The Judiciary, State of Hawai'i

Testimony to the Thirty-Second State Legislature
2023 Regular Session

Senate Committee on Judiciary
Senator Karl Rhoads, Chair
Senator Mike Gabbard, Vice Chair

Tuesday, February 14, 2023, at 9:40 a.m.
Conference Room 016 & Via Videoconference

by

Randy Pinal
Supervising Staff Attorney for the Intermediate Court of Appeals

Bill No. and Title: Senate Bill No. 977, Proposed S.D. 1, Relating to the Judiciary.

Purpose: Allows for judicial review of orders fixing minimum terms of imprisonment. Specifies that in any civil action brought by the petitioner seeking compensation of any kind or nature whatsoever as a result of, related to, or arising from a conviction and imprisonment for crimes for which the person was actually innocent, any recovery will offset, dollar for dollar, the total award made in the civil action against whom claims are asserted. Repeals section 661B-7, Hawaii Revised Statutes.

Judiciary's Position: Oppose.

This bill would amend Hawaii Revised Statutes (HRS) § 706-669 to allow a criminal defendant to file in the sentencing court a motion challenging minimum term proceedings conducted by the Hawaii Paroling Authority (HPA), and would amend HRS § 641-11 to allow an appeal from any order entered under the amended HRS 706-669 to the Intermediate Court of Appeals (ICA). The Judiciary opposes this bill because the current procedure provides meaningful review, this 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.

The written testimony submitted for this bill by the Honorable Shirley M. Kawamura, Deputy Chief Judge, Criminal Administrative Judge, Circuit Court of the First Circuit, demonstrates how existing court procedures allow for review of minimum term orders, are less burdensome and provide greater procedural safeguards than the amendments proposed by this bill, and would significantly impact circuit court operations. To address the concern of providing counsel for defendants challenging the HPA's minimum term orders, Judge Kawamura's testimony also contains the Judiciary's proposed alternative amendment to HRS § 706-669.

This written testimony separately demonstrates how **appeals proposed by the bill would create a substantial burden on the ICA, confusion, duplicative proceedings, and the potential for inconsistent results**.

Last year, in the 2022 session, the Legislature passed Senate Bill No. 2390, which became Act 90, to add another associate judge position on the ICA. 2022 Haw. Sess. Laws Act 90. In adopting Senate Bill No. 2390, the Legislature recognized the significant caseload of the ICA and the need for another judge to address it. 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.

This bill, however, would effectively nullify any gains in ICA productivity resulting from Act 90, and would likely create an even greater backlog of appeals. In 2019, the last full fiscal year before the pandemic, the HPA set **2,171** minimum terms for 681 defendants.[1] Under this bill, defendants could file a motion in the sentencing court from each HPA minimum term order. Further, once the sentencing court issues an order addressing such a motion, the defendant can then appeal the sentencing court's order to the ICA. This could conceivably result in hundreds of further appeals to the ICA each year, which would be an overwhelming number of additional cases. The ICA would need additional personnel to address such a significant increase in cases.

Moreover, the bill allows the sentencing court reviewing a motion under the proposed new HRS § 706-669(9) to order a remand to the HPA, while also allowing the defendant to appeal to the ICA from that same sentencing court order. In other words, an appeal to the ICA is allowed while the case also goes back to the HPA to potentially resolve any identified issue. This would create confusion, duplicative proceedings, the potential for inconsistent results, and the potential for wasted judicial resources.

Thank you for the opportunity to testify on this measure.

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[1] Hawaii Paroling Authority, 2019 Annual Statistical Report, at 3 (available online at https://dps.hawaii.gov/wp-content/uploads/2019/12/2019-Annual-Report.pdf).

The Judiciary, State of Hawai‘i

Testimony to the Thirty-Second State Legislature, 2023 Session

Senate Committee on Judiciary
Senator Karl Rhoads, Chair/
Senator Mike Gabbard, Vice-Chair/

Tuesday, February 14, 2023, 9:40 a.m.
Conference Room 016 & Via Videoconference

WRITTEN TESTIMONY ONLY

by

Shirley M. Kawamura
Deputy Chief Judge, Criminal Administrative Judge, Circuit Court of the First Circuit

Bill No. and Title: Senate Bill No. 977, Proposed S.D. 1, Relating to the Judiciary.

Purpose: Allows for judicial review of orders fixing minimum terms of imprisonment.

Judiciary's Position:

This testimony addresses only Part I of the bill and should be read in conjunction with the testimony submitted by Supervising Intermediate Court of Appeals Staff Attorney Randy Pinal. The Judiciary has no comment on Part II of the bill as proposed in SB977 SD1.

While the Judiciary understands the intent of the proposed legislation, the Judiciary provides the following comments and sets forth the impact the bill will have on 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 impact the bill will have on Judiciary operations both at the circuit and appellate level. To the extent that this bill will require additional resources at the circuit and appellate level, the Judiciary respectfully requests that appropriations be included for an additional circuit court trial division for the First Circuit Court (a new circuit court judge, two court clerks, and a law clerk position). 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 noted 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 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.

This 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.

Finally, there is currently a severe shortage of attorneys willing and able to take court appointed cases due to the low hourly fees paid for such work. In the event the above provision is adopted, or an alternative provision is included providing the right to counsel in the proposed "judicial review," the Judiciary respectfully requests the Committee consider including an amendment to section 802-5(b) of the Hawai'i Revised Statutes ("HRS") increasing the hourly rate of court appointed attorneys, perhaps consonant with federal rates.

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

At the outset the Judiciary would note that sentencing under the current statutory scheme requires the judge to sentence a defendant based on evaluation and consideration of specific delineated factors 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[1]) 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").[2] The petition is a relatively simple form which must be filled out 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

[1] *See, e.g.* HRS § 706-606.5 (mandatory minimum sentences for certain repeat offenders).
[2] *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).

and are sent to prisoners from the court on a regular basis. 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**.[3] Further, the court cannot dismiss a petition for want of particularity unless and until the petitioner is provided an opportunity to clarify the petition.[4] For a review of an HPA minimum term proceeding this requires asserting **facts** showing that there was a potential procedural[5] or due process[6] violation. Contrary to the preamble in the bill, petitioners are not required to submit anything other than the petition form; petitioners are not required to create their own record by attaching relevant documents and exhibits or requesting transcripts of the legal proceedings before the HPA, but they do have to allege facts in the petition that they believe are supported by the record. 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."[7] 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 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."[8] As such, these petitions are assigned directly 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.

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. 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

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[3] HRPP Rule 40(f).
[4] HRPP Rule 40(e).
[5] "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).
[6] 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).
[7] HRPP Rule 40(d).
[8] *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.

collaterally challenge their custody. Finally, the bill will significantly impact court operations, exponentially increasing the number of post-conviction adjudications, some with no basis, at a time when criminal courts are already operating with less than standard capacity.[9]

B. The Bill's Proposal Lacks a Clear Standard and Will be More Burdensome to Defendants and the Court

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 just prior to the pandemic, HPA set 2171 minimum terms for 681 defendants.[10] 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.

The bill in Section 1 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, 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,[11] that right has not been extended to a challenge of those proceedings.[12] 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 therefore it is not assured that a public defender, court appointed counsel, or private counsel will provide

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[9] In the First Circuit the criminal trial divisions have been operating without the defunded 18th Division since the middle of 2020.

[10] Hawai'i Paroling Authority 2019 Annual Statistics Report, Fiscal Year 2019, available online at https://dps.hawaii.gov/wp-content/uploads/2019/12/2019-Annual-Report.pdf

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

[12] "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).

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.[13] 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 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.[14] Inadvertently, this bill places 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 motions, 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 680 additional reviews[15] the circuit courts would be required to undertake per fiscal year.

C. 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, they 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;

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[13] *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").

[14] 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).

[15] The vast majority of these will 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, 681 minimum term proceedings for 681 defendants, that would mean an average of sixty-four judicial reviews per division

(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."[16] As noted above, the HPA is tasked with determining the minimum term of imprisonment a prisoner must serve before being eligible for parole.[17] The HPA is required to establish guidelines upon which these determinations can be made.[18] The HPA has been delegated broad discretion in establishing minimum terms.

With respect to the findings delineated above, 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.[19] In light of the comments above, the Judiciary respectfully requests that this measure defer to the process and proceedings pursuant to HRPP Rule 40, and **if the intent is to provide prisoners a statutory right to counsel in HRPP Rule 40 petitions challenging the minimum term proceedings before the HPA, the Judiciary respectfully recommends the amendment noted above.**

D. 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 on this measure.

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[16] HRS § 353-62
[17] HRS § 706-669
[18] *Id.*
[19] "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).

STATE OF HAWAII | KA MOKU'ĀINA 'O HAWAI'I
HAWAII PAROLING AUTHORITY
Ka 'Ākena Palola o Hawai'i
1177 Alakea Street, First Floor
Honolulu, Hawaii 96813

No. _____

TESTIMONY ON SENATE BILL 977, SD1
RELATING TO THE JUDICIARY

by
Edmund "Fred" Hyun, Chairman
Hawaii Paroling Authority

Senate Committee on Judicary
Senator Karl Rhoads, Chair
Senator Mike Gabbard, Vice Chair

Tuesday, February 14, 2023 – 9:40 a.m.
Conference Room 016

Chair Rhoads, Vice Chair Gabbard, and Members of the Committee:

The Hawaii Paroling Authority (HPA) OPPOSES SENATE Bill 977, SD1 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. In the last fiscal year, HPA set 1,348 minimum terms for 856 defendants. SB 977, SD1 would drastically increase the number of requests for judicial review.

- The Hawaii Administrative Rules (HAR) identified the criteria for MINIMUM hearings per HAR 23-700-22 and 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, SB 977, SD1 does not specify any process or standards for the Courts.

Thank you for the opportunity to present testimony in opposition to SB 977, SD1.

STATE OF HAWAIʻI

OFFICE OF THE PUBLIC DEFENDER

Testimony of the Office of the Public Defender, State of Hawai'i to the Senate Committee on Judiciary

February 12, 2023

S.B. No. 997: RELATING TO THE JUDICIARY

Chair Rhoads, Vice Chair Gabbard, and Members of the Committees:

The Office of the Public Defender strongly supports S.B. No. 997 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 sentences a defendant to an indeterminate term, the judge sets the maximum term of imprisonment. Months later, the HPA holds an administrative hearing. At this 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 only 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 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 by hand 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.

In regard to Proposed S.D. 1, the Office of the Public Defender takes no position on SECTION 5 and SECTION 6 [page 7, line 1 to page 8, line 3].

Thank you for the opportunity to testify on this measure.

To:	Hawai‘i State Senate Committees
Hearing Date/Time:	Tuesday., February 14, 9:40 AM
Place:	Hawai‘i State Capitol, Rm. 016 and Videoconference
Re:	Testimony of Hawai‘i Innocence Project in strong support of SB 977, Section 5.

Dear Senators Rhoads, Gabbard and Members of the Committees,

On behalf of the Hawai‘i Innocence Project, I strongly support SB 977. However, I would like to specifically address Section 5 of the proposed bill seeking to amend the current exclusivity section of Chapter 661B, Hawai‘i Revised Statutes. The current law precludes anyone who had been wrongfully imprisoned and is actually innocent from seeking Civil Rights claims and other legal claims against parties and limits the number of damages an innocent person can receive. In contrast, someone guilty of the crime can still sue the state without any limitations on the causes of actions they bring or the amount of damages they receive. We support amending the statute to allow for an offset of damages for the following reasons.

- Less than half of exonerees file federal civil rights or state tort lawsuits following exoneration. Of those who file, only 55% receive any monetary recovery[1]
- Those who do file have a long and difficult process. They must prove there was intentional official misconduct that violated their constitutional rights and resulted in their wrongful conviction, which are high thresholds to meet and particularly difficult to prove with the passage of time. In many instances, fault cannot be shown because the burden of proof is so high; in other instances, there is no viable claim because the conviction resulted from human error. Often the accused actors are protected by absolute or even qualified immunity doctrines that are impossible to overcome.
- These lawsuits often take years to resolve meaning exonerees aren’t receiving any financial assistance when they need it the most.
- The purpose of a global compensation statute is to provide financial compensation to exonerees regardless of fault.
- The inclusion of an offset provision can protect the state in instances where large civil settlements are won by the exoneree while preserving one's constitutional right to pursue civil litigation based on a violation of one's constitutional rights.

[1] Gutman, J., Sun, L. (2019). Why is Mississippi the Best State in Which to be Exonerated? An Empirical Evaluation of State Statutory and Civil Compensation for the Wrongfully Convicted. *Scholarly Commons*.

- Federal civil rights lawsuits hold bad actors accountable and incentivize agencies to make changes to prevent future wrongful convictions. A civil offset provision allows the state to recover money if an exoneree wins an award or settlement from the entities that are actually responsible for the wrongful convictions. The offset provision is a more fiscally responsible option than barring civil lawsuits.

- In instances where intentional misconduct is shown, then those bad actors should be revealed and the jurisdiction responsible for the wrongful conviction should be held accountable.

Those who have been wrongfully convicted and imprisoned while being actually innocent deserve to have their day in court and should not be limited exclusively to $50,000 a year, especially in cases where the unlawful misconduct was intentional.

Sincerely,

Kenneth L. Lawson

Kenneth L. Lawson

Co-Director, Hawai‘i Innocence Project

Hawai‘i Association of Criminal Defense Lawyers

February 13, 2023

S.B. No. 977: RELATING TO THE JUDICIARY

Chair Karl Rhoads
Vice Chair Mike Gabbard
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** S.B. No. 977 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 creating a quasi-civil case petition. This creates a new case and is separate from the original criminal case. 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.

If the circuit court denies the petition without a hearing and a lawyer, a lawyer will then be appointed if the inmate wishes to appeal. That costs the Judiciary, public defenders, and prosecutors time and resources. If the hearing should have been set, the appellate court sends the case back to the circuit court to set a hearing. At that point, there is an evidentiary hearing, which again is time consuming and expensive. If the petition is denied after the hearing, there may be a second appeal. Even then, the circuit court would order the HPA to conduct another minimum term hearing.

This bill allows all lawyers for the inmates—public defenders, court-appointed attorneys, and private counsel—to continue their representation by filing a motion in the original criminal case. This allows 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. The bill will limit the number of hearings and appeals. It will not only allow the indigent to keep their lawyers on the case, but it will save taxpayers time, resources, and money.

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

SB-977
Submitted on: 2/12/2023 1:42:44 PM
Testimony for JDC on 2/14/2023 9:40:00 AM

Submitted By	Organization	Testifier Position	Testify
Will Caron	Individual	Support	Written Testimony Only

Comments:

Judicial review of the Hawai‘i paroling authority’s order fixing the minimum term of imprisonment through a motion filed in the original criminal case allows public defenders to continue their representation of clients on appeal and raise errors that may have arisen at minimum term hearings. It will also reduce the number of petitions. Judicial review will provide greater uniformity in due process and statutory compliance by the Hawai‘i paroling authority. Please support SB977.

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February 13, 2023

Via: Web: www.capitol.hawaii.gov/submittestimony.aspx

COMMITTEE: **SENATE COMMITTEE ON THE JUDICIARY**
Chair: Sen. Karl Rhoads
Vice Chair: Sen. Mike Gabbard
DATE: Tuesday, February 14, 2023
TIME: 9:40 a.m.
PLACE: Conference Room 016 & Videoconferencing
State Capitol
415 Beretania Street
Honolulu, Hawai'i 96813

BILL NO.: **SB 977 SD1 – IN SUPPORT**

Honorable Senators: Karl Rhoads, Mike Gabbard and members of the Senate Committee on the Judiciary.

Thank you for providing me this opportunity to offer testimony in **strident support of Senate Bill 977 SD1.**

As background to our support of the Bill, I am one of the founding attorneys of the "Hawai'i Innocence Project" ("Project"). The Project is an upper level clinical program at the William S. Richardson School of Law. The Project provides individuals who have been wrongfully convicted, the last opportunity to seek exoneration, release, and redress. The project is manned by law students who are supervised by Co-Directors Prof. Ken

Lawson, Rick Fried, Esq. and practicing criminal defense attorneys, such as the undersigned. The supervising attorneys have combined legal experience in excess of 100 years.

Since the projects inception we have helped either through court exoneration or Governor clemency four individuals whose combined wrongful imprisonment totaled over 65 years. The most recent of which was just a few weeks ago - the Albert Ian Schweitzer case. Through these cases the Project has amply justified its necessity and existence.

INTRODUCTION

On June 26, 2015, the American Judicature Society-Hawaii Chapter formed this Special Committee on Redress for Unlawful Imprisonment ["Task Force"]. The two appointed

Co-Chairs of the Committee were The Honorable Jeannette H. Castagnetti and 9th Circuit Court of Appeals Judge Mark J. Bennett. I was appointed as the Reporter. The members of the Committee represented a wide range of State and Federal judicial representatives, legal, educational and community representatives from all of the interested stakeholders in the community.

Former Attorney General Douglas S. Chin asked the AJS to "review, comment on, and make recommendations" regarding a possible compensation statute for wrongfully imprisoned individuals. The Committee was tasked with the duty to review and address four main issues: (1) the factual circumstances under which a person would be eligible for redress, (2) the legal standard and process for eligibility, (3) the types of redress that would be available, including damages, health care, tuition, child support payments, fees and costs, and (4) what the government entity would pay.

The first meeting of the Committee took place on July 9, 2015 at which time the charge was officially presented and the Committee began its discussion of the issues involved.

At the initial meeting, the Committee engaged in a preliminary discussion of the issues and was asked to offer comments and a response to the following questions:

1. Should persons "wrongfully" convicted and imprisoned be entitled to monetary or other redress?

2. If so, what should be the grounds for such redress (actual innocence, something less, etc.)?

3. Who should decide (court, agency, or board)?

4. What should the standard of proof be (clear and convincing, preponderance), and should there be anything that acts to shift the burden from the claimant (prior court ruling establishing innocence, etc.)?

5. Should there be any damages other than money (former HB 148 had a very long list)?

6. Should the damages be fixed based on time, should they be at the discretion of the court/entity awarding the damages, or should they be "not less than" or "not more than" a particular amount?

7. Should there be additional avenues of redress (as former HB 148 seemed to allow), or should any new remedy be an exclusive remedy?

8. Should any statute make clear the limited nature of any waiver of sovereign immunity?

9. What should be the end product of the Committee, e.g., a report with recommendations, a proposed statute, or something else?

The committee addressed the above questions and reached consensus on each question. The committee decided to schedule a follow-up meeting to review compensation statutes from those jurisdictions which had passed such legislation, as well as available Innocence Project statistics and information. I volunteered to obtain, collate and disseminate the above information to the committee members.

The second meeting of the Committee took place on October 6, 2015 at which time the committee reviewed the compensation statutes from Alabama, California, Connecticut, District of Columbia, Florida, Illinois, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia and Wisconsin. Attached as Appendix D is a copy of the above statutes. The committee also reviewed the national Innocence Project Report "Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation."

The committee then decided that a subcommittee be established to prepare a draft of proposed legislation to be reviewed by the committee as a whole. The subcommittee was comprised of the following

volunteers: the Honorable Jeannette H. Castagnetti, Hon. Mark J. Bennett, Prof. Kenneth Lawson, Joshua A. Wisch, Esq., and the undersigned.

Members of the subcommittee met on November 4, 2015. The subcommittee considered language involving eligibility for compensation, evidence of innocence, evidence of a claim, burdens of proof, decision making entities, exclusions, amounts of compensation, types of eligible benefits, attorney's fees and tax implications, gleaned from the various statutes of Alabama, Colorado, Florida, Louisiana, Minnesota, Mississippi, New Hampshire, New Jersey, Texas, Vermont, Washington and Wisconsin. Attached as Appendix F is a composite of the various statutory provisions considered by the subcommittee. The subcommittee then proposed a draft statute. The draft was then circulated to the members as a whole for input, review, possible additions and amendments.

Members of the committee as a whole met on November 23, 2015. There was much discussion as to various provisions of the draft statute. Subsequent to several agreed upon modifications and amendments to the proposed draft, the members reached a consensus on a final draft.

The draft AJS Task Force proposed language was modified by the Legislature before its adoption as H.R.S.§ 661 et. seq. The statute has been in its present state since 2016. There are some significant issues in its present form. I believe that the proposed amendment addressing §661B titled "Offset," addresses one main concern of the statute. This much needed amendment will allow someone who has been wrongfully incarcerated the ability to seek redress in alternative ways – through either the present statute or via a civil court proceeding. However, if the exoneree does elect to proceed on a civil remedy she/he would not be able to seek duplicative compensation from the compensation fund.

This I believe would allow for appropriate compensation to those who desperately need it.

CONCLUSION

Any proposed "innocence compensation" legislation will normally have detractors especially in these fiscal times. This amendment will not put any additional fiscal burdens on the State, so any fiscal arguments against this measure are dispelled. In short I believe this bill strikes the necessary balance between the needs of the wrongfully convicted, as well as the State, therefore I wholeheartedly **support** this bill.

If you have any questions or need further clarification please feel free to contact me.

Sincerely,

William A. Harrison

February 12, 2023

THE SENATE COMMITTE ON JUDICIARY

To: Senator Karl Rhoads, Chair
Senator Mike Gabbard, Vice Chair
Senator Brandon J.C. Elefante
Senator Joy A. San Buenaventura
Senator Brandon Awa

Re: S.B. 977, S.D. 1, Proposed
Testimony of Virginia E. Hench, Attorney No. 6821, Co-Founder and Founding Director The Hawai'i Innocence Project, in Strong Support.

Dear Chair Rhoads, Vice Chair Gabbard, and Members of the Committee:

I write in strong support of S.B. 977, S.D. 1, proposed, which would amend Hawai'i's actual innocence compensation statute, H.R.S. Ch. 661B, to make the language of the statute more consistent with actual practice in the Hawai'i Courts.

Hawai'i is one of a majority of states which, along with the District of Columbia and the federal government, provides compensation for persons who have been wrongfully convicted, despite being innocent of the charges, who have served all or part of the sentences imposed as a result of the wrongful conviction, and who have been exonerated and released after their innocence has been legally established and their convictions vacated.

The proposed legislation, S.B. S.B. 977, S.D. 1, is needed to bring the existing compensation statute in line with the realities of post-conviction litigation. When a person's innocence is established based on evidence that excludes them as the perpetrator, compensation should not be denied to them based on whether or not certain words appear in the order. A pardon based on actual innocence should also be sufficient for the innocent person to receive compensation. The proposed changes are necessary to avoid compounding the unfairness of a wrongful conviction, and to help the exonerated person recover and make a new start in life.

I therefore respectfully urge that S.B. 977, S.D. 1, proposed, be passed, making Hawai`i's compensation statute more fair and more effective in achieving the purpose of compensating innocent exonerees.

Respectfully submitted,

Virginia E. Hench