

JOSH GREEN, M.D.
GOVERNOR
KE KIA'ĀINA



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

EDMUND "FRED" HYUN
CHAIR

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CLAYTON H.W. HEE
MILTON H. KOTSUBO
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ACTING ADMINISTRATOR

No. _____

TESTIMONY ON HOUSE BILL 1608, HD2
RELATING TO COMPENSATION FOR COURT-APPOINTED COUNSEL

by
Edmund "Fred" Hyun, Chair
Hawaii Paroling Authority

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

Tuesday, March 12, 2024; 10:00 a.m.
State Capitol, Conference Room 016 and via Video Conference

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

The Hawaii Paroling Authority (HPA) stands in support of HB 1608, HD2 to appropriate funds for the Deputy Public Defender position and require that the position be assigned to the Family Court Section. The Public Defenders Office represents inmates and parolees throughout the parole process.

Thank you for the opportunity to present testimony on HB 1608, HD 2. We will be available to answer questions the committee members may have.

JON N. IKENAGA
STATE PUBLIC DEFENDER

DEFENDER COUNCIL
1130 NORTH NIMITZ HIGHWAY
SUITE A-254
HONOLULU, HAWAI'I 96817

HONOLULU OFFICE
1130 NORTH NIMITZ HIGHWAY
SUITE A-254
HONOLULU, HAWAI'I 96817

APPELLATE DIVISION
TEL. NO. (808) 586-2080

DISTRICT COURT DIVISION
TEL. NO. (808) 586-2100

FAMILY COURT DIVISION
TEL. NO. (808) 586-2300

FELONY DIVISION
TEL. NO. (808) 586-2200

FACSIMILE
(808) 586-2222



STATE OF HAWAI'I
OFFICE OF THE PUBLIC DEFENDER

HAYLEY Y.C. CHENG
ASSISTANT PUBLIC DEFENDER

HILO OFFICE
275 PONAHAHAI STREET
SUITE 201
HILO, HAWAI'I 96720
TEL. NO. (808) 974-4571
FAX NO. (808) 974-4574

KONA OFFICE
75-1000 HENRY STREET
SUITE #209
KAILUA-KONA HI 96740
TEL. NO. (808) 327-4650
FAX NO. (808) 327-4651

KAUAI OFFICE
3060 EIWA STREET
SUITE 206
LIHUE, HAWAI'I 96766
TEL. NO. (808) 241-7128
FAX NO. (808) 274-3422

MAU'I OFFICE
81 N. MARKET STREET
WAILUKU, HAWAI'I 96793
TEL. NO. (808) 984-5018
FAX NO. (808) 984-5022

February 21, 2024

**TESTIMONY OF THE OFFICE OF THE PUBLIC DEFENDER STATE OF HAWAI'I
TO THE COMMITTEE ON JUDICIARY**

**HB 1608, HD2: RELATING TO THE OFFICE THE PUBLIC DEFENDER
March 12, 2024 at 10:00 a.m.**

**Chair Karl Rhoads
Vice Chair Mike Gabbard
Honorable Committee Members**

The Office of the Public Defender (OPD) supports this bill.¹

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 (Deputy Public Defender (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 an unspecified number of DPD positions. Consistent with the original version of this bill, we are asking that the funding be for 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 Hawai'i Constitutions require that every criminal defendant be afforded the right to counsel. Hawai'i 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

¹ To clarify, the OPD supports this bill so long as it does not adverse impact priorities identified in the Executive Supplemental Budget Request for FY2025.

(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 Hawai‘i Supreme Court and the Hawai‘i Intermediate Court of Appeals. DPDs represent sentenced defendants before the Hawai‘i 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 HOPE² program courts, drug courts, mental health courts, environmental courts, the Veteran’s treatment courts and the Oahu and Maui Community Outreach Courts.³

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.[⁴]

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

² “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.

³ 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.

⁴ 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>.

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 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.⁵ The cost of court-appointed counsel when aggregated will easily exceed the cost of funding the proposed positions.⁶

In a previous committee hearing, the OPD requested that this bill be amended to specify that the funding for the four DPD positions be DPD III positions (BUF151). 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

⁵ 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%.

⁶ 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.

Island offices. Due to 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).⁷

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 HB 1608

⁷ 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: Judiciary
Hearing Date/Time: Tuesday, March 12, 2024 at 10:00am
Place: Conference Room 016 & Videoconference
Re: **Testimony of the ACLU of Hawai'i in SUPPORT of HB1608 HD2 Relating to the Office of the Public Defender**

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

The American Civil Liberties Union of Hawai'i **SUPPORTS HB1608 HD2** 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."**

Proposed Amendment

For these reasons, we respectfully request that you adequately staff the Office of the Public Defender and **restore the six positions that were defunded during the pandemic**: 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).

Please pass **HB1608 HD2** with this proposed amendment.

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.

American Civil Liberties Union of Hawai'i
P.O. Box 3410
Honolulu, Hawai'i 96801
T: 808.522.5900
F: 808.522.5909
E: office@acluhawaii.org
www.acluhawaii.org

Law Office of Georgette A. Yaindl, LLLC
Georgette Anne Yaindl 8940
P.O. Box 307
Kailua-Kona Hawai`i 96745-0307
(808) 224-0219 v/txt (877) 300-8869 fax
gyaindl@gyattorney.com

March 11, 2024

Senator Karl Rhoads, Chair
Senator Mike Gabbard, Vice Chair
Committee on Judiciary
House of Representatives, State of Hawai`i

via: <http://www.capitol.hawaii.gov>

Dear Committee leadership and members,

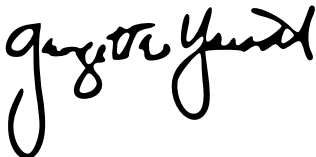
Re: **STRONG SUPPORT FOR HB1608 HD2 RELATING TO THE OFFICE OF
THE PUBLIC DEFENDER**

Hearing Date: Tuesday, March 12, 2024
Time: 10:00 a.m.
Location: Conference Room 016
State Capitol
415 South Beretania Street

I write in strong support and to express gratitude to the 17 House members that signed on to introduce this bill. As a member of the private criminal defense bar, I was shocked to learn that Act 9 (2020) resulted in the “abolition” of 6 OPD positions and I am shamed to acknowledge that this was the first time I had heard about it. I understand that the original version of the bill sought to restore 4 of the 6 positions, and that the current draft leaves that number blank. I respectfully urge members to pass this legislation and act at least to restore the 6 positions abolished in the wake of Act 9 (2020).

Thank you for your attention to this issue and attention to my letter. Mahalo.

Sincerely,



HB-1608-HD-2

Submitted on: 3/10/2024 11:07:11 AM

Testimony for JDC on 3/12/2024 10:00:00 AM

Submitted By	Organization	Testifier Position	Testify
David Pullman	Individual	Support	Written Testimony Only

Comments:

As a deputy public defender on Maui, I am supportive of any additional resources directed to our office. However, even more than expanding the number of attorneys we have, we need to increase the salaries of existing attorneys and support staff. In our office, our best attorneys are constantly being recruited by Maui County agencies that pay nearly twice what the State pays. Moreover, counties in other states, such as California, pay more than twice as much as Hawaii pays, with similar cost of living expenses. When one of our attorneys is offered such a substantial salary increase for similar work, they usually accept the much higher paid positions. This leaves us constantly needing to recruit attorneys to fill our vacancies and constantly losing our best and most experienced attorneys, relegating the defense of the accused to the least experienced attorneys in the state. Yes, we need additional attorneys, but moreso, we need to pay our attorneys commensurate with the salaries made by county-employed attorneys and public defenders in states like California.