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No. _____

TESTIMONY ON HOUSE BILL 862
RELATING TO THE JUDICIARY

by
Edmund "Fred" Hyun, Chairman
Hawaii Paroling Authority

House Committee on Judiciary & Hawaiian Affairs
Representative David A. Tarnas, Chair
Representative Gregg Takayama, Vice Chair

Tuesday, February 7, 2023 – 2:00 p.m.
Conference Room 325

Chair Tarnas, Vice Chair Takayama, and Members of the Committee:

The Hawaii Paroling Authority (HPA) OPPOSES House Bill (HB) 862 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) identifies 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 862 does not specify any process or standards for the Courts.

Thank you for the opportunity to present testimony in opposition to HB 862

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
Judiciary & Hawaiian Affairs**

February 7, 2023

H.B. No. 862: RELATING TO THE JUDICIARY

Chair Tarnas, Vice Chair Takayama, and Members of the Committee:

The Office of the Public Defender strongly supports H.B. No. 862 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.

Thank you for the opportunity to testify on this measure.



The Judiciary, State of Hawai'i

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

House Committee on Judiciary & Hawaiian Affairs

Representative David A. Tarnas, Chair
Representative Gregg Takayama, Vice Chair

February 7, 2023, at 2:00 p.m.
Via Videoconference

by
Randy Pinal
Supervising Staff Attorney for the Intermediate Court of Appeals

Bill No. and Title: House Bill No. 862, Relating to the Judiciary.

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

Judiciary's Position: Oppose.

The Judiciary has concerns about this bill and respectfully submits the following comments in opposition to the bill.

This bill would amend Hawai'i 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 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).

A. Existing Court Procedures Allow For Review Of Minimum Term Orders

Under current law, a prisoner in custody may seek judicial review of a minimum term of imprisonment set by the HPA through a petition filed in circuit court under Hawai'i Rules of Penal Procedure (HRPP) Rule 40.¹ HRPP Rule 40(a)(2)(iii) includes a catch-all provision that allows a prisoner in custody to seek court review based on "any other ground making the custody, though not the judgment, illegal." If the petition states a colorable claim for relief, then the circuit court is required to appoint counsel and conduct a hearing.²

¹ *Coulter v. State*, 116 Hawai'i 181, 184, 172 P.3d 493, 496 (2007).

² A "colorable claim" is one that "alleges facts which, if proven, would entitle the petitioner to relief." *Rapozo v. State*, 150 Hawai'i 66, 77-79, 497 P.3d 81, 92-94 (2021); HRPP Rule 40(f), (i).

The bill's proposed amendment to HRS § 706-669(9) would require the sentencing court to modify the order or remand the case to the HPA based on grounds which are nearly identical to those currently required on review under HRPP Rule 40.³

Under existing law, 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.⁴ 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.⁵

Thus, the bill's proposal to create a statutory right to file a motion to seek review of a minimum term order is duplicative of the current process available to a prisoner in custody under HRPP Rule 40.

B. The Bill's Proposal Lacks A Clear Standard And Could Result In Every Minimum Term Order Being Appealed

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 by filing a timely motion with the sentencing court. Yet the bill does not impose a clear standard. For example, there is no requirement that the motion assert an actual error occurred in the HPA minimum term proceedings or the HPA order. As proposed, 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.⁶ Given the absence of a clear standard on a defendant's request for judicial review of an HPA minimum term order, the bill would drastically increase the number of requests for judicial review. The lack of any standard could result in hundreds of new cases being filed in the circuit court each year, regardless of the merits of the claim, which would exhaust the judiciary's resources.

To reiterate, currently a defendant in-custody is able to petition the court to review a minimum term order based on the catch-all provision in HRPP Rule 40 which allows a petition based on "any other ground making the custody, though not the judgment, illegal."⁷ Accordingly, the Judiciary opposes the proposed amendments to HRS § 706-669 and HRS § 641-11 because they are not necessary and would significantly impact the judiciary's resources.

C. Additional Concerns With The Bill

³ Under the current process, 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.

⁴ *Fagaragan v. State*, 132 Hawai'i 224, 234, 320 P.3d 889, 899 (2014).

⁵ *Id.*

⁶ 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>).

⁷ See HRPP Rule 40(a)(2)(iii).

There are a number of additional concerns.

First, 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.⁸ Under the current HRPP Rule 40 process, 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)."

Second, this measure could preclude HRPP Rule 40(a)(2) review for any in-custody defendant that employs the proposed process set forth in HRS § 706-669(9). As outlined above, there is a current process in place that allows for judicial review of minimum term orders. It is not clear whether proposed HRS § 706-669(9) will be the only remedy available for court review of the order fixing the minimum term of imprisonment.

Third, the bill does not define the required level of “judicial review” and whether the review may be done only on the motion without an evidentiary hearing. By contrast, HRPP Rule 40 requires a full and fair evidentiary hearing upon an initial determination that the allegations, if true, would entitle the petitioner to relief. The HPA sets thousands of minimum terms each year. The bill would allow any defendant in custody to challenge the HPA’s decision, and the Judiciary is concerned with the bill’s lack of specificity on the standards to be followed by the court as well as the bill’s failure to specify that the review shall be only on the submitted motion.

Fourth, 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 discussed above, the proposed amendment to HRS § 706-669 is unnecessary and, thus, the proposed amendment to HRS § 641-11 is also unnecessary. As noted, in the last full fiscal year before the pandemic, the HPA set 2,171 minimum terms for 681 defendants.⁹ Absent changes to the bill, 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.

Fifth, the bill allows a sentencing court reviewing a motion under the proposed HRS § 706-669(9) to order remand of the case to the HPA, while also allowing an appeal to the ICA from that same order. This creates confusion and the potential for duplicative proceedings.

D. 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

⁸ Under the current HRPP Rule 40 process an inmate is not required to attach any records. *See* HRPP Rule 40(d). The preamble of the bill at Section 1 incorrectly states that an inmate who files a HRPP Rule 40 petition is required to “create their own record by attaching relevant documents” and “request transcription of the proceedings.” *See* HB No. 862, § 1.

⁹ Hawaii Paroling Authority, 2019 Annual Statistical Report, at 3.

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, 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.

E. Conclusion

The Judiciary respectfully opposes the bill. Thank you for the opportunity to testify on this measure.

Hawai'i Association of Criminal Defense Lawyers

February 3, 2023

H.B. No. 862: RELATING TO THE JUDICIARY

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. 862 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.

HB-862

Submitted on: 2/5/2023 1:51:37 PM

Testimony for JHA on 2/7/2023 2:00:00 PM

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. The legislature also finds that judicial review will provide greater uniformity in due process and statutory compliance by the Hawai'i paroling authority.