

JAN 19 2007

A BILL FOR AN ACT

RELATING TO CAPITAL PUNISHMENT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The legislature finds that there is a need to
2 provide for the imposition of the death penalty to address the
3 most serious offenses that can be committed, namely, the murder
4 of a minor who is less than twelve years old, murder combined
5 with torture or sexual assault, or any multiple murder. The use
6 of capital punishment in these circumstances is intended both to
7 punish the perpetrator and to deter others from committing these
8 types of crimes.

9 The legislature further finds that this Act is in
10 compliance with the United States Supreme Court's decision in
11 *Ring v. Arizona* (June 24, 2002), in which the Court ruled that a
12 jury, rather than a judge, must make a finding of aggravating
13 factors when those factors underlie a judge's choice to impose
14 the death penalty rather than a lesser, statutory punishment.
15 Because Arizona's enumerated aggravating factors operated as the
16 "functional equivalent of an element of a greater offense", the



1 Sixth Amendment to the United States Constitution required that
2 they be found by a jury.

3 The legislature finds that this Act complies with this
4 case, which has affected Arizona and other states' capital
5 punishment statutes. This Act requires that the jury deliberate
6 and recommend to the court whether the defendant should be
7 sentenced to death or to life imprisonment without the
8 possibility of parole. A recommendation of death requires the
9 unanimous vote of the entire membership of the jury, and must be
10 based on a written finding that there are insufficient
11 mitigating circumstances to overcome the circumstances of the
12 murder, and a listing of any aggravating circumstances.

13 In particular, the jury must find that there must exist at
14 least one aggravating circumstance that justifies the death
15 penalty, and there must be no mitigating circumstances or
16 insufficient mitigating circumstances considered as a whole to
17 outweigh each aggravating circumstance considered separately.
18 Notwithstanding the recommendation of the jury, the court may
19 enter a sentence of death only upon the recommendation of the
20 jury, but has full discretion to not issue such a sentence.

21 Finally, this Act prohibits the use of capital punishment
22 for persons under the age of eighteen years, and for those who,



1 as a result of a physical or mental disease, disorder, or
2 defect, lack the capacity to understand the proceedings against
3 them or to assist in their own defense, so long as the
4 incapacity endures.

5 The legislature finds that this Act is necessary for the
6 health, safety, and welfare of all of the people of this State.

7 SECTION 2. Chapter 706, Hawaii Revised Statutes, is
8 amended by adding a new section to be appropriately designated
9 and to read as follows:

10 "§706- Capital punishment; sexual assault and murder of
11 a minor. (1) This section shall apply only to a defendant who
12 has been convicted of one or more of the following offenses:

13 (a) Murder in the second degree under section 707-701.5 in
14 which the victim was under twelve years of age;

15 (b) Murder in the second degree under section 707-701.5 in
16 combination with either:

17 (i) Sexual assault in the first, second, or third
18 degree, under section 707-730, 707-731, 707-732,
19 or 707- , respectively; or

20 (ii) Torture. As used in this section, "torture" has
21 the same meaning as "cruelty", "torture", or
22 "torment" as defined in section 711-1100;



1 in which the victim was under the domination and
2 control of the defendant during the entire, continuous
3 period of time in which the offenses under clause (i)
4 or (ii) were committed; or

5 (c) Murder in the first degree of more than one person in
6 the same or separate incident under section 707-
7 701(1)(a).

8 (2) Upon conviction of a defendant for the offenses
9 specified in subsection (1), the court shall conduct a separate
10 sentencing proceeding to determine whether the defendant shall
11 be sentenced to death or to life imprisonment without
12 possibility of parole; provided that no person shall be
13 sentenced to death under this section who:

- 14 (a) Is under the age of eighteen years; or
- 15 (b) As a result of a physical or mental disease, disorder,
16 or defect lacks capacity to understand the proceedings
17 against the person or to assist in the person's own
18 defense, so long as the incapacity endures.

19 The proceeding shall be conducted by the trial judge before the
20 trial jury as soon as practicable. If the trial jury has been
21 waived or if the defendant pleaded guilty, the sentencing
22 proceeding shall be conducted before a jury empaneled for that

1 purpose, unless waived by the defendant. In the proceeding,
2 evidence shall be presented regarding any of the aggravating
3 circumstances listed in subsection (4) and the mitigating
4 circumstances listed in subsection (5), and evidence may be
5 presented as to any other matter that the court deems relevant
6 to the sentence. Any evidence that the court deems to have
7 probative value may be received; provided that this subsection
8 shall not be construed to authorize the introduction of any
9 evidence secured in violation of the Constitution of the United
10 States or of the State. The defendant and the State shall be
11 permitted to present arguments for or against the sentence of
12 death.

13 (3) After hearing all of the evidence, the jury shall
14 deliberate and recommend to the court whether the defendant
15 should be sentenced to death or to life imprisonment without the
16 possibility of parole. A recommendation of death shall require
17 a unanimous vote of the entire membership of the jury and shall
18 be based on a written finding that there are insufficient
19 mitigating circumstances to overcome the circumstances of the
20 sexual assault, murder, or torture, and a listing of any
21 aggravating circumstances:



1 (a) The jury finds that there exists at least one
2 aggravating circumstance under subsection (4) that
3 justifies the death penalty; and

4 (b) The jury finds that there are no mitigating
5 circumstances or there are insufficient mitigating
6 circumstances considered as a whole, as listed in
7 subsection (5), to outweigh each aggravating
8 circumstance considered separately.

9 (4) In making its recommendation, the jury shall consider
10 the following as aggravating circumstances:

11 (a) The sexual assault, torture, or murder were committed
12 while the defendant was confined in a correctional
13 facility, regardless of whether that confinement was
14 legal;

15 (b) The defendant committed another sexual assault,
16 torture, or murder at the time of the sexual assault,
17 torture, and murder in issue;

18 (c) The defendant knowingly created a substantial risk of
19 death to a person other than the victim or the
20 defendant;

21 (d) The sexual assault, torture, and murder were committed
22 while the defendant was engaged in the commission of,



- 1 or an attempt to commit, or flight after committing or
2 attempting to commit, any felony;
- 3 (e) The murder was committed for the defendant's pecuniary
4 or other personal gain or as a murder for hire;
- 5 (f) The defendant has a prior conviction for sexual
6 assault in any degree or murder in any degree;
- 7 (g) The murder was committed for the purpose of preventing
8 a witness from testifying, or a person from providing
9 evidence, or a person from participating in any legal
10 proceedings or official investigation; and
- 11 (h) The murder was committed by the unlawful and malicious
12 use or detonation of any explosive.
- 13 (5) In making its recommendation, the jury shall consider
14 the following mitigating circumstances, if they apply:
- 15 (a) The defendant has no significant history of prior
16 criminal activity;
- 17 (b) The sexual assault, torture, and murder were committed
18 while the defendant was under the influence of extreme
19 mental or emotional disturbance;
- 20 (c) The defendant acted against the defendant's will,
21 under extreme duress, or under the substantial
22 domination of another person, a finding of which shall



1 eliminate the possible imposition of the death
2 penalty;

3 (d) At the time of the sexual assault, torture, and
4 murder, the capacity of the defendant to appreciate
5 the wrongfulness of the defendant's conduct or to
6 conform the defendant's conduct to the requirements of
7 law was substantially impaired by something other than
8 the defendant's voluntary and knowing ingestion of
9 intoxicating substances;

10 (e) The age of the defendant at the time of the sexual
11 assault, torture, and murder; and

12 (f) The defendant was an accomplice in the sexual assault,
13 torture, and murder committed by another person and
14 the defendant's participation was relatively minor, a
15 finding of which shall eliminate the possible
16 imposition of the death penalty.

17 (6) Notwithstanding the recommendation of the jury, the
18 court may enter a sentence of death only upon the recommendation
19 of the jury but shall have full discretion to not issue such a
20 sentence.

21 The court shall set forth in writing its findings upon
22 which the sentence of death is based, including the finding



1 required of the jury in subsection (3). If the court does not
2 make the findings required to impose the death sentence, the
3 court shall impose a sentence of life imprisonment without the
4 possibility of parole.

5 (7) The judgment of conviction and sentence of death shall
6 be subject to automatic review by the supreme court within sixty
7 days after certification by the sentencing court of the entire
8 record unless time is extended by the supreme court for an
9 additional period, not to exceed thirty days, for good cause
10 shown. The review by the supreme court shall have priority over
11 all other cases before the supreme court and shall be heard in
12 accordance with rules adopted by the supreme court. The supreme
13 court shall determine whether the sentence was imposed under the
14 influence of passion, prejudice, or any other arbitrary factor,
15 whether the evidence supports the finding of a statutory
16 aggravating circumstance, and whether the sentence is
17 disproportionate as compared to other cases of a similar nature.
18 If the sentence is affirmed, the supreme court's findings shall
19 include a reference to other cases of a similar nature that the
20 court considered in affirming the sentence.

21 (8) A person sentenced to death under this section shall
22 be executed by the administration of lethal injection at a place



1 and time to be determined by the sentencing court, which may
2 delegate the decision to the director of public safety; provided
3 that the death penalty shall be stayed, if imposed on a pregnant
4 woman, until after the woman has given birth.

5 (9) In the event the death penalty in this section is held
6 to be unconstitutional by the supreme court or the United States
7 Supreme Court, the court having jurisdiction over a person
8 previously sentenced to death shall cause the person to be
9 brought before the court, and the court shall sentence the
10 person to life imprisonment without possibility of parole.

11 (10) As part of the sentence imposed under this section,
12 the court shall order the director of public safety and the
13 Hawaii paroling authority to prepare an application for the
14 governor to commute a sentence of death to life imprisonment
15 without the possibility of parole.

16 (11) Any DNA samples or evidence that have been collected
17 from:

18 (a) The defendant's blood as provided in section 706-
19 603(3), (4), or (5), as applicable, which has been
20 withdrawn and the results recorded, preserved, and
21 disseminated as provided in section 706-603(7); or



1 (b) The victim, the scene of the offense, or from any
2 other person or place relevant to any of the offenses
3 in question,
4 shall be further preserved for evidentiary purposes by the
5 appropriate law enforcement agency to allow the defendant the
6 opportunity to introduce that DNA evidence at any hearing, the
7 purpose of which in whole or in part is to exonerate the
8 defendant from guilt. The DNA evidence shall be preserved until
9 either the defendant has been exonerated or executed pursuant to
10 this section."

11 SECTION 3. Section 706-656, Hawaii Revised Statutes, is
12 amended to read as follows:

13 **"§706-656 Terms of imprisonment for first and second**
14 **degree murder and attempted first and second degree murder. (1)**
15 **[Persons] Except as provided in section 706- , persons**
16 convicted of first degree murder or first degree attempted
17 murder shall be sentenced to life imprisonment without
18 possibility of parole.

19 As part of such sentence the court shall order the director
20 of public safety and the Hawaii paroling authority to prepare an
21 application for the governor to commute the sentence to life
22 imprisonment with parole at the end of twenty years of



1 imprisonment; provided that persons who are repeat offenders
2 under section 706-606.5 shall serve at least the applicable
3 mandatory minimum term of imprisonment.

4 (2) Except as provided in section 706- or 706-657,
5 ~~[pertaining to enhanced sentence for second degree murder,]~~
6 persons convicted of second degree murder and attempted second
7 degree murder shall be sentenced to life imprisonment with
8 possibility of parole. The minimum length of imprisonment shall
9 be determined by the Hawaii paroling authority; provided that
10 persons who are repeat offenders under section 706-606.5 shall
11 serve at least the applicable mandatory minimum term of
12 imprisonment.

13 If the court imposes a sentence of life imprisonment
14 without possibility of parole pursuant to section 706-657, as
15 part of that sentence, the court shall order the director of
16 public safety and the Hawaii paroling authority to prepare an
17 application for the governor to commute the sentence to life
18 imprisonment with parole at the end of twenty years of
19 imprisonment; provided that persons who are repeat offenders
20 under section 706-606.5 shall serve at least the applicable
21 mandatory minimum term of imprisonment."



1 SECTION 4. Section 706-660.1, Hawaii Revised Statutes, is
2 amended by amending subsections (1), (2), and (3) to read as
3 follows:

4 "(1) [A] Except as provided in section 706- , a person
5 convicted of a felony, where the person had a firearm in the
6 person's possession or threatened its use or used the firearm
7 while engaged in the commission of the felony, whether the
8 firearm was loaded or not, and whether operable or not, may in
9 addition to the indeterminate term of imprisonment provided for
10 the grade of offense be sentenced to a mandatory minimum term of
11 imprisonment without possibility of parole or probation the
12 length of which shall be as follows:

- 13 (a) For murder in the second degree and attempted murder
14 in the second degree--up to fifteen years;
15 (b) For a class A felony--up to ten years;
16 (c) For a class B felony--up to five years; and
17 (d) For a class C felony--up to three years.

18 The sentence of imprisonment for a felony involving the use of a
19 firearm as provided in this subsection shall not be subject to
20 the procedure for determining a minimum term of imprisonment
21 prescribed under section 706-669 [~~7 provided further that a~~]. A
22 person who is imprisoned in a correctional institution as



1 provided in this subsection shall become subject to the parole
2 procedure as prescribed in section 706-670 only upon the
3 expiration of the term of mandatory imprisonment fixed under
4 paragraph (a), (b), (c), or (d).

5 (2) [A] Except as provided in section 706- , a person
6 convicted of a second firearm felony offense as provided in
7 subsection (1) where the person had a firearm in the person's
8 possession or threatened its use or used the firearm while
9 engaged in the commission of the felony, whether the firearm was
10 loaded or not, and whether operable or not, shall in addition to
11 the indeterminate term of imprisonment provided for the grade of
12 offense be sentenced to a mandatory minimum term of imprisonment
13 without possibility of parole or probation the length of which
14 shall be as follows:

- 15 (a) For murder in the second degree and attempted murder
16 in the second degree--twenty years;
17 (b) For a class A felony--thirteen years, four months;
18 (c) For a class B felony--six years, eight months; and
19 (d) For a class C felony--three years, four months.

20 The sentence of imprisonment for a second felony offense
21 involving the use of a firearm as provided in this subsection
22 shall not be subject to the procedure for determining a minimum



1 term of imprisonment prescribed under section 706-669 [~~7~~ provided
2 ~~further that a~~]. A person who is imprisoned in a correctional
3 institution as provided in this subsection shall become subject
4 to the parole procedure as prescribed in section 706-670 only
5 upon expiration of the term of mandatory imprisonment fixed
6 under paragraph (a), (b), (c), or (d).

7 (3) [A] Except as provided in section 706- , a person
8 convicted of a felony, where the person had a semiautomatic
9 firearm or automatic firearm in the person's possession or used
10 or threatened its use while engaged in the commission of the
11 felony, whether the semiautomatic firearm or automatic firearm
12 was loaded or not, and whether operable or not, shall in
13 addition to the indeterminate term of imprisonment provided for
14 the grade of offense be sentenced to a mandatory minimum term of
15 imprisonment without possibility of parole or probation the
16 length of which shall be as follows:

- 17 (a) For murder in the second degree and attempted murder
18 in the second degree--twenty years;
19 (b) For a class A felony--fifteen years;
20 (c) For a class B felony--ten years; and
21 (d) For a class C felony--five years.



1 The sentence of imprisonment for a felony involving the use of a
2 semiautomatic firearm or automatic firearm as provided in this
3 subsection shall not be subject to the procedure for determining
4 a minimum term of imprisonment prescribed under section
5 706-669 [~~provided further that a~~]. A person who is imprisoned
6 in a correctional institution as provided in this subsection
7 shall become subject to the parole procedure as prescribed in
8 section 706-670 only upon expiration of the term of mandatory
9 imprisonment fixed under paragraph (a), (b), (c), or (d)."

10 SECTION 5. Section 706-660.2, Hawaii Revised Statutes, is
11 amended to read as follows:

12 "**§706-660.2 Sentence of imprisonment for offenses against**
13 **children, elder persons, or handicapped persons.**

14 [~~Notwithstanding~~] (1) Except as provided in section 706-
15 and notwithstanding section 706-669, a person who, in the course
16 of committing or attempting to commit a felony, causes the death
17 or inflicts serious or substantial bodily injury upon a person
18 who is:

19 [~~1~~] (a) Sixty years of age or older;

20 [~~2~~] (b) Blind, a paraplegic, or a quadriplegic; or

21 [~~3~~] (c) Eight years of age or younger;



1 and such disability is known or reasonably should be known to
2 the defendant, ~~[shall]~~ if not subjected to an extended term of
3 imprisonment pursuant to section 706-662, shall be sentenced to
4 a mandatory minimum term of imprisonment without possibility of
5 parole as ~~[follows]~~ provided in subsection (2).

6 (2) A person who meets the criteria under subsection (1)
7 shall be sentenced as follows:

- 8 ~~[(1)]~~ (a) For murder in the second degree--fifteen years;
9 ~~[(2)]~~ (b) For a class A felony--six years, eight months;
10 ~~[(3)]~~ (c) For a class B felony--three years, four months;
11 ~~[(4)]~~ (d) For a class C felony--one year, eight months."

12 SECTION 6. Section 706-661, Hawaii Revised Statutes, is
13 amended to read as follows:

14 "**§706-661 Extended terms of imprisonment.** ~~[The]~~ Except as
15 provided in section 706- , the court may sentence a person who
16 satisfies the criteria for any of the categories set forth in
17 section 706-662 to an extended indeterminate term of
18 imprisonment, which shall have a maximum length as follows:

- 19 (1) For murder in the second degree--life without the
20 possibility of parole;
21 (2) For a class A felony--indeterminate life term of
22 imprisonment;



1 (3) For a class B felony--indeterminate twenty-year term
2 of imprisonment; and

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

5 In exercising its discretion on whether to impose the
6 extended term of imprisonment or to use other available
7 sentencing options, the court shall consider whether the
8 extended term is necessary for the protection of the public and
9 whether the extended term is necessary in light of the other
10 factors set forth in 706-606.

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

16 SECTION 7. Section 706-662, Hawaii Revised Statutes, is
17 amended to read as follows:

18 "§706-662 **Criteria for extended terms of imprisonment.**

19 [A] Except as provided in section 706- , a defendant who has
20 been convicted of a felony qualifies for an extended term of
21 imprisonment under section 706-661 if the convicted defendant
22 satisfies one or more of the following criteria:



- 1 (1) The defendant is a persistent offender in that the
2 defendant has previously been convicted of two
3 felonies committed at different times when the
4 defendant was eighteen years of age or older;
- 5 (2) The defendant is a professional criminal in that:
6 (a) The circumstances of the crime show that the
7 defendant has knowingly engaged in criminal
8 activity as a major source of livelihood; or
9 (b) The defendant has substantial income or resources
10 not explained to be derived from a source other
11 than criminal activity;
- 12 (3) The defendant is a dangerous person in that the
13 defendant has been subjected to a psychiatric or
14 psychological evaluation that documents a significant
15 history of dangerousness to others resulting in
16 criminally violent conduct, and this history makes the
17 defendant a serious danger to others. Nothing in this
18 section precludes the introduction of victim-related
19 data in order to establish dangerousness in accord
20 with the Hawaii rules of evidence;
- 21 (4) The defendant is a multiple offender in that:



- 1 (a) The defendant is being sentenced for two or more
- 2 felonies or is already under sentence of
- 3 imprisonment for felony; or
- 4 (b) The maximum terms of imprisonment authorized for
- 5 each of the defendant's crimes, if made to run
- 6 consecutively would equal or exceed in length the
- 7 maximum of the extended term imposed, or would
- 8 equal or exceed forty years if the extended term
- 9 imposed is for a class A felony;
- 10 (5) The defendant is an offender against the elderly,
- 11 handicapped, or a minor under the age of eight, in
- 12 that:
- 13 (a) The defendant attempts or commits any of the
- 14 following crimes: murder, manslaughter, a sexual
- 15 offense that constitutes a felony under chapter
- 16 707, robbery, felonious assault, burglary, or
- 17 kidnapping; and
- 18 (b) The defendant, in the course of committing or
- 19 attempting to commit the crime, inflicts serious
- 20 or substantial bodily injury upon a person who
- 21 is:
- 22 (i) Sixty years of age or older;



- 1 (ii) Blind, a paraplegic, or a quadriplegic; or
- 2 (iii) Eight years of age or younger; and
- 3 (c) Such disability is known or reasonably should be
- 4 known to the defendant; or
- 5 (6) The defendant is a hate crime offender in that:
 - 6 (a) The defendant is convicted of a crime under
 - 7 chapter 707, 708, or 711; and
 - 8 (b) The defendant intentionally selected a victim, or
 - 9 in the case of a property crime, the property
 - 10 that was the object of a crime, because of
 - 11 hostility toward the actual or perceived race,
 - 12 religion, disability, ethnicity, national origin,
 - 13 or sexual orientation of any person."

14 SECTION 8. Section 706- , Hawaii Revised Statutes, is
15 amended by amending subsection (1) to read as follows:

16 "§706- **Special sentencing of habitual violent felons.**

17 (1) [Notwithstanding] Except as provided in section
18 706- , and notwithstanding any other provision of law to the
19 contrary, a habitual violent felon shall be sentenced to both:

- 20 (a) A mandatory minimum term of imprisonment of not
- 21 less than thirty years; and



1 (b) A mandatory indeterminate term of life
2 imprisonment.

3 SECTION 9. Section 707-701, Hawaii Revised Statutes, is
4 amended by amending subsection (2) to read as follows:

5 "(2) Murder in the first degree is a felony for which the
6 defendant shall be sentenced [~~to imprisonment~~] as provided in
7 section 706- or 706-656[-], as applicable."

8 SECTION 10. Section 707-701.5, Hawaii Revised Statutes, is
9 amended by amending subsection (2) to read as follows:

10 "(2) Murder in the second degree is a felony for which the
11 defendant shall be sentenced [~~to imprisonment~~] as provided in
12 section 706- or 706-656[-], as applicable."

13 SECTION 11. Section 707-730, Hawaii Revised Statutes, is
14 amended by amending subsection (2) to read as follows:

15 "(2) [~~Sexual~~] Except as provided in section 706- ,
16 sexual assault in the first degree is a class A felony."

17 SECTION 12. Section 707-731, Hawaii Revised Statutes, is
18 amended by amending subsection (2) to read as follows:

19 "(2) [~~Sexual~~] Except as provided in section 706- ,
20 sexual assault in the second degree is a class B felony."

21 SECTION 13. Section 707-732, Hawaii Revised Statutes, is
22 amended by amending subsection (2) to read as follows:



1 "(2) [~~Sexual~~] Except as provided in section 706- ,
2 sexual assault in the third degree is a class C felony."

3 SECTION 14. Section 707- , Hawaii Revised Statutes, is
4 amended by amending subsection (4) to read as follows:

5 "(4) [~~Continuous~~] Except as provided in section 706- ,
6 continuous sexual assault of a minor under the age of fourteen
7 years is a class A felony."

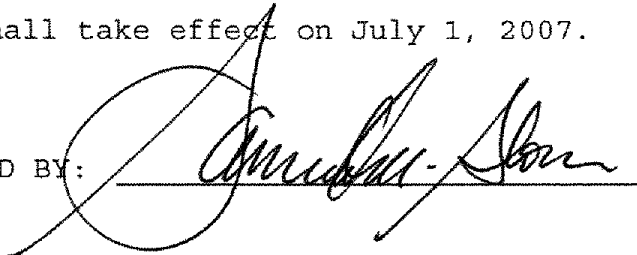
8 SECTION 15. This Act does not affect rights and duties
9 that matured, penalties that were incurred, and proceedings that
10 were begun, before its effective date.

11 SECTION 16. Statutory material to be repealed is bracketed
12 and stricken. New statutory material is underscored.

13 SECTION 17. This Act shall take effect on July 1, 2007.

14

INTRODUCED BY: _____



Report Title:

Capital Punishment; Murder

Description:

Provides for a sentence of death or life imprisonment without possibility of parole upon conviction of a defendant for the murder of a minor less than 12, murder combined with torture or sexual assault, or multiple murder. Requires separate sentencing proceeding after conviction before a jury.

