

QUESTION #
HB2789 HD1 SD1
(ACT 60, SESSION LAWS OF HAWAII 2004)

**PROPOSES A CONSTITUTIONAL AMENDMENT TO ALLOW THE LEGISLATURE
TO DEFINE WHAT BEHAVIOR CONSTITUTES A CONTINUING COURSE OF
CONDUCT IN SEXUAL ASSAULT CASES**

Constitutional Question

"Shall the Constitution of the State of Hawaii be amended to provide that the legislature may define what behavior constitutes a continuing course of conduct in sexual assault crimes?"

Description of Proposed Amendment

The proposed amendment would add a section to the Hawaii Constitution specifying that the Legislature may define what behavior constitutes a "continuing course of conduct" in sexual assault crimes. The Legislature previously defined this behavior in the crime of continuous sexual assault of a minor under the age of fourteen years, section 707-733.5, Hawaii Revised Statutes, as three or more acts of sexual penetration or sexual contact committed over a period of time. The Legislature also provided that the jury, to convict, need unanimously agree only that at least three acts of sexual penetration or sexual contact had been committed; the jury need not unanimously agree which acts constituted the three acts required by law.

However, the Hawaii Supreme Court held in 2003 that multiple acts of sexual penetration or sexual contact were, "by nature, separate and discrete and therefore may not form the basis of a continuing offense." *State v. Rabago*, 103 Hawaii 236, 253, 81 P.3d 1151, 1168 (2003). Furthermore, the court ruled that letting the jury convict without being unanimous as to which acts constituted the three acts required by law violated constitutional state guarantees of due process.

If the voters approve the proposed constitutional amendment, substantially the same language previously found unconstitutional by the Hawaii Supreme Court would be reenacted pursuant to the same 2004 legislation proposing this constitutional amendment (House Bill No. 2789, enacted as Act 60, Session Laws of Hawaii 2004). The offense created by that legislation would be a class A felony. Felony offenses are those punishable by more than one year in prison. There are three classes of felonies, A, B, and C, with A felonies being the most serious of these. Murder, an unclassified felony, is the most serious of all felonies.

Meaning of a "Yes" Vote

A "yes" vote means that the Hawaii Constitution will be amended to provide that the Legislature may define what behavior constitutes a "continuing course of conduct" in sexual assault crimes.

Meaning of a "No" Vote

A "no" vote means that the Hawaii Constitution will not be amended to provide that the Legislature may define what behavior constitutes a "continuing course of conduct" in sexual assault crimes.

Meaning of a "Blank" Vote

A "blank" vote has essentially the same meaning as a "no" vote because the number of "yes" votes must exceed the sum of the "no" and "blank" votes in order for the amendment to be approved.

Pros

Many young children who are sexually abused over an extended period of time are unable to specifically identify or recall the dates, times, places, and other circumstances surrounding each act of abuse, even though they clearly remember what was done to them and the fact that it happened repeatedly. This makes it very difficult to prove exactly when and where each act occurred.

To address this problem, the Legislature passed a law making it a class A felony to engage in three or more acts of sexual penetration or sexual contact over a period of time with a child under fourteen. This law made it possible for jurors to find a defendant guilty if they unanimously agreed that the defendant sexually assaulted the victim at least three times during the specified time period, even if the jurors could not all agree which acts constituted that number.

But in 2003, the Hawaii Supreme Court interpreted Hawaii's Constitution to require that the jury must agree which acts constituted the requisite number. As a result, it is once again very difficult to prosecute cases where the victim is too young to identify or recall the dates, times, places, and other circumstances of each act.

The proposed amendment balances the due process rights of the accused with the need to protect children from continuous sexual assault. Defendants will continue to enjoy all of the rights guaranteed by the United States Constitution. However, the amendment recognizes that children's limited capacity to specifically identify and recall the dates, times, places, and other circumstances of multiple sexual assaults should not help shield an assailant from conviction of

sexual assault in a case involving what the Legislature believes to be a continuing course of conduct.

Cons

A unanimous jury verdict of guilt is a cornerstone of our criminal justice system. It is very dangerous to change basic constitutional principles in order to address one specific criminal charge. Furthermore, some prosecutors claim that the current law creates a problem, but there has been no objective study of the current law that indicates that there is a problem. There have been no statistics demonstrating a problem with the law. Opponents of this proposed change are concerned that changing the Hawaii Constitution in this way will only be the beginning and that other proposed changes will follow year after year in attempts to eliminate the basic constitutional protections, such as a unanimous verdict, that have served our society since our Constitution was enacted.

This proposed constitutional amendment would allow a conviction on less than unanimous agreement as to which acts constitute the offense of continuous sexual assault of a minor under the age of fourteen years. This charge requires proof of three or more acts of sexual penetration or sexual conduct over a period of time. The Hawaii Supreme Court has ruled that the Hawaii Constitution requires that the jury be unanimous as to which three acts were committed in order to convict on this charge. This constitutional amendment would allow jurors to disagree about which three acts were committed but still return a guilty verdict.

Presently, a minor may allege three or more acts of sexual penetration or contact that result in the charge of continuous sexual assault of a minor under the age of fourteen years. While most criminal offenses do not require corroboration, probable cause to charge the offense of continuous sexual assault of a minor under the age of fourteen years, which carries a maximum penalty of twenty years in prison, can be based solely on the statement of a very young child. At trial, there may be other evidence, such as witnesses or medical testimony, or it may simply be a he-said/she-said situation. In order to convict a person of such a serious charge, it is crucial that all twelve jurors agree on which three acts each juror believes has been proven.