

## ACT 316

S.B. NO. 1819

A Bill for an Act Relating to Sentencing.

*Be It Enacted by the Legislature of the State of Hawaii:*

SECTION 1. Chapter 706, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

**“§706- 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 of incest, as defined in section 707-741, in which the victim of the offense is related to the alleged offender by consanguinity or marriage or residing in the same dwelling unit as the alleged offender 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 would be appropriate to provide notice of the expedited sentencing program to the alleged offender, the police department or other appropriate investigative law enforcement agency shall give an alleged offender written notice of the existence of the expedited sentencing program provided in this section. The providing of the notice shall not be a prerequisite to the taking of a statement from an alleged offender, nor in any manner shall it commit a prosecuting authority to issuing a statement of no objection to the alleged offender being considered for the expedited sentencing program.

(3) The written notice shall state: “YOU ARE ADVISED TO SEEK LEGAL COUNSEL IMMEDIATELY AND, IF YOU CANNOT AFFORD ONE, TO CONTACT THE OFFICE OF THE PUBLIC DEFENDER. FAILURE TO CONTACT AN ATTORNEY MAY KEEP YOU OUT OF THIS PROGRAM. A copy of section 706- , 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 imprisonment or even life imprisonment, depending upon the offense. However, section 706- , 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, which may be revoked 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- , HAWAII REVISED STAT-

UTES, 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- , HAWAII REVISED STATUTES, UNLESS, AFTER YOUR LEGAL COUNSEL HAS RECEIVED THIS NOTICE, YOU HAVE MADE A GOOD FAITH EFFORT TO AVOID THE NECESSITY FOR 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 phone 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 requested, within fourteen days of the defendant’s receipt of the written notice, and subsequently received a written statement from the appropriate prosecuting authority stating that office has no objection to the defendant being considered for the expedited sentencing program in accordance with this section and further, that it is established that each of the following criteria has been met:
- (a) After receiving the required written notice, the defendant has made a good faith effort to avoid the necessity for 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 at the time of the commission of the sexual assault;
  - (c) The defendant has not received a prior sentence under this section and has not received a prior conviction for felony sexual assault under section 707-730, 707-731, or 707-732 or of incest, as defined in 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 perform the function of a guardian ad litem has agreed that it would be in the best interest of the child for the alleged offender to be considered for the expedited sentencing program. The prosecuting authority shall not 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 the prosecuting authority may oppose at sentencing 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 or a person assigned to perform the function of a 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 alleged offender being considered for the expedited sentencing program in accordance with this section, unless the prosecuting authority waives compliance with the time limit, the alleged offender shall comply with each of the following requirements:

- (a) Continue to make a good faith effort to avoid the necessity for 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 who may be considered for the expedited sentencing program in accordance with this section as of the date sentence is imposed may be sentenced to a term of probation upon the conditions specified in section 706-624; provided that, if the defendant is sentenced to a term of imprisonment, which may be up to one year, 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 comply with the following conditions:

- (a) To participate in court approved, appropriate sex offender assessment and treatment, that must conform to the guidelines developed by the adult probation division of the appropriate circuit court, until clinically discharged; provided that the prosecuting authority shall be provided notice and the opportunity for a hearing prior to any treatment discontinuance being allowed by the court or the adult probation division; provided further that 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 provided further that a lack of assessment and treatment resources shall result in the defendant not being considered for the expedited sentencing program;
- (b) To provide a written waiver of confidentiality for any assessment, treatment, counseling, therapy, or other program ordered as a condition of probation;
- (c) To comply with all orders entered in a proceeding pursuant to chapter 587; and
- (d) Any 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 on a person who is provided a written notice of no objection by the prosecuting authority and who qualifies for the expedited sentencing program. The court shall provide written findings of fact

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setting forth specific reasons that justified imposition of a sentence which is not in accordance with this section.

(11) The prosecuting authority shall record each request received pursuant to this section and shall report the requests and the action taken to the Children's Advocacy Center in each county. The Children's Advocacy Center Interagency Advisory Committee in each county shall monitor the expedited sentencing program. The county committees also shall identify problems relating to the expedited sentencing program within the civil and criminal legal processes and propose solutions. The state director of the Children's Advocacy Center shall compile the information from each county committee and submit a report to the appropriate legislative committees on or before January 15 of each year."

SECTION 2. Section 706-621, Hawaii Revised Statutes, is amended to read as follows:

**"§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-\_\_\_\_\_ if the defendant has qualified for that sentencing program."

SECTION 3. Section 706-623, Hawaii Revised Statutes, is amended to read as follows:

**"§706-623 Terms of probation.** [(a)] (1) When the court has sentenced a defendant to be placed on probation, the period of probation shall be five years upon conviction of a felony, one year upon conviction of a misdemeanor, or six months upon conviction of a petty misdemeanor, unless the defendant is [sooner] discharged sooner by order of the court. The court, on application of a probation officer or of the defendant[,] or on its own motion, may discharge the defendant at any time. Prior to granting early discharge, 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-

[(b)] (2) When a defendant who is sentenced to probation has previously been detained in any state or [local] county correctional or other institution following arrest for the crime for which sentence is imposed, [such] the period of detention following arrest shall be deducted from the term of imprisonment if [such] 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 [local] county correctional or other institution, and the certificate shall be annexed to the official records of the defendant's sentence."

SECTION 4. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the invalidity does not affect other provisions or applications of the Act that can be given effect without the invalid provision or application, and to this end, the provisions of this Act are severable.

SECTION 5. Statutory material to be repealed is bracketed. New statutory material is underscored.<sup>1</sup>

SECTION 6. This Act shall take effect upon its approval and shall be repealed on June 30, 1995.

(Approved June 21, 1993.)

**Note**

1. Edited pursuant to HRS §23G-16.5.