

**Testimony of the Office of the Public Defender,
State of Hawaii to the House Committee on Judiciary**

Hrg: Thursday, March 13, 2008, 3:15 pm
5 copies required

**S.B. NO. 2301 SD1: RELATING TO CRITERIA FOR EXTENDED TERMS OF
IMPRISONMENT**

Chair Waters and Members of the Committee:

We oppose S.B. No. 2301 SD1 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.

Finally, this bill would assure that in every serious assault case involving a female, a pregnancy examination would have to be performed. Thus, a woman may be forced to accept a medical procedure which she may not want to undergo. If a woman is determined to be pregnant, when the case is brought to court, her pregnancy will become part of the public record. Through no choice of her own and perhaps against her wishes, her pregnancy will be made public. She would lose all of her privacy rights in what should be a very personal matter.

000100

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.

000101

DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

ALII PLACE
1060 RICHARDS STREET, HONOLULU, HAWAII 96813
AREA CODE 808 • 527-6494

PETER B. CARLISLE
PROSECUTING ATTORNEY



DOUGLAS S. CHIN
FIRST DEPUTY
PROSECUTING ATTORNEY

**THE HONORABLE TOMMY WATERS, CHAIR
HOUSE COMMITTEE ON JUDICIARY**

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

March 13, 2008

**RE: S.B. 2301, S.D. 1; RELATING TO CRITERIA FOR EXTENDED TERMS OF
IMPRISONMENT.**

Chair Waters and members of the House Committee on Judiciary, 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, S.D. 1.

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.

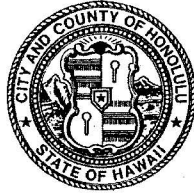
Thank you for this opportunity to testify.

000102

POLICE DEPARTMENT
CITY AND COUNTY OF HONOLULU

801 SOUTH BERETANIA STREET · HONOLULU, HAWAII 96813
TELEPHONE: (808) 529-3111 · INTERNET: www.honolulu-pd.org

MUFI HANNEMANN
MAYOR



BOISSE P. CORREA
CHIEF

PAUL D. PUTZULU
MICHAEL D. TUCKER
DEPUTY CHIEFS

OUR REFERENCE JC-NTK

March 13, 2008

The Honorable Tommy Waters, Chair
and Members
Committee on Judiciary
House of Representatives
State Capitol
Honolulu, Hawaii 96813

Dear Chair Waters and Members:

Subject: Senate Bill No. 2301, S.D. 1, Relating to Criteria for Extended Terms of Imprisonment

I am Carlton S. Nishimura, Major of the Criminal Investigation Division of the Honolulu Police Department, City and County of Honolulu.

The Honolulu Police Department supports Senate Bill No. 2301, S.D. 1, 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. This select group consists of people who are sixty years of age or older, handicapped or blind, and a minor who is eight years old or younger.

Society has recognized that the perpetrator who harms these 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,


CARLTON S. NISHIMURA, Major
Criminal Investigation Division

APPROVED:


BOISSE P. CORREA
Chief of Police

000103

COMMUNITY ALLIANCE ON PRISONS

76 North King Street, Suite 203, Honolulu, Hawai'i 96817

Phone/E-mail: (808) 533-3454/communityallianceonprisons@hotmail.com



COMMITTEE ON JUDICIARY

Rep. Tommy Waters, Chair

Rep. Blake Oshiro, Vice Chair

Thursday, March 13, 2008

3:15 PM

Room 325

OPPOSITION TO SB 2301 SD1 – CRITERIA FOR EXTENDED TERMS OF IMPRISONMENT

Aloha Chair Waters, Vice Chair Oshiro and Members of the Committee!

My name is Kat Brady and I am the Coordinator of Community Alliance on Prisons, a community initiative working on prison reform and criminal justice issues in Hawai'i for a decade. I respectfully offer our testimony always being mindful that Hawai'i has more than 6,000 people behind bars with more than 2,000 individuals serving their sentences abroad, thousands of miles away from their homes and their loved ones.

SB 2301 SD1 authorizes extended term of imprisonment for felony offenses committed against pregnant women.

Community Alliance on Prisons opposes this bill for several reasons:

- CAP opposes mandatory minimum sentencing, which removes judicial discretion. There is a move across the nation to dispense with mandatory sentencing as it is costly and ineffective. Our current statutes already provide for long sentences for individuals who commit heinous crimes.
- CAP opposes raising the status of pregnant women over other women, in general.
- CAP asserts that proffering bills after a heinous crime has been committed, is NOT the way to create good, thoughtful public policy. Avi Soifer, Dean of the UH William S. Richardson School of Law, used a quote by Shalom Spiegel from the Articles on the Prophet Amos that is fitting in this instance: **"Justice cools the fierce glow of moral passion by making it pass through the filter of reflection."** That is what our Judicial system is all about. As humans, we don't generally make our best decisions in the throes of emotion.

Community Alliance on Prisons respectfully asks that you HOLD this measure.

Mahalo for this opportunity to testify.

000104

**HOUSE OF REPRESENTATIVES
THE TWENTY-FOURTH LEGISLATURE
REGULAR SESSION OF 2008**

COMMITTEE ON JUDICIARY

DATE: Thursday, March 13, 2008
TIME: 3:15 p.m.
PLACE: Conference Room 325

Testimony in Support of SB 2301, SD 1

RELATING TO CRITERIA FOR EXTENDED TERMS OF IMPRISONMENT

**Carol R. White
Hawaii Right to Life**

This legislation is both pro-choice and pro-life.

It recognizes that pregnant women are vulnerable to violence, especially abuse by boyfriends or spouses.

It also recognizes that the pregnant woman is the bearer of human life, and therefore, merits special protections and enhancements.

SB 2301, SD 1 is a step in the right direction.

Last year, when Tyrone Vesperas stabbed his pregnant wife in the abdomen, he intended to kill her unborn child. News stories from the mainland have reported the murders of pregnant women, many because they refused to get abortions.

This bill would be greatly improved by including the unborn child in this legislation. When an unborn child loses his or her life in a criminal attack, the parents and society mourn the death of a separate individual, rather than viewing it simply as an additional injury to the mother.

While the Unborn Victims of Violence Act was being considered in Congress, Sharon Rocha -- whose daughter Laci and unborn grandson Conner were murdered in California -- wrote that Conner and other innocent unborn victims like him really did exist. "...our grandson did live. He had a name, he was loved, and his life was violently taken from him before he ever saw the sun."

Likewise, Cheryl-Lyn Vesperas no doubt mourned her unborn baby as she mourned her 14-year-old son who was killed by his father.

000105

Carol White
Testimony on SB 2301, SD 1
p.2

Twenty-four (24) states already have laws that explicitly recognize unborn children as victims of criminal acts -- 11 of these throughout the period of their *in utero* development. Criminal defendants have attacked these laws with every conceivable constitutional argument, but all such legal challenges have failed.

Federal law forbids the execution of pregnant women, recognizing the right of an innocent unborn child to live. (*Title 18 U.S.C.A. § 3596*, enacted in 1994)

In 1976, the U.S. became a signatory to the International Covenant on Civil and Political Rights (CCPR), which 143 other nations have also joined. Article 6(5) states, "*Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.*" The U.S. entered a partial reservation to Article 6(5), which reads, "The United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (*other than a pregnant woman*) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age." [italics added for emphasis] **Thus, within the reservation itself, the U.S. bound itself not to permit the execution of any woman who carries an unborn child.**

It has often been quoted that the law is a great teacher.

This committee and the Hawaii legislature have a great opportunity to make the moral point that all human life is precious, especially innocent human life.

I urge this committee not only to pass this bill but to improve its language to provide penalties for killing the unborn child.

000106

JUDtestimony

From: Jeannine Johnson [REDACTED]
Sent: Tuesday, March 11, 2008 7:40 PM
To: JUDtestimony
Subject: Testimony in Strong Support of SB2301,SD1 (offenses against pregnant women)

COMMITTEE ON JUDICIARY
Rep. Tommy Waters, Chair
Rep. Blake K. Oshiro, Vice Chair

RE: SB 2301, SD1 – RELATING TO CRITERIA FOR EXTENDED TERMS OF IMPRISONMENT.
Hearing on Thursday, March 13th, 2008, at 3:15 pm in Conference Room 325

Dear Chair Waters, Vice Chair Oshiro and Honorable Committee Members:

I **strongly support** SB2301, SD1 which authorizes extended term of imprisonment for felony offenses committed against pregnant women.

Mahalo,
Jeannine
Jeannine Johnson

[REDACTED]
Honolulu, Hawai'i 96821

[REDACTED]
Email: [REDACTED]
"PUPUKAHI I HOLOMUA"
(Unite in Order to Progress)

000107

JUDtestimony

From: Marcia, Maui RTL [REDACTED]
Sent: Wednesday, March 12, 2008 7:28 PM
To: JUDtestimony
Subject: Testimony in Support of SB 2301, SD 1

HOUSE OF REPRESENTATIVES
THE TWENTY-FOURTH LEGISLATURE
REGULAR SESSION OF 2008

COMMITTEE ON JUDICIARY

DATE:
Thursday, March 13, 2008

TIME:
3:15 p.m.

PLACE:
Conference Room 325

Testimony in Support of SB 2301, SD 1

RELATING TO CRITERIA FOR EXTENDED TERMS OF IMPRISONMENT

(Your name)

I am in support of the provisions in this bill for enhanced penalties for felony crimes against a pregnant woman. The woman and the unborn child needs all the protection the state can provide. If penalties are enforced this may help to deter individuals from harming pregnant women.

I urge this committee to pass this bill.

Sincerely,

Marcia Berkowitz

000109

Jeanne Y. Ohta

Honolulu, HI 96821

March 13, 2008

To: Representative Tommy Waters, Chair
Representative Blake Oshiro, Vice Chair and
Members of the Committee on Judiciary

Re: SB 2301 SD1 Relating to Criteria for Extended Terms of Imprisonment
Hearing: March 13, 2008, 3:15 p.m., Room 325

Position: Strong Opposition

I am testifying today in strong opposition to SB2301 SD1 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.

Importantly, the committee report refers to crimes against an unborn child as the intent of this bill. If so, the text of the bill is misleading as it does not reference crimes against an unborn child in a findings section, nor does it mention harm to an unborn child as part of the crime resulting in an extended sentence.

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.

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.

000110

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. I am also opposed to this proposal as it 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.

References:

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.

000111