The Judiciary, State of Hawai‘i

Testimony to the Thirty-First State Legislature, Regular Session 2021

House Committee on Judiciary and Hawaiian Affairs
Representative Mark M. Nakashima, Chair
Representative Scot Z. Matayoshi, Vice Chair

Thursday, February 4, 2021, 2:00 PM
VIA VIDEOCONFERENCE
State Capitol, Conference Room 325

by
Elizabeth Zack
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Bill No. and Title: House Bill No. 336, Relating to Courts of Appeal.

Purpose: Adds a new section to part 1 of Hawai‘i Revised Statutes chapter 602 to prohibit the supreme court from affirming, modifying, reversing, or vacating a matter on grounds other than those raised by the parties to the proceeding, unless the parties are provided the opportunity to brief the court and present oral argument on the matter.

HB 336 also adds a new section to part II of Hawai‘i Revised Statutes chapter 602 to prohibit the intermediate appellate court from affirming, modifying, reversing, or vacating a matter on grounds other than those raised by the parties to the proceeding unless the parties are provided the opportunity to brief the court and present oral argument on the matter.

Judiciary's Position:

The Judiciary respectfully opposes this bill.

Article VI, section 7 of the Hawai‘i Constitution sets forth the authority of the Hawai‘i Supreme Court to promulgate rules, regulations and procedures for all state courts and provides:

The supreme court shall have power to promulgate rules and regulations in all civil and criminal cases for all courts relating to process, practice, procedures, and appeals, which shall have the force and effect of law.

In implementing its constitutional rulemaking authority, the supreme court adopted rules for all of the courts in the State. Some of the rules allow the courts to notice plain error, sua sponte, even in cases where the alleged error is not raised by the parties. For example, Rule 52(b) of the Hawai‘i Rules of Penal Procedure provides "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Similarly, in implementing its constitutional rulemaking authority, the supreme court adopted an appellate rule that allows the appellate courts to notice plain error. Rule 28(b)(4) of the Hawai‘i Rules of Appellate Procedure provides that [p]oints not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented. (Emphasis added).

Given the clear constitutional authority that Article VI, section 7 provides to the Hawai‘i Supreme Court to promulgate rules and procedure for the courts of the State, the Judiciary believes HB 336 infringes on that constitutional authority.

The Judiciary notes the Hawai‘i Supreme Court is not alone in adopting rules that permit appellate courts to consider plain errors. The plain error doctrine exists in virtually all, if not all, jurisdictions. It has been stated that “[e]nsuring fundamental fairness in trial is the beacon of plain error review.” Wend v. People, 235 P.3d 1089, 1098 (Colo. 2010); see United States v. Young, 470 U.S. 1, 15, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). Rule 52(b) of the Hawai‘i Rules of Penal Procedure is based on the nearly identical provision of the Federal Rules of Criminal Procedure, and it is identically numbered. In fact, federal rule 52(b) serves as the template for the vast majority of the counterpart state rules, and provides that"[a] plain error that affects substantial rights may be considered even though it was not brought to the court’s attention." As early as 1896, the United States Supreme Court recognized the plain error doctrine, see Wiborg v. United States, 163 U.S. 632 (1896), and to this day it remains an integral part of an appellate court’s responsibility in fulfilling its duties.

In addition, HB 336 would prohibit appellate courts from sua sponte affirming a lower court on a different legal basis when the ultimate decision is correct, but was based on an erroneous interpretation of law. See, e.g., Reyes v. Kuboyama, 76 Hawai‘i 137, 140 (1994) (“[W]here the circuit court’s decision is correct, its conclusion will not be disturbed on the ground that it gave the wrong reason for its ruling.”) (citations omitted). This well-established practice facilitates the efficient resolution of disputes, rather than requiring remand to the trial court.

Thank you for allowing the Judiciary to comment on HB 336.

WRITTEN TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTY-FIRST LEGISLATURE, 2021

ON THE FOLLOWING MEASURE:
H.B. NO. 336, RELATING TO COURTS OF APPEAL.

BEFORE THE:
HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS

DATE: Wednesday, February 4, 2021 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Via Videoconference

TESTIFIER(S): **WRITTEN TESTIMONY ONLY.**
(For more information, contact Robyn Chun,
Deputy Attorney General, at 586-0618)

Chair Nakashima and Members of the Committee:

The Department of the Attorney General provides the following comments.

This bill would amend chapter 602, Hawaii Revised Statutes, by adding a new section designated "[s]ua sponte decisions" to Part I (page 6, lines 7-12). that provides that:

> The supreme court, when acting on a matter on appeal, shall not affirm, modify, reverse, or vacate a matter on grounds other than those raised by the parties to the proceeding, unless the parties are provided the opportunity to brief the court and present oral argument on the matter.

The bill would add the same section referring or pertaining to the intermediate court of appeals to Part II.

California government code section 68081 is very similar to that proposed by this bill. The California statute provides:

> Before the Supreme Court, a court of appeal, or the appellate division of a superior court renders a decision in a proceeding other than a summary denial of a petition for an extraordinary writ, based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails

> to afford that opportunity, a rehearing shall be ordered upon timely petition of any party.

California's statute has been in effect since 1986, and its appellate courts have applied the statute without problem. *See, e.g., Adoption of Alexander S.*, 750 P.2d 778, 783 (Cal. 1988).

Based on the California statute that provides for supplemental briefing, we suggest deleting the requirement in the bill for the appellate courts to hold oral argument regarding any issue not raised by the parties. The opportunity to brief such issues sufficiently protects litigants' rights. *See Blumberg Assocs. Worldwide, Inc. v. Brown & Brown of Connecticut*, 84 A.3d 840, 867-68 (Conn. 2014) (no reason why "reviewing court should be precluded from raising issues involving plain error or constitutional error sua sponte, as long as court provides an opportunity for the parties to be heard by way of supplemental briefing . . . ."). Further, the time required to schedule, prepare for, and hold oral arguments would likely result in additional delay in the appellate courts where substantial backlogs already exist.

Also based on the California's statute, we suggest adding a sentence that states, "If the court fails to afford that opportunity for the parties to submit supplemental briefing, a rehearing shall be ordered upon timely petition of any party." This will make clear the remedy available if the appellate court fails to provide the parties with the opportunity to submit supplemental briefs.

Thank you for the opportunity to testify on this bill.