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February 21, 2024

**TESTIMONY OF THE OFFICE OF THE PUBLIC DEFENDER STATE OF HAWAII
TO THE COMMITTEE ON FINANCE**

**H.B. No. 1608: RELATING TO THE OFFICE THE PUBLIC DEFENDER
February 22, 2024 at 11:00 a.m.**

**Chair Kyle T. Yamashita
Vice Chair Lisa Kitagawa
Honorable Committee Members**

The Office of the Public Defender (OPD) supports this bill.

Effective July 1, 2021, due to budget cuts resulting from the COVID-19 pandemic, the Legislature defunded six positions at the OPD – PN 100689 (PD Investigator – Kauai Branch), PN 107819 (DPD III – Oahu Branch), PN 101672 (DPD III – Hilo Branch), PN 102108 (DPD I – Oahu Branch), PN 100603 (Office Assistant I – Oahu Branch) and PN 101700 (Office Assistant I – Oahu Branch). This bill seeks to fund/restore four DPD positions.

The mission of the OPD is to provide legal representation for indigent defendants charged in state court with offenses involving the possibility of incarceration. Both the U.S. and Hawaii Constitutions require that every criminal defendant be afforded the right to counsel. Hawaii Revised Statutes, Chapter 802, establishes that the OPD provide the right to counsel to indigent defendants. Thus, the services provided by the OPD are mandated both constitutionally and statutorily. It is important to note, however, that not only are criminal defendants afforded the right to counsel, but also the right to effective assistance of counsel.

For the criminal justice system to operate efficiently and in accordance with constitutional and statutory mandates, it is essential that the OPD be adequately staffed. Deputy Public Defenders (DPDs) appear daily on behalf of clients in the Circuit, District, and Family Courts of every circuit in the state. DPDs also represent indigent defendants in the Hawaii Supreme Court and the Hawaii Intermediate Court of Appeals. DPDs represent sentenced defendants before the Hawaii

Paroling Authority and individuals subject to involuntary hospital commitment petitions. In addition to the traditional courts, the OPD staffs specialty courts across the state such as the HOPE¹ program courts, drug courts, mental health courts, environmental courts, the Veteran's treatment courts and the Oahu and Maui Community Outreach Courts.²

It would be virtually impossible for the vast majority of cases to move through the criminal justice system if the OPD is understaffed for extended periods of time. Case overloads caused by inadequate staffing will result in defendants charged in criminal cases from obtaining assigned counsel in a timely manner which will, in turn, result in the continuances of cases, backlogs in the courts and other major problems in the justice system. But, more significantly, exceeding a maximum caseload for a DPD may result in the ineffective assistance of counsel.

The 6th Amendment Center, an organization that provides expert support to state and local policy makers to ensure that indigent defendants receive constitutionally effective legal counsel, cautions:

The role of the indigent defense system, therefore, is to ensure that the individual attorneys have access to ongoing training, are properly supervised, are provided with sufficient resources, and have enough time to effectively represent every single client. Where a defendant is represented by an attorney who lacks the time necessary to properly investigate the case, to meet with the defendant, to file pretrial motions, to study the prosecution's plea offer, etc. – essentially, where the attorney is forced to triage services in favor of one client over another – then both the system and the attorney are in breach of their ethical and constitutional obligations to that defendant.[³]

Put another way, the National Association of Criminal Defense Lawyers (NACDL) also cautioned:

The guarantees of the 6th Amendment are not met simply by providing the defendant a warm body with a bar card. An accused is in need of and is entitled to

¹ “HOPE” is an acronym for “Hawai`i’s Opportunity Probation with Enforcement,” a high-intensity supervision program to reduce probation violations by drug offenders and others at high risk of recidivism.

² The mission of the Community Outreach Court (COC) is to assist non-violent offenders charged with offenses which target the homeless community to attend court sessions and resolve their outstanding cases.

³ Sixth Amendment Center, “Sufficient Time to Ensure Quality Representation.” <https://6ac.org/the-right-to-counsel/national-standards-for-providing-the-right-to-counsel/sufficient-time-to-ensure-quality-representation-aba-principle-4/#:~:text=This%20means%20that%20the%20appointed,attorneys%20owe%20to%20their%20clients>.

a zealous, capable advocate who can provide effective assistance consistent with prevailing professional norms. When public defense attorneys are burdened with excessive caseloads, they are unable to fulfill their ethical and constitutional responsibilities to their clients and the community.

Ineffective assistance of counsel claims pursuant to a post-conviction petition to set aside a conviction pursuant to Rule 40 of the Hawai'i Rules of Penal Procedure or a review by an appellate court may lead to the vacating of convictions and pleas. Excessive caseloads that drive DPDs into compromising ethical situations will eventually lead to the OPD having to reject cases, forcing the courts to appoint outside counsel (i.e. court-appointed counsel) to represent indigent defendants.⁴ The cost of court-appointed counsel when aggregated will easily exceed the cost of funding the proposed positions.⁵

In the Senate version of this bill, the OPD requested an amendment to specify that the funding for the four DPD positions be DPD III positions (BUF151). This amendment was accepted and the Senate version of the bill funds four DPD III positions at a cost of \$627,300. The OPD is asking for a similar amendment to H.B. No. 1608. Currently, the OPD has two vacant DPD I positions in the Oahu Branch and four vacant DPD II positions (one each in the Hilo and Kona Branches and two in the Maui Branch). The OPD has no vacant DPD III positions statewide. The OPD plans to divide the four DPD III positions among the four Neighbor Island offices. Due to

⁴ In 1973, the National Advisory Commission on Criminal Justice Standards and Goals (NAC), established and funded by the federal government, recommended annual maximum caseloads for public defense programs. The NAC's recommendations have had – and continue to have – significant influence in the field of public defense respecting annual caseloads of public defenders. Specifically, the NAC recommended that annual maximum caseloads 'of a public defender office should not exceed the following: felonies per attorney per year: not more than 150; misdemeanors (excluding traffic) per attorney per year: not more than 400; juvenile court cases per attorney per year: not more than 200; Mental Health Act cases per attorney per year; not more than 200; and appeals per attorney per year: not more than 25. National Legal Aid and Defender Association, "National Advisory Commission on Criminal Justice Standards and Goals, The Defense (Black Letter), Standard 13.12 Workload of Public Defenders. <https://www.nlada.org/defender-standards/national-advisory-commission/black-letter>.

In a recent report to the Department of Budget and Finance, the OPD estimated that its attorneys exceed the national standard for felony cases by 250% and the national standard for misdemeanor cases by 444%.

⁵ H.B. No. 1913 seeks to raise the rate for rate for court-appointed attorneys in the Family Court to \$150/hour. H.B. No 1914 seeks to raise the rate for court-appointed attorneys in the criminal courts to \$150/hour. The current rate for court-appointed attorneys in the Family Court and criminal courts is \$90/hour. The hourly wage for a DPD III position is \$48.34/hour (\$100,560 salary divided by 2,080 working hours in a year).

The hourly rate for court-appointed attorneys in federal cases is \$172/hour.

the higher cost of living on the Neighbor Islands, it is easier to fill DPD III positions (\$100,560 salary) than DPD II positions (\$84,400 salary).⁶

The OPD appreciates the sponsors of this bill for recognizing the critical importance of restoring positions to our office. Thank you for the opportunity to comment on H.B. No. 1608.

⁶ The salary issue is exacerbated by the fact that the OPD's "competitor" for persons seeking employment as a government criminal law attorney, the prosecutors' offices on each island, pays approximately \$15,000 to \$20,000 more than the OPD at every level.



Committee: Finance
Hearing Date/Time: Thursday, February 22, 2024 at 11:30am
Place: Conference Room 308 & Videoconference
Re: **Testimony of the ACLU of Hawai'i in SUPPORT of HB1608 HD1 Relating to the Office of the Public Defender**

Dear Chair Yamashita, Vice Chair Kitagawa and Members of the Committee:

The American Civil Liberties Union of Hawai'i **SUPPORTS HB1608 HD1** which appropriates funds for four deputy public defender positions within the Office of the Public Defender and requires that one of the positions be assigned to the family court section.

The U.S. Supreme Court's landmark case of *Gideon v. Wainwright*,¹ decided 60 years ago, established the fundamental right to an attorney for people accused of crimes and facing incarceration, regardless of their wealth or poverty. Since *Gideon*, the right to counsel has been expanded to include [children](#) in juvenile delinquency proceedings, [probationers](#) in probation revocation proceedings, and people charged with [misdemeanors](#). The Supreme Court has established that the right includes an obligation for lawyers to correctly advise their clients about certain [immigration consequences](#) of criminal convictions, and that the right includes effective assistance of counsel during [plea bargaining](#).

Significantly, a recent **National Public Defense Workload Study**,² examined the number of cases that public defense attorneys can reasonably handle. The NPDWS highlighted evidence that many public defense systems around the United States are overburdened. ***An overburdened public defense system inevitably jeopardizes the***

¹ <https://supreme.justia.com/cases/federal/us/372/335/>

² The [National Public Defense Workload Study](#) (NPDWS) finds that the last national workload standards, developed in 1973, are outdated and do not give attorneys enough time to provide constitutionally adequate representation to every client. These old national standards were not developed using a rigorous or reliable methodology. In contrast, the new NPDWS standards are a more effective benchmark for public defense attorneys, policymakers, and other stakeholders to use when evaluating whether a given public defense system is living up to the promise of our Constitution. https://www.rand.org/pubs/research_reports/RRA2559-1.html

constitutional rights of public defenders' clients and undermines the integrity of the justice system.

The new standards account for the increasing demands that modern technology places on criminal defense lawyers. To provide constitutionally adequate criminal defense, for example, attorneys need time in many cases to review voluminous information from body-worn cameras, cell phones, social media data, and forensic evidence.

According to Emma Anderson, deputy director of the American Civil Liberties Union's Criminal Law Reform Project, "The NPDWS study is yet another alarm indicating that we have much more work to do to make the constitutional right to counsel real for everyone." She also remarked that **"In this era of mass incarceration and overcriminalization public defenders work to challenge systemic oppression every day. Despite their essential role, public defenders are consistently undervalued. Lawmakers and decisionmakers must invest in public defense systems, while simultaneously reducing mass incarceration."**

For these reasons, we respectfully request that you adequately staff the Office of the Public Defender and pass **HB1608 HD1**.

Sincerely,

Carrie Ann Shirota

Policy Director
ACLU of Hawai'i
cshirota@acluhawaii.org

The mission of the ACLU of Hawai'i is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawai'i fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawai'i is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawai'i has been serving Hawai'i for over 50 years.

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