
A BILL FOR AN ACT

RELATING TO SENTENCING.

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

1 SECTION 1. The purpose of this Act is to amend Hawaii's
2 extended term sentencing law to address potential issues raised
3 in recent federal court opinions and rulings on the right to a
4 jury trial. These opinions, *Apprendi v. New Jersey*, 530 U.S.
5 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), *Blakely v.*
6 *Washington*, 542 U.S. 296, 124 S.Ct 2531, 159 L.Ed.2d 403 (2004),
7 *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160
8 L.Ed.2d 621 (2005) and *Cunningham v. California*, 549 U.S. _____
9 (2007) have held that any fact, other than prior convictions,
10 that increases the penalty for a crime beyond the ordinary
11 statutory maximum must be submitted to a jury and proved beyond
12 a reasonable doubt.

13 On February 20, 2007, the United States Supreme Court
14 denied the state's writ of certiorari in *Frank v. Kaua*, _____
15 S.Ct. , (2007) 2007 WL 506822, 74 USLW 3687, 75 USLW 3021 (U.S.
16 Feb 20, 2007) (NO. 05-1536) and granted a writ of certiorari in
17 *Maugaotega v. Hawaii* _____S.Ct. ____ 2005 WL 2890505 (U.S. Feb 20,
18 2007) (NO. 05-7309). In granting the writ of certiorari in



1 *Maugaotege*, the United States Supreme Court vacated the Hawaii
2 supreme court's opinion and remanded the case to the Hawaii
3 supreme court for further consideration in light of the recently
4 decided *Cunningham* case.

5 These recent developments critically impair the current
6 ability of the state courts to impose an extended term of
7 imprisonment upon a discrete class of defendants. Therefore,
8 the legislature finds a compelling necessity to amend Hawaii's
9 extended term sentencing statutes.

10 SECTION 2. Section 706-662, Hawaii Revised Statutes, is
11 amended to read as follows:

12 **"§706-662 Criteria for extended terms of imprisonment.** A
13 defendant who has been convicted of a felony qualifies for an
14 extended term of imprisonment under section 706-661 if it is
15 proven beyond a reasonable doubt that the convicted defendant
16 satisfies one or more of the following criteria:

17 (1) The defendant is a persistent offender in that the
18 defendant has previously been convicted of two
19 felonies committed at different times when the
20 defendant was eighteen years of age or older;

21 (2) The defendant is a professional criminal in that:



- 1 (a) The circumstances of the crime show that the
- 2 defendant has knowingly engaged in criminal
- 3 activity as a major source of livelihood; or
- 4 (b) The defendant has substantial income or resources
- 5 not explained to be derived from a source other
- 6 than criminal activity;
- 7 (3) The defendant is a dangerous person in that the
- 8 defendant has been subjected to a psychiatric or
- 9 psychological evaluation that documents a significant
- 10 history of [~~dangerousness to others resulting in~~]
- 11 criminally violent conduct[7] to others, and [~~this~~]
- 12 that history [~~makes~~] demonstrates the defendant poses
- 13 a serious danger to others. Nothing in this section
- 14 precludes the introduction of victim-related data [~~in~~
- 15 ~~order~~] to establish dangerousness in accord with the
- 16 Hawaii [~~rules of evidence,~~] Rules of Evidence;
- 17 (4) The defendant is a multiple offender in that:
- 18 (a) The defendant is being sentenced for two or more
- 19 felonies or is already under sentence of
- 20 imprisonment for felony; or
- 21 (b) The maximum terms of imprisonment authorized for
- 22 each of the [~~defendant's~~] crimes[7] for which the



1 defendant has been convicted, if [made] ordered
2 to run consecutively, would equal or exceed in
3 length the maximum of the extended term imposed
4 or would equal or exceed forty years if the
5 extended term imposed is for a class A felony;

6 (5) The defendant is an offender against the elderly,
7 handicapped, or a minor [~~under the age of~~] eight[7]
8 years-of-age or younger, in that:

9 (a) The defendant [~~attempts or commits~~] is convicted
10 of committing or attempting to commit any of the
11 following crimes: murder, manslaughter, a sexual
12 offense that constitutes a felony under chapter
13 707, robbery, felonious assault, burglary, or
14 kidnapping; and

15 (b) The defendant, in the course of committing or
16 attempting to commit the crime, inflicts serious
17 or substantial bodily injury upon a person who
18 is:

- 19 (i) Sixty years of age or older;
- 20 (ii) Blind, a paraplegic, or a quadriplegic; or
- 21 (iii) Eight [~~years-of-age~~] years-of-age or
22 younger; and

- 1 (c) Such disability is known or reasonably should be
- 2 known to the defendant; or
- 3 (6) The defendant is a hate crime offender in that:
 - 4 (a) The defendant is convicted of a crime under
 - 5 chapter 707, 708, or 711; and
 - 6 (b) The defendant intentionally selected a victim or,
 - 7 in the case of a property crime, the property
 - 8 that was the object of a crime, because of
 - 9 hostility toward the actual or perceived race,
 - 10 religion, disability, ethnicity, national origin,
 - 11 gender identity or expression, or sexual
 - 12 orientation of any person. For purposes of this
 - 13 subsection, "gender identity or expression"
 - 14 includes a person's actual or perceived gender,
 - 15 as well as a person's gender identity, gender-
 - 16 related self-image, gender-related appearance, or
 - 17 gender-related expression, regardless of whether
 - 18 that gender identity, gender-related self-image,
 - 19 gender-related appearance, or gender-related
 - 20 expression is different from that traditionally
 - 21 associated with the person's sex at birth."

1 SECTION 3. Section 706-664, Hawaii Revised Statutes, is
2 amended to read as follows:

3 **"§706-664 Procedure for imposing extended terms of**
4 **imprisonment.** (1) Hearings to determine the grounds for
5 imposing extended terms of imprisonment may be initiated by the
6 prosecutor or by the court on its own motion. The court shall
7 not impose an extended term unless the ground therefor has been
8 established at a hearing after the conviction of the defendant
9 and on written notice pursuant to subsection (2) to the
10 defendant of the ground proposed. Subject to the provisions of
11 section 706-604, the defendant shall have the right to hear and
12 controvert the evidence against the defendant and to offer
13 evidence upon the issue[-] before a jury; provided that the
14 defendant may waive the defendant's right to the determination
15 by a jury under this subsection, in which case the hearing and
16 determination shall be made by the court.

17 (2) Notice of an intention to seek an extended term of
18 imprisonment under section 706-662 shall be given to the
19 defendant within sixty days of the defendant's arraignment.
20 However, the sixty-day period may be waived by the defendant,
21 modified by stipulation of the parties, or extended upon a
22 showing of good cause by the State.



1 (3) If the jury, or the court, when the defendant has
2 waived the defendant's right to jury, finds that the facts that
3 form the basis for the imposition of an extended term of
4 imprisonment have been proven beyond a reasonable doubt, the
5 court may impose the indeterminate terms of imprisonment
6 provided for in section 706-661."

7 SECTION 4. Act 230, Session Laws of Hawaii 2006, is amended
8 by amending section 54 to read as follows:

9 "SECTION 54. This Act shall take effect upon its approval;
10 provided that on June 30, 2007, [~~sections 23 and 24~~] section 23
11 of this Act shall be repealed [~~and sections 706-661 and 706-~~
12 ~~662,~~] and section 706-661, Hawaii Revised Statutes, shall be
13 reenacted in the form in which [~~they~~] it read on the day before
14 the effective date of this Act."

15 SECTION 5. Statutory material to be repealed is bracketed
16 and stricken. New statutory material is underscored.

17 SECTION 6. This Act shall take effect on January 1, 2112.



Report Title:

Sentencing; Jury factual determination, enhanced penalties

Description:

Requires jury factual determination of criteria for extended sentencing. (HB1152 HD1)

