
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~~[7]~~ 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



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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 ~~[(c) 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[7]
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[7], 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 ~~[on]~~ 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:

A handwritten signature in black ink, appearing to read "Tony Wark", is written over a horizontal line. The signature is stylized and cursive.



Report Title:

Extended Term Sentencing; Jury Determinations

Description:

Requires jury to determine facts necessary to impose an extended term of imprisonment under section 706-662, HRS, unless right to jury determination is waived, in which case determination is to be made by judge. Requires facts to be proven beyond a reasonable doubt.

