imposed under section 706-606.3.

(2) When a defendant who is sentenced to probation has previously been detained in any state or county correctional or other institution following arrest for the crime for which sentence is imposed, the period of detention following arrest shall be deducted from the term of imprisonment if the term is given as a condition of probation. The pre-sentence report shall contain a certificate showing the length of such detention of the defendant prior to sentence in any state or county correctional or other institution, and the certificate shall be annexed to the official records of the defendant's sentence. [L 1972, c 9, pt of §1; am L 1986, c 314, §24; am L 1989, c 124, §1; am L 1993, c 316, §§3, 6; am L 1994, c 229, §2; am L 1995, c 157, §1; am L 1998, c 172, §7; am L 2001, c 127, §3; am L 2006, c 230, §19; am L 2009, c 88, §§8, 17(1); am L 2010, c 166, §21; am L 2012, c 140, §3 and c 143, §1]

Note

The L 2012, c 140, §3 amendment applies to offenses committed on or after January 1, 2013. L 2012, c 140, §5.

COMMENTARY ON §706-623

This section is in accord with previous Hawaii law providing a maximum probation period of five years in felony cases.[1] The prior law did not, however, state a maximum period of suspension of sentence in felony cases--although, by implication, it could have been read as five years also.[2] With respect to felony cases, this section of the Code changes the law by explicitly correlating the maximum period of suspension with the maximum period of probation. Whether the defendant should be sentenced to probation because the defendant needs supervision, guidance, assistance, or direction is an independent question; there is no rational basis for providing a longer period for suspension than for probation.

Because of the structure of courts in Hawaii, some anomalous results obtained under prior law. Upon the appeal of a misdemeanor case from the district court to the circuit court, the defendant, if conviction was upheld, could have had the defendant's sentence suspended or be sentenced to probation in the same manner and for the same period as a convicted felon.[3] Had the misdemeanant not appealed the misdemeanant would have been subject solely to the district court, the powers of which were more limited in this area. Prior to this Code, the district court did not have a probation service; however, the district magistrate could suspend the imposition or execution of sentence on the terms or conditions the district magistrate deemed best. The period of suspension could not, however, exceed thirteen months.[4]

The changes which this section makes in the law are obvious. It provides a maximum period of suspension of sentence or probation for misdemeanants, petty misdemeanants, and felons regardless of the court handling the case. Secondly, it would allow probation to be utilized by district court magistrates if a probation service is established in that court.

SUPPLEMENTAL COMMENTARY ON §706-623

Section 623 of the Proposed Code provided that the period of suspension or probation shall be two years in the case of a conviction for a misdemeanor or petty misdemeanor. However, the Legislature reduced the period to one year in the case of a conviction for a misdemeanor and six months in the case of a conviction for a petty misdemeanor, finding the proposed two-year period too severe and inconsistent with the actual length of imprisonment allowed upon conviction for these offenses. Conference Committee Report No. 2 (1972).

Act 124, Session Laws 1989, required courts to grant pre-sentence imprisonment credit to defendants who had been

sentenced to imprisonment as a condition of probation and who were detained prior to sentencing. Senate Standing Committee Report No. 1342.

Act 316, Session Laws 1993, amended this section to provide that the terms of probation in chapter 706, part II, other than in this section, shall not apply to sentences of probation imposed under §706-606.3, which creates an option for the expedited sentencing of persons who have committed intra-family sexual assault. House Standing Committee Report No. 1174, Senate Standing Committee Report No. 849.

Act 229, Session Laws 1994, amended this section to provide, inter alia, that when a defendant is sentenced to be placed on probation, the period of probation shall be ten years upon conviction of a class A felony unless the court enters the reason therefor on the record and sentences the defendant to a shorter period of probation. The legislature found that a longer probationary period for class A felony drug offenders would protect the public's interests and safety in the unusual cases where probation may be granted. Conference Committee Report No. 62.

Act 157, Session Laws 1995, extended the sunset date of the amendment to this section made by Act 316, Session Laws 1993, from June 30, 1995 to June 30, 2001. The legislature found that the expedited sentencing program served as "a viable alternative in a small number of select cases" and that the program should continue to be available within the criminal justice system. However, the legislature believed that there was insufficient basis to determine whether the program should be made permanent. Conference Committee Report No. 62.

Act 172, Session Laws 1998, amended this section to allow for a two-year sentence of probation for domestic violence convictions. Conference Committee Report No. 80.

Act 127, Session Laws 2001, repealed the sunset date for the expedited sentencing program of the family court, and in doing so, also prevented the possibility of the inadvertent repeal of important probation laws established in connection with the program. The purpose of the program was to allow for the expeditious removal of the offender from the family home, in cases of intra-family felony sexual assault or incest, thus allowing the child to remain in the home. The legislature found that the program applied only to those offenders found to be "safe to probate" and minimized the possibility of revictimizing the child by eliminating the need to testify and requiring treatment and supervision of all members of the child's family. The legislature further found that the program had been effective and beneficial to the families concerned. Senate

Standing Committee Report No. 1453, Conference Committee Report No. 114.

Act 230, Session Laws 2006, amended subsection (1) to allow a six-month extension of probation for a petty misdemeanor if good cause is found. House Standing Committee Report No. 665-06.

Act 88, Session Laws 2009, amended subsection (1) to permit probationary periods of eighteen to twenty-four months for persons convicted under various conditions for driving under the influence. Act 88 continued to promote highway safety by statutorily establishing several recommendations of the ignition interlock implementation task force established by Act 171, Session Laws 2008. House Standing Committee Report No. 617, Conference Committee Report No. 116.

Act 166, Session Laws 2010, amended subsection (1) by eliminating probationary provisions for convicted second and third [driving under the influence] offenders. Act 166 continued the work of the ignition interlock implementation task force, as a final implementation of the recommendations regarding the ignition interlock device program. The legislature found that although gains were made in reducing both driving under the influence arrests and the total number of alcohol-related fatalities, today's offender is more likely to have a highly elevated alcohol concentration and, as a whole, Hawaii's rate of alcohol-related fatalities remains unacceptably high. However, people with revoked licenses still need to get to work, to transport their families, and to fulfill other obligations, and there often is no efficient alternative to driving. Just as there is no single cause of this problem, there is no single solution, and Hawaii needs another tool to address it. House Standing Committee Report No. 718-10, Senate Standing Committee Report No. 2167, Conference Committee Report No. 88-10.

Act 140, Session Laws 2012, amended this section by: (1) allowing for probation for a period of four years for certain class B or class C felonies; and (2) clarifying that prior to granting early discharge, a defendant's probation officer must report to the court concerning the defendant's non-compliance, in addition to the defendant's compliance with the conditions of the defendant's probation. The legislature found that Act 140 was an outgrowth of the Justice Reinvestment Working Group and the Council of State Governments Justice Center to study, analyze, and make recommendations for improvements in the criminal justice system and corrections system in all fifty states. The analysis revealed that crime and victimization rates in Hawaii have declined, as have arrests and felony convictions for violent and property crimes. However, the population under probation supervision and incarceration has not

declined, and in some cases had increased. Senate Standing Committee Report No. 2973, Conference Committee Report No. 130-12.

Act 143, Session Laws 2012, amended this section to require a defendant's probation officer to provide the court information regarding the defendant's compliance or non-compliance with probation prior to the court determining whether to grant an early discharge from probation. The legislature found that under existing law, the court may grant early discharge from probation without input from a defendant's probation officer regarding that defendant's compliance with probation terms. Act 143 served as an additional tool for the courts to use in their assessment and determination of whether a defendant should be discharged from probation early. Conference Committee Report No. 73-12.

Case Notes

Subsection (2) pertains to periods of detention served following arrest and prior to the sentence imposed by the court in the first instance; circuit court did not abuse its discretion in refusing to credit defendant for time served in conjunction with previous periods of probation. 79 H. 194, 900 P.2d 770 (1995).

Section does not authorize trial court to compel a criminal defendant to execute a promissory note in the amount of any restitution order, or any balance thereof, as a condition of probation. 83 H. 105, 924 P.2d 1211 (1996).

Defendant was not statutorily entitled to credit for time served under presentence house arrest where conditions and restrictions of house arrest did not amount to detention in a "state or county institution"; as defendant enjoyed no visitation, living environment, or telephone or other communicative restrictions, and was under the direct supervision of private citizens, including parents, relatives and friends, defendant was not confined in an "other institution" within the meaning of subsection (2). 94 H. 315, 13 P.3d 324 (2000).

To fall within the ambit of subsection (2), a defendant detained in an "other institution" must be confined in such a manner as to be tantamount to imprisonment in a state or county correctional institution; defendant must be under the direct supervision and control of state or county actors, or actors under state or county control, such as subcontracted halfway houses or drug treatment centers. 94 H. 315, 13 P.3d 324 (2000).

Cited: 146 F.3d 661 (1998).

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§706-623 Commentary:

1. H.R.S. §711-77.

2. Id.

3. Id.

4. H.R.S. §710-12.

" **§706-624 Conditions of probation.** (1) Mandatory conditions. The court shall provide, as an explicit condition of a sentence of probation:

(a) That the defendant not commit another federal or state crime or engage in criminal conduct in any foreign jurisdiction or under military jurisdiction that would constitute a crime under Hawaii law during the term of probation;

(b) That the defendant report to a probation officer as directed by the court or the probation officer;

(c) That the defendant remain within the jurisdiction of the court, unless granted permission to leave by the court or a probation officer;

(d) That the defendant notify a probation officer prior to any change in address or employment;

(e) That the defendant notify a probation officer promptly if arrested or questioned by a law enforcement officer;

(f) That the defendant permit a probation officer to visit the defendant at the defendant's home or elsewhere as specified by the court; and

(g) That the defendant make restitution for losses suffered by the victim or victims if the court has ordered restitution pursuant to section 706-646.

(2) Discretionary conditions. The court may provide, as further conditions of a sentence of probation, to the extent that the conditions are reasonably related to the factors set forth in section 706-606 and to the extent that the conditions involve only deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 706-606(2), that the defendant:

(a) Serve a term of imprisonment to be determined by the court at sentencing in class A felony cases under section 707-702, not exceeding two years in class A felony cases under part IV of chapter 712, not exceeding eighteen months in class B felony cases, not exceeding one year in class C felony cases, not

exceeding six months in misdemeanor cases, and not exceeding five days in petty misdemeanor cases; provided that notwithstanding any other provision of law, any order of imprisonment under this subsection that provides for prison work release shall require the defendant to pay thirty per cent of the defendant's gross pay earned during the prison work release period to satisfy any restitution order. The payment shall be handled by the adult probation division and shall be paid to the victim on a monthly basis;

(b) Perform a specified number of hours of services to the community as described in section 706-605(1)(d);

(c) Support the defendant's dependents and meet other family responsibilities;

(d) Pay a fine imposed pursuant to section 706-605(1)(b);

(e) Work conscientiously at suitable employment or pursue conscientiously a course of study or vocational training that will equip the defendant for suitable employment;

(f) Refrain from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the crime or engage in the specified occupation, business, or profession only to a stated degree or under stated circumstances;

(g) Refrain from frequenting specified kinds of places or from associating unnecessarily with specified persons, including the victim of the crime, any witnesses, regardless of whether they actually testified in the prosecution, law enforcement officers, co-defendants, or other individuals with whom contact may adversely affect the rehabilitation or reformation of the person convicted;

(h) Refrain from use of alcohol or any use of narcotic drugs or controlled substances without a prescription;

(i) Refrain from possessing a firearm, ammunition, destructive device, or other dangerous weapon;

(j) Undergo available medical or mental health assessment and treatment, including assessment and treatment for substance abuse dependency, and remain in a specified facility if required for that purpose;

(k) Reside in a specified place or area or refrain from residing in a specified place or area;

(l) Submit to periodic urinalysis or other similar testing procedure;

(m) Refrain from entering specified geographical areas without the court's permission;

(n) Refrain from leaving the person's dwelling place except to go to and from the person's place of employment, the office of the person's physician or dentist, the probation office, or any other location as may be approved by the person's probation officer pursuant to court order. As used in this paragraph, "dwelling place" includes the person's yard or, in the case of condominiums, the common elements;

(o) Comply with a specified curfew;

(p) Submit to monitoring by an electronic monitoring device;

(q) Submit to a search by any probation officer, with or without a warrant, of the defendant's person, residence, vehicle, or other sites or property under the defendant's control, based upon the probation officer's reasonable suspicion that illicit substances or contraband may be found on the person or in the place to be searched;

(r) Sign a waiver of extradition and pay extradition costs as determined and ordered by the court;

(s) Comply with a service plan developed using current assessment tools; and

(t) Satisfy other reasonable conditions as the court may impose.

(3) Written statement of conditions. The court shall order the defendant at the time of sentencing to sign a written acknowledgment of receipt of conditions of probation. The defendant shall be given a written copy of any requirements imposed pursuant to this section, stated with sufficient specificity to enable the defendant to comply with the conditions accordingly. [L 1972, c 9, pt of §1; am L 1973, c 136, §5; am L 1978, c 224, §1; am L 1984, c 257, §2; am L 1986, c 314, §25; am L 1987, c 262, §1; am L 1989, c 48, §1; am L 2006, c 230, §20; am L 2012, c 292, §3; am L 2016, c 231, §23]

COMMENTARY ON §706-624

Previous Hawaii law provided the sentencing court with limited guidance or control in the exercise of its discretion in imposing conditions upon suspension of sentence or upon sentence to probation. The circuit court could impose "such terms and conditions as it may deem best" and was specifically authorized to condition probation on (1) commitment to the Hawaii Youth Correctional Facility, (2) periodic or intermittent confinement in a county jail, (3) payment of a fine in a prescribed manner,

(4) restitution or reparation, and (5) providing support to a person for whose support the defendant is legally responsible.[1] District courts could condition suspension of sentence on "such terms and conditions as the magistrate may deem best." The magistrate was specifically authorized to condition suspension on (1) periodic or intermittent confinement in jail, and (2) attendance at a traffic course or school prescribed by the magistrate.[2]

The Code seeks to focus on various appropriate conditions without limiting unduly the exercise of judicial discretion. Subsection (2) presents various authorized conditions and subsection (2)(m) is intended to insure flexibility for the court in devising the imposing conditions, provided the "conditions reasonably relate to the rehabilitation of the defendant."

Subsection (3) continues past statutory authorization for limited imprisonment as a condition of probation, but sets the maximum at six months. Probation and imprisonment are in some respects inconsistent with one another. Probation attempts to correct the defendant without interrupting the defendant's contact with open society. Imprisonment, on the other hand, is the isolation of the defendant from open society. Notwithstanding this area of inconsistency, the Code recognizes the utility of providing a limited degree of imprisonment as a possible condition of probation.

Subsection (3) also continues the past policy of the law by providing that the court may order that the term of imprisonment required to be served as a condition of probation be served intermittently. Thus, the court may, for example, order that the defendant serve the defendant's period of confinement at nights or on weekends so that undue economic hardship will not result to the defendant or members of the defendant's family.

Subsection (4) is an addition to the law suggested by the Model Penal Code and accepted in other states.[3] The intent is to provide the defendant with notice of what is expected of the defendant in a form which will not escape the defendant's memory.

SUPPLEMENTAL COMMENTARY ON §706-624

Act 136, Session Laws 1973, amended subsection (3) by deleting a sentence which provided that upon revocation of probation any term of imprisonment served as part of the probation shall not be credited toward the subsequent imprisonment. The legislature felt that the allowance of credit would do equity. Senate Standing Committee Report No. 858, House Standing Committee Report No. 726.

Act 224, Session Laws 1978, amended subsection (3) to authorize a court when sentencing a felon to probation to impose a term of imprisonment not exceeding one year as a condition of probation. The amendment is intended to give the court the discretion to require a convicted felon to serve a longer term of imprisonment as a condition of probation than a person convicted of a misdemeanor. Under prior law the maximum term of imprisonment, whether for a felon or for a misdemeanant, was set at six months.

Act 257, Session Laws 1984, added subsection (2)(g) to allow a court, as a condition of a suspended sentence or probation, to restrict a convicted person from entering certain geographical areas without the court's permission.

Act 262, Session Laws 1987, amended this section to provide home detention as an alternative to incarceration. The use of home detention is limited. It is not meant to be used as a means to reduce the prison population, or as a means to place a prisoner on probation or early release where the prisoner is in need of intensive supervision or is not eligible or qualified for early parole. The legislature does not intend home detention to be used by a court as justification to sentence a convicted person to probation if the person would not otherwise be sentenced to probation under the existing discretionary conditions. Senate Conference Committee Report No. 61, House Conference Committee Report No. 35.

Act 48, Session Laws 1989, required convicted persons on work release to pay a percentage of their earnings for restitution. Senate Standing Committee Report No. 1133, House Standing Committee Report No. 629.

Act 230, Session Laws 2006, amended this section by, among other things, (1) expanding the conditions of probation to include prohibiting the defendant from engaging in criminal conduct in any foreign or military jurisdiction that would constitute a crime under Hawaii law during the term of probation; (2) requiring the defendant to make restitution to the victim if ordered by the court; (3) increasing the terms of imprisonment that may be imposed as part of a sentence of probation and including five days' imprisonment for petty misdemeanors; and (4) including ammunition as an item that a person on probation may be prohibited from possessing. House Standing Committee Report No. 665-06.

Act 292, Session Laws 2012, amended subsection (2) by providing the courts with discretion when determining terms of imprisonment for various offenses and stipulating maximum terms of imprisonment for these offenses. The legislature noted that traffic related fatalities were a serious issue and that persons convicted of certain offenses involving traffic fatalities

should be dealt with accordingly. Further, the legislature believed that a judge should continue to hold the discretionary authority regarding the term of imprisonment as a condition of probation for a person convicted of manslaughter. Finally, allowing the courts the discretion to impose terms of imprisonment for certain violations up to a maximum period would help to ensure the safety of Hawaii's roadways. Senate Standing Committee Report No. 3229, Conference Committee Report No. 44-12.

Act 231, Session Laws 2016, amended subsection (2) to authorize a court, among other things, to add, as a condition for probation under certain circumstances, that a defendant submit to searches by a probation officer of the defendant's person, residence, vehicle, or other sites and property under the defendant's control, and to sign a waiver of extradition and pay extradition costs as the court may determine. Conference Committee Report No. 138-16.

Case Notes

Condition that defendant "refrain from company of people of questionable character" was not invalid for vagueness. 59 H. 366, 580 P.2d 1282 (1978).

Conditions imposed must be reasonable. 59 H. 378, 581 P.2d 759 (1978).

Where time for performing condition is not specified, performance is to be within a reasonable time. 59 H. 378, 581 P.2d 759 (1978).

Purpose and intent is to have convicted person make restitution for criminal acts; court can delegate function of making recommendations regarding restitution but cannot delegate sentencing function. 68 H. 292, 711 P.2d 1295 (1985).

Requirement that defendant submit to periodic urinalysis for drugs was proper. 72 H. 67, 806 P.2d 407 (1991).

If, at a combined sentencing disposition, imprisonment is imposed as a condition in more than one probation sentence, the period of imprisonment served for concurrent sentences of probation shall not exceed the maximum term allowed for a sentence of probation. 97 H. 430, 39 P.3d 557 (2002).

In a sentence of probation, imprisonment may be imposed only as a condition of the sentence of probation, not to exceed the maximum term established in subsection (2)(a). 97 H. 430, 39 P.3d 557 (2002).

A sentencing court may not impose discretionary conditions of probation pursuant to subsection (2) unless there is a factual basis in the record indicating that such conditions "are reasonably related to the factors set forth in §706-606" and

insofar as such "conditions involve only deprivations of liberty or property", that they are reasonably necessary for the purposes indicated in §706-606(2). 103 H. 462, 83 P.3d 725 (2004).

Based on defendant's history, the circumstances of the case, and the seriousness of the offense, the family court did not exceed the bounds of reason or disregard rules or principles of law to the substantial detriment of defendant when it sentenced defendant to undergo sex offender evaluation and treatment as a condition of probation. 107 H. 117, 111 P.3d 12 (2005).

A straightforward reading of subsection (3) prohibits the adoption of an "actual notice" rule; thus, under the plain and unambiguous language of subsection (3), it is mandated that defendants be given written copies of their conditions. 118 H. 15, 185 P.3d 200 (2008).

In connection with the conditions from this section that are incorporated by reference in §853-1, the "provision" in subsection (3) that requires a defendant who is granted probation to be given a written copy of the conditions, must necessarily apply to a defendant granted a deferred acceptance of guilty plea, who must adhere to such similar conditions. 118 H. 15, 185 P.3d 200 (2008).

Defendant's probation may not be revoked for failure to comply with special condition of probation, even though defendant was never provided with written notice of that condition, as required by subsection (3). 10 H. App. 192, 862 P.2d 295 (1993).

Seven-day term of imprisonment was not unreasonably related to factors set forth in §706-606, considering nature of offense and circumstances presented by the record. 10 H. App. 381, 876 P.2d 1331 (1994).

Based on this statute and §706-671(1), sentencing court would have no authority to sentence defendant to five years' probation and more than one year in prison; furthermore, the court was required to credit defendant for time already served in pre-trial detention. 79 H. 317 (App.), 901 P.2d 1296 (1995).

In light of paragraph (n), family court was authorized to require defendant to undergo polygraph testing as a reasonable condition of the granting of defendant's deferred acceptance of nolo contendere plea under §853-1. 92 H. 289 (App.), 990 P.2d 1171 (1999).

Where, pursuant to paragraph (3) (2005), defendant did not receive a written copy of the conditions of defendant's deferred acceptance of no contest plea, trial court erred in setting aside plea. 116 H. 38 (App.), 169 P.3d 990 (2007).

Family court did not abuse its discretion by requiring defendant to attend domestic violence counseling as a condition of defendant's probation; where defendant was charged with

endangering the welfare of an incompetent person under §709-905 based on substantial evidence that defendant assaulted complainant, under subsection (2), the court was free to impose discretionary conditions of probation that are reasonably related to the factors set forth in §706-606 and to the extent that the conditions involve only deprivations of liberty as is reasonably necessary for the purposes indicated in §706-606(2). 121 H. 228 (App.), 216 P.3d 1251 (2009).

Because there was no provision in §706-605 for the imposition of anger management or other treatment programs, but subsection (2)(j) authorized the imposition of, inter alia, mental health treatment as a discretionary term of probation, district court erred by sentencing defendant to both the thirty-day term of imprisonment (the maximum term of imprisonment for a petty misdemeanor) and anger management classes for defendant's harassment conviction (a petty misdemeanor). Defendant could have been sentenced to a thirty-day term of incarceration or a six-month term of probation, but not both, and thus defendant's sentence was illegal. 130 H. 332 (App.), 310 P.3d 1033 (2013).

Cited: 73 H. 81, 829 P.2d 1325 (1992).

Discussed: 78 H. 343, 893 P.2d 194 (1995).

Mentioned: 74 H. 75, 837 P.2d 776 (1992).

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§706-624 Commentary:

1. H.R.S. §711-77.

2. Id. §710-12.

3. M.P.C. §301.1, Tentative Draft No. 2, comments at 145-146 (1954).

" **§706-624.5 Notice of probation.** (1) Whenever the court places a defendant convicted of an offense against the person as described in chapter 707, or of an attempt to commit such an offense on probation without requiring the serving of a term of imprisonment, the court shall provide written notice to each victim of such offense of the probation, whenever the victim has made a written request for such notice. Notice shall be given to the victim at the address given on the request for notice or such other address as may be provided to the court by the victim from time to time.

(2) Neither the failure of any state officer or employee to carry out the requirements of this section nor compliance with it shall subject the State or the officer or employee to liability in any civil action. However, such failure may

provide a basis for such disciplinary action as may be deemed appropriate by competent authority. [L 1983, c 184, §2(1); am L 1986, c 314, §26]

Cross References

Notice of escape, see §706-673.

Rights of victims and witnesses in criminal proceedings, see chapter 801D.

COMMENTARY ON §706-624.5

Act 184, Session Laws 1983, added this section to require notification to a crime victim if a defendant who harmed the victim is released into the community after conviction. This addition was intended to insure that crime victims "are treated with fairness and respect" and that agencies in the criminal justice system cooperate with each other to provide information and other help to crime victims. House Conference Committee Report No. 46.

" **§706-625 Revocation, modification of probation conditions.** (1) The court, on application of a probation officer, the prosecuting attorney, the defendant, or on its own motion, after a hearing, may revoke probation except as provided in subsection (7), reduce or enlarge the conditions of a sentence of probation, pursuant to the provisions applicable to the initial setting of the conditions and the provisions of section 706-627.

(2) The prosecuting attorney, the defendant's probation officer, and the defendant shall be notified by the movant in writing of the time, place, and date of any such hearing, and of the grounds upon which action under this section is proposed. The prosecuting attorney, the defendant's probation officer, and the defendant may appear in the hearing to oppose or support the application, and may submit evidence for the court's consideration. The defendant shall have the right to be represented by counsel. For purposes of this section the court shall not be bound by the Hawaii rules of evidence, except for the rules pertaining to privileges.

(3) The court shall revoke probation if the defendant has inexcusably failed to comply with a substantial requirement imposed as a condition of the order or has been convicted of a felony. The court may revoke the suspension of sentence or probation if the defendant has been convicted of another crime other than a felony.

(4) The court may modify the requirements imposed on the defendant or impose further requirements, if it finds that such action will assist the defendant in leading a law-abiding life.

(5) When the court revokes probation, it may impose on the defendant any sentence that might have been imposed originally for the crime of which the defendant was convicted.

(6) As used in this section, "conviction" means that a judgment has been pronounced upon the verdict.

(7) The court may require a defendant to undergo and complete a substance abuse treatment program when the defendant has committed a violation of the terms and conditions of probation involving possession or use, not including to distribute or manufacture as defined in section 712-1240, of any dangerous drug, detrimental drug, harmful drug, intoxicating compound, marijuana, or marijuana concentrate, as defined in section 712-1240, unlawful methamphetamine trafficking as provided in section 712-1240.6, or involving possession or use of drug paraphernalia under section 329-43.5. If the defendant fails to complete the substance abuse treatment program or the court determines that the defendant cannot benefit from any other suitable substance abuse treatment program, the defendant shall be subject to revocation of probation and incarceration. The court may require the defendant to:

(a) Be assessed by a certified substance abuse counselor for substance abuse dependency or abuse under the applicable Diagnostic and Statistical Manual and Addiction Severity Index;

(b) Present a proposal to receive substance abuse treatment in accordance with the treatment plan prepared by a certified substance abuse counselor through a substance abuse treatment program that includes an identified source of payment for the treatment program;

(c) Contribute to the cost of the substance abuse treatment program; and

(d) Comply with any other terms and conditions of probation.

As used in this subsection, "substance abuse treatment program" means drug or substance abuse treatment services provided outside a correctional facility by a public, private, or nonprofit entity that specializes in treating persons who are diagnosed with substance abuse or dependency and preferably employs licensed professionals or certified substance abuse counselors.

Nothing in this subsection shall be construed to give rise to a cause of action against the State, a state employee, or a treatment provider. [L 1972, c 9, pt of §1; am L 1985, c 192,

§1; am L 1986, c 314, §27; am L 1989, c 45, §1; gen ch 1993; am L 1994, c 5, §6; am L 2002, c 161, §5; am L 2004, c 44, §12]

Note

Section 712-1240.6 referred to in text is repealed.

COMMENTARY ON §706-625

This section restates prior law[1] and allows the court to increase or relax the conditions of probation. Such power is essential if the disposition is to remain flexible. However, if an increase in the severity of the conditions is proposed, the court must accord the defendant the procedural rights stated in §706-627.

SUPPLEMENTAL COMMENTARY ON §706-625

Act 192, Session Laws 1985, amended this section and consolidated it with the law governing the revocation of probation or suspension of sentence, formerly contained in §706-628 and part of §706-627. As a result, §706-628 is repealed.

Act 45, Session Laws 1989, defined the word "conviction" as applied in the revocation or modification of probation conditions. Senate Standing Committee Report No. 1282, House Standing Committee Report No. 844.

Act 5, Session Laws 1994, amended this section by changing the subsection designations from letters to numbers for the purpose of consistency in the Hawaii Penal Code. Subsection references throughout the Penal Code are designated by numbers rather than letters. House Standing Committee Report No. 329-94, Senate Standing Committee Report No. 2638.

Act 161, Session Laws 2002, amended this section to require the court not to revoke probation for the first violation of a nonviolent drug-related probation condition, and to require that the probation violators be sentenced to undergo and complete drug treatment instead of incarceration. The legislature found that the link between substance abuse and crime is well-established. The legislature did not wish to diminish the seriousness of crime, but looked to approaching crime as being the result of addiction that is treatable. The treatment route was expected to produce a reduction in crime and recidivism. The legislature intended to promote treatment of nonviolent substance abuse offenders, rather than incarceration, as being in the best interests of the individual and the community at large. Conference Committee Report No. 96-02.

Case Notes

Criteria for modification. 55 H. 632, 525 P.2d 1119 (1974).

Mandated revocation of probation under certain circumstances is a means to compel a court to review defendant's original sentence in light of new facts. Court may reimpose the same sentence. 69 H. 424, 744 P.2d 1208 (1987).

Defendant was prejudiced because of inability to independently test urine samples. 70 H. 194, 767 P.2d 243 (1989).

Court had discretion to consider factors other than defendant's wilfulness in determining whether failure to comply with probation condition was inexcusable under section. 73 H. 81, 829 P.2d 1325 (1992).

Statutory language of subsection (e) (1992) must be harmonized with §706-671(2), mandating credit for time served in imprisonment. 78 H. 343, 893 P.2d 194 (1995).

Court abused discretion in revoking defendant's probation where defendant made the monthly payments as condition of probation and there was no other justifiable cause for revocation. 79 H. 511, 904 P.2d 525 (1995).

Subsection (5), which permits a trial court on revocation of probation to impose any sentence that might have originally been imposed at the time of conviction, does not apply to the sentencing procedure attendant to revocation of a deferred acceptance of guilty plea, which is already specifically governed by §853-3. 93 H. 362, 3 P.3d 1239 (2000).

Where petitioner lacked "written notice" that probation revocation was sought because petitioner was a high risk to commit another offense, and petitioner was not notified of the "evidence" of other sexual assaults that was used "against" petitioner in seeking revocation, petitioner's due process rights were violated. 125 H. 114, 254 P.3d 425 (2011).

Consistent with subsection (1), because petitioner, who was sentenced to probation under §706-622.5(1), had completed petitioner's probation term and was subsequently discharged and thus "satisfied the disposition of the court", as provided by §706-630, petitioner had, in effect, complied with the terms and conditions of probation for purposes of expungement under §706-622.5(4). 129 H. 363, 300 P.3d 1022 (2013).

For purposes of determining whether a defendant has inexcusably failed to comply with a substantial requirement imposed as a condition of a probation order, courts should consider (1) whether the defendant's actions were intentional; and (2) whether the defendant's actions, if intentional, were a deliberate attempt to circumvent the court's probation order, considering the goals of sentencing the defendant to probation. 132 H. 209, 320 P.3d 874 (2014).

In probation modification or revocation hearings, courts should apply a "good cause" standard for determining whether a continuance should be granted; family court abused its discretion in denying defendant's request for a continuance, where defendant had "good cause" for requesting a continuance and the court's error in failing to grant a continuance was not harmless. 132 H. 209, 320 P.3d 874 (2014).

Court cannot revoke probation and impose new probation term. 6 H. App. 253, 718 P.2d 1117 (1986).

Where defendant made conscious and wilful decision to fail to comply with a substantial requirement imposed as a condition of probation under subsection (3), court did not abuse discretion in revoking probation and imposing sentence which may have been originally imposed. 82 H. 441 (App.), 922 P.2d 1054 (1996).

Circuit court properly concluded that it was required to revoke defendant's probation pursuant to subsection (c) because of subsequent felony conviction. 83 H. 102 (App.), 924 P.2d 596 (1996).

When defendant refused to admit having committed the sex crimes and failed to pass the lie detector tests, defendant did not "inexcusably" fail to comply with a substantial requirement imposed as a condition of the probation order under subsection (3) as the trial court could not order defendant to admit defendant's sex crimes and defendant did not personally expressly and explicitly agree to admit defendant's sex crimes and to accept probation on that basis. 93 H. 321 (App.), 2 P.3d 725 (2000).

Upon revocation of probation pursuant to subsection (3), in light of the record, §§706-660 and 706-621, trial court did not abuse its discretion in sentencing defendant to imprisonment "for a term of not more than ten years with credit for time served". 97 H. 135 (App.), 34 P.3d 1034 (2001).

Where defendant failed to submit to drug/alcohol assessments, failed to report to defendant's probation officer, failed to notify probation officer of a change in address, and failed to pay the crime victim compensation and probation service fees, these violations of defendant's terms and conditions of probation did not involve the possession or use of drugs as meant under subsection (7); thus, trial court erred in its interpretation and application of this subsection. 112 H. 208 (App.), 145 P.3d 751 (2006).

Criminal contempt of court under §710-1077 is not available as a sanction for a violation of a condition of probation as there is no provision in this chapter that authorizes the use of criminal contempt as a sanction for violation of a condition of probation; the exclusive sanctions for a violation of a

condition of probation in this chapter are set forth in this section. 120 H. 312 (App.), 205 P.3d 577 (2009).

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§706-625 Commentary:

1. H.R.S. §711-77.

" **§706-626 Summons or arrest of defendant on probation; commitment without bail.** At any time before the discharge of the defendant or the termination of the period of probation:

(1) The court may, in connection with the probation, summon the defendant to appear before it or may issue a warrant for the defendant's arrest;

(2) A probation or law enforcement officer, having probable cause to believe that the defendant has failed to comply with a requirement imposed as a condition of the order, may arrest the defendant without a warrant and the defendant shall be held in custody pending the posting of bail pursuant to a bail schedule established by the court, or until a hearing date is set; provided that when the punishment for the original offense does not exceed one year, the probation or law enforcement officer may admit the probationer to bail; or

(3) The court, if there is probable cause to believe that the defendant has committed another crime or has been held to answer therefor, may commit the defendant without bail, pending a determination of the charge by the court having jurisdiction thereof. [L 1972, c 9, pt of §1; am L 1986, c 314, §28; am L 1989, c 125, §1; am L 2001, c 24, §1 and c 91, §4]

COMMENTARY ON §706-626

The court, in order to control the conditions of suspension or probation, must have power, either by summons or warrant, to require the defendant to appear before the court. Subsection (1) provides this power. Subsection (2) provides a more limited power for probation and peace officers; they may arrest without a warrant only where there is probable cause to believe that the defendant has failed to comply with a condition of probation or suspension.

Subsection (3) is addressed to the problem presented by a defendant who is on probation or under suspended sentence and who is accused or charged with commission of another crime. The commission of a crime while on probation or under suspension of

sentence would, in most cases, constitute a violation of a condition of probation or suspension. The question thus presented is whether the issue of guilt, with respect to the most recent crime, should be tried informally as a violation of a condition of suspension or probation or whether the issue should be tried independently. The Code resolves this question by providing that the defendant may be held pending an independent or formal determination by the court having jurisdiction over the charge, thus preserving for the defendant all procedural rights. This subsection must be read in conjunction with §706-628(1) which provides for revocation in cases where the defendant "has been convicted of another crime."

Subsection (1) is in substantial accord with prior law governing the circuit courts.[1] Subsection (2) is an addition to the law and subsection (3) represents a slight departure from it. The circuit court apparently had the power--although it may choose not to exercise it--to decide, in a probation proceeding, the issue of whether the defendant has committed a crime during the period of probation.[2]

SUPPLEMENTAL COMMENTARY ON §706-626

Act 125, Session Laws 1989, required that a probationer be placed in custody after arrest for a probation violation and permitted an arrested probationer to post bail in certain circumstances. Senate Standing Committee Report No. 1331.

Act 24, Session Laws 2001, amended this section to authorize probation or peace officers to admit defendants to bail when the punishment for the original offense does not exceed one year. Although law enforcement personnel may set bail for petty misdemeanor and misdemeanor offenses, they are not authorized to do so for probation violators and must defer to the courts. The legislature found that the ability to immediately arrest and set bail for petty misdemeanor and misdemeanor probationers would allow more efficient processing of probation violations. Senate Standing Committee Report No. 1516, House Standing Committee Report No. 547.

Case Notes

Subsection (3) should not be read to mean that statutes on probation are concerned only with offenses committed after a defendant is placed on probation. Implications arising from this section and commentary cannot be used to define language of §706-628(1). 62 H. 159, 612 P.2d 1168 (1980).

Evidentiary requirements of subsection (3), satisfaction of. 1 H. App. 98, 614 P.2d 405 (1980).

Under subsection (3), upon showing of probable cause court has discretionary authority to commit without bail. 1 H. App. 98, 614 P.2d 405 (1980).

Motion to commit without bail pursuant to subsection (3) tolls the period of probation. 1 H. App. 469, 620 P.2d 1082 (1980).

Period of probation which had been tolled begins to run again after written entry of judgment. 4 H. App. 35, 658 P.2d 910 (1983).

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§706-626 Commentary:

1. See H.R.S. §711-80.

2. Id.

" **§706-627 Tolling of probation.** (1) Upon the filing of a motion to revoke a probation or a motion to enlarge the conditions imposed thereby, the period of probation shall be tolled pending the hearing upon the motion and the decision of the court. The period of tolling shall be computed from the filing date of the motion through and including the filing date of the written decision of the court concerning the motion for purposes of computation of the remaining period of probation, if any. In the event the court fails to file a written decision upon the motion, the period shall be computed by reference to the date the court makes a decision upon the motion in open court. During the period of tolling of the probation, the defendant shall remain subject to all terms and conditions of the probation except as otherwise provided by this chapter.

(2) In the event the court, following hearing, refuses to revoke the probation or grant the requested enlargement of conditions thereof because the defendant's failure to comply therewith was excusable, the defendant may be granted the period of tolling of the probation for purposes of computation of the remaining probation, if any. [L 1972, c 9, pt of §1; am L 1977, c 106, §1; am L 1980, c 156, §1; am L 1985, c 192, §2; am L 1986, c 314, §29]

COMMENTARY ON §706-627

This section affords the defendant threatened with loss or change of suspension or probation status the same procedural protection afforded a defendant at the time of original disposition.[1] Determinations to revoke suspension or probation, or to change the conditions thereof, are sometimes made with a degree of informality that does not afford to the

defendant adequate opportunity to obtain counsel and to be heard upon the evidence.

> This is an area where dangers of abuse are real and the normal procedural protection proper. That a defendant has no right to suspension or probation does not justify the alteration of his status by methods that must seem and sometimes be unfair.[2]

Although written notice, the right to be represented by counsel, and the right to controvert and be heard upon the evidence, are provided by this section, it is not contemplated that the court must strictly enforce the rules of evidence. In this type of hearing, where the relevant issues are decided by a court without the presence of a jury, the court should be granted some flexibility in this area.

Act 106, Session Laws 1977, added subsections (2) and (3) to provide for tolling the period of probation or suspension of sentence pending the hearing to revoke the probation or suspension or to increase the conditions thereof. Formerly, with no tolling provisions, it was possible for the period of probation or suspended sentence to run out before termination of the hearing, relieving defendant of any further obligation even though the defendant may have committed acts justifying change in the defendant's probation or suspension status. The amended section is intended to prevent such situations from occurring. Senate Standing Committee Report No. 1105, House Standing Committee Report No. 450.

Act 156, Session Laws 1980, made the granting of the period of tolling discretionary rather than mandatory. The legislature felt that the prior law gave the defendants an unfair advantage by allowing them "credit" on their sentence even while they were not abiding by its terms. Senate Standing Committee Report No. 753-80, House Standing Committee Report No. 434-80.

Case Notes

The tolling provisions under this section apply to deferral periods pursuant to a deferred acceptance of guilty plea under §853-1. 92 H. 322, 991 P.2d 832 (2000).

Where State did not file a written motion to revoke defendant's deferred acceptance of guilty plea, the probationary period was not tolled; thus, as the deferment period had expired two months earlier, trial court lacked jurisdiction to revoke defendant's deferred acceptance of guilty plea. 118 H. 15, 185 P.3d 200 (2008).

Filing motion under subsection (2) is not the only method of tolling period of probation; motion under §706-626(3) also tolls period. 1 H. App. 469, 620 P.2d 1082 (1980).

Mentioned: 55 H. 632, 525 P.2d 1119 (1974).

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§706-627 Commentary:

1. Cf. §706-604.

2. M.P.C., Tentative Draft No. 2, comments at 152 (1954).

" **§706-628 REPEALED.** L 1985, c 192, §3.

Cross References

For similar provisions, see §706-625.

" **§706-629 Calculation of multiple dispositions involving probation and imprisonment, or multiple terms of probation.** (1) When the disposition of a defendant involves more than one crime:

(a) The court shall not impose a sentence of probation and a sentence of imprisonment except as authorized by section 706-624(2)(a); and

(b) Multiple periods of probation shall run concurrently from the date of the first such disposition.

(2) When a defendant, already under sentence, is convicted for another crime committed prior to the former disposition:

(a) The court shall not sentence to probation a defendant who is under sentence of imprisonment with more than six months to run;

(b) Multiple periods of probation shall run concurrently from the date of the first such disposition; and

(c) When a defendant, already under sentence of probation, is sentenced to imprisonment, the service of imprisonment shall not toll the prior sentence of probation.

(3) When a defendant is convicted of a crime committed while on probation and such probation is not revoked:

(a) If the defendant is sentenced to imprisonment, the service of such sentence shall not toll the prior sentence of probation; and

(b) If the defendant is sentenced to probation, the period of such probation shall run concurrently with or consecutively to the remainder of the prior period, as the court determines at the time of disposition. [L 1972, c 9, pt of §1; am L 1986, c 314, §30]

COMMENTARY ON §706-629

This section reflects the Code's preference for concurrent sentences and its disfavor of consecutive sentences.[1]

Subsection (1) deals with the problems presented when the disposition of a defendant involves more than one offense or when a defendant, already under sentence or suspension of sentence, is convicted for an offense committed prior to the former disposition.

Subsection (1)(a) continues the position of the Code that probation and imprisonment are inconsistent dispositions unless imprisonment is limited to a short period of six months or less.[2]

Subsection (1)(b) provides that periods of suspension or probation run concurrently from the date of the first disposition. If imprisonment is not warranted, there hardly seems any justification for providing elongated periods of suspension or probation when the disposition of the defendant involves more than one offense or when a defendant, already under suspension of sentence or on probation, is convicted for a crime committed prior to the former disposition.

Subsection (1)(c) provides that service of an indeterminate term of imprisonment, with its built-in term of parole, shall satisfy a suspended sentence on another count or a prior suspended sentence or a prior sentence to probation. By providing that the indeterminate term of imprisonment satisfies the other dispositions, subsection (1)(c) results in substantial concurrent service of all dispositions.

By providing that periods of suspension or probation run during a period of imprisonment for a definite term, subsection (1)(d) provides concurrent service of dispositions in situations involving suspension or probation and a definite term of imprisonment.

Subsection (2) is addressed to a somewhat different problem: multiple dispositions involving an offense committed while under suspension of sentence or on probation.

Subsection (2)(a) provides that if the defendant is sentenced to imprisonment for an indeterminate term, the service of such sentence shall satisfy the prior unrevoked suspended sentence or sentence to probation. This is in conformity with the concept of concurrent dispositions.

Subsection (2)(b) provides that if the defendant is sentenced to imprisonment for a definite term, the period of the prior suspension or prior probation shall not run during imprisonment. This is a slight departure from the policy of the Code generally favoring concurrent dispositions. However, because definite terms of imprisonment are relatively short, and because the defendant has committed a crime while under suspension or on

probation, the situation calls for a departure from the general policy and permits dispositions which are to be served consecutively. This subsection is analogous to §706-668 which permits consecutive terms of imprisonment for crimes committed while in prison. A further consideration for subsection (2)(b) is that, if the period of suspension of probation runs during a definite term of imprisonment (which does not have a built-in term of parole), there might, in some cases, not be sufficient means for court control following discharge of the defendant from imprisonment.

Finally, subsection (2)(c) provides that, where the court has not revoked a prior disposition of suspension or probation and has imposed an additional period of suspension or probation, the multiple periods shall run either concurrently or consecutively as the court determines at the time of sentence. Once again, although this subsection represents a limited departure from the policy of the Code favoring concurrent service of dispositions, it is called for by the defendant's situation. Again, it is analogous to the powers that the Code grants the sentencing court, under §706-668, in cases where a prisoner has committed a crime while in prison or during escape.

Case Notes

Imprisonment for a felony does not toll a prior probation sentence for an unrelated felony. 71 H. 612, 801 P.2d 1206 (1990).

If, at a combined sentencing disposition, imprisonment is imposed as a condition in more than one probation sentence, the period of imprisonment served for concurrent sentences of probation shall not exceed the maximum term allowed for a sentence of probation. 97 H. 430, 39 P.3d 557 (2002).

Subsection (1) applies to the combined sentencing disposition for multiple convictions, irrespective of whether the crimes were charged or tried in separate cases; subsection (1)(b) requires that in the event multiple sentences of probation are imposed, the sentences must run concurrently. 97 H. 430, 39 P.3d 557 (2002).

§706-629 Commentary:

1. Cf. §706-670.

2. Commentary to §706-624.

" **§706-630 Discharge of defendant.** Upon the termination of the period of the probation or the earlier discharge of the defendant, the defendant shall be relieved of any obligations imposed by the order of the court and shall have satisfied the disposition of the court, except as to any action under this chapter to collect unpaid fines, restitution, attorney's fees, costs, or interest. [L 1972, c 9, pt of §1; am L 1986, c 314, §31; am L 1998, c 269, §5]

COMMENTARY ON §706-630

This section provides that the court may discharge the defendant prior to the termination of the period of suspension or probation and that, if the defendant is not so discharged, no formal discharge is required upon termination of the statutory period of suspension or probation. Upon termination of the statutory period, the defendant is relieved of any further obligation by operation of law. This provision is a continuation of prior Hawaii law.[1]

SUPPLEMENTAL COMMENTARY ON §706-630

Act 269, Session Laws 1998, amended this section to allow victims of crime to enforce a criminal restitution order in the same manner as a civil judgment. Conference Committee Report No. 89.

Case Notes

Consistent with §706-625(1), because petitioner, who was sentenced to probation under §706-622.5(1), had completed petitioner's probation term and was subsequently discharged and thus "satisfied the disposition of the court", as provided by this section, petitioner had, in effect, complied with the terms and conditions of probation for purposes of expungement under §706-622.5(4). 129 H. 363, 300 P.3d 1022 (2013).

Where defendant paid all monthly restitution amounts imposed as a condition of probation sentence, there were no other grounds in record to revoke defendant's probation, and probation term had expired, under this section (1993), defendant should have been relieved of the obligations imposed by the probation sentence; trial court thus erred in imposing "free-standing" restitution order remaining in full force and effect beyond termination of defendant's term of probation. 92 H. 36 (App.), 986 P.2d 987 (1999).

Where Act 269's 1998 amendment took effect after defendant was sentenced, by its own terms did not apply retroactively to

extend defendant's obligation to pay restitution beyond defendant's period of probation, and did not empower the trial court to resentence defendant to a freestanding restitution order, as defendant was not in violation of defendant's conditions of probation stated in the 1995 resentencing order, trial court had no authority to resentence defendant on May 4, 2000, by its restitution order. 98 H. 137 (App.), 44 P.3d 288 (2002).

Where defendant's term of probation had already ended when the State charged defendant with criminal contempt for violating the no-contact condition of probation, and the State failed to take any steps during defendant's probation to revoke, modify or enlarge its terms and thereby toll the period of probation, the district court no longer had jurisdiction to revoke defendant's probation or modify or enlarge its terms; thus, by convicting defendant of criminal contempt as a sanction for a probation violation, the court essentially extended defendant's probation term for two years, which was inconsistent with this section. 120 H. 312 (App.), 205 P.3d 577 (2009).

§706-630 Commentary:

1. See H.R.S. §711-80.

" **§706-631 Probation is a final judgment for other purposes.** A judgment sentencing a defendant to be placed on probation shall be deemed tentative, to the extent provided in this chapter, but for all other purposes shall constitute a final judgment. [L 1972, c 9, pt of §1; am L 1986, c 314, §32]

COMMENTARY ON §706-631

This section is addressed to the question of finality inherent in every disposition involving suspension of sentence or sentence to probation. As §§706-625 and 628 indicate, the conditions of suspension or probation may be modified or the disposition itself may be revoked. These features of suspension or probation are, of course, necessary in order that the sentencing authority can maintain control over the disposition. However, merely because the sentencing court maintains some continuing flexibility with respect to the disposition, the conviction and disposition should not be regarded as lacking finality for other purposes such as constituting a judgment for purposes of appeal and a prior conviction for purposes of extended imprisonment.

This section, therefore, provides that a suspension of sentence or sentence to probation shall be deemed tentative to the extent provided in chapter 706, but for all other purposes such disposition shall constitute a final judgment.

"PART III. FINES AND RESTITUTION

Note

Part heading amended by L 1998, c 269, §3; L 2000, c 205, §5.

§706-640 Authorized fines. (1) A person who has been convicted of an offense may be sentenced to pay a fine not exceeding:

(a) $50,000, when the conviction is of a class A felony, murder in the first or second degree, or attempted murder in the first or second degree;
(b) $25,000, when the conviction is of a class B felony;
(c) $10,000, when the conviction is of a class C felony;
(d) $2,000, when the conviction is of a misdemeanor;
(e) $1,000, when the conviction is of a petty misdemeanor or a violation;
(f) Any higher amount equal to double the pecuniary gain derived from the offense by the defendant;
(g) Any higher or lower amount specifically authorized by statute.

(2) Notwithstanding section 706-641, the court shall impose a mandatory fine upon any defendant convicted of theft in the first or second degree committed by receiving stolen property as set forth in section 708-830(7). The fine imposed shall be the greater of double the value of the stolen property received or $25,000 in the case of a conviction for theft in the first degree; or the greater of double the value of the stolen property received or $10,000 in the case of a conviction for theft in the second degree. The mandatory fines imposed by this subsection shall not be reduced except and only to the extent that payment of the fine prevents the defendant from making restitution to the victim of the offense, or that the defendant's property, real or otherwise, has been forfeited under chapter 712A as a result of the same conviction for which the defendant is being fined under this subsection. Consequences for nonpayment shall be governed by section 706-644; provided that the court shall not reduce the fine under section 706-644(4) or 706-645. [L 1972, c 9, pt of §1; am L 1986, c 314, §33; am L 1987, c 181, §5; am L 1997, c 149, §4]

COMMENTARY ON §706-640

This section sets forth the maximum fine authorized for any offense according to grade and class. The maximum amount provided should be sufficient for both deterrent and correctional purposes; discretion in imposing a fine within the set maximum should be guided by the criteria set forth in §706-641.

The most significant use of the fine as a means of penalizing the offender is in offenses involving pecuniary gain. When the amount of pecuniary gain is proven, subsection (5) subordinates the stated amounts and authorizes a greater fine in an amount equal to double the pecuniary gain.

Subsection (6) acknowledges that other higher or lower fines may be authorized with respect to specific offenses when deemed necessary or appropriate to the situation. Subsection (6) also preserves and recognizes higher and lower limits for offenses which are set by provisions of law not within the Penal Code.

Because of the questionable wisdom and constitutionality of authorizing the disposition of assessing costs against convicted defendants in criminal cases, the Code departs from prior Hawaii law and does not authorize such a sentence. As a practical matter, costs are almost never imposed in criminal cases. The departure is from previous statutory language rather than practice.

SUPPLEMENTAL COMMENTARY ON §706-640

Act 314, Session Laws 1986, increased the maximum amounts of fines to allow a sentencing court discretion to impose severe fines, especially when the offender derives great financial gain from the criminal activity. Conference Committee Report No. 51-86.

Act 181, Session Laws 1987, added language to this section to reflect the recently created statutory murder and attempted murder crimes. These crimes are murder in the first and second degree and attempted murder in the first and second degree. Senate Standing Committee Report No. 1130.

Act 149, Session Laws 1997, amended this section to impose mandatory fines upon persons convicted of receiving stolen property. With the property crime rate continuing to escalate at a dramatic rate, the legislature supported the imposition of severe penalties for those who are in receipt of stolen property, in an effort to deter the criminal activity. Senate Standing Committee Report No. 1600.

" **§706-641 Criteria for imposing fines.** (1) The court shall not sentence a defendant only to pay a fine, when any

other disposition is authorized by law, except in misdemeanor and petty misdemeanor cases.

(2) The court shall not sentence a defendant to pay a fine in addition to a sentence of imprisonment or probation unless:

(a) The defendant has derived a pecuniary gain from the crime; or

(b) The court is of the opinion that a fine is specially adapted to the deterrence of the crime involved or to the correction of the defendant.

(3) The court shall not sentence a defendant to pay a fine unless:

(a) The defendant is or will be able to pay the fine; and

(b) The fine will not prevent the defendant from making restitution to the victim of the offense.

(4) In determining the amount and method of payment of a fine, the court shall take into account the financial resources of the defendant and the nature of the burden that its payment will impose. [L 1972, c 9, pt of §1; am L 1986, c 314, §34]

COMMENTARY ON §706-641

This section states the general position of the Code against the routine imposition of fines where other types of disposition are authorized. Even in the case of violations, where only a fine or suspended sentence is authorized, the fine imposed should be measured in terms of the defendant's ability to pay and in terms of the defendant's ability to make compensation to the victims, if any, of the defendant's offense.

Where other types of disposition are available, the court should not impose only a fine unless the court makes a determination that "a fine alone suffices for the protection of the public."

More is required of the court in order to impose both imprisonment and a fine or probation and a fine upon a defendant. The court is authorized by subsection (2) to impose such a sentence only if the defendant derived pecuniary gain from the crime or the court is of the opinion that a fine (in addition to imprisonment or probation) will serve either a correctional or deterrent function.

Subsection (3)(a) seeks to eliminate fines which the defendant cannot pay. Incarceration should not result from mere inability to pay an imposed fine. Contumacious non-payment is quite another thing and is handled in subsequent sections. Subsection (3)(b) seeks to prevent the imposition of a fine which would interfere with restitution or reparation to the victim.

Subsection (4) instructs the court to consider the defendant's financial resources with respect to the fine's amount and its method of payment (lump sum or installment payments).

The Code differs from prior law in that it ends the possibility of imprisonment for noncontumacious failure to make payment.[1] It also supplies legislative guidelines previously absent from the law.

Case Notes

Where defendant was sentenced pursuant to §431:10C-117(a)(2), because the district court may have been unaware of the applicability of quoted parts of this section and §706-642 and of its discretionary authority to sentence defendant to perform community service rather than to pay the fine, appellate court vacated the part of the sentence ordering defendant to pay a $1,000 fine and remanded that part for resentencing. 77 H. 476 (App.), 888 P.2d 376 (1995).

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§706-641 Commentary:

1. See H.R.S. §712-4.

" **§706-642 Time and method of payment.** (1) When a defendant is sentenced to pay a fine, the court may grant permission for the payment to be made within a specified period of time or in specified installments. If no such permission is embodied in the sentence, the fine shall be payable forthwith by cash, check, or by a credit card approved by the court.

(2) When a defendant sentenced to pay a fine is also sentenced to probation, the court may make the payment of the fine a condition of probation.

(3) When a defendant sentenced to pay a fine is also ordered to make restitution or reparation to the victim or victims, or to the person or party who has incurred loss or damage because of the defendant's crime, the payment of restitution or reparation shall have priority over the payment of the fine, pursuant to section 706-651. No fine shall be collected until the restitution or reparation order has been satisfied. [L 1972, c 9, pt of §1; am L 1980, c 50, §3; am L 1986, c 226, §2; am L 2016, c 231, §24]

COMMENTARY ON §706-642

This section merely gives the court specific statutory authorization for two common sentencing practices: (1)

installment payments of a fine, and (2) making a fine one of the conditions of continued probation.

SUPPLEMENTAL COMMENTARY ON §706-642

Act 50, Session Laws 1980, authorized the payment of fines by credit cards in recognition of the widespread use of credit cards and to enable the courts to take advantage of an efficient system of collection.

Act 226, Session Laws 1986, ensured that, in cases where both fines and restitution are imposed, the latter has priority; no fine is to be collected until the restitution order is satisfied. In enacting this change, the legislature stated that it "supports the concept of restitution as a valuable means of compensating losses incurred by victims and confronting the offender with the direct personal consequences of the crime." Senate Standing Committee Report No. 798-86.

Act 231, Session Laws 2016, amended subsection (3) to implement recommendations made by the Penal Code Review Committee convened pursuant to House Concurrent Resolution No. 155, S.D. 1 (2015).

Case Notes

Where defendant was sentenced pursuant to §431:10C-117(a)(2), because the district court may have been unaware of the applicability of quoted parts of §706-641 and this section and of its discretionary authority to sentence defendant to perform community service rather than to pay the fine, appellate court vacated the part of the sentence ordering defendant to pay a $1,000 fine and remanded that part for resentencing. 77 H. 476 (App.), 888 P.2d 376 (1995).

" **§706-643 Disposition of funds.** (1) The defendant shall pay a fine or any installment thereof to the cashier or clerk of the district or circuit court. In the event of default in payment, the clerk shall notify the prosecuting attorney and, if the defendant is on probation, the probation officer.

(2) All fines and other final payments received by a clerk or other officer of a court shall be accounted for, with the names of persons making payment, and the amount and date thereof, being recorded. All such funds shall be deposited with the director of finance to the credit of the general fund of the State. With respect to fines and bail forfeitures that are proceeds of the wildlife revolving fund under section 183D-10.5, and fines that are proceeds of the compliance resolution fund under sections 26-9(o) and 431:2-410, the director of finance

shall transmit the fines and forfeitures to the respective funds. [L 1972, c 9, pt of §1; am L 1986, c 314, §35; am L 1990, c 83, §2; am L 2006, c 230, §21; am L 2009, c 149, §7]

COMMENTARY ON §706-643

This section provides for payment to the clerk of the sentencing court and incorporates previous provisions of law with respect to disposition of collected funds. Out of an abundance of caution, subsection (2) deals with all funds collected in civil as well as penal cases. This broad scope is made necessary by previous provisions of former Title 37 (Criminal Law) dealing with funds collected in civil cases. See H.R.S. §§712-8 and 712-9 as codified prior to this Code.

SUPPLEMENTAL COMMENTARY ON §706-643

Act 83, Session Laws 1990, required the deposit of hunting fines and bail forfeitures to the wildlife revolving fund creating additional funds for wildlife programs. Senate Standing Committee Report No. 2085.

Act 230, Session Laws 2006, amended subsection (1) to require the defendant to pay a fine to the cashier or clerk of the district or circuit court, instead of the clerk of the sentencing court.

Act 149, Session Laws 2009, established an insurance fraud investigations branch to replace the insurance fraud investigations unit, with expanded authority to prevent, investigate, and prosecute insurance fraud to include all lines of insurance except workers' compensation. Act 149 amended subsection (2), requiring the deposit of fines and settlements resulting from insurance fraud prosecutions into the compliance resolution fund to help the insurance fraud investigations branch cover the cost of preventing, investigating, and prosecuting insurance fraud. The legislature found that because insurance fraud occurs in every line of insurance, the State's insurance fraud law should be expanded accordingly. Conference Committee Report No. 26, Senate Standing Committee Report No. 1338.

" **§706-644 Consequences of nonpayment; imprisonment for contumacious nonpayment; summary collection.** (1) When a defendant is sentenced pursuant to section 706-605, granted a conditional discharge pursuant to section 712-1255, or granted a deferred plea pursuant to chapter 853, and the defendant is ordered to pay a fee, fine, or restitution, whether as an independent order, as part of a judgment and sentence, or as a

condition of probation or deferred plea, and the defendant defaults in the payment thereof or of any installment, the court, upon the motion of the prosecuting attorney or upon its own motion, may require the defendant to show cause why the defendant's default should not be treated as contumacious and may issue a summons or a warrant of arrest for the defendant's appearance. Unless the defendant shows that the defendant's default was not attributable to an intentional refusal to obey the order of the court, or to a failure on the defendant's part to make a good faith effort to obtain the funds required for the payment, the court shall find that the defendant's default was contumacious and may order the defendant committed until the fee, fine, restitution, or a specified part thereof is paid.

(2) When a fee, fine, or restitution is imposed on a corporation or unincorporated association, it is the duty of the person or persons authorized to make disbursement from the assets of the corporation or association to pay it from those assets, and their failure to do so may be held contumacious unless they make the showing required in subsection (1).

(3) The term of imprisonment for nonpayment of fee, fine, or restitution shall be specified in the order of commitment, and shall not exceed one day for each $25 of the fee or fine, thirty days if the fee or fine was imposed upon conviction of a violation or a petty misdemeanor, or one year in any other case, whichever is the shorter period. A person committed for nonpayment of a fee or fine shall be given credit toward payment of the fee or fine for each day of imprisonment, at the rate of $25 per day.

(4) If it appears that the defendant's default in the payment of a fee, fine, or restitution is not contumacious, the court may make an order allowing the defendant additional time for payment, reducing the amount of each installment, or revoking the fee, fine, or the unpaid portion thereof in whole or in part, or converting the unpaid portion of the fee or fine to community service. A defendant shall not be discharged from an order to pay restitution until the full amount of the restitution has actually been collected or accounted for.

(5) Unless discharged by payment or, in the case of a fee or fine, service of imprisonment pursuant to subsection (3), an order to pay a fee, fine, or restitution, whether as an independent order, as a part of a judgment and sentence, or as a condition of probation or deferred plea pursuant to chapter 853, may be collected in the same manner as a judgment in a civil action. The State or the victim named in the order may collect the restitution, including costs, interest, and attorney's fees, pursuant to section 706-646. The State may collect the fee or

fine, including costs, interest, and attorney's fees pursuant to section 706-647.

(6) Attorney's fees, costs, and interest shall not be deemed part of the penalty, and no person shall be imprisoned under this section in default of payment of attorney's fees, costs, and interest. [L 1972, c 9, pt of §1; am L 1986, c 314, §36; gen ch 1992; am L 1996, c 137, §2; am L 1998, c 269, §6; am L 2000, c 205, §6]

COMMENTARY ON §706-644

The Code equates a fine with a court-imposed civil obligation in favor of the State. Thus the contempt power is utilized to enforce that obligation. Subsection (1) provides that the court may summon the defendant, or issue a warrant for the defendant's arrest, and order the defendant to show cause why the defendant's failure to pay the fine should not be regarded by the court as contumacious. If the defendant cannot, the defendant will be imprisoned as in the cases of civil contempt.

In the case of convicted corporations or unincorporated associations, subsection (2) places a similar duty to pay, or to justify default of payment, on the officer or agent of a corporation or unincorporated association authorized to distribute its assets.

Subsection (3) sets the limit on the period of imprisonment for contumacious nonpayment of fines. The terms are intended to be coercive, but not debilitating. The credit allowed is the same as that under previous law.[1]

Subsection (4) permits the court to take a flexible approach to noncontumacious default. The court may lower the amount of each payment or may revoke the fine in whole or in part.

Subsection (5) makes clear that all the processes for collection of an unpaid civil judgment are available for collection of a fine. This subsection is in accord with prior law.[2]

SUPPLEMENTAL COMMENTARY ON §706-644

Act 137, Session Laws 1996, amended this section to provide that fines and costs may be collected in the same manner as a civil judgment, and that the state attorney general may institute proceedings to collect the fine and costs, including interest and attorney's fees, as a civil judgment in the court of appropriate jurisdiction. The legislature found that the Act (which also amended the traffic code by enacting a new section with similar provisions) would assist the judiciary in collecting fines and costs imposed in traffic and criminal

cases. The Act also deleted the first sentence of subsection (5) to remove potential conflict between existing law and the provisions of the Act. House Standing Committee Report No. 379-96, Senate Standing Committee Report No. 2987.

Act 269, Session Laws 1998, amended this section by, among other things, allowing victims of crime to enforce a criminal restitution order in the same manner as a civil judgment. Conference Committee Report No. 89.

Act 205, Session Laws 2000, amended this section by adding that the nonpayment of any fees, in addition to the nonpayment of any fine or restitution ordered by a court, would be subject to the penalties and consequences imposed under this section.

Case Notes

Provision relating to imprisonment for contumacious nonpayment mentioned. 60 H. 160, 587 P.2d 1220 (1978).

From and after July 20, 1998, the amended provisions of this section statutorily provide for free standing orders of restitution (FSOs) to be imposed, inter alia, as a condition of probation; where original sentence of defendant on March 29, 1995, made restitution a condition of probation, restitution could not later be ordered as an FSO pursuant to this section. 103 H. 269, 81 P.3d 1184 (2003).

Where a case predates July 20, 1998, the effective date of amendments to this section, a free standing order of restitution (FSO) could have been separately and independently imposed at the time of a defendant's original sentencing, in addition to any other sentence such as probation or imprisonment; however, an FSO could not be imposed as a modification of a probation condition, or as a new term of probation following revocation, or otherwise. 103 H. 269, 81 P.3d 1184 (2003).

Mentioned: 55 H. 632, 525 P.2d 1119 (1974).

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§706-644 Commentary:

1. See H.R.S. §712-5.

2. See id. §§712-1 and 712-3.

" **§706-645 Revocation of fine or restitution.** (1) A defendant who has been sentenced to pay a fine or restitution and who is not in contumacious default in the payment thereof may at any time petition the court which sentenced the defendant for a revocation of the fine or restitution or of any unpaid portion thereof.

(2) If it appears to the satisfaction of the court that the circumstances which warranted the imposition of the fine or restitution have changed, or that it would otherwise be unjust to require payment, the court may revoke the fine or restitution or the unpaid portion thereof in whole or in part. Prior to revocation, the court shall afford the prosecuting attorney an opportunity to be heard. [L 1972, c 9, pt of §1; am L 1986, c 314, §37; gen ch 1992]

COMMENTARY ON §706-645

This section allows a defendant, who is not in contumacious default, to voluntarily appear and seek the relief that would be accorded to the defendant if the defendant's appearance were involuntary under §706-644.

" **§706-646 Victim restitution.** (1) As used in this section, "victim" includes any of the following:

(a) The direct victim of a crime including a business entity, trust, or governmental entity;

(b) If the victim dies as a result of the crime, a surviving relative of the victim as defined in chapter 351;

(c) A governmental entity that has reimbursed the victim for losses arising as a result of the crime or paid for medical care provided to the victim as a result of the crime; or

(d) Any duly incorporated humane society or duly incorporated society for the prevention of cruelty to animals, contracted with the county or State to enforce animal-related statutes or ordinances, that impounds, holds, or receives custody of a pet animal pursuant to section 711-1109.1, 711-1109.2, or 711-1110.5; provided that this section does not apply to costs that have already been contracted and provided for by the counties or State.

(2) The court shall order the defendant to make restitution for reasonable and verified losses suffered by the victim or victims as a result of the defendant's offense when requested by the victim. The court shall order restitution to be paid to the crime victim compensation commission if the victim has been given an award for compensation under chapter 351. If the court orders payment of a fine in addition to restitution or a compensation fee, or both, the payment of restitution and compensation fee shall be made pursuant to section 706-651.

(3) In ordering restitution, the court shall not consider the defendant's financial ability to make restitution in determining the amount of restitution to order. The court, however, shall consider the defendant's financial ability to make restitution for the purpose of establishing the time and manner of payment. The court shall specify the time and manner in which restitution is to be paid. While the defendant is in the custody of the department of public safety, restitution shall be collected pursuant to chapter 353 and any court-ordered payment schedule shall be suspended. Restitution shall be a dollar amount that is sufficient to reimburse any victim fully for losses, including but not limited to:

(a) Full value of stolen or damaged property, as determined by replacement costs of like property, or the actual or estimated cost of repair, if repair is possible;

(b) Medical expenses; and

(c) Funeral and burial expenses incurred as a result of the crime.

(4) The restitution ordered shall not affect the right of a victim to recover under section 351-33 or in any manner provided by law; provided that any amount of restitution actually recovered by the victim under this section shall be deducted from any award under section 351-33. [L 1998, c 269, pt of §1; am L 1999, c 18, §17; am L 2006, c 230, §22; am L 2012, c 211, §5; am L 2013, c 207, §1; am L 2016, c 231, §25]

COMMENTARY ON §706-646

Act 269, Session Laws 1998, added this section and §706-647 to allow victims of crime to enforce a criminal restitution order in the same manner as a civil judgment. This section also includes within the definition of "victim" a governmental entity which has reimbursed the victim for losses arising as a result of the crime, and allows the court to order restitution to be paid to the criminal injuries compensation commission if the victim has been given an award for compensation by the commission. Under current law, a defendant may be required by the court to pay restitution for losses caused to the victim. Collection of the restitution was left to governmental entities such as the judiciary, paroling authority, and department of public safety; these entities often were able to collect only a small fraction of the amount. Moreover, although the criminal injuries compensation commission helped victims by providing some compensation, victims of property crimes and some violent crimes were ineligible for any compensation from the commission. Furthermore, although a victim may bring a civil action against

the defendant, the process was costly and time-consuming. The legislature believed that victims should have a "fast track" ability to be compensated for their losses by allowing victims to enforce the criminal restitution order as a civil judgment, using all of the civil collection remedies. Conference Committee Report No. 89, Senate Standing Committee Report No. 3008.

Act 230, Session Laws 2006, amended this section to, among other things, require that when restitution is ordered, the amount ordered is not based on the defendant's financial ability to make restitution, but the defendant's financial ability to make restitution [shall] be considered in establishing the time and manner of payment. House Standing Committee Report No. 665-06.

Act 211, Session Laws 2012, amended this section by making a conforming amendment to include medical assistance provided by the State as an expense for which restitution may be ordered to conform with amendments made to other sections in the Hawaii Revised Statutes by Act 211. The legislature found that the medicaid program's ability to recover moneys from third parties to which it was entitled must be strengthened to maintain the viability of the medicaid program. Act 211 would assist the medicaid program in recovering those moneys, thereby reducing the burden on the program imposed by third parties and helping to ensure that the program is sustainable. Senate Standing Committee Report No. 3314.

Act 207, Session Laws 2013, amended subsection (1) by expanding the definition of "victim" to: (1) include duly incorporated humane societies or duly incorporated societies for the prevention of cruelty to animals, contracted with the county or State, in order to provide those societies with restitution for reasonable and verified losses suffered; and (2) provide that duly incorporated humane societies or duly incorporated societies for the prevention of cruelty to animals, contracted with the county or State, should not receive restitution as a victim for costs that have already been contracted and provided for by the counties or State. The legislature found that in a recent decision, the circuit court of the first circuit denied restitution to the Hawaiian Humane Society for their expenses incurred in caring for one hundred fifty-three dogs previously subjected to animal cruelty in the second degree. The court held that the Hawaiian Humane Society was not a government agency or a "direct victim" of the crime committed. Although the Hawaiian Humane Society assumed care of the dogs and became the legal owner of all of the dogs upon forfeiture proceedings, the court held that it was not the "actual owner" and was not entitled to restitution under this section. Act 207 provided

clear language to allow any duly incorporated humane society contracted with a county or State to receive restitution for expenses incurred when caring for an animal as a result of animal forfeiture or impoundment. Senate Standing Committee Report No. 1294, Conference Committee Report No. 19.

Act 231, Session Laws 2016, amended subsections (2) and (3) to implement recommendations made by the Penal Code Review Committee convened pursuant to House Concurrent Resolution No. 155, S.D. 1 (2015).

Case Notes

Defendant's argument that a crime victim who received indemnification from an insurer did not suffer a "loss" within the meaning of this section was without merit; the only exception for or reduction of restitution plainly stated in this section is that any amount actually recovered by the victim from the criminal should be deducted from the amount the victim might recover from the crime victim compensation special fund pursuant to §351-33. 121 H. 135 (App.), 214 P.3d 1125 (2009).

Trial court properly ordered defendant to repay the full amount of losses to employer without reduction for amounts paid by insurance, which furthered the rehabilitative purposes of this section to the greatest extent possible; if defendant was not required to pay any restitution, defendant would not have righted the wrong defendant committed and no rehabilitative purpose would be achieved; the interests of justice would not be served by allowing a thief to retain or otherwise benefit from the spoils of the thief's crime simply because the thief picked a victim who was prudent enough to have obtained insurance. 121 H. 135 (App.), 214 P.3d 1125 (2009).

Where defendant was ordered to pay restitution to employer, the direct victim of defendant's crime, not employer's insurer, defendant's sentence complied with subsection (1). 121 H. 135 (App.), 214 P.3d 1125 (2009).

Where (1) traffic accident victim, and not defendant, caused the accident, (2) it appeared that victim's vehicle flipped over on its roof causing victim's immediate death upon impact, and (3) there was no evidence in the record that defendant's criminal misconduct of failing to remain at the scene of the accident, provide information, and render reasonable assistance pursuant to §§291C-12 and 291C-14 caused victim's injuries or death, no nexus between defendant's conduct and victim's injuries and death had been demonstrated; thus, restitution could not be imposed under this section. 121 H. 191 (App.), 216 P.3d 117 (2009).

District court erred by ordering defendant to pay restitution for victim's lost wages under subsection (3); restitution for wage loss was contrary to the legislative intent behind this section, and thus, lost wages were not compensable as restitution. 130 H. 332 (App.), 310 P.3d 1033 (2013).

In light of this section's requirement that the restitution amount be "reasonable and verified" and that the victim is in the best position to provide information regarding and verification of his or her losses caused by the defendant, where restitution is contested, the burden to present a prima facie showing regarding restitution request is best placed on the prosecution who brings the restitution motion on behalf of the victim of the crime. 130 H. 332 (App.), 310 P.3d 1033 (2013).

Portion of restitution award for medical expenses vacated and remanded where district court found there was a basis in evidence to conclude defendant caused injury and resultant expenses to victim, while recognizing that victim had a preexisting neck condition and had been receiving treatment, but ruled no apportionment was possible where no expert medical opinion or competent medical evidence was presented; conclusion was at odds with the court's findings regarding the worsening of the victim's condition and consequential change in victim's medical treatment and based on a misconception that imposition of all medical expenses could be made on defendant where there was insufficient evidence upon which to base an apportionment. 130 H. 332 (App.), 310 P.3d 1033 (2013).

" **§706-647 Civil enforcement.** (1) A certified or exemplified copy of an order of any court of this State for payment of a fine or restitution pursuant to section 706-605 may be filed in the office of the clerk of an appropriate court of this State as a special proceeding without the assessment of a filing fee or surcharge. The order, whether as an independent order, as part of a judgment and sentence, or as a condition of probation or deferred plea, shall be enforceable in the same manner as a civil judgment.

(2) In the event the victim has received or applied for reimbursement from any governmental entity, the victim named in the order or the victim's attorney shall also mail notice of the filing to the governmental entity providing reimbursement and shall file proof of mailing with the clerk.

(3) Fees for docketing, transcription, or other enforcement proceedings shall be as provided by law for judgments of a court of this State. [L 1998, c 269, pt of §1; am L 2000, c 113, §1]

COMMENTARY ON §706-647

Act 269, Session Laws 1998, added this section and §706-646 to allow victims of crime to enforce a criminal restitution order in the same manner as a civil judgment. Under current law, a defendant may be required by the court to pay restitution for losses caused to the victim. Collection of the restitution was left to governmental entities such as the judiciary, paroling authority, and department of public safety; these entities often were able to collect only a small fraction of the amount. Moreover, although the criminal injuries compensation commission helped victims by providing some compensation, victims of property crimes and some violent crimes were ineligible for any compensation from the commission. Furthermore, although a victim may bring a civil action against the defendant, the process was costly and time-consuming. The legislature believed that victims should have a "fast track" ability to be compensated for their losses by allowing victims to enforce the criminal restitution order as a civil judgment, using all of the civil collection remedies. Conference Committee Report No. 89.

Act 113, Session Laws 2000, amended this section to authorize the waiver of filing fees when victims of crime seek civil enforcement of court-ordered restitution. Conference Committee Report No. 40.

" **§706-648 Probation services fee.** (1) The court, when sentencing a defendant to probation or granting deferral of a plea under section 853-1, shall order the defendant to pay a probation services fee. The amount of the fee shall be as follows:

(a) $150, when the term of probation or period of deferral is for more than one year; or

(b) $75, when the term of probation or period of deferral is for one year or less;

provided that no fee shall be ordered when the court determines that the defendant is unable to pay the fee.

(2) The entire fee ordered or assessed shall be payable forthwith by cash, check, or by a credit card approved by the court. When a defendant is also ordered to pay a fine, make restitution, pay a crime victim compensation fee, or pay other fees in addition to the probation services fee under subsection (1), payments by the defendant shall be made pursuant to section 706-651.

(3) Any defendant received for supervision pursuant to chapter 353B shall be assessed a probation services fee pursuant to this section.

(4) The defendant shall pay the fee to the clerk of the court. The fee shall be deposited with the director of finance

who shall transmit the fee to the probation services special fund pursuant to section 706-649. [L 2000, c 205, pt of §2; am L 2001, c 55, §29; am L 2004, c 78, §2; am L 2012, c 295, §1; am L 2016, c 231, §26]

Note

The 2012 amendment shall not apply to any defendant granted a deferred acceptance of guilty or no contest plea before July 9, 2012. L 2012, c 295, §3.

COMMENTARY ON §706-648

Act 205, Session Laws 2000, added this section to require a court, when sentencing a defendant to probation, to order the defendant to pay a probation services fee. The legislature found that this was necessary to help defray the costs of administering probation services. Conference Committee Report No. 45, Senate Standing Committee Report No. 3375.

Act 78, Session Laws 2004, amended this section to change the reference to the Interstate Parole and Probation Compact codified as part III of chapter 353 and repealed by Act 78, to reflect the new Interstate Compact for the Supervision of Adult Offenders, codified as chapter 353B. House Standing Committee Report No. 176-04.

Act 295, Session Laws 2012, amended this section to authorize the courts to assess a fee for probation services to all offenders under the supervision of the adult client services branch, including those granted deferred acceptance of guilty plea or deferred acceptance of nolo contendere plea, to hold offenders accountable for their actions and make them responsible for paying for some of their supervision costs. The legislature found that in 2000, it established probation services fees to help defray the costs of administering probation services. However, this fee could not be ordered for those offenders who are granted deferrals. Act 295 would allow the courts to collect probation services fees from offenders placed on deferral to make them accountable for their actions and to help pay for their supervision costs, and addressed the Judiciary's need for additional revenue to meet the rising costs of supervising offenders that are not covered by the general fund. Senate Standing Committee Report No. 2344.

Act 231, Session Laws 2016, amended subsection (2) to implement recommendations made by the Penal Code Review Committee convened pursuant to House Concurrent Resolution No. 155, S.D. 1 (2015).

" **§706-649 Probation services special fund.** (1) There is established in the state treasury a special fund to be known as the probation services special fund. All probation services fees collected under section 706-648 shall be deposited into this fund.

(2) Moneys in the probation services special fund shall be used by the judiciary to:

(a) Monitor and enforce compliance with the terms and conditions of probation and other supervision programs for defendants; and

(b) Support other duties and activities related to the supervision of defendants. [L 2000, c 205, pt of §2; am L 2004, c 10, §11; am L 2012, c 303, §2]

COMMENTARY ON §706-649

Act 10, Session Laws 2004, amended this section by removing the reference to the probation services special fund's exemption under §§36-27 and 36-30, to make this section consistent with the amendments made to §§36-27 and 36-30 by L 2003, c 179. Act 179, Session Laws 2003, amended §§36-27 and 36-30 by removing the exemption of certain special funds, among them the probation services special fund under this section, from paying the costs of central service operations of government and administrative expenses incurred by the departments responsible for the operations supported by the special funds. However, this section was not amended and still contained language exempting the fund from these expenses. House Standing Committee Report No. 1015-04.

Act 303, Session Laws 2012, amended this section by specifying that moneys in the probation services special fund be used by the Judiciary to monitor and enforce the compliance of probation terms and other supervision programs for defendants, and support other duties and activities related to the supervision of defendants. The legislature found that in 2008, it authorized the Judiciary and the Hawaii paroling authority to asses a fee for each application made by a parolee or probationer for a transfer out of the State to the mainland, and required that the fees collected be deposited into the general fund. During that same year, the legislature established a full-time position for an interstate coordinator to manage these transfer activities, but did not fund this position. Although the interstate coordinator position was eventually funded and filled through monies from the probation services special fund, additional revenue was needed to support the cost of an interstate coordinator. The interstate coordinator is an important position within the State's interstate compact office because

the coordinator oversees all interstate matters and serves as the primary contact for Hawaii probation and parole staff and mainland staff to ensure the accurate screening and timely processing of all transfer requests. Act 303 would allow the interstate transfer fees to be deposited into the probation services special fund to help defray the costs of an interstate coordinator and other related expenses, and clarified the purposes of the probation services special fund. Senate Standing Committee Report No. 2338, Senate Standing Committee Report No. 3278.

" **§706-650 Drug demand reduction assessments; special fund.** (1) In addition to any disposition authorized by chapter 706 or 853, any person who is:

(a) Convicted of an offense under part IV of chapter 712, except sections 712-1250.5 and 712-1257;
(b) Convicted under section 707-702.5;
(c) Convicted of a felony or misdemeanor offense under part IV of chapter 329;
(d) Convicted under section 291-3.1, 291-3.2, 291-3.3, 291E-61, or 291E-61.5;
(e) Found in violation of part III of chapter 291E; or
(f) Charged with any offense under paragraphs (a) to (d) who has been granted a deferred acceptance of guilty or no contest plea;

shall be ordered to pay a monetary assessment under subsection (2), except as provided under subsection (5).

(2) Monetary assessments for individuals subject to subsection (1) shall not exceed the following:

(a) $3,000 when the offense is a class A felony;
(b) $2,000 when the offense is a class B felony;
(c) $1,000 when the offense is a class C felony;
(d) $500 when the offense is a misdemeanor; or
(e) $250 when the person has been found guilty of an offense under section 712-1249, 291-3.1, 291-3.2, 291-3.3, 291E-61, or has been found in violation of part III of chapter 291E.

Notwithstanding sections 706-640 and 706-641 and any other law to the contrary, the assessments provided by this section shall be in addition to and not in lieu of, and shall not be used to offset or reduce, any fine authorized or required by law and shall be paid pursuant to section 706-651.

(3) There is established a special fund to be known as the "drug demand reduction assessments special fund" to be administered by the department of health. The disbursement of money from the drug demand reduction assessments special fund

shall be used to supplement substance abuse treatment and other substance abuse demand reduction programs.

(4) All monetary assessments paid and interest accrued on funds collected pursuant to this section shall be deposited into the drug demand reduction assessments special fund.

(5) If the court determines that the person has the ability to pay the monetary assessment and is eligible for probation or will not be sentenced to incarceration, unless otherwise required by law, the court may order the person to undergo a substance abuse treatment program at the person's expense. If the person undergoes a substance abuse treatment program at the person's expense, the court may waive or reduce the amount of the monetary assessment. Upon a showing by the person that the person lacks the financial ability to pay all or part of the monetary assessment, the court may waive or reduce the amount of the monetary assessment. [L 1995, c 205, §§1, 4; am L 1996, c 7, §1; am L 1998, c 152, §3; am L 2001, c 116, §1; am L 2004, c 152, §1; am L 2016, c 231, §27]

Note

Transfer of certain interest earnings to general fund until June 30, 2015. L 2009, c 79, §30(a)(40).

COMMENTARY ON §706-650

Act 152, Session Laws 2004, made permanent the drug demand reduction assessments enacted in Act 205, Session Laws 1995, and also, among other things, expanded the number of offenses for which the monetary assessments will be imposed; made the monetary assessments mandatory; specified that, in addition to restitution to the victim, probation and crime victim compensation fees shall also be paid before payment of the assessment; gave the court the discretion to order the offender to undergo substance abuse treatment at the offender's expense if the court determines that the offender is eligible for probation or will not be sentenced to prison; and provided that the court may waive or reduce the amount of the assessment if the offender undergoes treatment at the offender's expense or upon a showing that the offender lacks the financial ability to pay all or part of the assessment. House Standing Committee Report No. 1245-04.

Act 231, Session Laws 2016, amended this section to implement recommendations made by the Penal Code Review Committee convened pursuant to House Concurrent Resolution No. 155, S.D. 1 (2015).

" **§706-650.5 Human trafficking victim services fund.** (1) In addition to any disposition authorized by chapter 706, any individual who is:

(a) Convicted of an offense under part VIII of chapter 707; or

(b) Convicted of an offense under part I of chapter 712;

shall be ordered to pay a fee under subsection (2).

(2) Fees for individuals subject to subsection (1) shall not exceed the following:

(a) $5,000 when the offense is a class A felony;

(b) $2,500 when the offense is a class B felony;

(c) $1,000 when the offense is a class C felony;

(d) $500 when the offense is a misdemeanor; or

(e) $250 when the offense is a petty misdemeanor.

(3) There is established within the state treasury a special fund to be known as the human trafficking victim services fund to be administered by the department of labor and industrial relations. The disbursement of money from the human trafficking victim services fund shall be used to supplement programs, grants, or purchase of service contracts that support or provide comprehensive services to victims of labor trafficking crimes under part VIII of chapter 707, or victims of trafficking related to crimes under part I of chapter 712. Moneys in the special fund shall be used for new or existing programs, grants, or purchase of service contracts and shall not supplant any other moneys previously allocated to these programs, grants, or purchase of service contracts.

(4) All fees paid and interest accrued on funds collected pursuant to this section shall be deposited into the human trafficking victim services fund.

(5) When a defendant is ordered to make payments in addition to the human trafficking victim services fee authorized under subsection (2), payments by the defendant shall be made pursuant to section 706-651.

(6) The department of labor and industrial relations shall submit to the legislature no later than twenty days prior to the convening of each regular session a written annual report that provides the following:

(a) An accounting of the receipts of and expenditures from the human trafficking victim services fund; and

(b) Any recommendations to improve support of and services to victims of labor trafficking crimes under part VIII of chapter 707, or victims of trafficking related to crimes under part I of chapter 712. [L 2014, c 119, §1; am L 2016, c 231, §28]

COMMENTARY ON §706-650.5

Act 119, Session Laws 2014, added this section to impose a human trafficking victim services fee upon individuals who are convicted of certain trafficking offenses and to establish the human trafficking victim services fund, to provide support and services to human trafficking victims. The legislature found that existing law did not provide a source of revenue to support and provide services to human trafficking victims who often require access to basic and life-sustaining services, including toiletries and food, and may require long-term access to stable and supportive environments, such as licensed residential treatment facilities. Senate Standing Committee Report No. 3043, Conference Committee Report No. 97-14.

Act 231, Session Laws 2016, amended subsection (5) to implement recommendations made by the Penal Code Review Committee convened pursuant to House Concurrent Resolution No. 155, S.D. 1 (2015).

" **[§706-651] Payments by defendant; order of priority.** When a defendant is ordered to make payments pursuant to chapters 351, 706, 846F, and 853, or as otherwise provided by law, payments shall be made in the following order of priority:

(1) Restitution;
(2) Crime victims compensation fee;
(3) Probation services fee;
(4) Human trafficking victim services fee;
(5) Other fees, including but not limited to internet crimes against children fee and drug demand reduction assessment fee;
(6) DNA analysis monetary assessment; and
(7) Fines. [L 2016, c 231, §14]

COMMENTARY ON §706-651

Act 231, Session Laws 2016, added this section, which establishes the priority for payments that a defendant is ordered to make, including restitution, crime victims compensation fee, probation services fee, human trafficking victims services fees, DNA analysis monetary assessment, and fines. Conference Committee Report No. 138-16.

"PART IV. IMPRISONMENT

Law Journals and Reviews

The Abandonment of Punishment. 16 HBJ, no. 2, at 63 (1981).

§706-656 Terms of imprisonment for first and second degree murder and attempted first and second degree murder. (1) Persons eighteen years of age or over at the time of the offense who are convicted of first degree murder or first degree attempted murder shall be sentenced to life imprisonment without the possibility of parole.

As part of such sentence, the court shall order the director of public safety and the Hawaii paroling authority to prepare an application for the governor to commute the sentence to life imprisonment with parole at the end of twenty years of imprisonment; provided that persons who are repeat offenders under section 706-606.5 shall serve at least the applicable mandatory minimum term of imprisonment.

Persons under the age of eighteen years at the time of the offense who are convicted of first degree murder or first degree attempted murder shall be sentenced to life imprisonment with the possibility of parole.

(2) Except as provided in section 706-657, pertaining to enhanced sentence for second degree murder, persons convicted of second degree murder and attempted second degree murder shall be sentenced to life imprisonment with possibility of parole. The minimum length of imprisonment shall be determined by the Hawaii paroling authority; provided that persons who are repeat offenders under section 706-606.5 shall serve at least the applicable mandatory minimum term of imprisonment.

If the court imposes a sentence of life imprisonment without possibility of parole pursuant to section 706-657, as part of that sentence, the court shall order the director of public safety and the Hawaii paroling authority to prepare an application for the governor to commute the sentence to life imprisonment with parole at the end of twenty years of imprisonment; provided that persons who are repeat offenders under section 706-606.5 shall serve at least the applicable mandatory minimum term of imprisonment. [L 1986, c 314, §39; am L 1987, c 181, §6 and c 338, §10; am L 1989, c 211, §8; am L 1993, c 271, §2; am L 1996, c 15, §1; am L 2014, c 202, §2]

Note

The 2014 amendment applies to proceedings arising on or after July 2, 2014 and to proceedings that were begun but not concluded before July 2, 2014. L 2014, c 202, §6.

COMMENTARY ON §706-656

Act 271, Session Laws 1993, amended this section to provide that in cases designated under §706-657, the person may be

sentenced to life imprisonment without possibility of parole. The legislature felt that the court should have the discretion to determine when the circumstances of the murder justify the enhanced sentence, and that this discretion should be limited to those situations demonstrating exceptional depravity. House Standing Committee Report No. 1171, Senate Standing Committee Report No. 689.

Act 202, Session Laws 2014, amended subsection (1) by applying a sentence of life imprisonment without the possibility of parole to persons eighteen years of age or over at the time of the offense who are convicted of first degree murder or first degree attempted murder; and requiring that persons under eighteen years of age at the time of the offense who are convicted of first degree murder or first degree attempted murder are sentenced to life imprisonment with the possibility of parole. The legislature found that Hawaii is one of the few states that still allow life sentences without the possibility of parole for juvenile offenders. International law prohibits life sentence without parole for juvenile offenders under the age of eighteen at the time the crime is committed. The United States is the only country in the world that sentences its children to a lifetime of incarceration. In Miller v. Alabama, 132 S. Ct. 2455 (2012), the U.S. Supreme Court held that mandatory life sentences without parole for those under the age of eighteen at the time of their crimes violate the Eighth Amendment's prohibition on cruel and unusual punishments. The legislature also recognized that mitigating factors may exist for cases involving a juvenile offender. In Miller, the Supreme Court stated that youth is a moment and "condition of life when a person may be most susceptible to influence and to psychological damage." Therefore, the legislature encouraged the sentencing judge to take into account and consider any mitigating factors for cases involving a juvenile offender. Senate Standing Committee Report No. 3248, Conference Committee Report No. 56-14.

Case Notes

For sentencing purposes, conspiracy to commit second degree murder is a class C felony under §706-610 and subject to the sentencing provisions of §706-660, not this section. 84 H. 280, 933 P.2d 617 (1997).

Sentence for murder not an extended term. 6 H. App. 409, 723 P.2d 186 (1986).

" **§706-657 Enhanced sentence for second degree murder.** The court may sentence a person who was eighteen years of age or

over at the time of the offense and who has been convicted of murder in the second degree to life imprisonment without the possibility of parole under section 706-656 if the court finds that the murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity or that the person was previously convicted of the offense of murder in the first degree or murder in the second degree in this State or was previously convicted in another jurisdiction of an offense that would constitute murder in the first degree or murder in the second degree in this State. As used in this section, the phrase "especially heinous, atrocious, or cruel, manifesting exceptional depravity" means a conscienceless or pitiless crime which is unnecessarily torturous to a victim and "previously convicted" means a sentence imposed at the same time or a sentence previously imposed which has not been set aside, reversed, or vacated.

Hearings to determine the grounds for imposing an enhanced sentence for second degree murder may be initiated by the prosecutor or by the court on its own motion. The court shall not impose an enhanced term unless the ground therefor has been established at a hearing after the conviction of the defendant and on written notice to the defendant of the ground proposed. Subject to the provision of section 706-604, the defendant shall have the right to hear and controvert the evidence against the defendant and to offer evidence upon the issue.

The provisions pertaining to commutation in section 706-656(2), shall apply to persons sentenced pursuant to this section. [L 1993, c 271, §1; am L 1996, c 15, §2; am L 2014, c 202, §3]

Note

The 2014 amendment applies to proceedings arising on or after July 2, 2014 and to proceedings that were begun but not concluded before July 2, 2014. L 2014, c 202, §6.

COMMENTARY ON §706-657

Act 271, Session Laws 1993, added this section to give discretion to the court to sentence an individual, in a second degree murder case evidencing exceptional depravity, to life imprisonment without possibility of parole under §706-656. The legislature felt that this discretion should be limited to those situations in which the circumstances demonstrate that the individual who committed the crime is exceptionally depraved, and therefore should receive the enhanced sentence. House

Standing Committee Report No. 1171, Senate Standing Committee Report No. 689.

Act 15, Session Laws 1996, amended this section to provide that a court may sentence a person convicted of murder in the second degree to life imprisonment without the possibility of parole, if the person had a prior conviction for murder. The Act addressed the problem encountered by the prosecution in Briones v. State, 74 H. 442 (1993), in attempting to obtain a conviction of the defendant for murder in the first degree for killing two persons. The supreme court held in Briones v. State that the defendant must have had the prior intent or state of mind to kill two persons before the defendant killed the first person, for a conviction for murder in the first degree, which has a sentence of life imprisonment without parole. The legislature's intent was to permit a court to sentence a defendant to life imprisonment without the possibility of parole when the defendant commits two or more murders. Senate Standing Committee Report No. 2592, House Standing Committee Report No. 221-96.

Act 202, Session Laws 2014, amended this section to apply the sentencing guidelines under the section to persons eighteen years of age or over at the time of the offense. The legislature found that Hawaii is one of the few states that still allow life sentences without the possibility of parole for juvenile offenders. International law prohibits life sentences without parole for juvenile offenders under the age of eighteen at the time the crime is committed. The United States is the only country in the world that sentences its children to a lifetime of incarceration. In Miller v. Alabama, 132 S. Ct. 2455 (2012), the U.S. Supreme Court held that mandatory life sentences without parole for those under the age of eighteen at the time of their crimes violate the Eighth Amendment's prohibition on cruel and unusual punishments. The Supreme Court reasoned that children are constitutionally different from adults for sentencing purposes, and because juveniles have diminished culpability and greater prospects for reform, they are less deserving of the most severe punishments. The Supreme Court concluded that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. Act 202 recognized the constitutional differences relating to sentencing between juvenile and adult offenders by eliminating the sentences of life imprisonment without the possibility of parole for juvenile offenders. Senate Standing Committee Report No. 3248, Conference Committee Report No. 56-14.

Case Notes

The findings necessary to impose an enhanced sentence under this section must be made by the trier of fact; if the prosecution elects to seek an enhanced sentence pursuant to this section, it must be alleged in the complaint. 92 H. 19, 986 P.2d 306 (1999).

Section requires State to prove, beyond a reasonable doubt, that the victim suffered unnecessary torture and that the defendant intentionally or knowingly inflicted unnecessary torture upon the victim; "unnecessary torture" means the infliction of extreme physical or mental suffering, beyond that which necessarily accompanies the underlying killing. 93 H. 224, 999 P.2d 230 (2000).

Trial court erred in imposing enhanced sentence under this section where court's findings of fact regarding whether victim screamed or incurred defensive wounds were clearly erroneous and there was no substantial evidence that victim suffered unnecessary torture. 93 H. 224, 999 P.2d 230 (2000).

Jury's findings whether murder was "especially heinous, atrocious, or cruel, manifesting exceptional depravity"; unanimity requirement clarified. 95 H. 1, 18 P.3d 203 (2001).

Section not unconstitutionally vague as section provides adequate guidance to a fact-finder charged with determining whether a murder was "especially heinous, atrocious, or cruel, manifesting exceptional depravity" and provides adequate notice to the person of ordinary intelligence that an enhanced sentence may be imposed if he or she intentionally or knowingly inflicts unnecessary torture on the murder victim and the victim in fact suffers unnecessary torture. 95 H. 1, 18 P.3d 203 (2001).

" **§706-659 Sentence of imprisonment for class A felony.** Notwithstanding part II; sections 706-605, 706-606, 706-606.5, 706-660.1, 706-661, and 706-662; and any other law to the contrary, a person who has been convicted of a class A felony, except class A felonies defined in chapter 712, part IV, or section 707-702, shall be sentenced to an indeterminate term of imprisonment of twenty years without the possibility of suspension of sentence or probation. The minimum length of imprisonment shall be determined by the Hawaii paroling authority in accordance with section 706-669. A person who has been convicted of a class A felony defined in chapter 712, part IV, or section 707-702, may be sentenced to an indeterminate term of imprisonment, except as provided for in section 706-660.1 relating to the use of firearms in certain felony offenses and section 706-606.5 relating to repeat offenders. When ordering such a sentence, the court shall impose the maximum

length of imprisonment which shall be twenty years. The minimum length of imprisonment shall be determined by the Hawaii paroling authority in accordance with section 706-669. [L 1980, c 294, §1; am L 1994, c 229, §3; am L 2012, c 292, §4]

COMMENTARY ON §706-659

Act 294, Session Laws 1980, enacted this section to provide for automatic sentence of imprisonment for any person convicted of a class A felony. The legislature stated: "Your Committee feels that the seriousness of class A felonies...merits mandatory imprisonment. This bill effects this purpose by denying suspension of sentence and probation as sentencing options in class A convictions, but retains, through indeterminate sentence, the option of parole by the paroling authority in order that unusual extenuating circumstances can be given due consideration." Senate Standing Committee Report No. 965-80.

Act 229, Session Laws 1994, amended this section, inter alia, to allow the court to make an exception for a person convicted of a class A felony defined in chapter 712, part IV, from the mandatory sentence of an indeterminate term of imprisonment without the possibility of suspension of sentence or probation. The legislature believed that, in certain instances, the public is better served by allowing judges some discretion in evaluating all appropriate sentencing and treatment alternatives available for drug offenders. Conference Committee Report No. 62.

Act 292, Session Laws 2012, amended this section by exempting a person convicted of manslaughter from a mandatory indeterminate term of twenty years imprisonment without the possibility of suspension of sentence or probation, but allowing that person to be sentenced to an indeterminate maximum and minimum term of imprisonment to be determined by the court and paroling authority respectively. The legislature noted that traffic related fatalities were a serious issue and that persons convicted of certain offenses involving traffic fatalities should be dealt with accordingly. The legislature found that Act 292 provided clarity regarding the imposition of a term of imprisonment, as a condition for probation, for a person convicted of manslaughter, and makes this section consistent with §706-620(2), which allows for a sentence of probation for an offense of manslaughter. Senate Standing Committee Report No. 3229, Conference Committee Report No. 44-12.

Law Journals and Reviews

The Protection of Individual Rights Under Hawai‘i's Constitution. 14 UH L. Rev. 311 (1992).

Case Notes

Reasonable inference could be drawn that sentencing court considered special eight-year term under §706-667 prior to sentencing young adult defendant to twenty-year term. 73 H. 259, 831 P.2d 523 (1992).

Although "drug use" is not a prerequisite to eligibility for probation under this section, the legislature contemplated, consistent with the factors enumerated in §706-621, that the trial court would grant probation in cases where strong mitigating circumstances favored it. 97 H. 440, 39 P.3d 567 (2002).

" **§706-660 Sentence of imprisonment for class B and C felonies; ordinary terms; discretionary terms.** (1) Except as provided in subsection (2), a person who has been convicted of a class B or class C felony may be sentenced to an indeterminate term of imprisonment except as provided for in section 706-660.1 relating to the use of firearms in certain felony offenses and section 706-606.5 relating to repeat offenders. When ordering such a sentence, the court shall impose the maximum length of imprisonment which shall be as follows:

(a) For a class B felony--ten years; and

(b) For a class C felony--five years.

The minimum length of imprisonment shall be determined by the Hawaii paroling authority in accordance with section 706-669.

(2) A person who has been convicted of a class B or class C felony for any offense under part IV of chapter 712 may be sentenced to an indeterminate term of imprisonment; provided that this subsection shall not apply to sentences imposed under sections 706-606.5, 706-660.1, 712-1240.5, 712-1240.8 as that section was in effect prior to July 1, 2016, 712-1242, 712-1245, 712-1249.5, 712-1249.6, 712-1249.7, and 712-1257.

When ordering a sentence under this subsection, the court shall impose a term of imprisonment, which shall be as follows:

(a) For a class B felony--ten years or less, but not less than five years; and

(b) For a class C felony--five years or less, but not less than one year.

The minimum length of imprisonment shall be determined by the Hawaii paroling authority in accordance with section 706-669. [L 1972, c 9, pt of §1; am L 1976, c 92, §8 and c 204, §2; am L 1980, c 294, §2; am L 1986, c 314, §38; am L 2013, c 280, §2; am L 2016, c 231, §29]

COMMENTARY ON §706-660

This section embodies three important policy determinations of the Code.

With the exception of special problems calling for extended terms of incarceration as provided in subsequent sections, it provides for only one possible maximum length of imprisonment for each class of felony. Assuming care is used in designating the grade and class of each offense, this should go a long way in ameliorating the variety of inconsistent sentences previously authorized.

In 1965, the legislature enacted a law designed to end judicially imposed inconsistent sentences of imprisonment.[1] This policy known as true indeterminate sentencing is continued. The court's discretion is limited to choosing between imprisonment and other modes of sentencing. Once the court has decided to sentence a felon to imprisonment, the actual time of release is determined by parole authorities. Having decided on imprisonment, the court must then impose the maximum term authorized.[2] The concept is accepted in California[3] and is being proposed in Michigan.[4] This policy is also in substantial accord with the proposed A.B.A. Standards on sentencing.[5]

Inevitably, there will remain some disparity arising from the fact that some judges will be more strongly inclined toward granting probation (or other non-imprisonment disposition) than others. The criteria set forth in part II of this chapter, for withholding a sentence of imprisonment, are intended to alleviate this disparity somewhat. Moreover, §706-669, governing the procedure for determining the actual minimum time to be served, provides that the parole board must make an initial determination as soon as practicable but, in any event, no later than six months following commitment. Thus, "[g]rossly inappropriate denial[s] of probation can in most instances be cured fairly promptly through parole, if the circumstances favoring release are evident...."[6]

Finally, this section embodies a policy of differentiating exceptional problems calling for extended terms of imprisonment[7] from the problems which the vast majority of offenders present. Most of the felony sentences previously authorized in Hawaii were clearly intended to encompass the most dangerous offender. The uniform application of a sentence designed to encompass exceptional cases seems clearly unwarranted in the cases presented by the vast majority of offenders. This is borne out by the A.B.A.'s recent study:

> ...[M]any sentences authorized by statute in this country are, by comparison to other countries and in terms of the needs of the public, excessively long for the vast majority of cases. Their length is undoubtedly the product of concern for protection against the most exceptional cases, most notably the particularly dangerous offender and the professional criminal. It would be more desirable for the penal code to differentiate explicitly between most offenders and such exceptional cases, by providing lower, more realistic sentences for the former and authorizing a special term for the latter.[8]

The sentences provided in this section, when compared to the extended sentences authorized in subsequent sections, seek to achieve the recommended explicit differentiation.

SUPPLEMENTAL COMMENTARY ON §706-660

Act 204, Session Laws 1976, amended the first sentence by adding the exception excluding persons convicted of felonies involving firearms. In its report, the Conference Committee states that it "intends to require the court in cases of felonies where a firearm was used to impose a mandatory term of imprisonment" and that nothing contained in the bill "should be construed as precluding (a) the court from imposing an indeterminate sentence or an extended indeterminate sentence, or (b) the Hawaii paroling authority from fixing the minimum term of imprisonment at a length greater than the term of imprisonment provided for in this bill [706-660.1]." Conference Committee Report Nos. 34 and 35.

Act 294, Session Laws 1980, restricted this section to sentences for class B and C felonies, eliminating provisions relating to class A felonies. For class A felonies, see §706-659.

Act 280, Session Laws 2013, amended this section by granting a sentencing court the discretion to sentence a defendant convicted of a class B or class C felony drug offense to a prison sentence of a length appropriate to the defendant's particular offense and underlying circumstances. Specifically, this Act allows a court to impose a sentence of imprisonment for certain class B felonies for not less than five years, and a sentence of imprisonment for certain class C felonies for not less than one year. The legislature found that state mandatory minimum sentencing laws are being challenged across the nation because these laws mandate longer prison sentences regardless of whether the sentencing court believes the punishment is appropriate based on the circumstances and facts of the case. Studies have shown that mandatory minimum sentencing of drug

users causes an increase in incarceration costs and have a disproportionate impact on women and certain racial and ethnic groups. Senate Standing Committee Report No. 496, House Standing Committee Report No. 1464.

Act 231, Session Laws 2016, amended subsection (2) to implement recommendations made by the Penal Code Review Committee convened pursuant to House Concurrent Resolution No. 155, S.D. 1 (2015).

Case Notes

Because criminal solicitation to commit first degree murder is a crime declared to be a felony without specification of class within meaning of §706-610, it is a class C felony for sentencing purposes, subject to the sentencing provisions of this section. 84 H. 229, 933 P.2d 66 (1997).

For sentencing purposes, conspiracy to commit second degree murder is a class C felony under §706-610 and subject to the sentencing provisions of this section, not §706-656. 84 H. 280, 933 P.2d 617 (1997).

Where defendant was convicted by the jury of five first-degree thefts, each of which defendant was sentenced to ten years' incarceration, and pursuant to this section and §706-668.5, five ten-year terms running consecutively was the statutory maximum, defendant's sentence did not deprive defendant of defendant's right to a jury trial as interpreted by the U.S. Supreme Court in Apprendi and Blakely. 111 H. 267, 141 P.3d 440 (2006).

Upon revocation of probation pursuant to §706-625(3), in light of the record, §706-621 and this section, trial court did not abuse its discretion in sentencing defendant to imprisonment "for a term of not more than ten years with credit for time served". 97 H. 135 (App.), 34 P.3d 1034 (2001).

Cited: 56 H. 628, 548 P.2d 632 (1976).

§706-660 Commentary:

1. See H.R.S. §711-76.

2. It must, however, be remembered that the Code grants the court the power to impose an extended term of imprisonment (see §706-661).

3. Cal. Pen. Code §1168.

4. Prop. Mich. Rev. Cr. Code §1401.

5. A.B.A. Standards §3.2.

6. Prop. Mich. Rev. Cr. Code, comments at 130.

7. Cf. §706-661.

8. A.B.A. Standards §2.5.

" **§706-660.1 Sentence of imprisonment for use of a firearm, semiautomatic firearm, or automatic firearm in a felony.** (1) A person convicted of a felony, where the person had a firearm in the person's possession or threatened its use or used the firearm while engaged in the commission of the felony, whether the firearm was loaded or not, and whether operable or not, may in addition to the indeterminate term of imprisonment provided for the grade of offense be sentenced to a mandatory minimum term of imprisonment without possibility of parole or probation the length of which shall be as follows:

(a) For murder in the second degree and attempted murder in the second degree--up to fifteen years;

(b) For a class A felony--up to ten years;

(c) For a class B felony--up to five years; and

(d) For a class C felony--up to three years.

The sentence of imprisonment for a felony involving the use of a firearm as provided in this subsection shall not be subject to the procedure for determining minimum term of imprisonment prescribed under section 706-669; provided further that a person who is imprisoned in a correctional institution as provided in this subsection shall become subject to the parole procedure as prescribed in section 706-670 only upon the expiration of the term of mandatory imprisonment fixed under paragraph (a), (b), (c), or (d).

(2) A person convicted of a second firearm felony offense as provided in subsection (1) where the person had a firearm in the person's possession or threatened its use or used the firearm while engaged in the commission of the felony, whether the firearm was loaded or not, and whether operable or not, shall in addition to the indeterminate term of imprisonment provided for the grade of offense be sentenced to a mandatory minimum term of imprisonment without possibility of parole or probation the length of which shall be as follows:

(a) For murder in the second degree and attempted murder in the second degree--twenty years;

(b) For a class A felony--thirteen years, four months;

(c) For a class B felony--six years, eight months; and

(d) For a class C felony--three years, four months.

The sentence of imprisonment for a second felony offense involving the use of a firearm as provided in this subsection shall not be subject to the procedure for determining a minimum term of imprisonment prescribed under section 706-669; provided further that a person who is imprisoned in a correctional institution as provided in this subsection shall become subject to the parole procedure as prescribed in section 706-670 only upon expiration of the term of mandatory imprisonment fixed under paragraph (a), (b), (c), or (d).

(3) A person convicted of a felony, where the person had a semiautomatic firearm or automatic firearm in the person's possession or used or threatened its use while engaged in the commission of the felony, whether the semiautomatic firearm or automatic firearm was loaded or not, and whether operable or not, shall in addition to the indeterminate term of imprisonment provided for the grade of offense be sentenced to a mandatory minimum term of imprisonment without possibility of parole or probation the length of which shall be as follows:

(a) For murder in the second degree and attempted murder in the second degree--twenty years;

(b) For a class A felony--fifteen years;

(c) For a class B felony--ten years; and

(d) For a class C felony--five years.

The sentence of imprisonment for a felony involving the use of a semiautomatic firearm or automatic firearm as provided in this subsection shall not be subject to the procedure for determining a minimum term of imprisonment prescribed under section 706-669; provided further that a person who is imprisoned in a correctional institution as provided in this subsection shall become subject to the parole procedure as prescribed in section 706-670 only upon expiration of the term of mandatory imprisonment fixed under paragraph (a), (b), (c), or (d).

(4) In this section:

"Automatic firearm" has the same meaning defined in section 134-1.

"Firearm" has the same meaning defined in section 134-1 except that it does not include "semiautomatic firearm" or "automatic firearm".

"Semiautomatic firearm" means any firearm that uses the energy of the explosive in a fixed cartridge to extract a fired cartridge and chamber a fresh cartridge with each single pull of the trigger. [L 1976, c 204, §3; am L 1987, c 260, §1; am L 1990, c 195, §5; am L 1992, c 57, §1; gen ch 1992]

Revision Note

In subsection (4), paragraph designations deleted and definitions rearranged pursuant to §23G-15.

COMMENTARY ON §706-660.1

Designed to deter the use of firearms in the commission of offenses, this section, together with §706-660, is intended to require the court to impose a mandatory term of imprisonment in cases of felonies involving firearms. Nothing in this or in §706-660, however, is intended to preclude the court from imposing indeterminate or extended indeterminate sentences, or the paroling authority from fixing minimum terms of imprisonment, exceeding the terms provided for in this section. Senate Conference Committee Report No. 35, House Conference Committee Report No. 34 (1976).

Act 260, Session Laws 1987, amended this section by changing the conditions under which a mandatory sentence can be imposed. A mandatory sentence can be imposed regardless of whether the firearm was loaded, operable, or used as a threat. The legislature felt that allowing judicial discretion in imposing a mandatory sentence, for the first firearm offense, will address concerns that under certain circumstances the mere possession of a firearm may not justify a mandatory prison term. Senate Standing Committee Report No. 769, Senate Conference Committee Report No. 111, House Conference Committee Report No. 113.

Act 195, Session Laws 1990, amended this section to address community concerns in regard to the use of "assault weapons." Harsh sentences keep these weapons out of the hands of criminals. Senate Standing Committee Report No. 3058.

Act 57, Session Laws 1992, amended this section to conform subsection and paragraph designations to the style used in the Code. House Standing Committee Report No. 1198-92, Senate Standing Committee Report No. 1947.

Law Journals and Reviews

State v. Kumukau: A Case for the Application of Eighth Amendment Proportionality Analysis. 13 UH L. Rev. 577 (1991).

Case Notes

Defendant should be permitted to show that counsel was ineffective at time of prior convictions. 65 H. 354, 652 P.2d 1119 (1982).

Imposition of consecutive mandatory minimum terms were authorized; however, court imposing the maximum terms

consecutively may abuse its discretion. 71 H. 218, 787 P.2d 682 (1990).

Defendant who pled no contest to both kidnapping and use of firearm in commission of kidnapping was properly sentenced under enhanced sentencing statute for former but not latter crime; legislature did not intend to impose two mandatory minimum sentences for one use of firearm. 72 H. 496, 824 P.2d 107 (1992).

Appellant had a right under the due process clause, article I, §5 of the Hawai‘i constitution, to be given reasonable notice of the circuit court's intention to apply subsection (a) (1985) in sentencing appellant in connection with kidnapping conviction and to be afforded the opportunity to be heard with respect thereto. 76 H. 517, 880 P.2d 192 (1994).

Plain reading of indictment put defendant on notice that charges against defendant included possession of a firearm and that defendant could face sentencing enhancement under this section. 80 H. 327, 909 P.2d 1142 (1996).

Subsection (1) interpreted to preclude imposition of enhanced sentencing for defendant convicted of robbery where defendant did not personally possess, threaten to use, or use firearm while engaged in commission of that felony. 80 H. 327, 909 P.2d 1142 (1996).

A sentencing court may order that a mandatory minimum term of imprisonment imposed under this section be served consecutively to a mandatory period of imprisonment imposed under §706-606.5 in connection with a separate felony conviction arising out of a charge contained in the same indictment or complaint. 84 H. 476, 935 P.2d 1021 (1997).

Imposition of mandatory minimum sentences vacated where unclear from verdict and record whether jury found defendant guilty as principal who killed victims with firearm or as accomplice who aided commission of crime in some other way. 85 H. 462, 946 P.2d 32 (1997).

Trial court erred in imposing mandatory minimum term of fifteen years under subsection (3) where jury was not instructed on the statutory definition of semiautomatic pistol and did not expressly find that defendant used a semiautomatic firearm in the commission of the robbery. 91 H. 33, 979 P.2d 1059 (1999).

Trial court erred in sentencing defendant to mandatory minimum terms of imprisonment under subsections (1)(c) and (3)(c) where defendant's theft of a firearm was the entire felony; there was no underlying felony that defendant committed while possessing or using a firearm; as such, defendant's conduct fell outside the ambit of this section. 106 H. 441, 106 P.3d 364 (2005).

Where legislature intended to punish defendant under both §134-6 and this section for use of a firearm in shooting victim,

the double jeopardy clause of the Hawaii constitution was not violated when the trial court imposed a mandatory minimum term sentence under this section for attempted second degree murder when defendant was also convicted of, and sentenced for, use of a firearm in the commission of the separate felony of attempted second degree murder. 107 H. 469, 115 P.3d 648 (2005).

Section 706-669 required the Hawaii paroling authority to conduct its minimum term hearing within six months of defendant's commitment to the custody of the director of the department of public safety, and the paroling authority was not jurisdictionally barred by subsection (1) from fulfilling this statutorily imposed duty. 111 H. 35, 137 P.3d 349 (2006).

Whether felon being sentenced possessed, used, or threatened to use a firearm while engaged in the commission of a class A felony is a question of fact to be determined by the court. 7 H. App. 424, 774 P.2d 246 (1989).

Subsection (b) inapplicable where record contained no evidence that defendant's prior felony conviction involved possession, use, or threat to use firearm; proper sentencing statute was subsection (a). 9 H. App. 368, 842 P.2d 267 (1992).

Where discussion that defendant was subject to mandatory minimum terms of imprisonment under this section was conducted at bench outside of defendant's hearing, defendant was not given constitutionally required reasonable notice of intended application of this section. 82 H. 158 (App.), 920 P.2d 372 (1996).

Mandatory minimum term of imprisonment specified under subsection (3) cannot be imposed on a defendant who did not personally possess, use or threaten to use firearm, simply on the basis of his or her accomplice liability. 84 H. 112 (App.), 929 P.2d 1362 (1996).

Sentencing court must impose the mandatory minimum term of imprisonment specified under subsection (3) upon filing of appropriate motion and finding that defendant had firearm in defendant's possession or used or threatened its use while engaged in the commission of the felony. 84 H. 112 (App.), 929 P.2d 1362 (1996).

Where use of term "rifle" in complaint did not indicate whether weapon used was a semi-automatic or automatic firearm, as opposed to one which was not, complaint failed to properly allege, and thereby notify defendant of defendant's criminal liability under subsection (3)(d). 84 H. 352 (App.), 933 P.2d 1386 (1997).

Trial court erred in sentencing defendant to ten years of incarceration with a mandatory minimum term of ten years under subsection (3)(c) as convicting defendant of being a felon in possession of a firearm pursuant to §134-7(b) and sentencing

defendant to a mandatory minimum term of imprisonment pursuant to subsection (3)(c) essentially punished defendant twice for a single possession of a firearm; a rational interpretation of this section is that the legislature did not intend its application for felonies where the entirety of the felonious conduct is the use or possession of a firearm. 107 H. 273 (App.), 112 P.3d 759 (2005).

" **§706-660.2 Sentence of imprisonment for offenses against children, elder persons, or handicapped persons.** (1) Notwithstanding section 706-669, if not subjected to an extended term of imprisonment pursuant to section 706-662, a person shall be sentenced to a mandatory minimum term of imprisonment without possibility of parole as provided in subsection (2) if:

(a) The person, in the course of committing or attempting to commit a felony, causes the death or inflicts serious or substantial bodily injury upon another person who is:

(i) Sixty years of age or older;

(ii) Blind, a paraplegic, or a quadriplegic; or

(iii) Eight years of age or younger; and

(b) Such disability is known or reasonably should be known to the defendant.

(2) The term of imprisonment for a person sentenced pursuant to subsection (1) shall be as follows:

(a) For murder in the second degree--fifteen years;

(b) For a class A felony--six years, eight months;

(c) For a class B felony--three years, four months;

(d) For a class C felony--one year, eight months. [L 1988, c 89, §1; am L 1990, c 67, §8; am L 2015, c 35, §22]

COMMENTARY ON §706-660.2

Act 89, Session Laws 1988, added this section to mandate harsher penalties for crimes against victims who are less able to protect themselves. The legislature found that passage of this section will afford a greater measure of protection for the groups designated in this section. House Standing Committee Report No. 459-88, Senate Standing Committee Report No. 2544.

Act 35, Session Laws 2015, amended this section by adding subsection designations and making other technical nonsubstantive amendments.

Case Notes

No error in sentence of life imprisonment with a mandatory minimum term of fifteen years for attempted second degree murder

of infant by abandonment where defendant left infant in danger of death by reason of exposure or accident. 73 H. 109, 831 P.2d 512 (1992).

Determination that a defendant is within the class of offenders to which this section applies to be made by sentencing court after defendant's adjudication of guilt at trial by the trier of fact. 82 H. 304, 922 P.2d 358 (1996).

As an attempt to commit a crime is an offense of the same class and grade as the offense which is attempted, and second degree murder committed under the "aggravated circumstances" set forth in this section is expressly distinguished from classified felonies and, pursuant to §706-610, from unclassified felonies; thus, attempted second degree murder is not an "unclassified" offense for purposes of sentencing and is not treated as a class C felony pursuant to this section. 96 H. 17, 25 P.3d 792 (2001).

Failure to instruct the jury to determine whether infant victim was under the age of eight and whether defendant knew it, or should have known it, was harmless beyond a reasonable doubt; omitted sentencing factor was supported by uncontroverted evidence, including defendant's admission, that defendant's infant daughter was under the age of eight. 96 H. 17, 25 P.3d 792 (2001).

As defendant could only be sentenced under the options available for the offense for which defendant was convicted, defendant had only pled guilty to and was convicted of the offense of assault in the first degree, and plea was devoid of reference to all necessary aggravating circumstances, trial court erred in resentencing defendant to an indeterminate ten-year sentence with a mandatory minimum term of three years and four months under this section. 93 H. 189 (App.), 998 P.2d 70 (2000).

Where aggravating circumstance of complainant's age was not set forth in the plea agreement or admitted or stipulated to as part of the guilty plea, there was an insufficient factual basis in the accepted guilty plea to support the mandatory prison term under this section. 93 H. 189 (App.), 998 P.2d 70 (2000).

" **§706-661 Extended terms of imprisonment.** The court may sentence a person who satisfies the criteria for any of the categories set forth in section 706-662 to an extended term of imprisonment, which shall have a maximum length as follows:

(1) For murder in the second degree--life without the possibility of parole;

(2) For a class A felony--indeterminate life term of imprisonment;

(3) For a class B felony--indeterminate twenty-year term of imprisonment; and

(4) For a class C felony--indeterminate ten-year term of imprisonment.

When ordering an extended term sentence, the court shall impose the maximum length of imprisonment. The minimum length of imprisonment for an extended term sentence under paragraphs (2), (3), and (4) shall be determined by the Hawaii paroling authority in accordance with section 706-669. [L 1972, c 9, pt of §1; am L 1976, c 92, §8; am L 1999, c 286, §2; am L 2006, c 230, §§23, 54; am L Sp 2007 2d, c 1, §2]

Applicability of Act 1, Second Special Session of 2007

L Sp 2007 2d, c 1, §5 provides:

"SECTION 5. This Act shall apply to all sentencing or resentencing proceedings pending on or commenced after the effective date of this Act [October 31, 2007], whether the offense was committed prior to, on, or after the effective date of this Act [October 31, 2007]. A defendant whose extended term of imprisonment is set aside or invalidated shall be resentenced pursuant to this Act upon request of the prosecutor. This Act shall not entitle a defendant who has previously been sentenced to an extended term to be resentenced pursuant to the procedures set forth in this Act unless the defendant is otherwise legally entitled to be resentenced."

Case Notes

Extended sentence imposed on multiple offender held not cruel and unusual punishment. 56 H. 343, 537 P.2d 724 (1975).

Breach of plea agreement by prosecutor resulting from participation in extended term hearing may be remedied by remand for resentencing by another judge. 60 H. 93, 588 P.2d 412 (1978); 60 H. 104, 588 P.2d 408 (1978).

Participation by prosecutor in hearing for extended term sentencing, even though pursuant to order of court, constituted breach of plea agreement. 60 H. 93, 588 P.2d 412 (1978).

No abuse of discretion in court sentencing defendant to extended terms of imprisonment under this section and §706-662 where, inter alia, court considered each of the factors enumerated in §706-606 and all the mitigating factors raised by defendant. 83 H. 335, 926 P.2d 1258 (1996).

As §706-600 and this section do not authorize a court to impose a single sentence on a defendant who has been convicted of multiple charges, trial court did not violate plea agreement by imposing a life term for each class A felony defendant was

convicted of, and then running each life term concurrently. 91 H. 20, 979 P.2d 1046 (1999).

The constitutional prohibition against ex post facto measures was not offended by the plain language of Act 1, L Sp 2007 2d, amending §§706-662, 706-664, and this section regarding sentencing or resentencing for extended terms of imprisonment, where it was clear that the new jury provisions did not (1) increase criminal liability for conduct previously innocent, (2) aggravate the degree of defendant's crimes, (3) increase the punishment available at the time defendant committed defendant's crimes, or (4) alter evidentiary standards to defendant's detriment. 117 H. 381, 184 P.3d 133 (2008).

The constitutional prohibition against ex post facto measures was not offended by the retrospective application to defendant of Act 1, L Sp 2007 2d, amending §§706-662, 706-664, and this section, where Act 1 did not punish as a crime an act previously committed which was innocent when done, make more burdensome the punishment for the crime after its commission, nor deprive one charged with the crime of any defense available according to the law when the act was committed. 118 H. 68 (App.), 185 P.3d 816 (2008).

" **§706-662 Criteria for extended terms of imprisonment.** A defendant who has been convicted of a felony may be subject to an extended term of imprisonment under section 706-661 if it is proven beyond a reasonable doubt that an extended term of imprisonment is necessary for the protection of the public and that the convicted defendant satisfies one or more of the following criteria:

(1) The defendant is a persistent offender in that the defendant has previously been convicted of two or more felonies committed at different times when the defendant was eighteen years of age or older;

(2) The defendant is a professional criminal in that:

(a) The circumstances of the crime show that the defendant has knowingly engaged in criminal activity as a major source of livelihood; or

(b) The defendant has substantial income or resources not explained to be derived from a source other than criminal activity;

(3) The defendant is a dangerous person in that the defendant has been subjected to a psychiatric or psychological evaluation that documents a significant history of dangerousness to others resulting in criminally violent conduct, and this history makes the defendant a serious danger to others. Nothing in this section precludes the introduction of victim-related

data to establish dangerousness in accord with the Hawaii rules of evidence;

(4) The defendant is a multiple offender in that:
    (a) The defendant is being sentenced for two or more felonies or is already under sentence of imprisonment for any felony; or
    (b) The maximum terms of imprisonment authorized for each of the defendant's crimes, if made to run consecutively, would equal or exceed in length the maximum of the extended term imposed or would equal or exceed forty years if the extended term imposed is for a class A felony;

(5) The defendant is an offender against the elderly, handicapped, or a minor eight years of age or younger in that:
    (a) The defendant attempts or commits any of the following crimes: murder, manslaughter, a sexual offense that constitutes a felony under chapter 707, robbery, felonious assault, burglary, or kidnapping; and
    (b) The defendant, in the course of committing or attempting to commit the crime, inflicts serious or substantial bodily injury upon a person who has the status of being:
        (i) Sixty years of age or older;
        (ii) Blind, a paraplegic, or a quadriplegic; or
        (iii) Eight years of age or younger; and
    the person's status is known or reasonably should be known to the defendant; or

(6) The defendant is a hate crime offender in that:
    (a) The defendant is convicted of a crime under chapter 707, 708, or 711; and
    (b) The defendant intentionally selected a victim or, in the case of a property crime, the property that was the object of a crime, because of hostility toward the actual or perceived race, religion, disability, ethnicity, national origin, gender identity or expression, or sexual orientation of any person. For purposes of this subsection, "gender identity or expression" includes a person's actual or perceived gender, as well as a person's gender identity, gender-related self-image, gender-related appearance, or gender-related expression, regardless of whether that gender identity, gender-related self-image, gender-related appearance, or gender-related expression is different from that traditionally

associated with the person's sex at birth. [L 1972, c 9, pt of §1; am L 1978, c 210, §1; am L 1981, c 166, §1; am L 1985, c 280, §1; am L 1986, c 314, §40; am L 1988, c 305, §11; am L 1990, c 67, §8; gen ch 1992; am L 1996, c 3, §1; am L 2001, c 240, §3; am L 2003, c 33, §2; am L 2006, c 230, §§24, 54; am L Sp 2007 2d, c 1, §3]

Applicability of Act 1, Second Special Session of 2007

L Sp 2007 2d, c 1, §5 provides:

"SECTION 5. This Act shall apply to all sentencing or resentencing proceedings pending on or commenced after the effective date of this Act [October 31, 2007], whether the offense was committed prior to, on, or after the effective date of this Act [October 31, 2007]. A defendant whose extended term of imprisonment is set aside or invalidated shall be resentenced pursuant to this Act upon request of the prosecutor. This Act shall not entitle a defendant who has previously been sentenced to an extended term to be resentenced pursuant to the procedures set forth in this Act unless the defendant is otherwise legally entitled to be resentenced."

Law Journals and Reviews

Risky Business: Assessing Dangerousness in Hawai‘i. 24 UH L. Rev. 63 (2001).

State v. Rivera: Extended Sentencing and the Sixth Amendment Right to Trial by Jury in Hawai‘i. 28 UH L. Rev. 457 (2006).

Case Notes

Hawaii sentencing court found that an extended sentence was necessary to protect the public in appellee's case. Because the effect of the finding was to increase appellee's sentence above that authorized by the jury's guilty verdict, Apprendi v. New Jersey required a jury to make the finding. 436 F.3d 1057 (2006).

Petitioner's extended sentence, based on judge-determined facts, violated Apprendi v. New Jersey and represented "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States". 350 F. Supp. 2d 848 (2004).

Question whether trial court may rely solely on the pre-sentence diagnosis and report to make finding that defendant is

a multiple offender raised but not decided. 56 H. 32, 526 P.2d 1200 (1974).

Extended sentence imposed on multiple offender held not cruel and unusual punishment. 56 H. 343, 537 P.2d 724 (1975).

Proof beyond reasonable doubt in separate proceeding is required. 56 H. 628, 548 P.2d 632 (1976).

Where prior conviction is an element of the crime, it should be proven in the case in chief in a one stage proceeding. 57 H. 339, 555 P.2d 1199 (1976).

Applicability of the due process guarantees to the two-step process of imposing a sentence for extended term. 60 H. 71, 588 P.2d 394 (1978).

Contents of record on appeal. 60 H. 71, 588 P.2d 394 (1978).

In paragraph (4), the criterion that the extended term is "warranted" is construed to mean "necessary for the protection of the public." 60 H. 71, 588 P.2d 394 (1978).

Provisions not unconstitutional. 60 H. 100, 588 P.2d 409 (1978).

Trial court permissibly relied on pre-sentence report in finding defendant to be a persistent offender, where facts establishing defendant as such offender were in the record apart from the pre-sentence report. 60 H. 100, 588 P.2d 409 (1978).

Paragraph (4) interpreted as not requiring separate step to determine criminality. 60 H. 308, 588 P.2d 394 (1978).

Full-hearing requirement under section does not apply to adjustments of pre-penal code sentences under Act 188, SL 1975. 61 H. 517, 606 P.2d 83 (1980).

Criteria for imposition of extended term on multiple offender. 62 H. 112, 612 P.2d 110 (1980).

At the voir dire stage, it is uncertain whether the extended term provision for a multiple offender is applicable, and a defendant charged with three counts of robbery in the first degree is not entitled to twelve peremptory challenges pursuant to HRPP 24(b). 63 H. 354, 628 P.2d 1018 (1981).

Not cruel and unusual punishment under circumstances. 63 H. 488, 630 P.2d 619 (1981).

Sufficient evidence to impose extended term. 63 H. 488, 630 P.2d 619 (1981); 63 H. 636, 633 P.2d 1115 (1981).

Defendant should be permitted to show that counsel was ineffective at time of prior convictions. 65 H. 354, 652 P.2d 1119 (1982).

Circuit court did not err in first step of extended term sentencing procedure; case remanded to circuit court for specification of reasons for determining that extended terms were necessary for protection of public and entry of findings of fact to support that determination. 78 H. 383, 894 P.2d 80 (1995).

No abuse of discretion in court sentencing defendant to extended terms of imprisonment under §706-661 and this section where, inter alia, court considered each of the factors enumerated in §706-606 and all the mitigating factors raised by defendant. 83 H. 335, 926 P.2d 1258 (1996).

A psychiatric or psychological evaluation of a defendant under paragraph (3) does not require a face-to-face interview in cases where defendant refuses to be examined. 85 H. 258, 942 P.2d 522 (1997).

Where witness testimonies provided proof beyond reasonable doubt that defendant had significant history of dangerousness resulting in criminally violent conduct, extended term sentence under paragraph (3) proper and necessary for protection of public. 85 H. 258, 942 P.2d 522 (1997).

Where psychologist was competent to testify, foundation for testimony properly laid, and testimony established a history of defendant's violence, trial court did not abuse discretion in finding that psychologist's testimony constituted proof beyond a reasonable doubt that defendant had a "significant history of dangerousness to others resulting in criminally violent conduct", pursuant to paragraph (3). 90 H. 280, 978 P.2d 718 (1999).

Findings under paragraph (5) regarding (a) the age or handicapped status of the victim and (b) whether "such disability is known or reasonably should be known to the defendant" entail "intrinsic" facts; Hawaii constitution requires these findings to be made by the trier of fact, not the sentencing court. 91 H. 261, 982 P.2d 890 (1999).

A sentencing court may not impose an enhanced sentence based on a defendant's refusal to admit guilt with respect to an offense the conviction of which the defendant intends to appeal. 103 H. 315, 82 P.3d 401 (2003).

Trial court violated defendant's constitutional privilege against self-incrimination by imposing an enhanced sentence pursuant to paragraph (4) based solely on defendant's refusal to admit defendant's guilt with respect to the offenses of which defendant was convicted by the jury. 103 H. 315, 82 P.3d 401 (2003).

Hawaii's extended term sentencing scheme is not incompatible with Blakely v. Washington, as (1) Blakely addresses only statutory "determinate" sentencing "guideline" schemes, and (2) the Hawaii supreme court's "intrinsic-extrinsic" analysis culminating in State v. Kaua is compatible with both Blakely and Apprendi v. New Jersey. 106 H. 146, 102 P.3d 1044 (2004).

Trial court did not err in sentencing defendant to extended terms of imprisonment under this section where it found that (1) defendant was a persistent and multiple offender and (2) that

defendant's commitment for an extended term was necessary for the protection of the public. 106 H. 146, 102 P.3d 1044 (2004).

Trial court did not err in sentencing defendant to extended terms of imprisonment as a "multiple offender" pursuant to paragraph (4)(a); without this finding that the defendant committed a previous felony, notwithstanding that such an extended term may be considered "necessary for protection of the public", a judge would not be authorized to impose it; and extended term sentencing did not run afoul of Sixth Amendment to U.S. Constitution as interpreted by the U.S. Supreme Court in Apprendi v. New Jersey. 110 H. 79, 129 P.3d 1107 (2006).

Inasmuch as this section authorizes the sentencing court to extend a defendant's sentence beyond the "standard term" authorized solely by the jury's verdict by requiring the sentencing court, rather than the trier of fact, to make an additional necessity finding that does not fall under Apprendi's prior-or-concurrent-convictions exception, this section is unconstitutional on its face; thus, defendant's extended term sentences imposed by the trial court violated defendant's Sixth Amendment right to a jury trial and were illegal. 115 H. 432, 168 P.3d 562 (2007).

Invocation of a court's inherent power to provide process where none exists, by reforming this section (1996) to allow for jury fact-finding did not violate defendant's due process right, where assigning the fact-finding role to the jury would be a procedural, as opposed to a substantive, change that would not expand the scope of criminal liability, increase punishment, or alter any evidentiary burdens to defendant's detriment, but, rather, would simply change the course to a result. 117 H. 381, 184 P.3d 133 (2008).

The constitutional prohibition against ex post facto measures was not offended by the plain language of Act 1, L Sp 2007 2d, amending §§706-661, 706-664, and this section regarding sentencing or resentencing for extended terms of imprisonment, where it was clear that the new jury provisions did not (1) increase criminal liability for conduct previously innocent, (2) aggravate the degree of defendant's crimes, (3) increase the punishment available at the time defendant committed defendant's crimes, or (4) alter evidentiary standards to defendant's detriment. 117 H. 381, 184 P.3d 133 (2008).

Where enactment of Act 1, L Sp 2007 2d provided conclusive expression of legislative support for the use of juries as the trier of fact with respect to extended term sentencing fact-finding, invocation of circuit court's inherent power to reform this section so as to preserve its constitutionality did not unduly burden or substantially interfere with the other branch's exercise of its power. 117 H. 381, 184 P.3d 133 (2008).

This section sets forth the facts the jury must find in order to authorize the court to increase the defendant's sentence beyond the statutory maximum for the offense of manslaughter; as the matter of parole was a matter outside the scope of the jury's function, which was limited to finding the two operative facts under this section, it was error for the trial court to instruct the jury on parole. 127 H. 91, 276 P.3d 660 (2012).

The constitutional prohibition against ex post facto measures was not offended by the retrospective application to defendant of Act 1, L Sp 2007 2d, amending §§706-661, 706-664, and this section, where Act 1 did not punish as a crime an act previously committed which was innocent when done, make more burdensome the punishment for the crime after its commission, nor deprive one charged with the crime of any defense available according to the law when the act was committed. 118 H. 68 (App.), 185 P.3d 816 (2008).

COMMENTARY ON §§706-661 AND 706-662

These sections provide for extended terms of imprisonment for the exceptionally difficult defendant. The Code's limited recognition of consecutive sentences, and its attempt to provide lower authorized sentences for the majority of convicted defendants whose records or situations do not suggest the need for extended incarceration, necessitates some provision for dealing with the persistent, professional, dangerous, and multiple offender. Unlike other offenders, these defendants should be subject to possible extended terms because their records or situations indicate that extended incarceration may be necessary to protect the public. In these cases, rehabilitation, if possible, is unlikely to be achieved within an ordinary term.

The Code takes a flexible approach with respect to extended imprisonment. If one or more of the grounds provided by §706-662 is established, it remains discretionary with the court whether an extended term will be imposed--its imposition is not mandatory.

Section 706-662 authorizes an extended term in the case of (1) a persistent offender, (2) a professional criminal, (3) a dangerous person, and (4) a multiple offender. Subsections (1) through (4) state the minimal requirements for each of the findings. These requirements are not intended as mandates, or even guidelines, but rather as limitations on the court's exercise of discretion.

> [T]he existence of the minimal conditions do not make the finding necessary nor is it, indeed, compulsory in any case. Minimal conditions are stated as a safeguard against

possible abusive findings, not as a judgment that establishment of the conditions necessarily demands that the finding in question should be made. Of course, before the court can make the ultimate finding required, it must find that the minimal conditions are established.[1]

SUPPLEMENTAL COMMENTARY ON §§706-661 AND 706-662

Act 210, Session Laws 1978, amended §706-662 by adding paragraph (5), finding offenses against the elderly and the handicapped to be a significant problem.

Act 166, Session Laws 1981, amended §706-662 by deleting the requirement that defendants be at least twenty-two years of age before they become subject to possible extended terms as persistent offenders or professional criminals, it appearing that those most often arrested and sentenced for felonies fell in the eighteen to twenty-five year age group. As amended, the section authorizes the court to impose extended terms, in appropriate cases, regardless of the defendant's age. Senate Standing Committee Report No. 705.

Act 280, Session Laws 1985, amended §706-662 to impose an extended prison term on a defendant who, while committing or attempting to commit certain felony offenses, inflicts serious bodily injury on a person who is blind, paraplegic, quadriplegic, sixty years old or older, or eight years of age or younger. This amendment addresses the needs of persons who cannot protect themselves as well as expresses condemnation of defendants who commit crimes against those persons. House Standing Committee Report No. 398, Senate Standing Committee Report No. 852.

Act 305, Session Laws 1988, amended §706-662 by clarifying the definition of dangerousness by removing old language and using language which conforms more to "state of the art" knowledge about violence prediction. The legislature stated that this would lead to an increase in the accuracy of violence prediction by focusing on the two principal components, history of dangerousness and present triggers of violent behavior. This section was also amended to allow the introduction of victim-related data in order to establish dangerousness. Senate Standing Committee Report No. 2153.

Act 3, Session Laws 1996, amended §706-662 by adding manslaughter to the crimes for which an extended term of imprisonment may be given when the defendant inflicts serious or substantial bodily injury on a person sixty years or older, handicapped, or eight years or younger. The legislature found that the elderly, handicapped, and children are more vulnerable and should be provided more protection, and that adding

manslaughter to the enhanced sentencing statute was consistent with the policy to protect the more vulnerable people in the community. Senate Standing Committee Report No. 2036, House Standing Committee Report No. 988-96.

Act 286, Session Laws 1999, amended §706-661 to make the extended term of imprisonment for murder in the second degree an indeterminate life imprisonment without the possibility of parole. Conference Committee Report No. 89.

Act 240, Session Laws 2001, amended §706-662 by allowing extended terms of imprisonment for perpetrators of hate-motivated crimes, to protect Hawaii's citizens from crimes motivated by bigotry and hate. House Standing Committee Report No. 1422.

Act 33, Session Laws 2003, amended §706-662, among others, to protect a person's actual or perceived gender identity or expression under the State's current hate crime laws. The legislature found that one child out of two hundred is born with noticeable gender ambiguity, and one child out of one hundred has hidden ambiguity. These persons often struggle with their gender identity and are ridiculed, harassed, and sometimes assaulted by others for being different. The U.S. Department of Justice reports that hate crimes directed against gay, lesbian, bisexual, and transgender citizens are especially violent. "Sexual orientation," currently included in the hate crimes law, is not the same as "gender identity." The legislature believed that this class of persons should be included and afforded protection under Hawaii's hate crime laws. Senate Standing Committee Report No. 593, House Standing Committee Report No. 1184.

Act 230, Session Laws 2006, amended §706-661 to require the court to consider public safety in deciding whether to impose an extended term of imprisonment. Act 230 amended §706-662 to clarify that a defendant who has been convicted of a felony qualifies for an extended term of imprisonment under §706-661. Act 230 also provided that the amendments to §§706-661 and 706-662 would sunset on June 30, 2007. House Standing Committee Report No. 665-06, Conference Committee Report No. 94-06.

Act 1, Second Special Session Laws 2007, amended Hawaii's extended sentencing statutes, §§706-661, 706-662, and 706-664, to ensure that the procedures used to impose extended terms of imprisonment comply with the requirements of the United States Supreme Court and the Hawaii supreme court. Act 1 required that a jury determine the facts necessary to impose an extended term of imprisonment, unless the defendant waives the right to a jury determination, and that facts necessary to impose an extended term of imprisonment are proven beyond a reasonable doubt. The legislature found that Hawaii's current extended sentencing

procedure had been deemed unconstitutional because a judge, rather than a jury, was required to find facts, other than those of prior or concurrent convictions, necessary to enhance a defendant's sentence beyond the ordinary or standard term authorized by the jury's verdict. Act 1's amendments conformed the State's enhanced sentencing law to the requirements of the United States Supreme Court and the Hawaii supreme court. Act 1 applied retroactively to sentencing or resentencing proceedings that were pending on or commenced after its effective date [October 31, 2007], whether the offense was committed prior to, on, or after that date. However, the Act did not entitle a defendant who was previously sentenced to an extended term of imprisonment to resentencing pursuant to the procedures set forth in the Act, unless the defendant was otherwise legally entitled to be resentenced. Senate Standing Committee Report No. 7, House Standing Committee Report No. 1.

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§§706-661 and 706-662 Commentary:

1. M.P.C., Tentative Draft No. 2, comments at 41-42 (1954).

" **§706-663 Sentence of imprisonment for misdemeanor and petty misdemeanor.** *[Repeal and reenactment on July 1, 2020. L 2016, c 217, §8.]* After consideration of the factors set forth in sections 706-606 and 706-621, the court may sentence a person who has been convicted of a misdemeanor or a petty misdemeanor to imprisonment for a definite term to be fixed by the court and not to exceed one year in the case of a misdemeanor or thirty days in the case of a petty misdemeanor, subject to earlier release pursuant to section 353-36. [L 1972, c 9, pt of §1; am L 1986, c 314, §41; am L 2016, c 217, §2]

COMMENTARY ON §706-663

This section of the Code continues the previous policy of the law of providing definite sentences (not to exceed one year) in the case of misdemeanors,[1] and adds a new category of minor criminal offenses, designated as petty misdemeanors, for which imprisonment not exceeding 30 days is authorized. The court is free within the statutory maximum to choose a shorter definite period of confinement.

Indeterminate terms of imprisonment are not provided for misdemeanors or petty misdemeanors because the gravity of the offenses and the character of most such offenders would not warrant the authorization of a longer prison term. The flexibility sought to be achieved by indeterminate sentences

decreases as the maximum authorized term of imprisonment decreases. In view of this fact and in view of the fact that resources devoted to the determination of minimum terms of imprisonment have decreasing marginal utility as maximum authorized terms decrease, the Code provides for definite terms in cases of misdemeanors and petty misdemeanors.

SUPPLEMENTAL COMMENTARY ON §706-663

Act 217, Session Laws 2016, amended this section by making a conforming amendment. Act 217 authorized the director of public safety to release detainees or inmates charged on or after July 1, 2016, with petty misdemeanor or misdemeanor offenses; provided that the detainee or inmate is not disqualified based on present charges or past arrest or conviction of certain serious or violent offenses. The legislature found that correctional facilities in Hawaii suffer from persistent overcrowding and that this condition adversely affects the ability of the State to adequately provide for the safe, secure, and humane incarceration of inmates in its care and custody. Act 217 provided a reasonable alternative to incarceration that would relieve overcrowded jail conditions in Hawaii. Senate Standing Committee Report No. 3563, Conference Committee Report No. 70-16.

Case Notes

Where trial court's rationale for imposing jail time reflected the factors listed in §706-606, and the jail time imposed did not exceed the maximum jail term authorized by this section, trial court did not clearly exceed the bounds of reason nor disregard rules or principles of law or practice to defendant's substantial detriment in imposing a jail term; thus, trial court did not abuse its discretion in sentencing defendant to one hundred twenty days' imprisonment. 116 H. 403 (App.), 173 P.3d 550 (2007).

Because there was no provision in §706-605 for the imposition of anger management or other treatment programs, but §706-624(2)(j) authorized the imposition of, inter alia, mental health treatment as a discretionary term of probation, district court erred by sentencing defendant to both the thirty-day term of imprisonment (the maximum term of imprisonment for a petty misdemeanor) and anger management classes for defendant's harassment conviction (a petty misdemeanor). Defendant could have been sentenced to a thirty-day term of incarceration or a six-month term of probation, but not both, and thus defendant's sentence was illegal. 130 H. 332 (App.), 310 P.3d 1033 (2013).

Cited: 146 F.3d 661 (1998).

§706-663 Commentary:

1. See H.R.S. §701-2.

" **§706-664 Procedure for imposing extended terms of imprisonment.** (1) Hearings to determine the grounds for imposing extended terms of imprisonment may be initiated by the prosecutor or by the court on its own motion. The court shall not impose an extended term unless the ground therefor has been established at a hearing after the conviction of the defendant and written notice of the ground proposed was given to the defendant pursuant to subsection (2). Subject to the provisions of section 706-604, the defendant shall have the right to hear and controvert the evidence against the defendant and to offer evidence upon the issue before a jury; provided that the defendant may waive the right to a jury determination under this subsection, in which case the determination shall be made by the court.

(2) Notice of intention to seek an extended term of imprisonment under section 706-662 shall be given to the defendant within thirty days of the defendant's arraignment. However, the thirty-day period may be waived by the defendant, modified by stipulation of the parties, or extended upon a showing of good cause by the prosecutor. A defendant previously sentenced to an extended term under a prior version of this chapter shall be deemed to have received notice of an intention to seek an extended term of imprisonment.

(3) If the jury, or the court if the defendant has waived the right to a jury determination, finds that the facts necessary for the imposition of an extended term of imprisonment under section 706-662 have been proven beyond a reasonable doubt, the court may impose an indeterminate term of imprisonment as provided in section 706-661. [L 1972, c 9, pt of §1; am L 1986, c 314, §42; gen ch 1992; am L Sp 2007 2d, c 1, §4]

Applicability of Act 1, Second Special Session of 2007

L Sp 2007 2d, c 1, §5 provides:

"SECTION 5. This Act shall apply to all sentencing or resentencing proceedings pending on or commenced after the effective date of this Act [October 31, 2007], whether the offense was committed prior to, on, or after the effective date of this Act [October 31, 2007]. A defendant whose extended term

of imprisonment is set aside or invalidated shall be resentenced pursuant to this Act upon request of the prosecutor. This Act shall not entitle a defendant who has previously been sentenced to an extended term to be resentenced pursuant to the procedures set forth in this Act unless the defendant is otherwise legally entitled to be resentenced."

COMMENTARY ON §706-664

This section sets forth the procedure when the court has before it a motion in favor of sentencing the defendant to imprisonment for an extended term. Fairness to the defendant demands that the defendant receive notice of the ground upon which an extended term is proposed and that the hearing focus on this issue. In other respects the hearing will be the same as that provided for in cases involving the possibility of imprisonment within the ordinary limits.

SUPPLEMENTAL COMMENTARY ON §706-664

Act 1, Second Special Session Laws 2007, amended this section and other extended sentencing statutes (§§706-661 and 706-662) to ensure that the procedures used to impose extended terms of imprisonment comply with the requirements of the United States Supreme Court and the Hawaii supreme court. Act 1 required that a jury determine the facts necessary to impose an extended term of imprisonment, unless the defendant waives the right to a jury determination, and that facts necessary to impose an extended term of imprisonment are proven beyond a reasonable doubt. The legislature found that Hawaii's current extended sentencing procedure had been deemed unconstitutional because a judge, rather than a jury, was required to find facts, other than those of prior or concurrent convictions, necessary to enhance a defendant's sentence beyond the ordinary or standard term authorized by the jury's verdict. Act 1's amendments conformed the State's enhanced sentencing law to the requirements of the United States Supreme Court and the Hawaii supreme court. Act 1 applied retroactively to sentencing or resentencing proceedings that were pending on or commenced after its effective date [October 31, 2007], whether the offense was committed prior to, on, or after that date. However, the Act did not entitle a defendant who was previously sentenced to an extended term of imprisonment to resentencing pursuant to the procedures set forth in the Act, unless the defendant was otherwise legally entitled to be resentenced. Senate Standing Committee Report No. 7, House Standing Committee Report No. 1.

Case Notes

Question as to proper procedure for making finding of multiple offender raised but not decided. 56 H. 32, 526 P.2d 1200 (1974).

Independent hearing with full procedural due process. 56 H. 628, 548 P.2d 632 (1976).

Notice of hearing may issue from court without help from prosecutor. 60 H. 93, 588 P.2d 412 (1978).

The court may properly initiate extended term hearings, notwithstanding inaction by prosecutor. 60 H. 100, 588 P.2d 409 (1978).

Notice adequate under circumstances. 63 H. 488, 630 P.2d 619 (1981).

The constitutional prohibition against ex post facto measures was not offended by the plain language of Act 1, L Sp 2007 2d, amending §§706-661, 706-662, and this section regarding sentencing or resentencing for extended terms of imprisonment, where it was clear that the new jury provisions did not (1) increase criminal liability for conduct previously innocent, (2) aggravate the degree of defendant's crimes, (3) increase the punishment available at the time defendant committed defendant's crimes, or (4) alter evidentiary standards to defendant's detriment. 117 H. 381, 184 P.3d 133 (2008).

The constitutional prohibition against ex post facto measures was not offended by the retrospective application to defendant of Act 1, L Sp 2007 2d, amending §§706-661, 706-662, and this section, where Act 1 did not punish as a crime an act previously committed which was innocent when done, make more burdensome the punishment for the crime after its commission, nor deprive one charged with the crime of any defense available according to the law when the act was committed. 118 H. 68 (App.), 185 P.3d 816 (2008).

" **§706-665 Former conviction in another jurisdiction.** For purposes of sections 706-606.5, 706-620, and 706-662(1), a conviction of the commission of a crime in another jurisdiction shall constitute a previous conviction. Such conviction shall be deemed to have been of a felony if sentence of death or of imprisonment in excess of one year was authorized under the law of such other jurisdiction. Such a conviction shall be graded, for purposes of section 706-620 by comparing the maximum imprisonment authorized under the law of such other jurisdiction with the maximum imprisonment authorized for the relevant grade of felony. [L 1972, c 9, pt of §1; am L 1986, c 314, §43]

COMMENTARY ON §706-665

Since the minimal requirements for an extended term of imprisonment for a persistent offender deal in part with former convictions, it becomes necessary to treat the problem raised by former convictions in another jurisdiction. The Code recognizes such convictions for purposes of §706-662. In order to achieve a uniform standard for grading foreign convictions, the Code measures the authorized sentence in the jurisdiction where the conviction occurred according to the grading system of this Code.

A problem is presented by the fact that some states authorize imprisonment for terms of more than one year for crimes denominated as misdemeanors or petty misdemeanors by the Code. There is no easy answer to this dilemma. For the purposes of determining the persistency of an offender, the power and integrity of the penal codes of other states must be recognized. The court, however, is not compelled to order an extended term of imprisonment even if the minimal conditions are established. Where a defendant's status as a persistent offender is based on foreign convictions which are greater than those authorized by the Code, the court is free not to make such a finding if, in the opinion of the court, it would result in undue hardship.

Case Notes

Prior convictions in which defendant was denied counsel should not be used against the defendant. 56 H. 628, 548 P.2d 632 (1976).

" **§706-666 Definition of proof of conviction.** (1) An adjudication by a court of competent jurisdiction that the defendant committed a crime constitutes a conviction for purposes of sections 706-606.5, 706-662, and 706-665, although sentence or the execution thereof was suspended, provided that the defendant was not pardoned on the ground of innocence.

(2) Prior conviction may be proved by any evidence, including fingerprint records made in connection with arrest, conviction, or imprisonment, that reasonably satisfies the court that the defendant was convicted. [L 1972, c 9, pt of §1; am L 1982, c 246, §1]

COMMENTARY ON §706-666

Section 706-666 is addressed to the problems of the definition and proof of former convictions. The Code takes the position that, in determining whether the defendant is a persistent offender, conviction per se is sufficient provided the time for

appeal has expired and the defendant has not been pardoned on the ground of innocence. The fact that the disposition of the defendant resulted in a suspended sentence or a suspended execution of a sentence should not be held material for purposes of extended terms.

Subsection (2) provides for a non-restrictive approach to admitting evidence on prior convictions. Since (1) the evidence relied upon is largely official records, (2) the issue is tried to the court, and (3) the court is not compelled to find the defendant a persistent offender, or to impose an extended term even if the minimal requirements are established, no sound purpose would be served by adopting a restrictive evidentiary approach.

SUPPLEMENTAL COMMENTARY ON §706-666

Act 246, Session Laws 1982, clarified the definition of a conviction by providing that an adjudication by a court of competent jurisdiction that the defendant committed a crime constitutes a conviction.

Case Notes

In State v. Kamae, 56 H. 32, 526 P.2d 1200 (1974), the court held that an appeal in forma pauperis was not frivolous when it sought to raise the question of whether the trial court's reliance on a pre-sentence diagnosis and report was sufficient under §706-666(2) to establish that the defendant was a multiple offender warranting an extended term under §706-662(4). The court did not reach the ultimate question.

Pre-sentence report held insufficient evidence of prior conviction. 56 H. 628, 548 P.2d 632 (1976).

Evidence of defendant's prior conviction reasonably satisfied the court. 9 H. App. 583, 854 P.2d 238 (1993).

" **§706-667 Young adult defendants.** (1) Defined. A young adult defendant is a person convicted of a crime who, at the time of the offense, is less than twenty-two years of age and who has not been previously convicted of a felony as an adult or adjudicated as a juvenile for an offense that would have constituted a felony had the young adult defendant been an adult.

(2) Specialized correctional treatment. A young adult defendant who is sentenced to a term of imprisonment exceeding thirty days may be committed by the court to the custody of the department of public safety and shall receive, as far as practicable, such special and individualized correctional and

rehabilitative treatment as may be appropriate to the young adult defendant's needs.

(3) Special term. A young adult defendant convicted of a felony, in lieu of any other sentence of imprisonment authorized by this chapter, may be sentenced to a special indeterminate term of imprisonment if the court is of the opinion that such special term is adequate for the young adult defendant's correction and rehabilitation and will not jeopardize the protection of the public. When ordering a special indeterminate term of imprisonment, the court shall impose the maximum length of imprisonment, which shall be eight years for a class A felony, five years for a class B felony, and four years for a class C felony. The minimum length of imprisonment shall be set by the Hawaii paroling authority in accordance with section 706-669. During this special indeterminate term, the young adult shall be incarcerated separately from career criminals, when practicable.

[(4)] This section shall not apply to the offenses of murder or attempted murder. [L 1972, c 9, pt of §1; am L 1976, c 92, §8; am L 1980, c 295, §§2, 3; am L 1986, c 314, §44; am L 1987, c 338, §10; am L 1989, c 211, §8; gen ch 1993; am L 1997, c 318, §4; am L 2006, c 230, §25]

Cross References

Immaturity excluding penal conviction; transfer of proceedings to family court, see §704-418.

COMMENTARY ON §706-667

This section provides for specialized treatment for young persons over whom family court jurisdiction has been waived and for those persons under the age of 22 years who are not subject to the jurisdiction of that court.

It is clear that the age span encompassed in this section is a period of formative years and, notwithstanding the fact that the defendants are not subject to the jurisdiction of the family court, "[p]rudence and humanity... argue for a specialized and concentrated effort in this area."[1]

Subsection (2) recognizes that specialized and concentrated effort includes penal institutions designed to meet the needs of young adult defendants. The department of social services and housing should have among its various divisions, an agency which can provide the young adult defendant with such "special and individualized correctional and rehabilitative treatment as may be appropriate to his needs." Subsection (2) provides that, regardless of whether a special term is imposed pursuant to

subsection (3), when a young adult defendant is sentenced to imprisonment for more than 30 days (i.e., for a misdemeanor or felony) the young adult defendant may be committed to the department of social services and housing for special correctional and rehabilitative treatment.

Subsection (3) provides for a special term of imprisonment for young adult defendants convicted of a felony. Once again, the Code adopts a flexible approach in sentencing. The court is not compelled to impose a special term in the case of a convicted young adult. It may, according to the provisions of part II of this chapter, suspend the imposition of sentence or sentence the defendant to probation. If the court determines that imprisonment is necessary, the court is free, within the limitations heretofore set forth, to choose between the special term authorized by this section and the ordinary and extended terms authorized by prior sections in this part. Subsection (3) merely authorizes the employment of a special, more limited term of imprisonment "if the court is of the opinion that such special term is adequate for... [the defendant's] correction and rehabilitation and will not jeopardize the protection of the public." Assuming the court is satisfied that this condition can be met, there seems no reason for not allowing the court, if it chooses, to protect the young offender from the longer maxima provided for felonies.

SUPPLEMENTAL COMMENTARY ON §706-667

The legislature in enacting the Code in 1972 changed subsection (2) by making it discretionary with the court, rather than mandatory, to commit the young adult defendant to the custody of the department of social services and housing for specialized treatment.

Act 295, Session Laws 1980, amended this section to establish a more equitable and just system of sentencing young adults. Conference Committee Report No. 34-80 (42-80). Subsection (1) was amended by changing the definition of a young adult defendant so as to exclude repeat felony offenders from the class of young persons entitled to specialized treatment. Subsection (3) was amended to provide for different terms of imprisonment depending upon whether the offense involved is a class A, B, or C felony. Subsection (3) was also amended by the addition of an express provision that young adults be incarcerated separately from career criminals when practicable. Lastly, the section was amended to provide that it does not apply to the offense of murder.

Act 318, Session Laws 1997, amended this section by defining a young adult defendant as a person convicted of a crime who, at

the time of sentencing, is less than twenty-two years of age. The legislature found that immediate action was necessary for the protection and safety of the community from the growing number of minors who commit violent, serious, or multiple felonies. Senate Standing Committee Report No. 1561.

Act 230, Session Laws 2006, amended this section to, among other things, require that the young adult defendant be less than twenty-two years at the time of the offense, rather than at the time of sentencing.

Case Notes

Not repealed by implication by §706-606.1. 67 H. 46, 677 P.2d 463 (1984).

Defendant did not fall within definition of a young adult defendant. 71 H. 609, 801 P.2d 553 (1990).

Reasonable inference could be drawn that sentencing court considered special eight-year term prior to sentencing young adult defendant to twenty-year term under §706-659. 73 H. 259, 831 P.2d 523 (1992).

A sentencing court must afford a defendant his or her right of presentence allocution before ruling on the applicability of the young adult defendants statute. 90 H. 280, 978 P.2d 718 (1999).

Defendant, who was age-eligible for sentencing under this section, the young adult defendant statute, at the time defendant's deferred acceptance of guilty plea was granted, but age-ineligible at the time it was revoked, could not thereafter be sentenced as a young adult defendant; specialized treatment under this section is afforded only to those who are less than the prescribed twenty-two years of age at the time of sentencing. 93 H. 362, 3 P.3d 1239 (2000).

Sentencing court did retain the discretion to sentence petitioner defendant, who was convicted of violating §712-1240.8, to a special five-year indeterminate term of imprisonment under this section. Specifically, the phrase "[n]otwithstanding sections 706-620, 706-640, 706-641, 706-660, 706-669, and any other law to the contrary", found in the sentencing provision of §712-1240.8(3), did not override sentencing petitioner defendant under this section as "contrary". 130 H. 21, 305 P.3d 437 (2013).

Referred to: 56 H. 75, 527 P.2d 1269 (1974); 61 H. 1, 594 P.2d 1078 (1979).

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§706-667 Commentary:

1. M.P.C., Tentative Draft No. 7, comments at 24 (1957).

" **§706-668 REPEALED.** L 1986, c 314, §46.

" **§706-668.5 Multiple sentence of imprisonment.** (1) If multiple terms of imprisonment are imposed on a defendant, whether at the same time or at different times, or if a term of imprisonment is imposed on a defendant who is already subject to an unexpired term of imprisonment, the terms may run concurrently or consecutively. Multiple terms of imprisonment run concurrently unless the court orders or the statute mandates that the terms run consecutively.

(2) The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider the factors set forth in section 706-606.

(3) For terms of imprisonment imposed prior to June 18, 2008, the department of public safety shall post written notice in all inmate housing units and the facility library at each correctional facility for a period of two months and send written notice to the defendant no later than January 1, 2016, that shall include but not be limited to:

(a) Notice that the department of public safety may recalculate the multiple terms of imprisonment imposed on the defendant; and

(b) Notice of the defendant's right to have the court review the defendant's sentence. [L 1986, c 314, §45; am L 2008, c 193, §1; am L 2015, c 194, §1]

COMMENTARY ON §706-668.5

Act 193, Session Laws 2008, amended this section to promote consistency in sentencing law by requiring that multiple terms of imprisonment, whether imposed at the same time or at different times, run concurrently unless the court orders or the statute mandates that the terms run consecutively. Testimony indicated that there had been some misunderstanding and misinterpretation of the sentencing law involving multiple terms of imprisonment. Act 193 clarified the law. Conference Committee Report No. 81-08, House Standing Committee Report No. 688-08, Senate Standing Committee Report No. 3337.

Act 194, Session Laws 2015, amended this section to require the department of public safety to provide written notice to defendants who had terms of imprisonment imposed prior to June 18, 2008, to include notice: (1) that the department may recalculate the multiple terms of imprisonment imposed on the defendant; and (2) of the defendant's right to have the court review the defendant's sentence. The legislature found that prior to 2008, this section provided that multiple terms of

imprisonment run consecutively unless the court specifically ordered that the terms run concurrently. Act 193, Session Laws 2008, amended this section to provide that multiple terms of imprisonment run concurrently unless the court specifically orders that the terms run consecutively. Act 194 attempted to bring parity to the treatment of defendants sentenced to multiple terms prior to the effective date of Act 193, which is June 18, 2008, and those sentenced to multiple terms after that date while providing defendants with adequate notice regarding the possibility of their multiple terms of imprisonment being recalculated by the department and their rights to have the court review their sentences. Conference Committee Report No. 158.

Law Journals and Reviews

State v. Kumukau: A Case for the Application of Eighth Amendment Proportionality Analysis. 13 UH L. Rev. 577 (1991).

Case Notes

Statute (pre-2008) discussed, where defendants' motion for partial summary judgment was granted as to counts alleging violations of the state constitution and negligence, but was otherwise denied, in a 42 U.S.C. §1983 civil rights lawsuit brought by a former state prisoner and other allegedly similarly-situated plaintiffs primarily seeking damages for "over detention". 678 F. Supp. 2d 1061 (2010).

Sentencing court's imposition of consecutive prison terms pursuant to this section constituted an abuse of discretion, where court's sole purpose in imposing consecutive terms was to maximize the supervisory power of the Hawaii paroling authority over defendant in an attempt to facilitate the collection of court-ordered restitution. 78 H. 127, 890 P.2d 1167 (1995).

Sentencing court did not abuse its discretion in resentencing appellant to consecutive terms of imprisonment. 79 H. 281, 901 P.2d 481 (1995).

Extraordinarily sadistic and cruel manner in which defendant committed offenses and defendant's past behavioral history required retributive, incapacitative and deterrent penal objectives of consecutive terms of imprisonment achieved under this section. 83 H. 335, 926 P.2d 1258 (1996).

Trial court plainly erred in sentencing defendant to consecutive terms of imprisonment based on the unsubstantiated allegation that defendant had transferred a semi-automatic firearm to a drug dealer. 106 H. 441, 106 P.3d 364 (2005).

Where defendant was convicted by the jury of five first-degree thefts, each of which defendant was sentenced to ten years' incarceration, and pursuant to §706-660 and this section, five ten-year terms running consecutively was the statutory maximum, defendant's sentence did not deprive defendant of defendant's right to a jury trial as interpreted by the U.S. Supreme Court in Apprendi and Blakely. 111 H. 267, 141 P.3d 440 (2006).

Imposing a prison sentence consecutively to "any sentence" pursuant to §706-606.5(5), including the lesser of such sentences, is a novel, but accurate view of the statute; thus, henceforth, the circuit court must state on the record its reasons for imposing a consecutive as opposed to a concurrent sentence under §706-606.5 or this section. 122 H. 495, 229 P.3d 313 (2010).

The circuit court did not abuse its discretion in sentencing defendant to consecutive terms of imprisonment based on defendant's "extensive criminality". 131 H. 94, 315 P.3d 720 (2013).

Trial court did not abuse its discretion in sentencing defendant to consecutive terms of imprisonment under this section where, taking into consideration all of the factors set forth in §706-606, the court pointed to the high level of cruelty, violence, and viciousness involved in the commission of the offenses, that most of the offenses took place in front of defendant's two-year-old son, defendant's lack of remorse, the clear and present danger defendant posed to complainant and the community, and the poor prospects for defendant's rehabilitation. 106 H. 365 (App.), 105 P.3d 242 (2004).

Court did not abuse its discretion in sentencing defendant to consecutive terms of imprisonment under this section because it considered the factors set forth in §706-606; defendant's extensive record and the fact that defendant caused a lot of harm in the community were specific circumstances that led the court to conclude that a consecutive sentence was appropriate. 129 H. 135 (App.), 295 P.3d 1005 (2013).

Discussed: 81 H. 421 (App.), 918 P.2d 228 (1996).

" **§706-669 Procedure for determining minimum term of imprisonment.** (1) When a person has been sentenced to an indeterminate or an extended term of imprisonment, the Hawaii paroling authority shall, as soon as practicable but no later than six months after commitment to the custody of the director of the department of [public safety] hold a hearing, and on the basis of the hearing make an order fixing the minimum term of imprisonment to be served before the prisoner shall become eligible for parole.

(2) Before holding the hearing, the authority shall obtain a complete report regarding the prisoner's life before entering the institution and a full report of the prisoner's progress in the institution. The report shall be a complete personality evaluation for the purpose of determining the prisoner's degree of propensity toward criminal activity.

(3) The prisoner shall be given reasonable notice of the hearing under subsection (1) and shall be permitted to be heard by the authority on the issue of the minimum term to be served before the prisoner becomes eligible for parole. In addition, the prisoner shall:

(a) Be permitted to consult with any persons the prisoner reasonably desires, including the prisoner's own legal counsel, in preparing for the hearing;

(b) Be permitted to be represented and assisted by counsel at the hearing;

(c) Have counsel appointed to represent and assist the prisoner if the prisoner so requests and cannot afford to retain counsel; and

(d) Be informed of the prisoner's rights under [paragraphs] (a), (b), and (c).

(4) The authority in its discretion may, in any particular case and at any time, impose a special condition that the prisoner will not be considered for parole unless and until the prisoner has a record of continuous exemplary behavior.

(5) After sixty days notice to the prosecuting attorney, the authority in its discretion may reduce the minimum term fixed by its order pursuant to subsection (1).

(6) A verbatim stenographic or mechanical record of the hearing shall be made and preserved in transcribed or untranscribed form.

(7) The State shall have the right to be represented at the hearing by the prosecuting attorney who may present written testimony and make oral comments and the authority shall consider such testimony and comments in reaching its decision. The authority shall notify the prosecuting attorney of the hearing at the time the prisoner is given notice of the hearing. The hearing shall be opened to victims or their designees or surviving immediate family members who may present a written statement or make oral comments.

(8) The authority shall establish guidelines for the uniform determination of minimum sentences which shall take into account both the nature and degree of the offense of the prisoner and the prisoner's criminal history and character. The guidelines shall be public records and shall be made available to the prisoner and to the prosecuting attorney and other interested government agencies. [L 1972, c 9, pt of §1; am L

1976, c 92, §8; am L 1988, c 282, §1; gen ch 1993; am L 1996, c 4, §1 and c 193, §1]

COMMENTARY ON §706-669

This section continues the policy of the previous law of vesting in the Board of Paroles and Pardons the exclusive authority to determine the minimum time which must be served before the prisoner will be eligible for parole. However, the Code differs from present law in two respects: (a) it does not recognize a sentence of imprisonment not subject to the possibility of parole except the instances enumerated in §706-606(a), and (b) it provides that the order of the Board shall be made upon the basis of a prior hearing which, under subsection (3), affords the prisoner an opportunity to be heard and a mode for participation. Both concepts are suggested by the Model Penal Code.[1] In addition, subsection (3) specifically provides that the prisoner will be afforded assistance and representation by counsel, if the prisoner wishes.

Subsection (2) continues the previous requirement that the Board of Paroles arm itself with sufficient information concerning the prisoner before it makes a determination as to parole eligibility. Subsection (4) is a continuation of the previous policy of granting to the Board the authority to impose a special condition relating to the prisoner's behavior before the prisoner will be eligible for parole. Subsection (5) gives the Board the discretionary power to reduce the minimum term previously fixed by its order. Subsection (6) insures that a record of the hearing will be made and preserved.

SUPPLEMENTAL COMMENTARY ON §706-669

When the legislature adopted the Code in 1972, it provided for life imprisonment without possibility of parole in the four instances enumerated in §706-606(a) (1972).

Act 92, Session Laws 1976, substituted the terms "Hawaii paroling authority" and "authority" for the term "board of paroles and pardons" and "board."

Act 282, Session Laws 1988, amended this section to allow the prosecuting attorney to appear and present oral comment and written testimony at minimum term hearings before the Hawaii paroling authority, disallowing oral testimony by witnesses. Senate Conference Committee Report No. 270, House Conference Committee Report No. 96-88.

Act 4, Session Laws 1996, amended this section by clarifying that victims may present written statements or oral comments at minimum prison term hearings before the parole board. The

legislature found that the practice of the parole board was to permit victims or their representatives the opportunity to comment at minimum term hearings, although current law did not expressly provide for that opportunity. The legislature agreed that victims should be allowed to be heard and to be present at the hearings, and that victims were entitled to be heard when the crimes involved property, as well as when the crimes were against persons. Senate Standing Committee Report No. 1972, House Standing Committee Report No. 1025-96.

Act 193, Session Laws 1996, amended this section by providing that the prosecuting attorney shall receive sixty days notice prior to the reduction of minimum terms of imprisonment by the Hawaii paroling authority. Current law was unclear regarding whether the prosecuting attorney was entitled to notice prior to the reduction of minimum terms of imprisonment by the paroling authority. The Act clarified that the prosecuting attorney is entitled to notice. Conference Committee Report No. 60.

Case Notes

Mentioned with respect to claim of right as a defense. 63 H. 105, 621 P.2d 381 (1980).

Section (1993) allows victim or their representatives the opportunity to make oral comments at minimum prison term hearings before the Hawaii paroling authority. 91 H. 20, 979 P.2d 1046 (1999).

Neither chapter 706 nor chapter 353 prohibits the Hawaii paroling authority from setting a prisoner's minimum term at a period equal to his or her maximum sentence. 97 H. 183, 35 P.3d 210 (2001).

This section required the Hawaii paroling authority to conduct its minimum term hearing within six months of defendant's commitment to the custody of the director of the department of public safety, and the paroling authority was not jurisdictionally barred by §706-660.1(1) from fulfilling this statutorily imposed duty. 111 H. 35, 137 P.3d 349 (2006).

Where Hawaii paroling authority's minimum term decision was in violation of the authority's guidelines as it failed to specify either the level of punishment or the significant criteria upon which the decision was based, the failure to include this information was arbitrary and capricious; thus, an amended minimum term order issued by the authority did not "cure" the authority's initial violation of its guidelines and the petitioner did not have to show prejudice in order to obtain postconviction relief from the minimum term order. 116 H. 181, 172 P.3d 493 (2007).

Intermediate court of appeals erred in concluding that petitioner waived petitioner's due process claim relating to the Hawaii paroling authority's (HPA) nondisclosure of adverse materials in petitioner's HPA file, where petitioner would not have any opportunity to raise the issue of HPA's nondisclosure of evidence in any other proceeding if petitioner was not aware of the existence of letters sent between victim's aunt and HPA prior to petitioner's second minimum term hearing until they were filed with respondent State's response to petitioner's petition for post-conviction relief. 129 H. 429, 302 P.3d 697 (2013).

Inasmuch as the petitioner's offenses did not meet the prescribed criteria of a level III offender and no further written justification was provided explaining the Hawaii paroling authority's (HPA) decision, the HPA's action of classifying the petitioner as a level III offender was in violation of the HPA guidelines and therefore, under the circumstances, arbitrary and capricious. 132 H. 224, 320 P.3d 889 (2014).

Once the petitioner made a showing that the failure to raise the petitioner's claims in the first HRPP rule 40 petition was not an intelligent and knowing failure, it was unnecessary for the circuit court to reach the question of the existence of extraordinary circumstances, and the second petition should not have been denied without a hearing on the basis that the claims had been waived. 132 H. 224, 320 P.3d 889 (2014).

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§706-669 Commentary:

1. See M.P.C. §§6.06, 6.07, 305.6 and 305.7.

" **§706-670 Parole procedure; release on parole; terms of parole, recommitment, and reparole; final unconditional release.** (1) *[Repeal and reenactment on July 1, 2018. L 2012, c 139, §14(4); L 2013, c 67, §2(4).]* Parole hearing. A person sentenced to an indeterminate term of imprisonment shall receive an initial parole hearing at least one month before the expiration of the minimum term of imprisonment determined by the Hawaii paroling authority pursuant to section 706-669. If the person has been sentenced to multiple terms of imprisonment, the parole hearing shall not be required until at least one month before the expiration of the minimum term that expires last in time. A validated risk assessment shall be used to determine the person's risk of re-offense and suitability for community supervision. For purposes of this subsection, "validated risk assessment" means an actuarial tool to determine a person's

likelihood of engaging in future criminal behavior. The department of public safety shall select a research-based risk assessment tool and shall validate the accuracy of the risk assessment tool at least every five years in consultation with the paroling authority. Assessments shall be performed by department of public safety staff who are trained in the use of the risk assessment tool. Except for good cause shown to the paroling authority, a person who is assessed as low risk for re-offending shall be granted parole upon completing the minimum sentence, unless the person:

(a) Is found to have an extensive criminal history record that is indicative of a likelihood of future criminal behavior in spite of the finding by the risk assessment by the paroling authority;

(b) Is found to have committed misconduct while in prison that is equivalent to a misdemeanor or felony crime within thirty-six months of the expiration of the minimum term of imprisonment;

(c) Has any pending felony charges in the State;

(d) Is incarcerated for a sexual offense under part V of chapter 707 or child abuse under part VI of chapter 707; or

(e) Does not have a parole plan as set forth under section 706-670(3) and (4), as approved by, and at the discretion of, the paroling authority.

If parole is not granted at the initial parole hearing, additional hearings shall be held at twelve-month intervals or less until parole is granted or the maximum period of imprisonment expires. The State shall have the right to be represented at the initial parole hearing and all subsequent parole hearings by the prosecuting attorney, who may present written testimony and make oral comments. The authority shall consider the testimony and comments in reaching its decision. The authority shall notify the appropriate prosecuting attorney of the hearing at the time the prisoner is given notice of the hearing.

(2) Parole conditions. The authority, as a condition of parole, may impose reasonable conditions on the prisoner as provided under section 706-624.

(3) Prisoner's plan and participation. Each prisoner shall be given reasonable notice of the prisoner's parole hearing and shall prepare a parole plan, setting forth the manner of life the prisoner intends to lead if released on parole, including specific information as to where and with whom the prisoner will reside, a phone contact where the prisoner can be reached, and what occupation or employment the prisoner will follow, if any. The prisoner shall be paroled in the county

where the prisoner had a permanent residence or occupation or employment prior to the prisoner's incarceration, unless the prisoner will: reside in a county in which the population exceeds eight-hundred thousand persons; reside in a county in the State in which the committed person has the greatest family or community support, opportunities for employment, job training, education, treatment, and other social services, as determined by the Hawaii paroling authority; or be released for immediate departure from the State. The institutional parole staff shall render reasonable aid to the prisoner in the preparation of the prisoner's plan and in securing information for submission to the authority. In addition, the prisoner shall:

(a) Be permitted to consult with any persons whose assistance the prisoner reasonably desires, including the prisoner's own legal counsel, in preparing for a hearing before the authority;

(b) Be permitted to be represented and assisted by counsel at the hearing;

(c) Have counsel appointed to represent and assist the prisoner if the prisoner so requests and cannot afford to retain counsel; and

(d) Be informed of the prisoner's rights as set forth in this subsection.

(4) Authority's decision; initial minimum term of parole. The authority shall render its decision regarding a prisoner's release on parole within a reasonable time after the parole hearing. A grant of parole shall not be subject to acceptance by the prisoner. If the authority denies parole after the hearing, it shall state its reasons in writing. A verbatim stenographic or mechanical record of the parole hearing shall be made and preserved in transcribed or untranscribed form. The authority, in its discretion, may order a reconsideration or rehearing of the case at any time and shall provide reasonable notice of the reconsideration or rehearing to the prosecuting attorney. If parole is granted by the authority, the authority shall set the initial minimum length of the parole term.

(5) Release upon expiration of maximum term. If the authority fixes no earlier release date, a prisoner's release shall become mandatory at the expiration of the prisoner's maximum term of imprisonment.

(6) Sentence of imprisonment includes separate parole term. A sentence to an indeterminate term of imprisonment under this chapter includes as a separate portion of the sentence a term of parole or of recommitment for violation of the conditions of parole.

(7) Revocation hearing. When a parolee has been recommitted, the authority shall hold a hearing within sixty days after the parolee's return to determine whether parole should be revoked. The parolee shall have reasonable notice of the grounds alleged for revocation of the parolee's parole. The institutional parole staff shall render reasonable aid to the parolee in preparation for the hearing. In addition, the parolee shall have, with respect to the revocation hearing, those rights set forth in subsection (3)(a), (3)(b), (3)(c), and (3)(d). A record of the hearing shall be made and preserved as provided in subsection (4).

(8) Length of recommitment and reparole after revocation of parole. If a parolee's parole is revoked, the term of further imprisonment upon such recommitment and of any subsequent reparole or recommitment under the same sentence shall be fixed by the authority but shall not exceed in aggregate length the unserved balance of the maximum term of imprisonment.

(9) Final unconditional release. When the prisoner's maximum parole term has expired or the prisoner has been sooner discharged from parole, a prisoner shall be deemed to have served the prisoner's sentence and shall be released unconditionally. [L 1972, c 9, pt of §1; am L 1976, c 92, §8; am L 1983, c 30, §1; am L 1984, c 257, §3; am L 1986, c 314, §47; am L 1988, c 282, §2; am L 1993, c 101, §2 and c 201, §2; gen ch 1993; am L 1996, c 193, §2; am L Sp 2007, c 8, §15; am L 2012, c 139, §§8, 12]

Note

The repeal and reenactment note at subsection (1) in the main volume is amended to read as follows: "[Repeal and reenactment on July 1, 2018. L 2012, c 139, §14(4); L 2013, c 67, §2(4); L 2016, c 231, §69.]".

The L 2012, c 139, §8 amendment applies to individuals committing an offense on or after July 1, 2012. L 2012, c 139, §14(3).

Cross References

Comprehensive offender reentry system, see chapter 353H.

COMMENTARY ON §706-670

Subsections (1) through (3) are largely self-explanatory and adopt a procedure for parole determination which affords the prisoner an opportunity to participate and be heard. The

procedure also provides for periodic review of the prisoner's case.

In the Proposed Draft, §670 provided for an automatic period of parole, the length of which would vary with the prisoner's initial period of incarceration, but which would not be greater than ten years, and which would be required in every case following an indeterminate term of imprisonment. The legislature did not accept this proposal in its entirety. Thus, subsection (4) now requires a prisoner's unconditional release at the expiration of the prisoner's maximum term of imprisonment. The legislature felt that to impose "an additional term of parole would be an unfair burden to a person who has paid his debt to society." Conference Committee Report No. 2 (1972).

Subsection (5) provides that the maximum term of parole shall be ten years. In this area, as in terms of imprisonment, the Code leaves with the Board of Paroles and Pardons the task of determining the minimum term of parole.

Subsection (6) provides for a hearing on revocation of parole which affords the parolee fair notice, representation, and assistance, much in the same manner as that provided in the case of hearings on the minimum term and initial parole.

Subsection (8) provides for unconditional discharge of the defendant when the maximum term of parole has expired or upon sooner release by the Board.

SUPPLEMENTAL COMMENTARY ON §706-670

Act 30, Session Laws 1983, amended subsection (1) to change the maximum term of recommittal for a parole violator from ten years to the remainder of the parolee's original, maximum sentence. It was felt that a parole violator should not be relieved of any part of the court-imposed maximum sentence. However, the legislature intended that the paroling authority periodically reconsider the parole of any recommitted parolee. Senate Standing Committee Report No. 357 (1983), House Standing Committee Report No. 811.

Act 257, Session Laws 1984, added a new subsection (2) to allow the paroling authority, as a condition of parole, to prohibit a parolee from entering certain geographical areas without the paroling authority's permission.

Act 282, Session Laws 1988, amended this section to allow the prosecuting attorney to appear and present oral comment and written testimony at parole hearings before the Hawaii paroling authority, disallowing oral testimony by witnesses. Senate Conference Committee Report No. 270, House Conference Committee Report No. 96-88.

Act 101, Session Laws 1993, amended subsection (4) to clarify that a grant of parole is not subject to the acceptance of the person being paroled. Inmates who refuse parole and choose to remain in prison take up valuable bedspace in already crowded correctional facilities, and the State loses the opportunity to assist in reintegrating them back into the community. House Standing Committee Report No. 1123, Senate Standing Committee Report No. 839.

Act 201, Session Laws 1993, amended subsection (3) to provide that prisoners who have been granted parole are to be paroled in the county where the prisoner had a permanent residence or occupation or employment prior to incarceration, unless the prisoner will reside in a county having a population exceeding 800,000 persons, or will be released for immediate departure from the State. The legislature found that this would prevent an influx of parolees whose roots are on Oahu from settling on the neighbor islands, which could strain a county's social service infrastructure. Conference Committee Report No. 104.

Act 193, Session Laws 1996, amended this section by providing that the prosecuting attorney shall have the right to be represented at the initial parole hearing and all subsequent parole hearings, and that the prosecuting attorney shall have reasonable notice of the reconsideration or rehearing of parole cases by the Hawaii paroling authority. The Act made clear the prosecuting attorney's right to be represented and to receive notice, since the current law was unclear regarding the prosecuting attorney's rights on these matters. Conference Committee Report No. 60.

Act 8, Special Session Laws 2007, amended subsection (3) to permit the Hawaii paroling authority to parole committed persons to the county in the State where the committed person has the greatest family or community support, opportunities for employment, job training, education, treatment, and other social services. This will allow the Hawaii paroling authority to provide meaningful opportunities for offenders to reintegrate into society and demonstrate that they have the potential to function as law-abiding citizens. Senate Standing Committee Report No. 993.

Act 139, Session Laws 2012, amended this section, among other things, by: (1) requiring the department of public safety to select a research-based risk assessment tool and validate the accuracy of the risk assessment tool at least every five years in consultation with the Hawaii paroling authority; (2) specifying that parole shall be granted upon completion of the minimum term to a person who is assessed as low risk for reoffending unless the person, among other things, is found to have: (A) committed misconduct while in prison that is

equivalent to a misdemeanor or felony crime within thirty-six months of the expiration of the minimum term of imprisonment; or (B) an extensive criminal history record that is indicative of a likelihood of future criminal behavior in spite of the finding by the risk assessment; and (3) requiring prisoners, in preparing their parole plan, to include, among other things, a phone contact, if any, where they can be reached. The purpose of Act 139 was to implement the recommendations of the justice reinvestment working group. Act 139 was a recommendation of the Council of State Governments Justice Center, which provided intensive technical assistance to Hawaii to conduct a comprehensive analysis of the State's criminal justice system and to help state leaders develop policy options that could increase public safety while saving taxpayer dollars. The Justice Center utilized a data-driven approach to identify inefficiencies, develop cost-effective policy options, and develop a plan for a reinvestment of savings that reduces recidivism and increases public safety. It was the legislature's intent to realize cost savings and reinvest those savings back into the corrections system to reduce recidivism, decrease the prison population, and strengthen public safety. Conference Committee Report No. 165-12.

Act 139, Session Laws 2012, also provided for the reenactment of subsection (1) upon the repeal of the amendments made by the Act on July 1, 2018.

Act 67, Session Laws 2013, made a technical amendment to the repeal and reenactment provision of Act 139, Session Laws 2012, which affected this section.

Act 231, Session Laws 2016, amended the repeal and reenactment provision of Act 139, Session Laws 2012.

Case Notes

Neither this chapter nor chapter 353 prohibits the Hawaii paroling authority from setting a prisoner's minimum term at a period equal to his or her maximum sentence. 97 H. 183, 35 P.3d 210 (2001).

As §353-66 and this section can be given effect without conflict, subsection (7) is not the "exclusive" law governing parole revocations, does not embrace the entire law on the subject, and does not repeal §353-66 by implication. 88 H. 229 (App.), 965 P.2d 162 (1998).

A petitioner is not entitled to relief for Hawaii paroling authority's failure to comply with time limit specified in subsection (7) for parole revocation hearing unless record shows that failure to comply (1) was unreasonable and (2) caused petitioner actual prejudice. State's failure to comply with

specified time limit is presumptively unreasonable and it is Hawaii paroling authority's burden to rebut this presumption; it is petitioner's burden to prove that State's unreasonable failure to comply caused actual prejudice to petitioner. 89 H. 474 (App.), 974 P.2d 1064 (1998).

" **§706-670.5 Notice of parole or final unconditional release.** (1) As used in this section, the following terms have the following meanings:

"Offense against the person" means any of the offenses described in chapter 707 and includes any attempt to commit any of those offenses.

"Prisoner" or "parolee" means a person who has been convicted of an offense against the person.

"Surviving immediate family member" means a person who is a surviving grandparent, parent, sibling, spouse or reciprocal beneficiary, child, or legal guardian of a deceased victim.

"Victim" means the person who was the victim of the offense against the person for which the prisoner or parolee was convicted.

(2) The Hawaii paroling authority shall give written notice of the parole or release from parole of a prisoner or parolee to each victim who has submitted a written request for notice or to a surviving immediate family member who has submitted a written request for notice.

(3) The department of public safety shall give written notice of the final unconditional release of a prisoner or parolee, who has not been previously paroled or discharged, to each victim who has submitted a written request for notice or to a surviving immediate family member who has submitted a written request for notice.

(4) The authority or department, as the case may be, shall provide written notice to the victim or surviving immediate family member at the address given on the written request for notice or such other address as may be provided by the victim or surviving immediate family member, not less than ten days prior to parole or final unconditional release. The authority or department, in its discretion, may instead give written notice to the witness or victim counselor programs in the prosecuting attorney's office in the county where the victim or the surviving immediate family member resides.

(5) Neither the failure of any state officer or employee to carry out the requirements of this section nor compliance with it shall subject the State, the officer, or employee to liability in any civil action. However, such failure may provide a basis for such disciplinary action as may be deemed appropriate by a competent authority. [L 1983, c 184, §2(2); am

L 1985, c 227, §1; am L 1987, c 338, §10; am L 1989, c 211, §8; am L 1997, c 383, §66]

Cross References

Notice of escape, see §706-673.

Registration of sex offenders and other covered offenders and public access to registration information, see chapter 846E.

COMMENTARY ON §706-670.5

Act 184, Session Laws 1983, added this section to require notification to a crime victim if a defendant who harmed the victim is released into the community after conviction. This addition was intended to insure that crime victims "are treated with fairness and respect" and that agencies in the criminal justice system cooperate with each other to provide information and other help to crime victims. House Conference Committee Report No. 46.

Act 227, Session Laws 1985, amended this section so that: (1) victims or surviving immediate family members of a deceased victim are notified whenever the offender is paroled or unconditionally released; and (2) in lieu of notifying a victim or surviving family member, the appropriate authorities may notify the witness or victim counselor programs in the county where the victim or a family member resides. Under prior law, only the victim was notified of the parole or unconditional release. House Conference Committee Report No. 5, Senate Conference Committee Report No. 4.

Act 383, Session Laws 1997, amended this section by amending the definition of "surviving immediate family member" to include a reciprocal beneficiary. The amendment establishes the status of reciprocal beneficiaries and provides certain state governmental benefits to those with that status. Among the benefits extended to reciprocal beneficiaries which are substantially equivalent to those extended to spouses is legal standing relating to victims rights. Conference Committee Report No. 2.

" **§706-671 Credit for time of detention prior to sentence; credit for imprisonment under earlier sentence for same crime.** (1) When a defendant who is sentenced to imprisonment has previously been detained in any State or local correctional or other institution following the defendant's arrest for the crime for which sentence is imposed, such period of detention following the defendant's arrest shall be deducted from the minimum and maximum terms of such sentence. The officer having

custody of the defendant shall furnish a certificate to the court at the time of sentence, showing the length of such detention of the defendant prior to sentence in any State or local correctional or other institution, and the certificate shall be annexed to the official records of the defendant's commitment.

(2) When a judgment of conviction or a sentence is vacated and a new sentence is thereafter imposed upon the defendant for the same crime, the period of detention and imprisonment theretofore served shall be deducted from the minimum and maximum terms of the new sentence. The officer having custody of the defendant shall furnish a certificate to the court at the time of sentence, showing the period of imprisonment served under the original sentence, and the certificate shall be annexed to the official records of the defendant's new commitment.

(3) Notwithstanding any other law to the contrary, when a defendant is convicted for a crime committed while serving a sentence of imprisonment on a separate unrelated felony conviction, credit for time being served for the term of imprisonment imposed on the defendant for the separate unrelated felony conviction shall not be deducted from the term of imprisonment imposed on the defendant for the subsequent conviction. [L 1972, c 9, pt of §1; gen ch 1993; am L 2012, c 50, §1]

Note

L 2012, c 50, §2 provides:

"SECTION 2. The prohibition in this Act [amending section 706-671] against deducting the time served on a separate unrelated felony from the sentence imposed for a crime committed while in prison for the separate unrelated felony shall not apply when the crime committed while in prison for the separate unrelated felony, was committed prior to the effective date of this Act [July 1, 2012]."

COMMENTARY ON §706-671

This section provides for a result which the Code deems fair. It provides that time spent in incarceration before sentence or, where a prior conviction or sentence has been vacated, before resentence be credited against the minimum and maximum terms of imprisonment. While it is true that most felons will be paroled prior to the expiration of the maximum term authorized by statute, nevertheless this section provides for some equalization, in the remaining felony cases and in misdemeanor

cases, between those defendants who obtain pre-sentence release and those who do not.

SUPPLEMENTAL COMMENTARY ON §706-671

The legislature in enacting the Code changed 671, as set forth in the Proposed Draft, to provide that a convicted person shall receive credit for any time served in any state or local correctional facility against both the minimum and maximum term of imprisonment. This provides for those few instances where the Code or other statutes provide for minimum terms of imprisonment. Cf. §706-606, as enacted.

Act 50, Session Laws 2012, amended this section by clarifying that a defendant would not earn credit for time served for a subsequent crime while the defendant is serving an imprisonment sentence for a separate, unrelated offense. The legislature found that the existing language of and case law related to this section has led to ambiguities and inconsistencies by the parties involved in a criminal case. Act 50 created uniform application and deterred imprisoned offenders from incurring new offenses. Senate Standing Committee Report No. 3188.

Case Notes

Imprisonment required for credit to be applied to second sentence for the same crime. 69 H. 407, 744 P.2d 84 (1987).

Imprisonment served under a previous term of probation is not required to be credited towards defendant's new term of probation. 71 H. 73, 783 P.2d 292 (1989).

Defendant was not entitled to credit for time served while on probation. 71 H. 612, 801 P.2d 1206 (1990).

No credit applied towards probation sentence for time served in a federal prison for unrelated federal offenses. 72 H. 230, 813 P.2d 854 (1991).

Where defendant was sentenced to serve six months of imprisonment as a condition of probation, the six months of imprisonment was time spent imprisoned for purposes of subsection (2); when defendant was subsequently sentenced to serve maximum term of one year of imprisonment, circuit court was required under subsection (2) to deduct the time served in prison from the maximum one-year term of imprisonment. 78 H. 343, 893 P.2d 194 (1995).

A sentence that credits a defendant with the time served for an unrelated offense is illegal because the sentencing court is not authorized by this chapter to grant such a credit. 94 H. 250, 11 P.3d 1094 (2000).

Under this section, a defendant is entitled to have presentence credit applied only once against the aggregate of defendant's consecutive sentences. 96 H. 195, 29 P.3d 914 (2001).

Where the department of public safety's (DPS) written policy for computing presentence credit for consecutive sentences merely adopted and enforced the holding of Tauiliili, which set forth the proper interpretation of this section, any change in the DPS's or the Hawaii paroling authority's internal policies regarding the calculation of presentence credit was irrelevant for purposes of an ex post facto analysis. 125 H. 429, 263 P.3d 709 (2010).

Where the Tauiliili decision did not "reform" the law in any way--did not overrule any prior decision of the Hawaii supreme court with regard to application of presentence credit to two or more consecutive sentences and was the first opportunity for the court to interpret this section on that issue--and did not increase the punishment for the crime for which defendant was convicted, the court's construction of this section reflected the correct reading of the statute, not an expansion of it, and did not violate due process. 125 H. 429, 263 P.3d 709 (2010).

Defendant claiming uncredited time served in confinement under subsection (1) is entitled to prove entitlement to the credit and to subpoena relevant documents as are necessary in aid thereof. 79 H. 175 (App.), 900 P.2d 172 (1995).

Based on subsection (1) and §706-624, sentencing court would have no authority to sentence defendant to five years' probation and more than one year in prison; furthermore, the court was required to credit defendant for time already served in pre-trial detention. 79 H. 317 (App.), 901 P.2d 1296 (1995).

Defendant not entitled to credit for time served in another state where imprisonment in other state was for another crime, not for any of the crimes for which defendant was sentenced in Hawaii. 84 H. 191 (App.), 932 P.2d 328 (1997).

Subsection (1) does not afford a defendant the right to credit against the sentence imposed against him or her for the time that the defendant spent in prison, post-arrest and pre-sentence as a consequence of a different charge or conviction. 91 H. 163 (App.), 981 P.2d 720 (1999).

" **§706-672 Place of imprisonment.** When a person is sentenced to imprisonment, the court shall commit the person to the custody of the department of public safety for the term of the person's sentence and until released in accordance with law. The director of public safety shall determine the proper program of redirection and any place of confinement of the committed

person. [L 1972, c 9, pt of §1; am L 1983, c 182, §1; am L 1987, c 338, §10; am L 1989, c 211, §8; gen ch 1993]

COMMENTARY ON §706-672

This section is substantially in accord with prior law. H.R.S. §711-83 (as codified prior to this Code) provided that felons be committed to the custody of the director of the department of social services and housing for placement within the correctional facilities of the department. Although there was no specific statutory direction that persons imprisoned for misdemeanors shall be incarcerated in county jails,[1] this was the usual practice.

SUPPLEMENTAL COMMENTARY ON §706-672

In enacting the Code, the legislature added to §672(1) of the Proposed Draft the last sentence which allows the court to determine the *initial* place of confinement. The Conference Committee Report states that "the Director of the Department of Social Services and Housing shall determine the proper program of redirection and any *subsequent* place of confinement best suited to meet the individual needs of the committed person." Conference Committee Report No. 2 (1972) (emphasis added). The committee also put its gloss on the word "institution," appearing in subsection (2), by stating its "intent that 'institution' refers to any detention or correctional facility other than Oahu prison." Id.

Act 182, Session Laws 1983, amended this section to authorize the director of social services to determine a convicted person's place of confinement. Under prior law, courts determined the initial place of confinement for convicted persons with indeterminate prison terms and also determined the permanent place of confinement for convicted persons with definite prison terms. Because of that law, convicted persons were sometimes inappropriately housed due to the court's commitment or the prisoner's subsequent behavior. By amending this section, the director is able to place convicted persons in the most appropriate program and is better able to use the department's resources to provide for the safety of other prisoners and the department's staff. Senate Standing Committee Report No. 722, House Standing Committee Report No. 419.

Case Notes

Nothing in the federal or the state constitution or the state statutory law entitles prisoner to a hearing in connection with

the prisoner's transfer to a mainland prison. 63 H. 138, 621 P.2d 976 (1981).

§706-672 Commentary:

1. But cf. H.R.S. §710-12, which reads in part: "The magistrate may direct, as one of the terms and conditions of such suspension of sentence, periodical or intermittent confinement of such person in jail or his attendance at a traffic course or school prescribed by the magistrate."

" **§706-673 Notice of escape.** (1) As used in this section, the following terms have the following meanings:

"Offense against the person" means any of the offenses described in chapter 707 and includes any attempt to commit any of those offenses.

"Prisoner" means a person who has been convicted of an offense against the person.

"Surviving immediate family member" means a person who is a surviving grandparent, parent, sibling, spouse or reciprocal beneficiary, child, or legal guardian of a deceased victim.

"Victim" means the person who was the victim of the offense against the person for which the prisoner was convicted.

(2) Upon written request, the department of public safety shall give notice of the escape of a prisoner, immediately following the escape, by the most reasonable and expedient means available, to each victim or a surviving immediate family member of the victim, through the victim witness assistance program in the county where the crime was committed.

(3) Neither the failure of any state officer or employee to carry out the requirements of this section nor compliance with it shall subject the State, the officer, or employee to liability in any civil action. However, such failure may provide a basis for such disciplinary action as may be deemed appropriate by a competent authority. [L 1990, c 193, §1; am L 1997, c 383, §67]

Cross References

Registration of sex offenders and other covered offenders and public access to registration information, see chapter 846E.

COMMENTARY ON §706-673

Act 193, Session Laws 1990, added this section which would require the department of public safety to notify victims or

their next-of-kin of an escape by the prisoner who committed a crime against the victim. The legislature felt this requirement would make victims of crimes feel more secure knowing they would be notified immediately if the prisoner escaped. Senate Standing Committee Report No. 2935.

Act 383, Session Laws 1997, amended this section by amending the definition of "surviving immediate family member" to include a reciprocal beneficiary. The amendment establishes the status of reciprocal beneficiaries and provides certain state governmental benefits to those with that status. Among the benefits extended to reciprocal beneficiaries which are substantially equivalent to those extended to spouses is legal standing relating to victims rights. Conference Committee Report No. 2.