

**Session Laws of Hawaii
Passed By The
Twenty-Fourth State Legislature
Second Special Session
2007**

ACT 1

H.B. NO. 2

A Bill for an Act Relating to Sentencing.

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

SECTION 1. The purpose of this Act is to amend Hawaii's extended term sentencing law to address issues raised in recent federal court opinions and rulings on the right to a jury trial. These opinions, *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), and *Cunningham v. California*, 549 U.S. ___, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007), have held that any fact, other than prior or concurrent convictions, that increases the penalty for a crime beyond the ordinary statutory maximum must be submitted to a jury and proven beyond a reasonable doubt.

On February 20, 2007, the United States Supreme Court denied the State's petition for a writ of certiorari in *Frank v. Kaula*, 549 U.S. ___, 127 S.Ct. 1233, 167 L.Ed.2d 144 (2007) and granted a writ of certiorari in *Maugaotega v. Hawaii*, 549 U.S. ___, 127 S.Ct. 1210, 167 L.Ed.2d 37 (2007). In granting the writ of certiorari in *Maugaotega*, the United States Supreme Court vacated the judgment of the Hawaii supreme court and remanded the case to the Hawaii supreme court for further consideration in light of the recently decided *Cunningham* case. After further consideration in light of the *Cunningham* case, the Hawaii supreme court issued an opinion in *State v. Maugaotega*, ___P.3d ___, 2007 WL 2823760, Oct. 1, 2007 (No. 26657), which held that statutes governing Hawaii's extended term sentencing are unconstitutional because they require a judge rather than a jury to find facts, other than those of prior or concurrent convictions, necessary to enhance a defendant's sentence beyond the ordinary or standard term authorized by the jury's verdict.

However, the Hawaii supreme court declined to exercise its inherent judicial power to order, on remand, that a jury be empanelled to find the facts necessary to impose an extended term of imprisonment. The court explained that it had done so because, when the legislature attempted, through Act 230, Session Laws of Hawaii 2006, to conform the extended term sentencing scheme to the requirements set forth by the United States Supreme Court, it did not vest in the jury the power to find the requisite facts but had instead directed that the court retain this responsibility. The end result of these cases is that the ability of the state courts to impose an extended term of imprisonment upon a discrete class of defendants is critically impaired and that convicted persons who pose a danger to the public can not be sentenced to an

extended term of imprisonment even though such a term may be both appropriate and necessary.

The purpose of this Act is to amend Hawaii's extended term sentencing statutes to ensure that the procedures used to impose extended terms of imprisonment comply with the requirements set forth by the United States Supreme Court and Hawaii supreme court. The legislature intends that these amendments apply to any case that requires resentencing because of the decisions in the *Apprendi*, *Blakely*, *Booker*, *Cunningham*, and *Maugaotega* cases. It is not the purpose of this Act to confer upon a defendant who has previously been sentenced to an extended term the right to be resentenced under the new procedures in this Act, unless the defendant is otherwise legally entitled to be resentenced. As the Hawaii supreme court held in *State v. Gomes*, 107 Haw. 308, 113 P.3d 184 (2005), the *Apprendi* rule itself does not retroactively apply to those cases in which the defendant's conviction became final prior to the United States Supreme Court's announcement of that rule in 2000. To the extent that this Act applies retroactively, the legislature finds that it does not subject any offender to additional punishment or other disadvantage.

SECTION 2. Section 706-661, Hawaii Revised Statutes, is amended to read as follows:

~~“§706-661 [Sentence of imprisonment for felony; extended terms. In the cases designated in section 706-662, a person who has been convicted of a felony may be sentenced to an extended indeterminate term of imprisonment. When ordering such a sentence, the court shall impose the maximum length of imprisonment which shall be as follows:] Extended terms of imprisonment. The court may sentence a person who satisfies the criteria for any of the categories set forth in section 706-662 to an extended term of imprisonment, which shall have a maximum length as follows:~~

- (1) For murder in the second degree—life without the possibility of parole;
- (2) For a class A felony—indeterminate life term of imprisonment;
- (3) For a class B felony—indeterminate twenty-year term of imprisonment; and
- (4) For a class C felony—indeterminate ten-year term of imprisonment.

~~When ordering an extended term sentence, the court shall impose the maximum length of imprisonment. The minimum length of imprisonment for an extended term sentence under [§]paragraphs[§] (2), (3), and (4) shall be determined by the Hawaii paroling authority in accordance with section 706-669.”~~

SECTION 3. Section 706-662, Hawaii Revised Statutes, is amended to read as follows:

~~“§706-662 Criteria for extended terms of imprisonment. A [convicted] defendant [may be subject to] who has been convicted of a felony may be subject to an extended term of imprisonment under section 706-661[;] if it is proven beyond a reasonable doubt that an extended term of imprisonment is necessary for the protection of the public and that the convicted defendant satisfies one or more of the following criteria:~~

- (1) The defendant is a persistent offender [~~whose imprisonment for an extended term is necessary for protection of the public. The court shall not make this finding unless~~] in that the defendant has previously been convicted of two or more felonies committed at different times when the defendant was eighteen years of age or older[-];

- (2) The defendant is a professional criminal [~~whose imprisonment for an extended term is necessary for protection of the public. The court shall not make this finding unless:~~] in that:
- (a) The circumstances of the crime show that the defendant has knowingly engaged in criminal activity as a major source of livelihood; or
 - (b) The defendant has substantial income or resources not explained to be derived from a source other than criminal activity[-];
- (3) The defendant is a dangerous person [~~whose imprisonment for an extended term is necessary for protection of the public. The court shall not make this finding unless:~~] in that the defendant has been subjected to a psychiatric or psychological evaluation that documents a significant history of dangerousness to others resulting in criminally violent conduct, and this history makes the defendant a serious danger to others. Nothing in this section precludes the introduction of victim-related data [~~in order~~] to establish dangerousness in accord with the Hawaii rules of evidence[-];
- (4) The defendant is a multiple offender [~~whose criminal actions were so extensive that a sentence of imprisonment for an extended term is necessary for protection of the public. The court shall not make this finding unless:~~] in that:
- (a) The defendant is being sentenced for two or more felonies or is already under sentence of imprisonment for any felony; or
 - (b) The maximum terms of imprisonment authorized for each of the defendant's crimes, if made to run consecutively, would equal or exceed in length the maximum of the extended term imposed or would equal or exceed forty years if the extended term imposed is for a class A felony[-];
- (5) The defendant is an offender against the elderly, handicapped, or a minor [~~under the age of eight, whose imprisonment for an extended term is necessary for the protection of the public. The court shall not make this finding unless:~~] eight years of age or younger in that:
- (a) The defendant attempts or commits any of the following crimes: murder, manslaughter, a sexual offense that constitutes a felony under chapter 707, robbery, felonious assault, burglary, or kidnapping; and
 - (b) The defendant, in the course of committing or attempting to commit the crime, inflicts serious or substantial bodily injury upon a person who [~~is:~~] has the status of being:
 - (i) Sixty years of age or older;
 - (ii) Blind, a paraplegic, or a quadriplegic; or
 - (iii) Eight years of age or younger; and
- [~~(c) Such disability~~] the person's status is known or reasonably should be known to the defendant[-]; or
- (6) The defendant is a hate crime offender [~~whose imprisonment for an extended term is necessary for the protection of the public. The court shall not make this finding unless:~~] in that:
- (a) The defendant is convicted of a crime under chapter 707, 708, or 711; and
 - (b) The defendant intentionally selected a victim[-] or, in the case of a property crime, the property that was the object of a crime, because of hostility toward the actual or perceived race, religion, disability, ethnicity, national origin, gender identity or expression, or sexual orientation of any person. For purposes of this subsec-

tion, “gender identity or expression” includes a person’s actual or perceived gender, as well as a person’s gender identity, gender-related self-image, gender-related appearance, or gender-related expression[;], regardless of whether that gender identity, gender-related self-image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person’s sex at birth.”

SECTION 4. Section 706-664, Hawaii Revised Statutes, is amended to read as follows:

“§706-664 Procedure for imposing extended terms of imprisonment. (1) Hearings to determine the grounds for imposing extended terms of imprisonment may be initiated by the prosecutor or by the court on its own motion. The court shall not impose an extended term unless the ground therefor has been established at a hearing after the conviction of the defendant and ~~[on]~~ written notice ~~[to the defendant]~~ of the ground proposed~~[-]~~ was given to the defendant pursuant to subsection (2). Subject to the provisions of section 706-604, the defendant shall have the right to hear and controvert the evidence against the defendant and to offer evidence upon the issue~~[-]~~ before a jury; provided that the defendant may waive the right to a jury determination under this subsection, in which case the determination shall be made by the court.

(2) Notice of intention to seek an extended term of imprisonment under section 706-662 shall be given to the defendant within thirty days of the defendant’s arraignment. However, the thirty-day period may be waived by the defendant, modified by stipulation of the parties, or extended upon a showing of good cause by the prosecutor. A defendant previously sentenced to an extended term under a prior version of this chapter shall be deemed to have received notice of an intention to seek an extended term of imprisonment.

(3) If the jury, or the court if the defendant has waived the right to a jury determination, finds that the facts necessary for the imposition of an extended term of imprisonment under section 706-662 have been proven beyond a reasonable doubt, the court may impose an indeterminate term of imprisonment as provided in section 706-661.”

SECTION 5. This Act shall apply to all sentencing or resentencing proceedings pending on or commenced after the effective date of this Act, whether the offense was committed prior to, on, or after the effective date of this Act. A defendant whose extended term of imprisonment is set aside or invalidated shall be resentenced pursuant to this Act upon request of the prosecutor. This Act shall not entitle a defendant who has previously been sentenced to an extended term to be resentenced pursuant to the procedures set forth in this Act unless the defendant is otherwise legally entitled to be resentenced.

SECTION 6. 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, which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 7. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 8. This Act shall take effect upon its approval.

(Approved October 31, 2007.)