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# 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 *Maugaotega*, 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, and this history makes  
12 the defendant a serious danger to others. Nothing in  
13 this section precludes the introduction of victim-  
14 related data in order to establish dangerousness in  
15 accord with the Hawaii rules of evidence;
- 16 (4) The defendant is a multiple offender in that:
- 17 (a) The defendant is being sentenced for two or more  
18 felonies or is already under sentence of  
19 imprisonment for felony; or
- 20 (b) The maximum terms of imprisonment authorized for  
21 each of the [~~defendant's~~] crimes[~~7~~] for which the  
22 defendant has been convicted, if [made] ordered



1 to run consecutively, would equal or exceed in  
2 length the maximum of the extended term imposed  
3 or would equal or exceed forty years if the  
4 extended term imposed is for a class A felony;

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

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

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

18 (i) Sixty years of age or older;

19 (ii) Blind, a paraplegic, or a quadriplegic; or

20 (iii) Eight [~~years of age~~] years-of-age or  
21 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 July 1, 2007.



**Report Title:**

Sentencing; Jury factual determination, enhanced penalties

**Description:**

Requires jury factual determination of criteria for extended sentencing. (SD1)

