

ACT 62

S.B. NO. 2861

A Bill for an Act Relating to Criminal Procedure.

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

SECTION 1. Chapter 806, Hawaii Revised Statutes, is amended by adding a new part to be appropriately designated and to read as follows:

“PART INFORMATION CHARGING

§806-A Definitions. In this part, unless a different meaning is plainly required:

“Legal prosecuting officer” means the attorney general or a prosecuting attorney, a deputy attorney general or a deputy prosecuting attorney, or a person designated and authorized by the attorney general or prosecuting attorney to act as a deputy attorney general or deputy prosecuting attorney, respectively.

§806-B Prosecution of felonies by written information. Criminal charges may be instituted by written information signed by a legal prosecuting officer and filed in the court having jurisdiction thereof when the charge is a felony for which charging by written information is permitted by section 806-C.

§806-C Felonies for which criminal charges may be instituted by written information. (a) Criminal charges may be instituted by written information for a felony when the charge is a class C felony under section 19-3.5 (voter fraud); section 128D-10 (knowing releases); section 132D-14(1), (2)(a), and (3), (penalties for failure to comply with requirements of sections 132D-7, 132D-10 and 132D-16); section 134-6 (carrying or use of firearm in the commission of a separate felony); section 134-7(a) and (b) (ownership or possession prohibited); section 134-8 (prohibited ownership); section 134-9 (licenses to carry); section 134-17(a) (relating to false information or evidence concerning psychiatric or criminal history); section 134-51 (deadly weapons); section 134-52 (switchblade knives); section 134-53 (butterfly knives); section 188-23 (possession or use of explosives, electrofishing devices, and poisonous substances in state waters prohibited); section 231-34 (attempt to evade or defeat tax); section 231-36 (false and fraudulent statements); section 245-37 (sale or purchase of packages of cigarettes without stamps); section 245-38 (vending unstamped cigarettes); section 245-51 (sale of export cigarettes prohibited); section 245-52 (alteration of packaging prohibited); section 291C-12.5 (accidents involving substantial bodily injury); section 291E-61.5 (habitually operating a vehicle under the influence of an intoxicant); section 329-41 (prohibited acts B); section 329-42 (prohibited acts C); section 329-43.5 (prohibited acts related to drug paraphernalia); section 329C-2 (manufacture, distribution, or possession with intent to distribute an imitation controlled substance to a person under eighteen years of age); section 346-34(d)(2) and (e) (fraud involving food stamps or coupons with a value exceeding \$300.00); section 346-43.5 (medical assistance fraud); section 383-141 (falsely obtaining benefits); section 431:10C-307.7 (insurance fraud); section 482D-7 (violation of fitness standards and stamping requirements); section 485-8 (registration of securities); section 485-14 (registration of dealers, investment advisers, salespersons, and investment adviser representatives); section 485-25 (fraudulent and other prohibited practices); section 707-703 (negligent homicide in the second degree); section 707-705 (negligent injury in the first degree); section 707-711 (assault in the second degree); section 707-713 (reckless endangering in the first degree); section 707-721 (unlawful imprisonment in the first degree); section

707-726 (custodial interference in the first degree); section 707-757 (electronic enticement of a child in the second degree); section 707-766 (extortion in the second degree); section 708-811 (burglary in the second degree); section 708-821 (criminal property damage in the second degree); section 708-831 (theft in the second degree); section 708-833.5 (shoplifting); section 708-835.5 (theft of livestock); section 708-836 (unauthorized control of propelled vehicle); section 708-836.5 (unauthorized entry into motor vehicle); section 708-839.5 (theft of utility services); section 708-839.8 (identity theft in the third degree); section 708-852 (forgery in the second degree); section 708-854 (criminal possession of a forgery device); section 708-858 (suppressing a testamentary or recordable instrument); section 708-875 (trademark counterfeiting); section 708-891.5 (computer fraud in the second degree); section 708-892.5 (computer damage in the second degree); section 708-895.6 (unauthorized computer access in the second degree); section 708-8100 (fraudulent use of a credit card); section 708-8102 (theft/forgery of credit cards); section 708-8103 (credit card fraud by a provider of goods or services); section 708-8104 (possession of unauthorized credit card machinery or incomplete cards); section 708-8200 (cable television service fraud in the first degree); section 708-8202 (telecommunication service fraud in the first degree); section 709-903.5 (endangering the welfare of a minor in the first degree); 709-906 (abuse of family or household members); section 710-1016.3 (obtaining a government-issued identification document under false pretenses in the first degree); section 710-1016.6 (impersonating a law enforcement officer in the first degree); section 710-1017.5 (sale or manufacture of deceptive identification document); section 710-1018 (securing the proceeds of an offense); section 710-1021 (escape in the second degree); section 710-1023 (promoting prison contraband in the second degree); section 710-1024 (bail jumping in the first degree); section 710-1029 (hindering prosecution in the first degree); section 710-1060 (perjury); section 710-1072.5 (obstruction of justice); section 711-1103 (riot); section 711-1109.3 (cruelty to animals/fighting dogs); section 711-1110.9 (violation of privacy in the first degree); section 711-1112 (interference with the operator of a public transit vehicle); section 712-1221 (promoting gambling in the first degree); section 712-1222.5 (promoting gambling aboard ships); section 712-1224 (possession of gambling records in the first degree); section 712-1243 (promoting a dangerous drug in the third degree); section 712-1246 (promoting a harmful drug in the third degree); section 712-1247 (promoting a detrimental drug in the first degree); section 712-1249.6 (promoting a controlled substance in, on, or near schools or school vehicles); section 803-42 (interception, access, and disclosure of wire, oral, or electronic communications, use of pen register, trap and trace device, and mobile tracking device prohibited); or section 846E-9(a)(2) (penalty for failure to comply with requirements of chapter 846E).

(b) Criminal charges may be instituted by written information for a felony when the charge is a class B felony under section 134-7(b) (ownership or possession prohibited); section 329-43.5 (prohibited acts related to drug paraphernalia); section 708-810 (burglary in the first degree); section 708-830 (theft in the first degree); 708-839.7 (identity theft in the second degree); section 708-851 (forgery in the first degree); section 708-891 (computer fraud in the first degree); section 708-892 (computer damage in the first degree); section 712-1242 (promoting a dangerous drug in the second degree); section 712-1245 (promoting a harmful drug in the second degree); or section 712-1249.5 (commercial promotion of marijuana in the second degree).

(c) Criminal charges may be instituted by written information for a felony when the charge is a felony under section 19-3 (election fraud); section 480-4 (combinations in restraint of trade, price-fixing and limitation of production prohibited); section 480-6 (refusal to deal); or section 480-9 (monopolization).

(d) Criminal charges may be instituted by written information for a felony when the charge is a charge under section 329-46 (prohibited acts related to visits to more than one practitioner to obtain controlled substance prescriptions) and the comparable offense under part IV of chapter 712 as enumerated in subsection (a), (b), or (c).

(e) Criminal charges may be instituted by written information for a felony when the charge is a charge that involves 702-221 (liability for conduct of another), 702-222 (accomplice liability), 702-223 (complicity), 705-500 (criminal attempt), 705-510 (criminal solicitation), or 705-520 (criminal conspiracy), and the underlying offense is an offense listed above in subsection (a), (b), (c), or (d).

§806-D Exhibits. (a) When an offense is prosecuted by information, the legal prosecuting officer shall attach an exhibit demonstrating the existence of probable cause to believe that the offense charged in the information has been committed and that the defendant committed the offense.

(b) The exhibit shall include an affidavit or a declaration made under penalty of law. In addition, the exhibit may include, but is not limited to, documents, photographs, audio recordings, video recordings, other recordings, and other materials or copies thereof.

(c) The legal prosecuting officer shall include within the exhibit evidence that is clearly exculpatory, but no information shall be dismissed for failure to include such evidence if the court finds that the inclusion of the clearly exculpatory evidence would not have changed the finding of probable cause.

(d) Each signed statement of any person whose name appears as a witness in any affidavit or declaration that is part of the exhibit regarding the charged offense shall be made part of the filing if:

- (1) It is in the possession of the legal prosecuting officer, the police, other county or state law enforcement agents; or
- (2) It is in the possession of a federal law enforcement officer and:
 - (A) The legal prosecuting officer is aware of and able to timely obtain the statement; and
 - (B) The statement is one that the legal prosecuting officer would be required to produce in discovery.

(e) Statements made part of the filing pursuant to subsection (d) may be redacted to remove the social security number, address, or phone number of any person.

(f) An information shall not be dismissed for failure to attach or file any such statement described in subsection (d). Any such statement shall be promptly provided to the defendant, or filed with the court if the location of the defendant is unknown or the defendant is without counsel, upon discovery by the legal prosecuting officer.

(g) The information shall be filed in the circuit court, and may be filed under seal with leave of court on good cause shown. All exhibits in support of the information shall be filed under seal in the circuit court.

§806-E Probable cause. (a) When an information is filed, the court having jurisdiction shall review the information and its exhibit to determine whether there is probable cause to believe that the offense charged was committed and that the defendant committed the offense charged.

(b) A finding of the existence of probable cause or lack thereof may be based in whole or in part upon hearsay evidence or upon evidence that may ultimately be ruled to be inadmissible at the trial.

(c) If the court finds that there is probable cause to believe that the offense charged was committed and that the defendant committed the offense charged, the

court shall set bail and direct the clerk to issue a warrant for the arrest of the defendant.

(d) As used in this section, "court having jurisdiction" and "court" mean the circuit court; provided that the chief justice may by order authorize district court judges to make probable cause determinations, set bail, and direct the issuance of arrest warrants, as provided by this section.

§806-F Procedure for motion to dismiss. (a) The defendant may move in circuit court to dismiss the information on the grounds that the information and its exhibit do not establish the existence of probable cause to believe that the offense charged was committed or probable cause to believe that the defendant committed the offense.

(b) Upon the filing of the motion to dismiss, the court shall conduct a hearing within a reasonable time, but no later than thirty days after filing, except as otherwise agreed upon by the parties.

(c) If the defendant is incarcerated the court shall conduct a hearing no later than fifteen days after filing, except as otherwise agreed upon by the parties.

(d) An information shall not be dismissed due to the failure of the court to conduct a hearing within the periods of time stated above; provided, that if the defendant is incarcerated due to an inability to post the previously set bail and a hearing is not held within the specified time period, the court shall immediately hold a hearing to consider whether the defendant should be released upon reasonable conditions set by the court.

(e) The information and all its attachments shall be considered by the court and made a part of the record at a hearing on the motion to dismiss the information.

§806-G Evidence at hearing on motion to dismiss. (a) The defendant may introduce evidence at the hearing. The defendant may also subpoena and call witnesses if the motion is accompanied by a declaration stating that counsel for the defendant (or the defendant if appearing without counsel) has a good faith basis to believe that each witness subpoenaed will provide specific testimony to help demonstrate that the information and its exhibit or exhibits do not establish the existence of probable cause to believe that the offense charged has been committed or probable cause to believe that the defendant committed the offense charged.

(b) The court may, in its discretion, permit the State to call witnesses, introduce evidence, or otherwise supplement the exhibit or exhibits appended to the information.

§806-H Ruling on motion to dismiss. (a) The court shall determine from an examination of the information and its attachments, and in light of any evidence presented at a hearing on a motion to dismiss the information, whether the information and its attachments establish the existence of probable cause to believe that the offense charged has been committed and that the defendant committed the offense charged.

(b) A finding of the existence of probable cause or lack thereof may be based in whole or in part upon hearsay evidence or on evidence that may ultimately be ruled to be inadmissible at the trial."

SECTION 2. Section 641-13, Hawaii Revised Statutes, is amended to read as follows:

"§641-13 By State in criminal cases. An appeal may be taken by and on behalf of the State from the district or circuit courts to the supreme court, subject to chapter 602, in all criminal cases, in the following instances:

- (1) From an order or judgment quashing, setting aside, or sustaining a motion to dismiss, any indictment, information, or complaint or any count thereof;
- (2) From an order or judgment, sustaining a special plea in bar, or dismissing the case where the defendant has not been put in jeopardy;
- (3) From an order granting a new trial;
- (4) From an order arresting judgment;
- (5) From a ruling on a question of law adverse to the State where the defendant was convicted and appeals from the judgment;
- (6) From the sentence, on the ground that it is illegal;
- (7) From a pretrial order granting a motion for the suppression of evidence, including a confession or admission, or the return of property in which case the intermediate appellate court or the supreme court, as the case may be, shall give priority to such an appeal and the order shall be stayed pending the outcome of the appeal;
- (8) From an order denying a request by the State for protective order for nondisclosure of witness for their personal safety under Rule 16(e)(4) of the Hawaii Rules of Penal Procedure, in which case the intermediate appellate court or the supreme court, as the case may be, shall give priority to such appeal and the order shall be stayed pending outcome of such appeal; or
- (9) From a judgment of acquittal following a jury verdict of guilty.’’

SECTION 3. Section 806-6, Hawaii Revised Statutes, is amended to read as follows:

“**§806-6 Use of; furnishing of copy.** In all cases of offenses against the laws of the State brought in the first instance in a court of record, the accused shall be arraigned and prosecuted upon an information, complaint, or indictment as soon after the commitment of the offense of which he is accused as may be expedient.

In [~~all cases of~~] felony¹ cases charged by complaint or indictment, the defendant shall be furnished [~~before arraignment~~] with a copy of the [~~complaint or indictment found against him.~~] charging document before arraignment. In felony cases charged by written information, the defendant shall be furnished with a copy of the information and all attached exhibits at the initial court appearance and the custody of the materials shall be governed by Rule 16 of the Hawaii Rules of Penal Procedure.”

SECTION 4. The prosecuting attorney of each county shall maintain a record of all cases received and prosecuted by way of information between the effective date of this Act and November 30, 2007. A report from the prosecuting attorney of each county, containing a record of the above statistics, shall be submitted to the legislature no later than twenty days prior to the convening of the 2008 regular session.

SECTION 5. In codifying the new part added to chapter 806, Hawaii Revised Statutes, by section 1 of this Act, the revisor of statutes shall substitute appropriate section numbers for the letters used in the new sections’ designations in this Act.

SECTION 6. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 7. This Act shall take effect upon the date the chief election officer issues a certificate of election under section 11-156, Hawaii Revised Statutes,

ACT 62

certifying that the State Constitution has been amended² to allow felony criminal charges to be initiated by the filing of a written information.

(Approved May 10, 2004.)

Notes

1. "Felony" should not be underscored.
2. See SB 2851, this volume, at page 1085, proposing an amendment to Article I of the State Constitution.