

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

Hrg: Tuesday, Feb. 12, 2008, 9:00 a.m.
1 copy required

**S.B. NO. 2301: RELATING TO CRITERIA FOR EXTENDED TERMS OF
IMPRISONMENT**

Chair Taniguchi and Members of the Committee:

We oppose S.B. No. 2301 which seeks to expand the extended term sentencing law to specified offenses against a pregnant woman. The bill provides that if a person, in the course of committing murder, manslaughter, felony sexual assault and other specified offenses or an attempt to commit those offenses, inflicts serious or substantial bodily injury upon a woman who is pregnant, the person would be subject to an extended term of imprisonment. The woman's pregnancy must be known or reasonably should have been known to the defendant.

We have due process concerns with respect to when a defendant will be imputed with knowledge of a woman's pregnancy. The assumption is that, most often, a violent act against a pregnant woman will occur in the domestic setting. When will a defendant be assumed to have had reasonable knowledge of the woman's pregnancy? What if there is a history of fabrication between the partners about pregnancy? What if a recent discovery of pregnancy is hidden from the defendant? So many different scenarios can arise in a volatile domestic relationship which can cast doubt on the knowledge of a defendant.

Even more uncertainty can arise with respect to strangers involved in an altercation. When will a defendant be deemed to have reasonably known about the pregnancy status of a woman? If the woman is on the heavier side, will the authorities assume he had reasonable knowledge of her pregnancy?

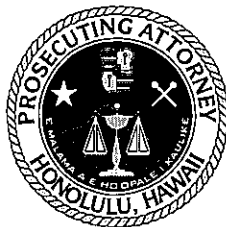
Due to modern day fears of miscarriage and other factors affecting pregnancy, many women hesitate to disclose their pregnancy until very late in their term. Medical records currently are shrouded in confidentiality under state and federal privacy laws. Quite often, a woman's pregnancy will not be apparent merely by her appearance. Under these circumstances, a defendant should not be subject to an extended term of imprisonment. Currently, under HRS § 706-606(1), the court must consider, in the imposition of sentence, "[t]he nature and circumstances of the offense and the history and characteristics of the defendant." Thus, the law now requires the court to take into account the fact that an offense was committed against a pregnant woman. No court takes such a circumstance likely. The present laws provide for adequate sentences when the courts are presented with such cases.

Thank you for the opportunity to comment on this bill.

DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

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**THE HONORABLE BRIAN TANIGUCHI, CHAIR
SENATE COMMITTEE ON JUDICIARY AND LABOR**

Twenty-Fourth State Legislature
Regular Session of 2008
State of Hawaii

February 12, 2008

**RE: S.B. 2301; RELATING TO CRITERIA FOR EXTENDED TERMS OF
IMPRISONMENT.**

Chair Taniguchi and members of the Senate Committee on Judiciary and Labor, the Department of the Prosecuting Attorney of the City and County of Honolulu submits the following testimony in support of the intent of S.B. 2301.

The purpose of this bill is to amend Hawaii's extended term sentencing law to allow an extended term of imprisonment for defendants who commit or attempt to commit murder, manslaughter, a felony sexual assault, robbery, a felony assault, burglary or kidnapping against a pregnant woman when the defendant inflicts serious or substantial bodily injury to the pregnant woman.

We support the intent of this bill, which is to close a loophole raised in *State v. Aiwahi*, 109 Haw. 115, 123 P.3d 1210 (2005) which held that an unborn child is not a person under the Hawaii Penal Code and therefore there is no criminal liability for offenses committed against an unborn child. This bill would assist in closing the loophole by authorizing an extended term of imprisonment for causing serious or substantial bodily injury to a pregnant woman during the course of committing an enumerated felony when the defendant knows or should know the victim is pregnant.

However, we do note that there are several different approaches to this problem, including proposals for mandatory minimum terms of imprisonment and creation of new offenses involving assaults on pregnant women. We would suggest that these bills also be considered as they cover misdemeanor assaults against pregnant women and provide additional sentencing protections.

In closing we would also note that this bill does not reflect the current language of Hawaii Revised Statute (HRS) section 706-662, as it does not include the amendments made by Act 1 of

the Second Special Session of 2007. We would ask that if this bill is passed out, that it would be amended to reflect the current language of HRS 706-662; we have attached a copy of Act 1 of the Second Special Session of 2007 for reference as to the current language of HRS 706-662.

Thank you for this opportunity to testify.

Approved by the Governor

on OCT 31 2007

HOUSE OF REPRESENTATIVES
TWENTY-FOURTH LEGISLATURE, 2007
SECOND SPECIAL SESSION
STATE OF HAWAII

ACT 001
H.B. NO. 2

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 issues raised in recent
3 federal court opinions and rulings on the right to a jury trial.
4 These opinions, *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct.
5 2348, 147 L.Ed.2d 435 (2000), *Blakely v. Washington*, 542 U.S.
6 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), *United States v.*
7 *Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), and
8 *Cunningham v. California*, 549 U.S. ___, 127 S.Ct. 856, 166
9 L.Ed.2d 856 (2007), have held that any fact, other than prior or
10 concurrent convictions, that increases the penalty for a crime
11 beyond the ordinary statutory maximum must be submitted to a
12 jury and proven beyond a reasonable doubt.

13 On February 20, 2007, the United States Supreme Court
14 denied the State's petition for a writ of certiorari in *Frank v.*
15 *Kaua*, 549 U.S. ___, 127 S.Ct. 1233, 167 L.Ed.2d 144 (2007) and
16 granted a writ of certiorari in *Maugaotega v. Hawaii*, 549 U.S.
17 ___, 127 S.Ct. 1210, 167 L.Ed.2d 37 (2007). In granting the



1 writ of certiorari in *Maugaotega*, the United States Supreme
2 Court vacated the judgment of the Hawaii supreme court and
3 remanded the case to the Hawaii supreme court for further
4 consideration in light of the recently decided *Cunningham* case.
5 After further consideration in light of the *Cunningham* case, the
6 Hawaii supreme court issued an opinion in *State v. Maugaotega*,
7 ___P.3d ___, 2007 WL 2823760, Oct. 1, 2007 (No. 26657), which
8 held that statutes governing Hawaii's extended term sentencing
9 are unconstitutional because they require a judge rather than a
10 jury to find facts, other than those of prior or concurrent
11 convictions, necessary to enhance a defendant's sentence beyond
12 the ordinary or standard term authorized by the jury's verdict.

13 However, the Hawaii supreme court declined to exercise its
14 inherent judicial power to order, on remand, that a jury be
15 empanelled to find the facts necessary to impose an extended
16 term of imprisonment. The court explained that it had done so
17 because, when the legislature attempted, through Act 230,
18 Session Laws of Hawaii 2006, to conform the extended term
19 sentencing scheme to the requirements set forth by the United
20 States Supreme Court, it did not vest in the jury the power to
21 find the requisite facts but had instead directed that the court
22 retain this responsibility. The end result of these cases is



1 that the ability of the state courts to impose an extended term
2 of imprisonment upon a discrete class of defendants is
3 critically impaired and that convicted persons who pose a danger
4 to the public can not be sentenced to an extended term of
5 imprisonment even though such a term may be both appropriate and
6 necessary.

7 The purpose of this Act is to amend Hawaii's extended term
8 sentencing statutes to ensure that the procedures used to impose
9 extended terms of imprisonment comply with the requirements set
10 forth by the United States Supreme Court and Hawaii supreme
11 court. The legislature intends that these amendments apply to
12 any case that requires resentencing because of the decisions in
13 the *Apprendi*, *Blakely*, *Booker*, *Cunningham*, and *Maugaotega* cases.
14 It is not the purpose of this Act to confer upon a defendant who
15 has previously been sentenced to an extended term the right to
16 be resentenced under the new procedures in this Act, unless the
17 defendant is otherwise legally entitled to be resentenced. As
18 the Hawaii supreme court held in *State v. Gomes*, 107 Haw. 308,
19 113 P.3d 184 (2005), the *Apprendi* rule itself does not
20 retroactively apply to those cases in which the defendant's
21 conviction became final prior to the United States Supreme
22 Court's announcement of that rule in 2000. To the extent that



1 this Act applies retroactively, the legislature finds that it
2 does not subject any offender to additional punishment or other
3 disadvantage.

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

6 "§706-661 [~~Sentence of imprisonment for felony, extended~~
7 ~~terms. In the cases designated in section 706-662, a person who~~
8 ~~has been convicted of a felony may be sentenced to an extended~~
9 ~~indeterminate term of imprisonment. When ordering such a~~
10 ~~sentence, the court shall impose the maximum length of~~
11 ~~imprisonment which shall be as follows:] Extended terms of
12 imprisonment. The court may sentence a person who satisfies the
13 criteria for any of the categories set forth in section 706-662
14 to an extended term of imprisonment, which shall have a maximum
15 length as follows:~~

- 16 (1) For murder in the second degree--life without the
17 possibility of parole;
- 18 (2) For a class A felony--indeterminate life term of
19 imprisonment;
- 20 (3) For a class B felony--indeterminate twenty-year term
21 of imprisonment; and



1 (4) For a class C felony--indeterminate ten-year term of
2 imprisonment.

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

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

10 "§706-662 **Criteria for extended terms of imprisonment.** A
11 [convicted] defendant [may be subject to] who has been convicted
12 of a felony may be subject to an extended term of imprisonment
13 under section 706-661[-] if it is proven beyond a reasonable
14 doubt that an extended term of imprisonment is necessary for the
15 protection of the public and that the convicted defendant
16 satisfies one or more of the following criteria:

17 (1) The defendant is a persistent offender [whose
18 ~~imprisonment for an extended term is necessary for~~
19 ~~protection of the public. The court shall not make~~
20 ~~this finding unless] in that the defendant has
21 previously been convicted of two or more felonies~~



1 committed at different times when the defendant was
2 eighteen years of age or older[-];

3 (2) The defendant is a professional criminal [whose
4 ~~imprisonment for an extended term is necessary for~~
5 ~~protection of the public. The court shall not make~~
6 ~~this finding unless~~] in that:

7 (a) The circumstances of the crime show that the
8 defendant has knowingly engaged in criminal
9 activity as a major source of livelihood; or

10 (b) The defendant has substantial income or resources
11 not explained to be derived from a source other
12 than criminal activity[-];

13 (3) The defendant is a dangerous person [whose
14 ~~imprisonment for an extended term is necessary for~~
15 ~~protection of the public. The court shall not make~~
16 ~~this finding unless~~] in that the defendant has been
17 subjected to a psychiatric or psychological evaluation
18 that documents a significant history of dangerousness
19 to others resulting in criminally violent conduct, and
20 this history makes the defendant a serious danger to
21 others. Nothing in this section precludes the
22 introduction of victim-related data [~~in order~~] to



1 establish dangerousness in accord with the Hawaii
2 rules of evidence[-];

3 (4) The defendant is a multiple offender [~~whose criminal~~
4 ~~actions were so extensive that a sentence of~~
5 ~~imprisonment for an extended term is necessary for~~
6 ~~protection of the public. The court shall not make~~
7 ~~this finding unless-~~] in that:

8 (a) The defendant is being sentenced for two or more
9 felonies or is already under sentence of
10 imprisonment for any felony; or

11 (b) The maximum terms of imprisonment authorized for
12 each of the defendant's crimes, if made to run
13 consecutively, would equal or exceed in length
14 the maximum of the extended term imposed or would
15 equal or exceed forty years if the extended term
16 imposed is for a class A felony[-];

17 (5) The defendant is an offender against the elderly,
18 handicapped, or a minor [~~under the age of eight, whose~~
19 ~~imprisonment for an extended term is necessary for the~~
20 ~~protection of the public. The court shall not make~~
21 ~~this finding unless-~~] eight years of age or younger in
22 that:



- 1 (a) The defendant attempts or commits any of the
2 following crimes: murder, manslaughter, a sexual
3 offense that constitutes a felony under chapter
4 707, robbery, felonious assault, burglary, or
5 kidnapping; and
- 6 (b) The defendant, in the course of committing or
7 attempting to commit the crime, inflicts serious
8 or substantial bodily injury upon a person who
9 ~~[is]~~ has the status of being:
- 10 (i) Sixty years of age or older;
11 (ii) Blind, a paraplegic, or a quadriplegic; or
12 (iii) Eight years of age or younger; and
- 13 ~~[(e) Such disability]~~ the person's status is known or
14 reasonably should be known to the defendant~~[-]~~;
15 or
- 16 (6) The defendant is a hate crime offender ~~[whose~~
17 ~~imprisonment for an extended term is necessary for the~~
18 ~~protection of the public. The court shall not make~~
19 ~~this finding unless:]~~ in that:
- 20 (a) The defendant is convicted of a crime under
21 chapter 707, 708, or 711; and



1 (b) The defendant intentionally selected a victim[?]
 2 or, in the case of a property crime, the property
 3 that was the object of a crime, because of
 4 hostility toward the actual or perceived race,
 5 religion, disability, ethnicity, national origin,
 6 gender identity or expression, or sexual
 7 orientation of any person. For purposes of this
 8 subsection, "gender identity or expression"
 9 includes a person's actual or perceived gender,
 10 as well as a person's gender identity, gender-
 11 related self-image, gender-related appearance, or
 12 gender-related expression[+], regardless of
 13 whether that gender identity, gender-related
 14 self-image, gender-related appearance, or gender-
 15 related expression is different from that
 16 traditionally associated with the person's sex at
 17 birth."

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

20 "§706-664 Procedure for imposing extended terms of
 21 imprisonment. (1) Hearings to determine the grounds for
 22 imposing extended terms of imprisonment may be initiated by the



1 prosecutor or by the court on its own motion. The court shall
2 not impose an extended term unless the ground therefor has been
3 established at a hearing after the conviction of the defendant
4 and ~~[an]~~ written notice ~~[to the defendant]~~ of the ground
5 proposed[-] was given to the defendant pursuant to subsection
6 (2). Subject to the provisions of section 706-604, the
7 defendant shall have the right to hear and controvert the
8 evidence against the defendant and to offer evidence upon the
9 issue[-] before a jury; provided that the defendant may waive
10 the right to a jury determination under this subsection, in
11 which case the determination shall be made by the court.

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

21 (3) If the jury, or the court if the defendant has waived
22 the right to a jury determination, finds that the facts



1 necessary for the imposition of an extended term of imprisonment
2 under section 706-662 have been proven beyond a reasonable
3 doubt, the court may impose an indeterminate term of
4 imprisonment as provided in section 706-661."

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

16 SECTION 6. If any provision of this Act, or the
17 application thereof to any person or circumstance is held
18 invalid, the invalidity does not affect other provisions or
19 applications of the Act, which can be given effect without the
20 invalid provision or application, and to this end the provisions
21 of this Act are severable.



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

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

4

INTRODUCED BY:

Tony Nat



H.B. NO. ²

APPROVED this 31 day of OCT 2007

A handwritten signature in black ink, appearing to read "L. L. Ige". The signature is fluid and cursive, with the first and last names being clearly legible.

GOVERNOR OF THE STATE OF HAWAII

testimony

From: Jeannine Johnson [jeannine@hawaii.rr.com]
Sent: Sunday, February 10, 2008 6:51 PM
To: testimony
Cc: Rep. Barbara Marumoto; Rep. Lyla B. Berg; Rep. Gene Ward; Sen. Fred Hemmings; Sen. Sam Slom; Dana.Viola@hawaii.gov
Subject: Testimony in Strong Support of SB2218 (TRO monitoring), SB2301 (crimes against pregnant women), SB2962 (sex offenders) and SB3182 (good Samaritans)

COMMITTEE ON JUDICIARY AND LABOR

Senator Brian T. Taniguchi, Chair

Senator Clayton Hee, Vice Chair

SB 2218 RELATING TO ELECTRONIC MONITORING
SB 2301 RELATING TO CRITERIA FOR EXTENDED TERMS OF IMPRISONMENT
SB 2962 RELATING TO PUBLIC SAFETY
SB 3182 RELATING TO EXTENDED SENTENCING

DATE: Tuesday, February 12, 2008
TIME: 9:00 a.m.
PLACE: Conference Room 016

Aloha Chair Taniguchi and Vice Chair Hee,

Mahalo for providing a hearing on these vital bills.

I wholly support each of the above-stated bills which strengthen our criminal laws and protect the public.

Mahalo for your support of each of these excellent bills.

Jeannine

Jeannine Johnson
5648 Pia Street
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"PUPUKAHI I HOLOMUA"
(Unite in Order to Progress)

Jeanne Y. Ohta

1016 A Hind Iuka Drive
Honolulu, HI 96821

February 12, 2008

To: Senator Brian Taniguchi, Chair
Senator Clayton Hee, Vice Chair

From: Jeanne Ohta

Re: SB 2301 Relating to Criteria for Extended Terms of Imprisonment
Hearing: February 12, 2008, 9:00 a.m., Room 016

Position: Strong Opposition

Good morning, I am testifying in strong opposition to SB2301 Relating to Criteria for Extended Terms of Imprisonment which would add pregnant women to the list of victims that a violent offense is committed against.

While this bill is meant to address a crime that has been widely publicized, I believe that it ultimately does not provide any additional protection for pregnant women and could have unintended consequences. Extended sentences do not provide a deterrent effect against crime. Research on “three-strikes” sentences, enhanced sentences for firearms related crimes, and mandatory minimums for drug offenses have found no deterrent effects on the commission of crimes.^{1, 2, 3}

Marc Mauer found that “increasing time does not contribute to general deterrence.” Rather, if the criminal justice system has any deterrence, it is achieved primarily by the certainty of punishment, not the severity of the punishment. People think they can get away with it.⁴

Many abusers have found that the system did not punish them when they abused their partners. In “Domestic Violence: The Criminal Justice Response,” Schlesinger and Buzawa found that abusers were likely to have light or no sanctions against them early in their abusive history. This leads them to conclude that little will happen to them if they continue their abusive behavior.¹

¹Legislative Analyst’s Office, “A Primer: Three Strikes-The Impact After More Than a Decade,” www.lao.ca.gov/2005/3_Strikes/3_strikes_102005.htm.

²The National Academy of Sciences, “Firearms and Violence: A Critical Review (2004).”

³Rep. John Conyers, “Drug Law and Policies: the Need for Reforms and Creative Solutions,” in a speech to the National Bar Association, 2004.

⁴Mauer, Marc, Social Research, “The Hidden Problem of Time Served in Prison,” Vol. 74:No.2, Summer 2007, pg. 702-704.

In fact, according to the State Judiciary's Annual Report, in 2006, 209 felony offenses against families and children were charged. Of these, 64 were completed resulting in only 24 incarcerations, 5 probations and 16 other sentences. This is hardly a track record of protecting women.

Before passing this proposal, I encourage legislators to find out:

- If domestic violence protective orders filed has risen 62.8%, from 2,859 in 1997 to 4,654 in 2006, why have family court criminal actions decreased 26% from 4,337 in 1998 to 3,209 in 2006?
- Are abusers already being charged at the highest level possible?
- Are they being given the maximum sentences?
- How much of the sentences are they serving?
- How many domestic violence cases are being plead to lower offenses and to which courts?

I am opposed to solving this issue by imposing a special value on the lives of pregnant women as compared to all other women and this proposal will not help save lives.

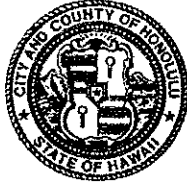
I encourage legislators to find out why current systems and policies are not working to protect women from their batterers. Batterers seem to face small or light sanctions and then continue to batter their partners; often with escalating violence. Improving those systems will do more to protect women.

I urge you to hold this bill and not let public emotion and sentiment push this bill and its unintended consequences. Thank you for the opportunity to testify.

LATE

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MUFJ HANNEMANN
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BOISSE P. CORREA
CHIEF

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DEPUTY CHIEFS

OUR REFERENCE JC-NTK

February 12, 2008

The Honorable Brian T. Taniguchi, Chair
and Members
Committee on Judiciary and Labor
The Senate
State Capitol
Honolulu, Hawaii 96813

Dear Chair Taniguchi and Members:

Subject: Senate Bill No. 2301, Relating to Criteria for Extended Terms of Imprisonment

I am Janet Crotteau, Captain of the Criminal Investigation Division of the Honolulu Police Department, City and County of Honolulu.


The Honolulu Police Department supports Senate Bill No. 2301, Relating to Criteria for Extended Terms of Imprisonment.

This bill amends section 706-662 by adding the classification of a pregnant woman to a select group of people who deserve special consideration. These people are the elderly over the age of sixty, the handicapped, and a minor under the age of eight.

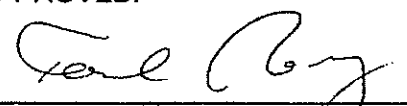
Society has recognized that the perpetrator who harms these protected people is one of the most serious offenders and therefore, should face some of the most serious consequences.

Thank you for the opportunity to testify.

Sincerely,


JANET CROTTÉAU, Captain
Criminal Investigation Division

APPROVED:


for BOISSE P. CORREA
Chief of Police