

STATE OF HAWAI‘I  
**OFFICE OF THE PUBLIC DEFENDER**

**Testimony of the Office of the Public Defender,  
State of Hawai‘i to the House Committee on  
Corrections, Military & Veterans**

February 8, 2023

H.B. No. 432: RELATING TO APPEAL

Chair Hashem, Vice Chair Chun, and Members of the Committee:

The Office of the Public Defender strongly supports H.B. No. 432 because it allows court appointed counsel, including deputy public defenders, to continue representing clients after the Hawai‘i Paroling Authority (“HPA”) sets the minimum term of imprisonment.

When the trial court sends someone to an indeterminate term, the judge sets the maximum term of imprisonment. Months later, the HPA holds an administrative hearing. The defendant still has the right to counsel. Deputy public defenders are present at the hearing to advocate for their clients. The HPA then determines how much time the defendant must serve in prison before becoming eligible for parole. That decision is guided by administrative rules, statutes, and the State and federal constitutions. .

In the event the HPA commits error, the recourse available to have a court review what has happened is through an onerous and burdensome petition pursuant to Rule 40 of the Hawai‘i Rules of Penal Procedure (“HRPP”). Because these petitions are considered a new cause of action and a civil matter, indigent defendants are not entitled to the services of the OPD or by court-appointed counsel.

For defendants who can afford it, private lawyers draft and file their Rule 40 petitions professionally and expeditiously. The poor, however, must write their petitions in prison without representation of any kind. Once filed, it is left to the judge to decide if the OPD (or court-appointed counsel) gets reappointed. *See* HRPP Rule 40(i); Engstrom v. Naauao, 51 Haw. 318, 459 P.2d 376 (1969). This creates two classes of defendants: those who can hire an attorney to advocate for them and those who must go at it alone and hope the judge will reappoint an attorney. This is wrong. The right to counsel should not be conditioned on one’s financial ability to hire an attorney.

This bill levels the playing field and allows indigent defendants to keep their lawyers after the minimum term hearing. It should reduce the oftentimes confusing and haphazard petitions filed by inmates desperate for effective representation. Moreover, it empowers the sentencing judge, who is familiar with the defendant and the case itself, to modify the minimum term order when it finds the HPA has erred thereby expediting the process and saving time and resources.

Thank you for the opportunity to testify on this measure.

JOSH B. GREEN, M.D.  
GOVERNOR  
KE KIA'ĀINA



STATE OF HAWAII | KA MOKU'ĀINA 'O HAWAII  
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No. \_\_\_\_\_

TESTIMONY ON HOUSE BILL 432  
RELATING TO APPEALS

by  
Edmund "Fred" Hyun, Chairman  
Hawaii Paroling Authority

House Committee on Corrections, Military & Veterans  
Representative Mark J. Hashem, Chair  
Representative Cory M. Chun, Vice Chair

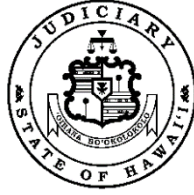
Wednesday, February 8, 2023 – 9:00 a.m.  
Conference Room 430

Chair Hashem, Vice Chair Chun, and Members of the Committee:

The Hawaii Paroling Authority (HPA) OPPOSES HB 432 to allow for judicial review of orders fixing minimum terms of imprisonment by the HPA.

- Passing this measure would unnecessarily burden the sentencing courts to conduct a judicial review as well as present a potential conflict in the cases where the court has imposed a mandatory minimum for repeat offenders.
- The Hawaii Administrative Rules (HAR) identified the criteria for MINIMUM hearings per HAR 23-700-22, HAR 23-700-23, 24, and 25.
- The Hawaii Rules of Appellate Procedure (Rule 40) allows for pro se filing as well as by attorney for the inmate.
- Finally, HB 432 does not specify any process or standards for the Courts.

Thank you for the opportunity to present testimony in opposition to HB 432.



## *The Judiciary, State of Hawai‘i*

Testimony to the Thirty-Second State Legislature, 2023 Regular Session

House Committee on Corrections, Military & Veterans

Rep. Mark J. Hashem, Chair

Rep. Cory M. Chun, Vice Chair

Wednesday, February 8, 2023, 9:00 a.m.

Videoconference

by:

Randy Pinal

Supervising Staff Attorney for the Intermediate Court of Appeals

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**Bill No. and Title:** House Bill No. 432, Relating to Appeals.

**Purpose:** Allows parties aggrieved by an order of the Hawai‘i Paroling Authority to appeal to the intermediate appellate court within 90 days of issuance and service of the order fixing the minimum term of imprisonment. Establishes the standard of judicial review for an order of the Hawaii Paroling Authority.

**Judiciary’s Position: Oppose.**

This bill would amend Hawai‘i Revised Statutes (HRS) § 641-11 to allow direct appeals from any order of the Hawai‘i Paroling Authority (HPA) to the Intermediate Court of Appeals (ICA), and also amend HRS § 706-669 to allow a criminal defendant to file in the sentencing court a motion challenging minimum term proceedings conducted by the HPA. The Judiciary opposes this bill because the current procedure provides meaningful review, the bill likely would result in a significant impact on the Judiciary’s available resources, and the process under the bill would result in duplicative proceedings and the potential for inconsistent results.

House Bill No. 862 and its companion, Senate Bill No. 977, propose similar amendments to HRS § 641-11 and HRS § 706-699 as this bill, but the proposed amendment to HRS § 641-11 in those bills is limited to appeals from circuit court orders on motions challenging the HPA’s minimum term proceedings described in Section 3 of each bill.

- A. Appeals Proposed by Section 2 of the Bill Would Create Confusion, Inconsistent Results, and a Substantial Burden on the ICA**

On June 17, 2022, the Governor signed Act 90 to increase the number of associate judges on the ICA from five to six. 2022 Haw. Sess. Laws Act 90. The Legislature found that adding another ICA associate judge “would enable the Judiciary to expeditiously resolve a greater number of appeals and address the foreseeable backlog of cases from the trial courts.” Conf. Comm. Rep. No. 103-22.

In fiscal year 2018-2019, the last full fiscal year before the COVID-19 pandemic began, the HPA issued at least **6,762** decisions in various matters, including, without limitation, minimum term hearings, applications for reduction of minimum sentences, parole consideration hearings, parole violation hearings, paroles suspended because a person’s whereabouts are unknown, discharge from parole, inmate interviews/reviews, and pardon consideration investigations. Hawai‘i Paroling Authority, 2019 Annual Statistical Report, at 3 (available at <https://dps.hawaii.gov/wp-content/uploads/2019/12/2019-Annual-Report.pdf>). This does not account for non-substantive HPA orders, such as setting or rescheduling hearings. Allowing every HPA order to be appealed directly to the ICA would conceivably increase the ICA’s caseload by several thousand cases, which would nullify any gains in ICA productivity resulting from Act 90 and increase the case backlog and time to disposition to unprecedented heights.

Further, the amendments proposed by the bill are contrary to existing case law and court rules that govern judicial review of HPA orders. For instance, filing a petition in circuit court under Hawai‘i Rules of Penal Procedure (HRPP) Rule 40 is the appropriate means to seek judicial review of an HPA order fixing a minimum term of imprisonment, denying parole, revoking parole, or denying an application for reduction of the minimum sentence. Coulter v. State, 116 Hawai‘i 181, 184, 172 P.3d 493, 496 (2007) (minimum term); Turner v. Hawaii Paroling Auth., 93 Hawai‘i 298, 307, 1 P.3d 768, 777 (App. 2000) (parole denial); Williamson v. Hawaii Paroling Auth., 97 Hawai‘i 156, 157, 34 P.3d 1055, 1057 (App. 2000) (parole revocation and reduction of minimum sentence), rev’d on other grounds, 97 Hawai‘i 183, 35 P.3d 210 (2001). The pro forma petition, which is readily available to prisoners, requires the petitioner merely to state the grounds on which they claim they are being held unlawfully and any facts supporting each ground. Contrary to statements in Section 1 of the bill, prisoners are not required to “create their own record by attaching relevant documents” and request transcripts of HPA proceedings. Instead, under HRPP Rule 40, the circuit court may require the State to answer a petition and the State “shall file with its answer any records that are material to the questions raised in the petition which are not included in the petition.” HRPP Rule 40(d). HRPP Rule 40 petitions are assigned to the sentencing court if the sentencing judge is still presiding on the criminal calendar. If that judge is no longer available, then the case is assigned to another criminal division. If the petition states a colorable claim for relief, then the circuit court is required to appoint counsel and conduct a hearing. Rapozo v. State, 150 Hawai‘i 66, 77-79, 497 P.3d 81, 92-94 (2021); HRPP Rule 40(f), (i). Disposition of the petition is based upon findings of fact and conclusions of law entered by the circuit court, which are reviewable by the appellate court. Coulter, 116 Hawai‘i at 184, 172 P.3d at 496.

Bybypassing the HRPP Rule 40 process and allowing a direct appeal to the ICA from any HPA order denies the circuit court the opportunity to review claims, develop the record, conduct a hearing, make credibility determinations, and enter findings of fact and conclusions of law that

would aid appellate review. The ICA is not authorized or equipped to perform these functions contemplated by HRPP Rule 40.

In addition, the bill is internally inconsistent. The first paragraph of Section 1 describes perceived problems with the current process for judicial review of an HPA order setting a minimum term and proposes to correct the problems by allowing the prisoner to file a motion in the sentencing court, setting up the proposed amendment to HRS § 706-669 in Section 3 of the bill, but then the second paragraph of Section 1 abruptly states the purpose of the Act is to allow parties aggrieved by any HPA order to appeal directly to the ICA. There is no explanation why allowing all HPA orders to be appealed directly to the ICA addresses the concerns in Section 1, or how the overly broad proposed amendment to HRS § 641-11 is in any way related to the proposed amendment to HRS § 706-669.

Regardless, even if the bill's focus is HPA orders setting minimum terms, it would be inconsistent and waste judicial resources to allow a party to appeal to the ICA and concurrently file a motion seeking relief in the sentencing court. Once a notice of appeal is filed from an HPA order, there would be confusion whether the sentencing court would lose jurisdiction over the appealed case, and could not decide a motion under the statutory amendments. See State v. Ontiveros, 82 Hawai'i 446, 448-49, 923 P.2d 388, 390-91 (1996). In short, there would be piecemeal litigation, inefficiencies, and potential inconsistencies resulting from duplicative proceedings. See Greer v. Baker, 137 Hawai'i 249, 252-53, 369 P.3d 832, 836 (2016).

**B. Existing Procedures Allow for Meaningful Review of Minimum Term Orders and are Less Burdensome for Defendants and the Judiciary Than Those Proposed by Section 3 of the Bill**

The proposed amendment to HRS § 706-669 would create a process for review by the sentencing court of an HPA order setting the defendant's minimum term of imprisonment simply by filing a timely motion with the sentencing court. There is no requirement that the motion assert any alleged error in the HPA minimum term proceedings or the HPA order; the defendant need only timely request a review of "the minimum term proceedings." In the last full fiscal year before the pandemic, HPA set **2,171** minimum terms for **681** defendants. Hawaii Paroling Authority, 2019 Annual Statistical Report, at 3. Given the absence of any standards governing a defendant's request for judicial review of an HPA minimum term order, other than timeliness, the bill would drastically increase the number of requests for judicial review in the sentencing court and, naturally, result in more appeals to the ICA, which again would negate any gains from Act 90.

The HPA is not part of the Judiciary and the Judiciary does not have access to HPA records. 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"). The bill does not dictate which party is required to provide the sentencing court with HPA records and transcripts to decide the motion contemplated by proposed HRS § 706-669(9); as the moving party, that responsibility likely would fall to the defendant. By contrast, in HRPP Rule 40 proceedings, the circuit court can require the State to

answer the petition and the State is required to provide the circuit court with HPA records and transcripts necessary to evaluate the petition. HRPP Rule 40(d). Thus, the bill creates an additional burden on the defendant.

Moreover, any judicial review conducted under proposed HRS § 706-669(9), or the defendant's failure to file a timely motion under the new statutory scheme, likely would preclude any subsequent challenge by the defendant under HRPP Rule 40(a)(3) concerning the HPA's minimum term order or proceedings.

Proposed HRS § 706-669(9) states that upon a timely filed motion, the sentencing court "may conduct judicial review of the minimum term proceedings." Thus, it appears the sentencing court could exercise its discretion not to review the HPA proceedings, which could occur if the defendant has not alleged error or provided necessary records or transcripts. By contrast, HRPP Rule 40 requires the circuit court to review each claim in each petition and the relevant documents, and enter findings of fact and conclusions of law on the petition.

Also, the bill does not define the required level of "judicial review." It is unlikely that it requires a full and fair evidentiary hearing, as is required under HRPP Rule 40 upon an initial determination that the allegations, if true, would entitle the petitioner to relief. Instead it appears to require simply that the sentencing court conduct a nonhearing "review [of] the records and proceedings." Thus, the bill provides a less comprehensive judicial review process than what currently exists, potentially to the defendant's disadvantage.

Proposed HRS § 706-669(9) requires the sentencing court to modify the order or remand the case to the HPA if it finds one of the enumerated defects in the order. The required findings are substantially similar to those already required upon review of an HPA order setting the minimum term under HRPP Rule 40. *Fagaragan v. State*, 132 Hawai'i 224, 234, 320 P.3d 889, 899 (2014) ("With respect to HPA decisions establishing a minimum term, . . . 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. 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 . . . ." (cleaned up)).

### **C. Suggested Alternative**

Section 1 of the bill presumes that "public defenders" will continue to represent their clients in the motion filed in sentencing court under proposed HRS § 706-669(9). Indigent criminal defendants have a right to court-appointed counsel in their first appeal, *State v. Erwin*, 57 Haw. 268, 269, 554 P.2d 236, 238 (1976), and at HPA minimum term hearings, HRS § 706-669(3) (2014); *D'Ambrosio v. State*, 112 Hawai'i 446, 466, 146 P.3d 606, 626 (App. 2006), but that right has not been extended to judicial review of HPA minimum term proceedings, and this bill does not do so. In addition, a defendant may have terminated counsel's representation before the minimum term hearing and appeared self-represented in those proceedings and the first criminal appeal. Therefore, the bill does not ensure that a public defender, court appointed counsel, or private counsel will represent a defendant in the motion contemplated by this bill.

If the Legislature intends to codify the right to counsel for judicial review of HPA orders and proceedings establishing the minimum term, the Judiciary respectfully suggests the following amendment to HRS § 706-669:

(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 filed under the rules of penal procedure within 90 days of the issuance and service of the order fixing the minimum term of imprisonment challenging those proceedings.

The Judiciary's suggested alternative language would maintain the existing, more comprehensive, and less burdensome procedural protections in HRPP Rule 40 proceedings, while guaranteeing the right to counsel in that process.

Thank you for the opportunity to testify on this measure.



# Hawai'i Association of Criminal Defense Lawyers

February 6, 2023

H.B. No. 432: RELATING TO APPEALS

Chair David Tarnas  
Vice Chair Gregg Takayama  
Honorable Committee Members

The Hawai'i Association of Criminal Defense Lawyers (HACDL) is a local organization of lawyers practicing in state and federal courts. HACDL members include public defenders and private counsel who represent the criminally accused.

HACDL **SUPPORTS** H.B. No. 432 because it streamlines the review process without burdening appellate courts. Right now the only way for inmates to get courts to review the Hawai'i Paroling Authority's minimum term orders is by filing a creating a quasi-civil case petition. Indigent petitioners cannot rely on their court-appointed attorneys and have little assistance from a trained lawyer. Even then, the circuit court does not have to set a hearing or appoint a lawyer.

This bill allows all lawyers for the inmates—public defenders, court-appointed attorneys, and private counsel—to continue representation in the criminal case and raise legal issues through a simple motion. This will allow the indigent to remain represented by counsel. It will promote efficiency in our courts and should cut down on the number of petitions written by inmates without a lawyer while in prison. The bill also empowers circuit courts, where it feels necessary, to modify minimum term orders if it finds an error. This will save time instead of sending the case back to the HPA for another hearing.

HACDL hopes this much-needed review process will take effect soon.

**LATE**

**HB-432**

Submitted on: 2/8/2023 4:44:19 AM

Testimony for CMV on 2/8/2023 9:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Shannon Rudolph	Individual	Support	Written Testimony Only

Comments:

Support