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Testimony of the Office of the Public Defender, State of Hawai'i to the House Committee on Judiciary & Hawaiian Affairs

February 4, 2025

H.B. 1247: Relating to Criminal Proceedings

Chair Tarnas, Vice-Chair Poepoe, and Members of the Committee:

The Office of the Public Defender **strongly supports H.B. 1247.**

Public defenders represent indigent people who have been sentenced to prison. They appear with the inmate before the Hawai'i Paroling Authority (HPA). The HPA determines how much time they must serve before they become eligible parole. This minimum term hearing will determine when rehabilitation programs, work furlough programs, and other services become available.

This bill fixes a badly needed procedural problem. A petition for relief pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 40 is a non-criminal petition asking the trial court to examine not only the record in the case, but additional materials attached to the petition. *See* HRPP Rule 40(c)(3). It is better equipped to handle issues that relate to the criminal proceedings in court. *See, e.g.*, *Wilton v. State*, 116 Hawai'i 106, 170 P.3d 357 (2007) (ineffective assistance of counsel claim); *Birano v. State*, 143 Hawai'i 163, 426 P.3d 387 (2018) (prosecutorial misconduct in failure to provide exculpatory evidence to defense); *Warner v. State*, 151 Hawai'i 433, 517 P.3d 716 (2022) (post-conviction challenge to monetary assessments like fines and fees at the time of sentencing).

But the Rule 40 petition is a poor vehicle to obtain judicial review of the HPA's decision on a minimum term. The first problem arises from a lack of representation during the drafting state of the petition. The OPD does not get involved in most Rule 40 petitions unless and until the circuit court first reviews them and finds a "colorable claim." *Rapozo v. State*, 150 Hawai'i 66, 79, 497 P.3d 81 (2021). As the Hawai'i Supreme Court recently put it, "[o]nly if a court finds a 'colorable claim' will counsel be appointed." *State v. Yuen*, 154 Hawai'i 434, 447 n. 17, 555 P.3d 121, 134 n. 17 (2024). That comes *after* the Attorney General, which represents the HPA, has written a response. HRPP Rule 40(d). And by then, counsel is limited to whatever claims the inmate managed to present. *See* HRPP Rule 40(f) (limiting hearings to "issues raised in the petition or answer.").

So the indigent inmate is expected to do their own legal research, draft their own petition, and present a "colorable claim" for relief without resources or any help from their lawyer. And then the Attorney General, the agency assigned to represent the HPA, can respond and pick apart their efforts. HRPP Rule 40(d). This should not be tolerated. The right to counsel is constitutionally guaranteed at sentencing. *State v. Pitts*, 131 Hawai'i 537, 544, 319 P.3d 456, 463 (2014). It extends to minimum term hearings. HRS § 706-669(3)(c). But the right is lost when presenting a case for judicial review. This makes little sense and is fundamentally unfair. This bill will allow continuous representation to permit judicial review of an important part of the criminal legal system.

The bill will also ensure a speedier resolution of post-conviction claims in court. There are no time constraints on when a court must review a Rule 40 petition to determine a "colorable claim." And typically, it takes a long time. *State v. Yuen*, 154 Hawai'i at 447 n. 17, 555 P.3d at 134 n. 17. ("It takes significant time after affirmance of a conviction on final appeal for a HRPP Rule 40 petition to be filed and resolved."). The bill eliminates a considerable number of Rule 40 petitions by requiring attorneys to file the motion within 90 days of the HPA decision. And given the deferential standards of review in Section 4, it could even reduce the number of motions.

The OPD acknowledges that courts will have to keep their cases open long after the issuance of the judgment. The OPD also recognizes that the Judiciary may take issue with the regulation of its records in Section 2. But the OPD is hopeful that those concerns can be heard, discussed, and addressed without derailing the spirit of this much-needed bill: provide inmates with speedy and efficient judicial review with the assistance of their lawyers.

Fortunately, the inmate's attorney has access to the docket online, which contains the presentence investigation report, judgment of conviction, and other documents that will assist the court in conducting judicial review. Moreover, the burden of ordering a transcript of the sentencing hearing and the HPA's minimum term hearing falls on counsel. The OPD is hopeful that Section 2 of the bill can be amended to accommodate any of the concerns the Judiciary has about records. It should not derail the merits of this much-needed bill.

Thank you for the opportunity to comment on this measure.

STATE OF HAWAII | KA MOKU'ĀINA 'O HAWAI'I
HAWAII PAROLING AUTHORITY
Ka 'Ākena Palola o Hawai'i
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Honolulu, Hawaii 96813

No. _____

TESTIMONY ON HOUSE BILL 1247, RELATING TO CRIMINAL PROCEEDINGS

by
Gene DeMello, Jr., Interim Chair
Hawaii Paroling Authority

House Committee on Judiciary & Hawaiian Affairs
Representative David A. Tarnas, Chair
Representative Mahina Poepoe, Vice Chair

Friday, February 7, 2025 – 2:05 p.m.
State Capitol Conference Room 325 and Via Video Conference

Chair Tanas, Vice Chair Poepoe and Members of the Committee:

The Hawaii Paroling Authority (HPA) offers comments to HB 1247 to allow immediate judicial review of orders fixing minimum terms of imprisonment by the HPA. The proposed amendment should have a defined procedure and a standard for review by the Courts. This will facilitate eligibility review, legal scrutiny, and possibly minimize sentencing disparities.

HPA has statutory authority (HRS §706-669) to set minimum terms of imprisonment using guidelines set forth in the Hawaii Administrative Rules (HAR). The HAR also authorizes HPA to reduce a minimum term after serving one-third of the longest sentence. When properly petitioned by an inmate, HPA decisions undergo judicial review by the Courts for legal analysis and opinion of HPA's action and decision. The Courts can either uphold the HPA decision or provide direction for correction. This process has strengthened HPA's decision-making process because the Courts provide legal clarity and definition of guidelines and factors which provides guidance to future decisions.

Thank you for the opportunity to provide testimony to HB 1247.

The Judiciary, State of Hawai‘i

Testimony to the Thirty-Third Legislature, 2025 Regular Session

House Committee on Judiciary and Hawaiian Affairs
Representative David A. Tarnas, Chair
Representative Mahina Poepoe, Vice Chair

Friday, February 7, 2025 at 2:05 p.m.
State Capitol, Conference Room 325

By

Jeannette Castagnetti
Chief Judge, First Circuit

Peter Cahill
Chief Judge, Second Circuit

Wendy DeWeese
Chief Judge, Third Circuit

Bill No. and Title: House Bill No. 1247, Relating to Criminal Proceedings.

Purpose: Provides immediate judicial review of orders fixing minimum terms of imprisonment.

Judiciary's Position:

While the Judiciary understands the intent of the proposed legislation, the Judiciary opposes the bill, provides the following comments, and sets forth the impact the bill will have in light of the already present ability for defendants to obtain meaningful review of their minimum term proceedings held before the Hawai‘i Paroling Authority (“HPA”) and the significant effect the essentially “automatic review” of all HPA minimum term decisions will have on Judiciary operations both at the circuit and appellate level. To the extent that this bill as written will require additional resources at the circuit and appellate level, the Judiciary respectfully requests that appropriations be included for the additional staffing necessary to fulfill the purposes of this bill. The Judiciary is currently determining the positions and amounts necessary to meet these obligations and will provide the same to the Committee as soon as possible. The Judiciary also requests that any appropriations that may be added to this bill not supplant the Judiciary’s existing funding and current budget requests.

As an alternative suggestion to alleviate the concerns specifically outlined below and to ensure the overall purpose of the bill to confer the right to counsel for a judicial review of the minimum term proceedings before the HPA, the Judiciary respectfully suggests an amendment to section 706-669 to state:

> (9) In instances where the prisoner has been represented by counsel in the minimum term proceedings, the prisoner shall continue to have the right to representation by counsel in any petition challenging those proceedings that is filed under the rules of penal procedure within 90 days of the issuance and service of the order fixing the minimum term of imprisonment. The supreme court shall establish rules regarding the form and content of the petition, the parties, and hearings on the motion, and the referral to the public defender where necessary. The grounds set forth in the petition challenging the proceedings may allege that the minimum term order is:
>
> (a) In violation of constitutional or statutory provisions;
> (b) In excess of the statutory authority or jurisdiction of the Hawai‘i paroling authority;
> (c) Made upon unlawful procedure;
> (d) Affected by other error of law;
> (e) Clearly erroneous in view of substantive evidence on the whole record; and/or
> (f) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

This suggested alternative language would permit the Hawai‘i Supreme Court to establish comprehensive procedural protections in a separate cause of action, while guaranteeing the right to counsel in that process and alleviating any issues with respect to jurisdiction (see below). It will further make clear that the challenge is being made against the HPA's actions and is not a challenge to the underlying criminal conviction.[1] If accepted, the Judiciary requests that the amendment not be effective until June 30, 2026 to permit the Judiciary time to promulgate rules to effectuate the provisions of the bill.

A. Current Procedure Already Allows for Meaningful Review of Minimum Term Orders

At the outset the Judiciary would note that the current statutory scheme requires the judge to sentence a defendant based on evaluation and consideration of specific delineated factors

[1] The opposing party in any such action will necessarily be the Hawai‘i Paroling Authority as represented by the Attorney General of the State of Hawai‘i and not the State of Hawai‘i as the prosecutor in the underlying criminal action.

outlined in HRS § 706-606. In the vast majority of cases a sentence to imprisonment is for an indeterminate term of five, ten, or twenty-year terms, or life imprisonment either with or without the possibility of parole. In all those cases except those sentenced to life imprisonment without the possibility of parole, the Legislature has delegated the determination of how much time (over and above any mandatory minimum ordered by the court[2]) a defendant must spend incarcerated before being eligible for parole to the HPA.

Under current law the appropriate means to challenge a minimum term of imprisonment set by the HPA is through a petition filed pursuant to Rule 40 of the Hawai‘i Rules of Penal Procedure ("HRPP").[3] The petition is a relatively simple form which must be filled out to the best of the petitioner's ability with the relevant information on the petitioner's case, its current procedural posture, and the petitioner's current custodial status, and requires the petitioner to state the grounds on which they claim they are being held unlawfully and any facts supporting each ground. The forms are readily available and are sent to prisoners from the court on a regular basis. The opposing party in any such challenge, whether it be pursuant to HRPP Rule 40 or in the underlying criminal case, is the State of Hawai‘i by and through the Hawai‘i Paroling Authority and not the State of Hawai‘i by and through the criminal prosecution. In addition, the petitioner has a right to appeal any ruling on the HRPP Rule 40 petition to the appellate court.

Pursuant to HRPP Rule 40, if the petition **alleges facts** which, **if proven**, would entitle the petitioner to relief (a "colorable claim"), then the court **must set and hold a full and fair evidentiary hearing and appoint counsel for petitioner**.[4] Further, the court cannot dismiss a petition for want of particularity unless and until the petitioner is provided an opportunity to clarify the petition.[5] For a review of an HPA minimum term proceeding this requires asserting **facts** showing that there was a potential procedural[6] or due process[7] violation. Contrary to the preamble in the bill, petitioners are not required to submit anything other than the petition form; petitioners are <u>not required to create their own record</u> by attaching relevant documents and exhibits or requesting transcripts of the legal proceedings before the HPA, <u>but they do have to allege facts in the petition that they believe are supported by the record.</u> In fact, the rule requires the State to "file with its answer any records that are material to the questions raised in the petition which are not included in the petition."[8] Therefore, **it is incumbent on the State** in these matters to provide the records and transcripts of the HPA proceedings and when they fail to

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[2] *See, e.g.* HRS § 706-606.5 (mandatory minimum sentences for certain repeat offenders).
[3] *Williamson v. Hawai‘i Paroling Authority*,97 Hawai‘i 156, 34 P.3d 1055 (App. 2000), *rev'd on other grounds,* 97 Hawai‘i 183, 35 P.3d 210 (2001), *De La Garza v. State*, 129 Hawai‘i 429, 438, 302 P.3d 697, 706 (2013).
[4] HRPP Rule 40(f).
[5] HRPP Rule 40(e).
[6] "With respect to a procedural violation, the court will assess whether the HPA conformed with the procedural protections of HRS § 706-669 and complied with its own guidelines, which the HPA was required to establish by statute." *Coulter v. State,* 116 Hawai‘i 181, 184, 172 P.3d 493, 496 (2007).
[7] With respect to due process violations, "judicial intervention is appropriate where the HPA has failed to exercise any discretion at all, acted arbitrarily and capriciously so as to give rise to a due process violation, or otherwise violated the prisoner's constitutional rights." *Williamson v. Hawai‘i Paroling Authority*,97 Hawai‘i 183, 195, 35 P.3d 210, 222 (2001).
[8] HRPP Rule 40(d).

do so, courts frequently issue orders requiring the State to provide the records in question. Further, "[b]ecause HRPP Rule 40 petitions challenge the validity of a criminal defendant's conviction or confinement, they are basically criminal, and not civil, in nature."[9] These cases, though in a new case number, are assigned to the sentencing court if that judge is still sitting on the criminal calendar. Under current law, these challenges survive a prior filed notice of appeal in the underlying criminal case as they are a collateral challenge to a defendant's custody under the rule, based on the HPA action, and are a separate cause of action. **In other words, the Rule 40 challenge to the minimum term could proceed regardless of whether the circuit court had lost jurisdiction over the underlying criminal case**.

The bill, in essence, codifies a HRPP Rule 40-type judicial review of every HPA minimum term order, without requiring the defendant to assert any error in the minimum term proceedings and leaving it to the court to assert the error in the proceeding. The bill requires the defendant, rather than the State, to provide the records and transcripts of the proceedings to the circuit court and jeopardizes defendants' future ability to collaterally challenge their custody. Finally, the bill will significantly impact court operations, exponentially increasing the number of post-conviction adjudications, some with no basis.

B. The Bill Fails to Consider that the Circuit Court May Lack Jurisdiction Upon a Filing of the Notice of Appeal

The bill implies that the request for review would be filed in the underlying criminal case rather than as a Rule 40 proceeding. However, after the circuit court enters a judgment of conviction and sentence, a defendant has thirty days to file a notice of appeal. Within six months after the prison receives a defendant who has been sentenced to an indeterminate term, the HPA will conduct a minimum term hearing. Thus, if the defendant has already filed an appeal in his criminal case, the circuit court will have lost jurisdiction to hear any part of the underlying criminal case some six months prior to the filing of this proposed motion seeking review.[10] The provisions of Section 2 do not remedy this situation. In fact, the retention of records by the sentencing court for 90 days would have little to no effect on these provisions as the amendment proposed to section 706-669 contemplates a motion filed some nine months after sentencing.

C. The Bill's Proposal Lacks a Clear Standard, Fails to Provide a Right to Counsel, and Will be More Burdensome to Both Defendants and the Court

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[9] *Penaflor v. Mossman*, 141 Hawai'i 358, 366, 409 P.3d 762, 770 (Haw.App. 2017). *See also*, HRPP Rule 40(c)(3) stating:

> (3) *Separate Cause of Action.* If a post-conviction petition alleges neither illegality of judgment nor illegality of post-conviction "custody" or "restraint" but instead alleges a cause of action based on a civil rights statute or other separate cause of action, the court shall treat the pleading as a civil complaint not governed by this rule. However, where a petition seeks relief of the nature provided by this rule and simultaneously pleads a separate claim or claims under a civil rights statute or other separate cause of action, the latter claim or claims shall be ordered transferred by the court for disposition under the civil rules.

[10] The sole exception is a motion to reduce sentence filed within 90 days of the sentence.

The bill creates a process for an automatic direct review by the sentencing court of a defendant's HPA minimum term proceeding and the Notice and Order of Fixing of Minimum Term from the HPA ("HPA Order") simply by filing a motion with the court within 90 days of the "issuance and service" of the HPA Order. There is **no requirement that the motion assert any sort of alleged error in the HPA minimum term proceeding or the HPA Order, it simply permits the defendant to request a review of the minimum term proceedings**. Indeed, as written the bill would also allow defendants sentenced by the court to a mandatory minimum term of imprisonment, such as pursuant to section 706-606.5 as a repeat offender, or pursuant to section 706-660.1 for the use of a firearm, to seek "judicial review" despite the fact that the HPA set their minimum term to be eligible for parole at the mandatory minimum issued by the court.

For reference, in the fiscal year 2023, HPA set 1273 minimum terms for 916 defendants.[11] Thus, rather than reducing the number of petitions to the court for review of the HPA Order, this bill as written will in fact drastically increase the number of requests for review.

Further, the stated purpose of the bill and the language proposed in Section 4 presumes that counsel for defendant in the criminal case (generally the Office of the Public Defender ("OPD") or counsel appointed on defendant's behalf due to a conflict with the OPD) will continue legal representation after the minimum term hearing and therefore will further represent the defendant in this "motion." However, the bill, as written, does not do so. Indeed section 706-669(3) only provides procedures for representation at the minimum term proceedings, and although a defendant has a constitutional right to counsel at the minimum term hearing,[12] that right has not been extended to a challenge of those proceedings.[13] In addition, there are times when a defendant may have terminated counsel's representation prior to the minimum term proceedings and proceeded *pro se* and, at times, when a defendant is appealing the underlying conviction a new attorney may have been appointed solely for that appeal. Therefore, as written, a right to counsel for the filing of the motion to the sentencing court is not conferred and it is not assured that a public defender, court appointed counsel, or private counsel will provide representation to defendant in the preparation of this application to the court. If the intent is to provide a statutory right to counsel, the Judiciary's proposed amendment satisfies that intent.

Under the bill, if the court chooses to conduct the judicial review, there is no provision as to who would provide the court with the records and transcripts of those proceedings. The HPA is not part of the Judiciary and the Judiciary does not have access to HPA records.[14] These records and files are kept by the HPA. Though silent, this likely requires the defendant to provide any such records as they are the party requesting judicial review. If the defendant is

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[11] Hawai'i Paroling Authority 2023 Annual Statistics Report, Fiscal Year 2023, available online at https://dcr.hawaii.gov/hpa/wp-content/uploads/sites/3/2024/02/HPA-FY-2023-Annual-Report.pdf

[12] *D'Ambrosio v. State*, 112 Hawai'i 446, 466, 146 P.3d 606, 626 (Haw.App, 2006)

[13] "A HRPP Rule 40 petition is an appropriate means to challenge a minimum term of imprisonment set by the HPA" *Coulter,* 116 Hawai'i at 184, 172 P.3d at 496. *See, e.g. Fagaragan v. State*, 132 Hawai'i 224, 240, 320 P.3d 889, 905 (2014), *and De La Garza,* 129 Hawai'i 429, 302 P.3d 697 (both permitting a pro se HRPP Rule 40 challenge and subsequent pro se appeal to the setting of his HPA minimum term).

[14] *See* Hawai'i Administrative Rules § 23-700-2(b) (effective Aug. 22, 1992) (the HPA is an "independent quasi-judicial body which, for administrative purposes only, is attached to the Department of Public Safety").

proceeding pro se, this will greatly restrict his access to meaningful review under this provision. Importantly, any review conducted under this bill will likely preclude any subsequent challenge by the defendant under HRPP Rule 40(a)(3) regarding these minimum term proceedings.[15] Inadvertently, this bill may place a greater burden on defendants than the current procedures.

Further, if the court chooses to undertake the review, the bill does not provide what that "judicial review" requires. It appears to require simply that the court conduct an *in camera* or a non-hearing "review[ ] the records and proceedings." If, however, the intent of the bill is for a hearing on the motion, this will greatly increase the hearings and proceedings at the circuit court level, and as noted above, will waste significant judicial resources especially in cases where the defendant does not assert what errors are alleged to have occurred. Even if the intent is for nonhearing review, these proceedings will require written findings of fact and conclusions of law for each review made so as to permit appellate review. To have each case where a defendant has been sentenced to imprisonment extended on the docket for an additional six to nine months will have a significant impact and the Judiciary would request the appropriations noted above to alleviate the roughly 916 additional reviews[16] the circuit courts would be required to undertake per fiscal year. The Judiciary's proposed amendment will ensure that standards and procedures will be promulgated to effectuate the intent of the bill.

D. The Findings Required Under the Bill are Those Already Required to be Determined in an HRPP Rule 40

The last portion of the proposed new subsection (9) to section 706-669, requires that if the court conducts a review the record and proceeding in response to the motion from the defendant, it shall modify the order or remand the case to the HPA if the order is:

(a) In violation of constitutional or statutory provisions;
(b) In excess of the statutory authority or jurisdiction of the Hawai‘i paroling authority;
(c) Made upon unlawful procedure;
(d) Affected by other error of law;
(e) Clearly erroneous in view of substantive evidence on the whole record; or
(f) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The Judiciary notes that the Legislature has established that the HPA shall be the "central paroling authority for the State."[17] As stated above, the HPA is tasked with determining the minimum term of imprisonment a prisoner must serve before being eligible for parole.[18] The

[15] Also, in the event a defendant fails to file a motion within 90 days pursuant to this section, that defendant will waive any challenge they may seek to make in the future to the HPA Order and proceedings pursuant to HRPP Rule 40(a)(3).
[16] The vast majority of these will likely be in the First Circuit where there are currently eight criminal trial divisions. Assuming at least seventy-five percent of these are First Circuit cases, then those 1,273 minimum term reviews for 916 defendants would mean an average of eighty-six judicial reviews per division in the First Circuit with the other circuits conducting the other 229 reviews annually.
[17] HRS § 353-62
[18] HRS § 706-669

HPA is required to establish guidelines upon which these determinations can be made.[19] The HPA has been delegated broad discretion in establishing minimum terms.

With respect to the findings delineated in the bill, such findings are substantially similar to those already required to be made upon a review of the HPA Order under the current procedure in an HRPP Rule 40 proceeding.[20] In light of the comments above, the Judiciary respectfully requests that this measure defer to the process and proceedings already available pursuant to HRPP Rule 40. Alternatively, **if the intent is to provide prisoners a statutory right to counsel in petitions challenging the minimum term proceedings before the HPA, the Judiciary respectfully recommends the amendment noted above.**

E. Appellate Review is Already Contemplated and Available Under Current Law

Under the current HRPP Rule 40 procedure, a petitioner can appeal any decision of the circuit court on their petition. Thus, an amendment to HRS § 641-11 is unnecessary. However, should this bill proceed as currently written, the bill's proposal to allow appeals to the ICA of the circuit court's proposed HRS § 706-669 order would create a substantial increase in the workload of the ICA. As noted, the proposed HRS § 706-669(9) would likely result in a vast number of increased requests for judicial review of HPA minimum term orders and proceedings in circuit court, and naturally more appeals to the ICA. The number of appeals filed could be in the hundreds each year and, as the defendant is in-custody, these appeals would become priority appeals that would result in further delays to other appeals pending before the appellate courts.

Thank you for the opportunity to testify.

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[19] *Id.*

[20] "Judicial intervention is appropriate where the HPA has failed to exercise any discretion at all, acted arbitrarily and capriciously so as to give rise to a due process violation, or otherwise violated the prisoner's constitutional right. With respect to claims of procedural violations, the court will assess whether the HPA complied with the procedural protections of HRS § 706-669 and complied with its own guidelines." *Faragan*, 132 Hawai'i at 234, 320 P.3d at 899 (internal quotations omitted).

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THE HONORABLE DAVID A. TARNAS, CHAIR
HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS
Thirty-Third State Legislature
Regular Session of 2025
State of Hawaiʻi

February 7, 2025

RE: H.B. 1247; RELATING TO CRIMINAL PROCEEDINGS.

Chair Tarnas, Vice Chair Poepoe, and members of the House Committee on Judiciary and Hawaiian Affairs, the Department of the Prosecuting Attorney for the City and County of Honolulu submits the following testimony in **opposition** to H.B. 1247.

H.B. 1247 provides immediate judicial review of the minimum term fixed by the paroling authority. This bill does not adequately represent the interests of the prosecution or victims of crime on the appeal. It creates lop-sided presumption favoring shorter terms of incarceration, even where a longer term is necessary to protect the public and deter crime.

In every stage of a criminal prosecution, the State has the right to be represented. That extends to a minimum-term parole hearing.[1] Victims of crime and surviving family members have the right to be present and to speak at these hearings.

This bill does not clarify whether the adverse party on appeal would be the paroling authority or the prosecution. The State believes that the prosecution should have the right to defend a minimum-sentence determination.

The State should also have the right to appeal an unreasonable minimum-term sentences. In the federal system, both the defense and prosecution may appeal unreasonable sentences.[2] That's fair. A minimum-term sentence should balanced—neither draconian nor indulgent.

Disparities in the criminal justice system do not simply affect defendants. They also affect victims of crime. The poor are more likely to be victims of crime. Social biases on race, gender, and other aspects of identity affect how different crime victims are perceived. The Jim Crow South enforced its apartheid terrorism less through state violence than by deliberate

[1] HRS § 706-669(7).
[2] 18 U.S.C. § 3742(a), (b).

indifference to the crimes of private actors.[3] And traces of this condescension and apathy, though rare, have even appeared in Hawai‘i cases.[4] A fair system would allow the State to challenge unreasonably lenient decisions, including decisions infected by such implicit biases.

"[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."[5]

Thank you for the opportunity to testify.

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[3] *See, e.g., United States v. Cruikshank*, 92 U.S. 542 (1875) (overturning lynching convictions on theory that private persons cannot violate civil rights); *Federal Power to Prosecute Violence Against Minority Groups*, 57 YALE L.J. 855, 856 (1948) ("Although repression of violence is peculiarly the province of government, local agencies charged with the maintenance of order often fail to provide these [minority] groups with adequate protection.").

[4] *See, e.g., State v. Maelega*, 80 Hawai‘i 172, 907 P.2d 758 (1995) (Nakayama, J., concurring in part) ("The jury . . . apparently came to the conclusion that it is not reasonable for a man to kill his wife because he suspects infidelity. In this case, where the old way of thinking of women as chattel met head-on with the present day acknowledgment of women as having the right to personal autonomy, there was no error committed by the trial judge and the conviction should stand. Accordingly, I dissent from the majority opinion and would affirm Maelega's conviction.").

[5] *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934).