

HB1019

HD1



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-FIFTH LEGISLATURE, 2010**

ON THE FOLLOWING MEASURE:

H.B. NO. 1019, H.D. 1, RELATING TO THE PENAL CODE.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY AND GOVERNMENT OPERATIONS

DATE: Tuesday, March 16, 2010 **TIME:** 9:30 a.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): Mark J. Bennett, Attorney General, or
Lance M. Goto, Deputy Attorney General

Chair Taniguchi and Members of the Committee:

The Department of the Attorney General strongly supports this bill.

As introduced, this bill was part of the 2010 legislative package of the Hawaii Law Enforcement Coalition. The Coalition is composed of the Chiefs of Police of all four counties, the Prosecuting Attorneys of all four counties, the Attorney General, and the United States Attorney for the District of Hawaii. Every bill in the Coalition's legislative package has the unanimous support of every Coalition member.

This bill will amend section 707-701.5, Hawaii Revised Statutes, to include, in the offense of murder in the second degree, acts committed with the intent to cause serious bodily injury to another person, and which result in the death of that person. This bill also defines "simulated firearm" in chapters 707 and 708, Hawaii Revised statutes; makes the use of a simulated firearm in the commission of theft a form of robbery in the first degree; and makes the use of a simulated firearm in the commission of terroristic threatening a form of terroristic threatening in the first degree.

This bill will address cases that have occurred under the current law, where defendants who brutally beat and kill another

person have been able to convince juries to reduce murder charges to manslaughter by claiming that they only intended to cause bodily injury to the person, and did not know they would kill the person. "Serious bodily injury" includes bodily injury that creates a substantial risk of death; thus, individuals who act with the intent to cause serious bodily injury to another person, and whose act results in the death of another person, should be guilty of murder in the second degree.

These amendments to section 707-701.5 are based on the Illinois murder law; other states also take this approach.

We also support the "simulated firearm" provisions in part II of this bill. These provisions will address cases in which offenders brandish objects, which may not be real firearms, in the commission of a robbery or terroristic threatening offense. The victims in these offenses cannot tell that the simulated firearms are not real, and respond to the threats and intimidation in the same manner as if the firearms were real, and are just as traumatized.

Armed law enforcement officers who witness simulated firearm offenses also may not be able to distinguish the object from a real firearm, and in the interest of public and personal safety would have to respond as if the offender were armed with a real weapon.

We respectfully urge that this bill be passed.

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

March 16, 2010

H.B. No. 1019 HD1: RELATING TO THE PENAL CODE

Chair Taniguchi and Members of the Committee:

We strongly oppose the passage of H.B. No. 1019 HD1.

Murder 2°

This bill would bring about a radical change in our Murder 2° law by imposing strict liability under that law for acts that the legislature presently does not intend to be prosecuted as Murder. Given the ultimate penalty of life imprisonment for that offense, a person should not ever be held strictly liable for acts which he/she does not intend or know to cause death.

First of all, the present law which defines murder as “intentionally or knowingly causing the death of another person” has been in existence since 1972 and has never presented a problem with regard to the prosecution of persons rightfully charged with this offense. The fact that a few individuals personally feel that more people should suffer the penalties of a murder conviction for acts that do not fall within the definition of the current law does not justify a wholesale change in the statute.

Moreover, the justification sheet for this bill includes a 2004 case in which a jury did not convict a defendant charged with attempted murder who allegedly set his neighbor afire with gasoline. The jury instead returned a verdict of Assault 1°. The prosecution had every opportunity to argue its case for attempted murder to the jury. The fact that one jury did not return a verdict to the prosecutor’s satisfaction should not result in a change of the long-standing murder law.

This bill would punish as murder any person who “with the intent to do serious bodily injury to any person, performs acts that cause the death of that person.” This is a very fluid standard that extends the murder statute far beyond its current definition. The amendment states that a person merely has to act “with the intent to do serious bodily injury.” Therefore, one could be convicted of murder even if he/she never actually causes any injury to the victim. For instance, if someone swings a bat, crowbar or other object at someone clearly intending to cause serious bodily injury, and the victim collapses of a heartache and later succumbs, the person with the bat could be convicted of murder. If the victim is actually hit with the bat ending up in the hospital and later dies of an unforeseen circumstance such as an infection or medical malpractice, the offender is potentially liable for murder. In both of the aforementioned scenarios, the offender clearly did not intend to cause a death nor can it be argued that the offender knew that his actions would cause a death. Such an offender would not escape without serious consequences as he/she could be convicted of Assault 1° or Attempted Assault 1°, a class B felony, and be imprisoned for ten years.

The most troublesome part of this bill is that the proposed amendment to the murder law would hold a person who clearly did not intend to kill someone but whose actions set in motion a situation which ended in the victim's death equally criminally liable under the law with someone who shoots a victim in the head, execution-style. The proposal also opens the door to a slippery slide of establishing more strict liability criminal offenses and ending the practice rooted in fundamental justice of grading levels of culpability and punishing law violators accordingly.

Simulated firearms

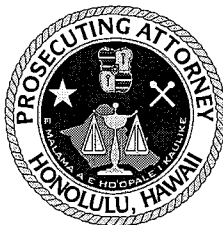
This bill would also expand the criminal liability under the offenses of Terroristic Threatening 1° and Robbery 1° for commission of those offenses with the use of "simulated firearms." Currently, if a person uses a simulated firearm, such offenses are classified as Terroristic Threatening 2°, a misdemeanor, and Robbery 2°, a class B felony.

The reason that Terroristic Threatening and Robbery offenses that are committed with use of an actual firearm are treated more seriously is that the introduction of a firearm into such situations increases the potential for someone suffering death or serious bodily injury. If a person intentionally uses a simulated firearm, that person should not be treated in the same class as one who possesses an actual firearm. While we acknowledge that the simulated firearm would certainly scare people, the person who uses it has made a conscious decision not to employ the use of an actual firearm and should be treated separately under the law from one who uses an actual firearm. Indeed the main danger that the person possessing the simulated firearm might present is to himself or herself because the police or other armed persons present might treat the object as an actual firearm and take action accordingly.

Thank for the opportunity to comment on this measure.

DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

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PETER B. CARLISLE
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DOUGLAS S. CHIN
FIRST DEPUTY
PROSECUTING ATTORNEY

THE HONORABLE BRIAN TANIGUCHI, CHAIR
SENATE JUDICIARY AND GOVERNMENT OPERATIONS COMMITTEE
Twenty-fifth State Legislature
Regular Session of 2010
State of Hawai'i

March 16, 2010

RE: H.B. 1019, H.D. 1; RELATING TO THE PENAL CODE.

Chair Taniguchi and members of the Senate Committee on Judiciary and Government Operations, the Department of the Prosecuting Attorney submits the following testimony in support of H.B. 1019, H.D. 1 but with a request for an amendment.

The purpose of this bill is to amend Hawaii Revised Statutes (HRS) section 707-701.5 related to murder in the second degree to include instances where the actor intentionally performs acts that cause the death of another person with the intent to do serious bodily injury. In addition, H.B. 1019, H.D. 1 amends the offenses of terroristic threatening in the first degree and robbery in the first degree to include situations where the victim is robbed or threatened with a "simulated firearm." A "simulated firearm" is defined as any object that: 1) substantially resembles a firearm; 2) can reasonably be perceived to be a firearm; or 3) is used or brandished as a firearm.

Compared to other jurisdictions, such as Illinois, Hawaii has a very weak murder offense. The current law in Hawaii applies only to person who intentionally or knowingly cause the death of another person. Thus, when a murder defendant kills or almost kills someone by physical assault they can often escape a murder conviction by successfully arguing to a jury that their intent was not to kill, but just to injure the victim. We believe this loophole leads to unjust results. The current definition of serious bodily injury in HRS section 707-700 already includes injury which creates a substantial risk of death and we believe Hawaii's murder offense should be expanded to include causing the death of another with the intent to cause serious bodily injury. However, we would request that the bill be amended to include provisions that were included in the original version of H.B. 1019 but were deleted from the H.D. 1. These provisions amended the offense of murder in the second degree to include situations where a defendant intentionally or knowingly committed acts that create a strong probability of death or serious bodily injury to another person and which does result in such death.

We also support the provisions relating to simulated firearms. The current state of the law provides in pertinent part that threats or thefts committed with a dangerous instrument are the offenses of robbery in the first degree or terroristic threatening in the first degree, class A and class C felonies respectively. Since dangerous instruments are those objects or materials which in the manner it is used or intended to be used are capable of producing death or serious bodily injury, items which look like firearms but are not, are not dangerous instruments as they cannot produce death; therefore commission of a robbery with one or making a threat with one is not first degree robbery or terroristic threatening. However, the victims and witnesses to the robbery or threat are intended to perceive and do perceive the simulated firearm as a real firearm and feel the same fear and apprehension that victims of a robbery or threat with a real firearm do. For this reason we think the distinction between the robbery or threat with a real gun or a simulated firearm should be eliminated.

For this reason, we strongly support the passage of H.B. 1019, H.D. 1 with the proposed amendments and thank you for this opportunity to testify.

William P. Kenoi
Mayor



Harry S. Kubojiri
Police Chief

Paul K. Ferreira
Deputy Police Chief

March 12, 2010

County of Hawai`i

POLICE DEPARTMENT

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Senator Brian T. Taniguchi
Chair and Members
Committee on Judiciary and Government Operations
State Capitol
415 South Beretania Street, Conference Room 016
Honolulu, Hawai'i 96813

Re: HOUSE BILL 1019, HD1, RELATING TO THE PENAL CODE

Dear Senator Taniguchi and Members:

The Hawai'i Police Department supports the passage of House Bill No. 1019, HD1, Relating to the Penal Code, that amends the offense of Murder in the Second Degree, defines "simulated firearm" and increases criminal penalties for the use of a simulated firearm during the commission of robbery or terroristic threatening.

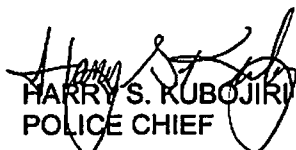
The purpose of this bill is to amend the offense of Murder in the Second Degree, to include in the offense acts committed with intent to cause serious bodily injury to another person or create the strong probability of causing death or serious bodily injury to another person, which result in the death of another person, the offense only applies for whom the serious bodily injury was intended.

This proposed legislation also defines "simulated firearms" and appropriately punishes criminals who were previously convicted of lesser crimes based on existing statutes. Presently, if the weapon is not a real firearm, the perpetrator cannot be charged with the higher offense of Robbery in the First Degree or Terroristic Threatening in the First Degree, even when victims subjected to these serious crimes perceive the simulated firearm as real.

Today, simulated firearms are sophisticated and can easily be perceived as real, even to trained law enforcement personnel. The inability to charge and prosecute at the higher offense only promotes the use of simulated firearms by criminals knowledgeable on present statutes. Similar legislation has already been passed in nine other states.

This proposed legislation will provide a greater deterrent to such violence and promote public safety for all. For these reasons, we urge this committee to support this bill. Thank you for allowing the Hawai'i Police Department to testify on HB 1019, HD1.

Sincerely,


HARRY S. KUBOJIRI
POLICE CHIEF