LATE TESTIMONY

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

January 30, 2013

S.B. NO. 880 RELATING TO SENTENCE OF IMPRISONMENT FOR SEXUAL ASSAULT OF A MINOR UNDER THE AGE OF TWELVE YEARS

Senator Hee and Members of the Committee:

S. B. 880 seeks to create mandatory minimum terms for Class "A" (currently carries a mandatory 20 year prison term, Class "B" (currently carries a 10 year prison term or a possible term of 5 years' probation with up to 18 months prison) and Class "C" (currently carries a 5 year prison term or a possible term of 5 years' probation with up to 12 months prison) sexual assault offenses as follows.

The new law would mandate a mandatory minimum term of six years and eight months of a twenty year prison term for:

- knowing penetration with "strong compulsion" (defined as use of threat, physical force or dangerous instrument) of a minor under the age of 12,
- knowing penetration of those persons defined as "mentally defective", and,
- knowing penetration of a person rendered mentally incapacitated or physically helpless by administration of a drug.

The new law would also mandate a mandatory minimum term of three **years and** four months of a ten year prison term for:

- knowing penetration with "compulsion" (defined as lack of consent or threat of humiliation, property damage or financial loss) of a minor under the age of 12,
- knowing penetration of minors under the age of 12 defined as "mentally incapacitated" or "physically helpless", and
- knowing penetration of a minor under the age of 12 who is in a public or private prison, detention facility, or is committed to the director of the department of public safety. (We note that this particular provision is impossible to occur because, in Hawaii, minors under the age of 12 are never held "in custody").

The new law would also mandate a mandatory minimum term of one year and eight months of a five year prison term for:

- reckless penetration with "compulsion" (defined as lack of consent or threat of humiliation, property damage or financial loss) of a minor under the age of 12.

We acknowledge the good intentions supporting this proposed legislation. However, in application, it has the very real prospect of forcing more child victims to have to go through a trial where they will have to re-live the assault upon their bodies and psyche in a public setting in the presence of their perpetrator. It will also result in more costs to already overburdened court and corrections systems. Finally, it reflects a real distrust of the Hawaii Paroling Authority that is not justified.

As noted above, Class "A" offenses carry a mandatory 20 year prison term. Our parole board is then tasked with setting a minimum term which the defendant must serve before being eligible to be considered for parole. When that minimum term is completed, the parole board may grant parole or may determine that the defendant must do additional programming with incarceration before parole will be considered. The parole board has the option of requiring a defendant to serve the entire term of 20 years.

In Class "B" and "C" offenses, if the defendant is sentenced to a prison term of 10 years and 5 years, respectively, the parole board will act as described above.

We believe that the Hawaii Paroling Authority should continue to bear the responsibility to assess each case and determine the minimum and maximum terms to be served. From a cost analysis alone, this is important because there are times that the circumstances of a defendant may change. The parole board has the ability to react to such changes. For example, when defendants suffer significant health events (stroke, or other debilitating condition) or require particular levels of care that are prohibitively expensive to provide in a prison setting, the parole board can consider parole for a person who is certainly no longer a threat to the community but would be a serious drain on taxpayers to keep in prison. If the person is serving <u>mandatory</u> time, such options are not available.

More importantly, the addition of these significant mandatory minimum terms will be a real burden on the resolution of these cases. Currently, the idea of a so-called "open" term (one without a mandatory minimum) allows a defendant to think, however unrealistic it may be, that if he or she does well in the prison setting, they will have a chance to be out in a few years. That kind of thinking can fuel a decision to plead to a Class "A" offense, rather than go to trial.

However, if there is a mandatory minimum in place for essentially one third of the maximum term, counsel for the defendant will have to inform him or her that they may not only have to serve that six year, eight month term, but additional years on top of that. That is because there is certain programming that the parole board requires before approving parole, such as the Sex Offender Treatment Program, which normally takes two years. We would have to inform our client that they might not be eligible for the program until their mandatory term was completed, then they might be on a waiting list, then they would have to do the program, all adding up to additional years of prison.

Under this scenario, clients are much more likely to demand trial than agree to such a long sentence. Likewise, in the case of Class "B" and "C" cases, clients sometimes agree to plead under an agreement with the State that the prosecution could ask for the prison term but the defendant could still argue for probation. Again, however unlikely, it is the opportunity to ask for probation that persuades a defendant to enter a plea. With that possibility gone, those defendants will often feel they have nothing to gain from a plea, so will go to trial.

All these scenarios mean that children, the real victims in these cases, the persons who are "minors under the age of 12" will have to get up in a public courtroom, in front of jurors and a judge, with the defendant present, and not only recount the specifics of the assault, but be subject to cross-examination.

We oppose S.B. No. 880 for these reasons. We are aware of no compelling reasons that require this change in the law and believe it will cause far more problems than it might solve.

Thank you for the opportunity to comment on this bill.