

**Testimony of the Office of the Public Defender,  
State of Hawaii to the Senate Committee on Judiciary and Labor**

Hrg: Monday, Feb. 11, 2008, 9:00 a.m.  
1 copy required

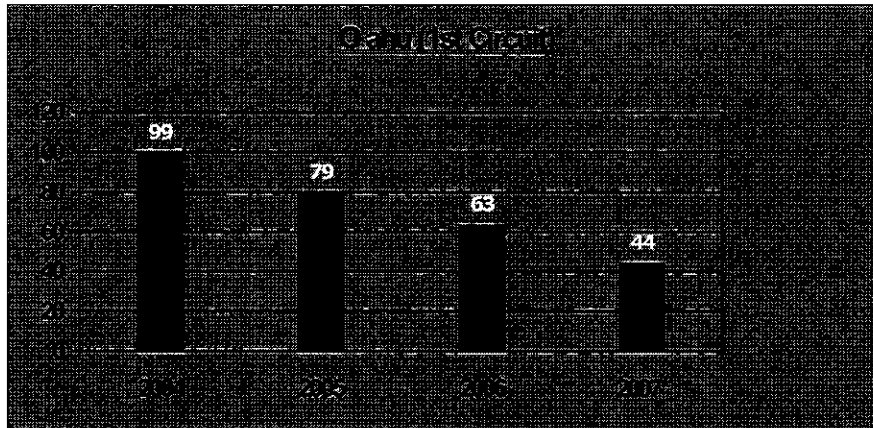
**S.B. NO. 3204: RELATING TO POST CONVICTION PROCEEDINGS**

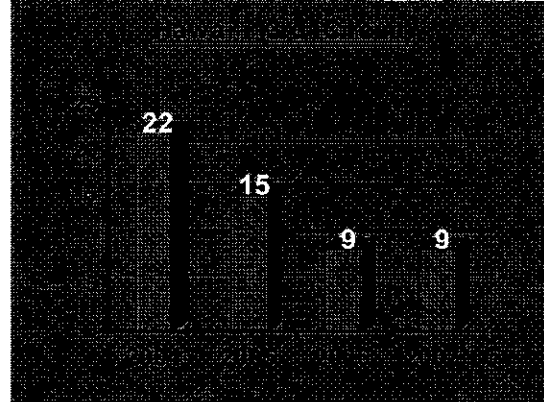
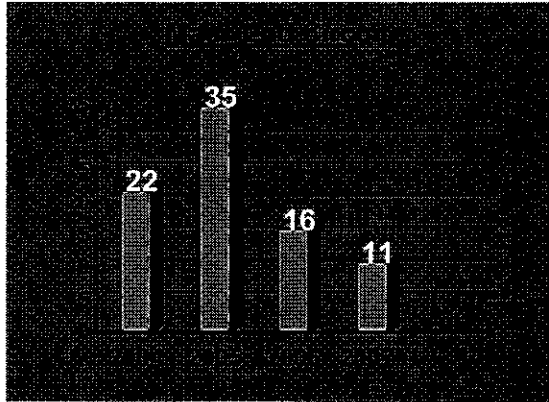
Chair Taniguchi and Members of the Committee:

We oppose S.B. No. 3204 which seeks to impose a five-year limitation on the time in which a person who has been convicted of a crime is able to file a petition for post-conviction relief. The bill also severely limits the ability of a convicted person to file second or successive petitions. We believe that such a limitation on the ability to seek relief in the courts for a wrongful conviction is patently unfair and potentially penalizes a petitioner for circumstances which might be beyond his/her control.

The purpose of this bill appears to be to limit the number of post-conviction petitions being filed by prisoners. However, statistics compiled from actual Judiciary files illustrate that such petitions have actually been on the decrease in recent years. [See tables below]

**Number of Post-Conviction Petitions Filed**





Thus, when you examine the actual caseload statistics, there is no demonstrated need for this legislation since petitions are already on the decline. Indeed, the imposition of a strict time limitation could very well have the opposite effect and increase petition filings since defendants will become concerned about the time lapse even if they are unsure about the grounds for their petitions.

The experience in the federal system portend the predicted increases in post-conviction proceedings if this measure should pass. The language in S.B. No. 3204 is very similar to limitations imposed on federal habeas corpus petitions through the Antiterrorism and Effective Death Penalty Act of 1996. Federal Bureau of Justice Statistics show that, following the passage of that act, between 2004 and 2005, state prisoner petitions filed in federal court increased nearly 5% and federal prisoner petitions filed in federal court increased by more than 15%.

The proposed changes will also increase the workload of the circuit courts and the complexity of post-conviction proceedings. Currently, the circuit court routinely summarily denies a great number of post-conviction petitions as containing no colorable claim. However, the proposed changes contain a number of exceptions to the five-year limitation period. Because of the drastic nature of the five-year limitation and the accompanying ban against successive petitions, the circuit court will inevitably be forced to conduct full hearings and the parties will have to litigate the applicability of the exceptions to the time bar and successive petition bar. These proceedings will invoke the necessity for more court time and potentially lead to more cases on appeal.

The five-year limitation could also work grave injustices to wrongfully convicted prisoners. As an example, the DNA testing statute passed by this legislature in 2005 contains provisions for post-conviction DNA analysis of evidence upon the petition of a convicted defendant. See HRS §§844D-121 through 133. The DNA law has no time limitation. Under the change proposed by this bill, a discovery of DNA evidence which exonerates the defendant but occurs five years following the conviction would be barred from presentation to the court. There is an exception which tolls the running of the five-year period until “the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence. . . .” However, if the defendant was represented by counsel throughout the trial process and for the five years following the conviction, and counsel neglected to investigate the DNA evidence, such neglect could be imputed to defendant and the five-year limitation would thereby ban the filing of a petition.

In summary, this bill ignores the fact that it is fairly commonplace these days for persons who were convicted by a court of law to be exonerated far more than five years following their convictions. Many have spent decades in state and federal prisons – even on death row. This measure could unfairly deny an innocent person the means to challenge his/her conviction by imposing an arbitrary time limitation on the filing of a habeas corpus petition and an arbitrary prohibition against the filing of a second or successive petition. The bill seeks to do this in the face of statistical evidence demonstrating that the current system is not being abused or is in need of an overhaul.

Thank you for the opportunity to comment on this bill.



**LATE**

**TESTIMONY OF THE STATE ATTORNEY GENERAL  
TWENTY-FOURTH LEGISLATURE, 2008**

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**ON THE FOLLOWING MEASURE:**

S.B. NO. 3204 RELATING TO POST CONVICTION PROCEEDINGS.

**BEFORE THE:**

SENATE COMMITTEE ON JUDICIARY AND LABOR

**DATE:** Monday, February 11, 2008 **TIME:** 9:00 AM

**LOCATION:** State Capitol, Room 016  
*Deliver to: Committee Clerk, Room 219, 1 copy*

**TESTIFIER(S):** Mark J. Bennett, Attorney General  
or Lisa M. Itomura

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Chair Taniguchi and Members of the Committee:

The Attorney General supports this bill, which limits post-conviction litigation. For the reasons set forth below, however, we request that this bill be amended, at least in part, with the text of S.B. No. 2967, which has also been referred to this Committee.

S.B. No. 3204 proposes to amend chapter 660, Hawaii Revised Statutes (HRS), to add a statute of limitations on the filing of complaints under that chapter and a limitation on the filing of multiple petitions. Pursuant to these new amendments, defendants would be free to file complaints within a period of five years from the last of four separate dates:

- (1) The date on which a judgment becomes final by the conclusion of direct review or the expiration of time for seeking such review;
- (2) The date on which an impediment to filing a complaint created by unconstitutional government action is removed;
- (3) The date on which a newly created constitutional rule was initially recognized and made retroactively applicable to cases on collateral review; or
- (4) The date on which the facts of the claim or claims

presented could have been discovered through due diligence, and the newly discovered evidence, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by a preponderance of the evidence that no reasonable fact-finder would have found the petitioner guilty of the offense.

Presently, defendants convicted in state court may challenge judgments and custody in three separate ways. They may file a direct appeal to the Intermediate Court of Appeals and the Hawaii Supreme Court; they may file a writ of habeas corpus with the United States District Court after meeting certain requirements; or they may file a petition for post-conviction relief in state courts pursuant to Rule 40 of the Hawaii Rules of Penal Procedure (HRPP) and chapter 660, HRS. Of these three, a petition for post-conviction relief is the only method without a statute of limitation, and defendants have repeatedly, some vexatiously, used this method to file challenges to their convictions and custody long after the events at issue. Addressing the merits of such claims and conducting retrials or new hearings, if necessary, are difficult when the challenges are made in such a seriously delayed fashion. This bill ensures that review of convictions and custody is conducted while the record and witnesses are more likely to be available. It promotes the finality of judgments and sentences and other custodial decisions while allowing defendants a reasonable period in which to discover, contemplate, prepare, and file actions challenging judgments and custody.

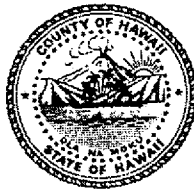
In comparison, the federal Anti-Terrorism and Effective Death Penalty Act of 1996 imposes a one-year statute of limitations on the filing of a federal writ of habeas corpus, with numerous tolling periods for such things as the pendency of

state appeals. States such as Virginia also impose a one-year statute of limitations on the filing of post-conviction relief, while other states impose statute of limitation periods anywhere from thirty days with tolling periods (Kansas) to three years (Iowa).

The Permanent Committee on Rules of Penal Procedure and Circuit Court Criminal Rules recently proposed to amend Rule 40, HRPP, to add a statute of limitations for post conviction proceedings. The Hawaii Supreme Court rejected the Permanent Committee's proposal, citing in part "the Legislature's authority with regard to the privilege of the writ of habeas corpus" under article I, section 15 of the State Constitution. Both S.B. No. 3204 and S.B. No. 2967 propose to add a statute of limitations to chapter 660, HRS, based on the text proposed by the Permanent Committee. However, S.B. No. 2967 is more comprehensive in scope, in that it covers every claim with respect to conviction, custody, and prison conditions, whereas S.B. No. 3204 does not.

We respectfully urge the Committee to replace the relevant portion of S.B. No. 3204 with the text of S.B. No. 2967.

**JAY T. KIMURA**  
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**OFFICE OF THE PROSECUTING ATTORNEY**

**LATE**

**Testimony In Support of SB 3204**  
**Relating to Post-Conviction Proceedings**

Hearing before the Senate Committee on the Judiciary  
Monday, February 11, 2008, 9:00 a.m.  
Deliver to Committee Clerk, Conference Room 016

Submitted by Charlene Y. Iboshi, First Deputy Prosecuting Attorney for  
Jay T. Kimura, Prosecuting Attorney for Hawai'i County

TO: Chair Taniguchi, and Members of the Committee:

Request for Legislative action: The following history of establishing time limits for filing post-conviction proceedings under Judicial Rules and habeas corpus proceedings and limits on successive complaints arose based upon the attached Hawaii Supreme Court Order filed on November 7, 2007, rejecting a proposed judicial rule change:

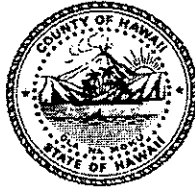
With the growing number of successive and untimely post-conviction collateral attacks on convictions after direct appeal, the Hawaii judiciary and parties were concerned that there is no finality of court judgments. Evidentiary hearings were done many years after events, so memories, notes, and transcripts have faded. Successive post-conviction petitions encouraged proponents to delay raising all the issues in a timely manner. Many claims especially against defense counsel were groundless, but required a hearing. Generally, the procedures and practice to attack the convictions collaterally have been under the Hawaii Rules of Penal Procedures.

Rule 40, Post-conviction proceeding: (a) Proceedings and grounds: The post-conviction proceeding established by this rule shall encompass all common law and statutory procedures for the same purpose, including habeas corpus and coram nobis; provided that he foregoing shall not be construed to limit the availability of remedies in the trial court or on direct appeal.

The Judiciary's Permanent Committee on the Rules of Penal Procedures reviewed the issue comprehensively and with much debate. The Committee is comprised of a well-balanced array of practitioners, including the trial judges from all the circuits, the State Public Defender, and four experienced, private defense counsels, and prosecutors. The Permanent Committee on the Rules of Penal Procedure worked on a rule change that would protect the defendant's rights, but provide reasonable time limits for filing the post-conviction petitions (commonly considered the Habeas Corpus Privilege) and limits to successive petitions. These reasonable limits would encourage timely and complete collateral attacks on the conviction.

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**OFFICE OF THE PROSECUTING ATTORNEY**

Testimony in Support of SB 3204, cont'd:

The Judiciary's Permanent Committee on the Hawaii Rules of Penal Procedures worked on the proposed Rule 40 change for over a year. Under the proposed Rule change, the judiciary still retains the right to consider petitions where new evidence or other circumstances show that the defendant is innocent of the crime.

Much of the time was debating the time restriction. The effort to restrict successive post-conviction petitions and untimely petitions is a national effort. The federal restriction on collateral attacks on the conviction is one (1) year after the direct appeal is final.

The five (5) year time limit was a "compromise" vote within the Judiciary's Permanent Committee on the Rules of Penal Procedure. With the generous five year limit after the direct appeal is final, along with other safe guards for true "innocent" defendant cases allowed, the Judicial Committee agreed to pass the Rule and submit proposed Rule 40, Hawaii Rules of Penal Procedures changes to the Hawaii Supreme Court for approval. In the November 7, 2007, attached Order, the Hawaii Supreme Court explains their position that Legislative changes, rather than judicial rule changes, are required to provide time limits and limits on successive filings under the Habeas Corpus statute.

We appreciate the responsiveness of this Senate Committee to review the proposed changes to Habeas Corpus, Chapter 660, Hawaii Revised Statutes, based upon the Hawaii Supreme Court's Order. We would recommend for clarity, to expand the SB 3204's language to include "complaint filed under this chapter, or any post-conviction judicial proceedings filed under Rule 40 of the Hawaii Rules of Penal Procedures." This expanded language should cover the concerns of the Hawaii Supreme Court. Currently, there are procedural limits under the Rule 40, Post-conviction Proceedings. Clearly, it should be expressed that the Legislature intends to allow the Judiciary to impose the procedural rules and regulations limits that are currently adopted in our current Rule 40, Hawaii Rules of Penal Procedure.

In conclusion, we support Senate Bill 3204, along with the recommended changes. Thank you for considering our testimony and for your responsiveness to support judicial economy and finality of judgments, while protecting the rights of defendants convicted of crimes.

Attachment: Hawaii Supreme Court Order, November 7, 2007 Re: Hawaii Rules of Penal Procedure, Rule 40



IN THE SUPREME COURT OF THE STATE OF HAWAII

In the Matter of the  
HAWAII RULES OF PENAL PROCEDURE

CLERK, APPELLATE COURTS  
STATE OF HAWAII  
E. R. RINDINO

2007 NOV - 7 AM 10:33

FILED

ORDER

(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

The Permanent Committee on Rules of Penal Procedure and Circuit Court Criminal Rules proposed amendments to Rule 40 of the Hawai'i Rules of Penal Procedure (HRPP) that would add the following two sections:

**(j) Time limits.** A five (5) year period of limitation shall apply to a petition filed for post-conviction relief under this rule. The limitation period shall run from the last of:

(1) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(2) the date on which the impediment to filing an application created by a governmental action in violation of the Constitution of the State of Hawai'i or the Constitution of the United States that prevented the filing of the petition for post-conviction relief was removed;

(3) the date on which a newly created constitutional rule under the Constitution of the State of Hawai'i or the Constitution of the United States was initially recognized and made retroactively applicable to cases on collateral review by the Supreme Court of the State of Hawai'i or the Supreme Court of the United States; or

(4) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence; and the newly discovered evidence, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by a preponderance of the evidence that no reasonable fact finder would have found the petitioner guilty of the offense.

**(k) Successive petitions.** A claim presented in a second or successive post-conviction petition under this rule that was not presented in a prior petition shall be dismissed unless:

(1) the petitioner shows that the claim relies on a previously unavailable new rule of constitutional law under the Constitution of the State of Hawai'i or the Constitution of the United States, made retroactive to cases on collateral review by the Supreme Court of the State of Hawai'i or the Supreme Court of the United States; or

(2) the factual basis for the claim could not have been discovered previously through the exercise of due diligence, and the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

After study and consideration of the comments we received, including consideration of the Legislature's authority with regard to the privilege of the writ of habeas corpus, we believe adoption of the proposal would be inappropriate. See HRPP Rule 40(a) ("The post-conviction proceeding established by this rule shall encompass all common law and statutory procedures for the same purpose, including habeas corpus and coram nobis . . ."); Article VI, Section 7 of the Hawai'i Constitution ("The supreme court shall have power to promulgate rules and regulations in all civil and criminal cases for all courts relating to process, practice, procedure and appeals, which shall have the force and effect of law."); and Article I, Section 15 of the Hawai'i Constitution ("The power of suspending the privilege of the writ of habeas corpus, and the laws or the execution thereof, shall never be exercised except by the legislature, or by authority derived from it to be exercised in such particular cases only as the legislature shall expressly prescribe."). Therefore,

IT IS HEREBY ORDERED that the proposed amendments to  
HRPP Rule 40 are rejected.

DATED: Honolulu, Hawai'i, November 7, 2007.



Hawai'i. Tokoyama



Kama E. Sullivan



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February 10, 2008

THE HONORABLE BRIAN T. TANIGUCHI, CHAIR  
THE HONORABLE CLAYTON HEE, VICE-CHAIR  
COMMITTEE ON JUDICIARY AND LABOR

THE SENATE  
THE TWENTY-FOURTH LEGISLATURE  
REGULAR SESSION OF 2008  
STATE OF HAWAII

TESTIMONY OF BENJAMIN M. ACOB,  
PROSECUTING ATTORNEY FOR THE COUNTY OF MAUI,  
IN SUPPORT OF SENATE BILL NO. 3204  
RELATING TO POST CONVICTION PROCEEDINGS

The Honorable Chairpersons and Committee Members:

The Department of the Prosecuting Attorney for the County of Maui strongly supports S.B. 3204 Relating to Post Conviction Proceedings.

The purpose of this Bill is to impose limitations on the filing of post-conviction petitions. Specifically, this Bill seeks to: 1) impose a five (5) year statute of limitation period for the filing any post-conviction petition, such as those typically filed pursuant to Rule 40 of the Hawaii Rules of Penal Procedure; and 2) limit the successive filing of those petitions.

For the past two years, the Judiciary's Permanent Committee on the Hawaii Rules of Penal Procedure ("HRPP Committee"), which is comprised of judges, prosecutors and defense attorneys, carefully studied and debated the issues relating to this Bill. Last year, the HRPP Committee submitted a proposal to the Hawaii Supreme Court for approval. However, in November of 2007, the Hawaii Supreme Court rejected the proposal. In doing so, the Court opined, "[w]e believe the adoption of the proposal would be inappropriate". In essence, the Court concluded that under the Hawaii Constitution, only the Legislature has the power to affect

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the "privilege of the writ of habeas corpus". This Bill seeks to accomplish the same goals and objectives of the HRPP Committee's proposal.

Under the current HRPP Rule 40, there are few, if any, limitations for filing a writ of habeas corpus. This is problematic for several reasons. First, there is no finality to the case. For example, we have had cases where petitions were filed more than ten (10) years after the case became "final". In those cases, difficulties responding to such petitions arose due to the destruction of defense counsel records, transcripts and evidence. In addition, some witnesses either died or could not remember the details of the case. Indeed, it is extremely difficult to adequately respond to specific allegations involving something that occurred years ago.

Second, because there is no finality to a judgment under the current rules, there is uncertainty as to how long evidence and records should be retained. In extreme cases, a new trial can be ordered years after the judgment became "final". Because of this uncertainty, our Department attempts to preserve all records and evidence in the most serious cases.

Third, under the current rule, there is no provision specifically addressing the filing of successive petitions. This sometimes leads to abuse of the system, harassment, and judicial inefficiency. For example, some petitioners file multiple petitions during the pendency of an initial petition. Others file petitions soon after the first petition is finally adjudicated. Some petitioners file a petition years after the judgment of the first petition was final. Obviously, this is not only an abuse of the writ, but also inefficient piecemeal litigation.

Finally, the current rule is very similar to the statute of limitations imposed in the federal system. There, however, a petitioner is given only ONE YEAR to file a federal claim following a final judgment in state court. Like the federal law, this Bill allows for certain enumerated exceptions for both to the limitations period and the filing of successive petitions.

In closing, our Department recognizes how truly important the writ of habeas corpus is to the criminal justice system in Hawaii. We believe that this Bill fairly and justly imposes some responsibility upon the petitioner to exercise his or her rights in a timely and judicially efficient manner.

Accordingly, for the reasons stated above, our Department strongly supports H.B. 3204. Thank you for the opportunity to testify.

(H.B. 3204, Relating to Post Conviction Proceedings.)