

Hawai'i HCR 23 Task Force

Fourth Task Force Meeting

June 6, 2024

Jennifer Kisela, Deputy Program Director, CSG Justice Center
Carl Reynolds, Senior Legal & Policy Advisor, CSG Justice Center
Sephria Reynolds-Tanner, Policy Analyst, CSG Justice Center

The CSG Justice Center's work with the Hawai'i HCR 23 Task Force is made possible through funding from the Bureau of Justice Assistance.



Justice Center
THE COUNCIL OF STATE GOVERNMENTS

Presentation Outline

I. Parole System Models

II. The HPA Model

- a. Legal Structure
- b. Data Analysis

III. Policy Option Discussion

The HCR 23 Mandates

1. **Study whether parole system models** used by other states might be suited for Hawai`i.
2. **Recommend** whether the administration of justice may be better served by removing the **responsibility of setting minimum sentences** from the Hawai`i Paroling Authority.
3. **Examine and make recommendations** regarding existing procedures of the Hawai`i Paroling Authority setting the **minimum terms of imprisonment** to increase efficiency of the procedures.
4. **Examine and compare the minimum sentences** issued by the Hawai`i Paroling Authority and the courts to determine whether there are significant differences.

House Concurrent Resolution 23, Thirty-second Legislature, Reg. Sess. (Hawai`i 2023).

Like most states, Hawai'i uses parole release (indeterminate) and does not use sentencing guidelines (SGLs).

Determinate

Fixed term that may be reduced by good time or earned time; no parole body; post-release supervision may be included in sentence.

Indeterminate

Judge specifies sentence—min/max or just one—and **parole authority** determines LOS after minimum is reached.

	Determinate	Indeterminate
SGLs	DC, DE, FL, KS , MN, NC , OR, US, VA, WA	AL, AR, MD, MA, MI , PA , TN, UT
No SGLs	AZ, CA, IL , IN, ME, NM, OH, WI	AK, CO, CT, GA, HI , IA , ID, KY, LA, MO , MS, MT, ND , NE, NH, NJ, NV, NY, OK, RI, SC, SD, TX , VT, WV , WY

Six other parole states give the paroling authority some minimum-setting power, but none use a hearing process.

Connecticut: Minimums are fixed at 50 percent, or 85 percent if the offense or criminal record shows the use or threat of physical force, as determined through a paper review and deliberation among two or more parole board members.

Iowa: Most prison sentences include a judicial maximum term but no minimum term, and most people are eligible for parole release immediately upon admission.

Kentucky: The parole board by policy sets fixed minimums for most people in prison: maximum 40+ years eligible in 8; maximum 2–39 years eligible at 20 percent.

Missouri: Most fixed minimums are set by regulations by the parole board, based on offense category and risk assessment, with minimums in ranging from 15 percent to 33 percent of the maximum.

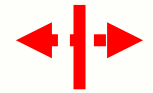
North Dakota: Most incarcerated people are eligible for discretionary parole release soon after they enter prison, and the parole board has broad discretion to set minimum terms.

Utah: The parole board is required to set a date for the first parole hearing (but not the hearing itself) within six months of the commitment to prison.

The most common features in paroling states are fixed minimums and mandatory release to supervision.

Each sentence contains two key points in time, defining three periods of time:

- (1) minimum before parole eligibility
- (2) during parole eligibility
- (3) mandatory supervision

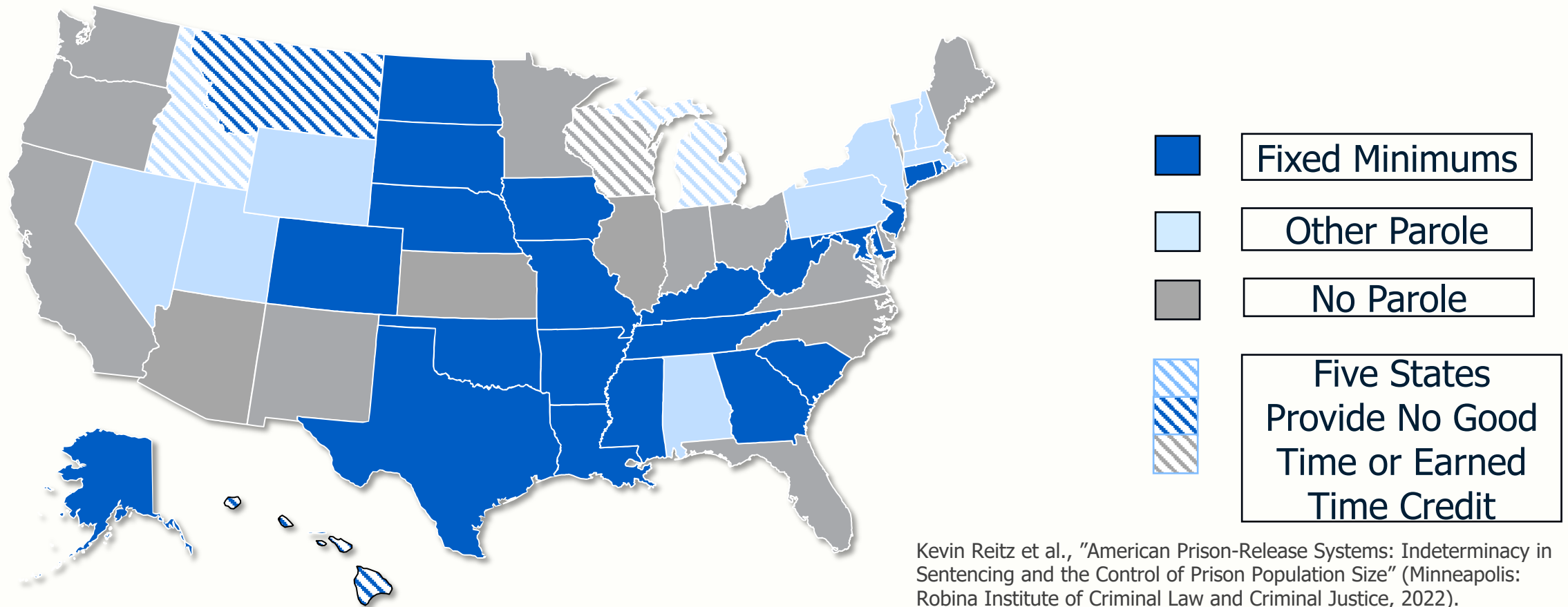


Varying rules
for time
increments



Varying effect
of good time or
earned time on
parole eligible
or mandatory
release date

Of 34 paroling states, 22 use fixed minimums for some or all of the prison population.



Hawai'i already uses fixed minimums for repeated offenses and use of firearms.

Felony Grade	Stat. Max.	Repeat Offense Mandatory Minimums		
		1 Prior = 33%	2 Priors = 67%	3 Priors = 100%
2 nd Degree Murder	Life w/ Parole	10 yrs	20 yrs	30 yrs
Class A	20 yrs (240 mos)	80 mos	160 mos	240 mos
Class B	10 yrs (120 mos)	40 mos	80 mos	120 mos
Class C	5 yrs (60 mos)	20 mos	40 mos	60 mos

H.C.A. Sec. 706-606.5.

Key Points

1. HPA's authority to set minimums is uncommon, and using a hearing to establish the minimum is unique.
2. About two-thirds of states with parole release, including Hawai`i, have fixed minimums for some or all of the prison population.
3. Hawai`i is one of 5 states that provides no good time or earned time credits; 39 other states use some time crediting system that gives the corrections agency discretion to advance mandatory release, independent of parole.
4. Hawai`i already uses fixed minimums for repeated offenses and use of firearms.

Kevin Reitz et al., "American Prison-Release Systems: Indeterminacy in Sentencing and the Control of Prison Population Size" (Minneapolis: Robina Institute of Criminal Law and Criminal Justice, 2022).

Presentation Outline

I. Parole System Models

II. The HPA Model

- a. Legal Structure
- b. Data Analysis

III. Policy Option Discussion

General Statutory Framework for the HPA

§ 353-62 Hawai`i paroling authority; responsibilities and duties; operations; records, reports, staff

(a) . . . [T]he paroling authority shall:

(1) Serve as the central paroling authority for the State;

(2) Consider for parole all committed persons, except in cases where the penalty of life imprisonment not subject to parole has been imposed, regardless of the nature of the offense committed;

(3) Determine the time at which parole shall be granted to any eligible individual as that time at which maximum benefits of the correctional institutions to the individual have been reached and the element of risk to the community is minimal; . . .

H.R.S. §353-62 Hawaii paroling authority; responsibilities and duties; operations; records, reports, staff.

Minimum Setting Statutory Framework for HPA

§ 706.669 Procedure for determining minimum term of imprisonment

“ . . . no later than six months after commitment . . . hold a hearing, and on the basis of the hearing make an order **fixing the minimum term of imprisonment** . . .

. . . obtain a complete report regarding the prisoner's life before entering the institution and a full report of the prisoner's progress in the institution

“The authority shall establish guidelines for the **uniform determination of minimum sentences** which shall take into account both the nature and degree of the offense of the prisoner and the prisoner's criminal history and character. . . .”

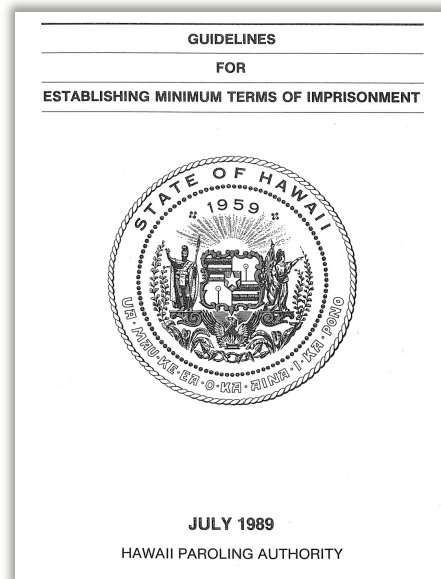
Several other sentencing statutes cross-reference to this authority as controlling.

H.R.S. §706-669 Procedure for determining minimum term of imprisonment; §706-659 Sentence of imprisonment for class A felony; § 706-660 Sentence of imprisonment for class B and C felonies; ordinary terms; discretionary terms; §706-661 Extended terms of imprisonment.

HPA uses 1989 guidelines for setting minimums.

Three levels of severity:

- ❖ Level I (mitigated)
- ❖ Level II
- ❖ Level III (aggravated)



Three Main Factors:

"The criteria outlined below are, in some instances, a matter of **individual interpretation and perception and cannot be completely objective.** . . .

[T]wo of the primary criteria . . . , Nature of Offense and Degree of Injury/Loss to Person or Property, **are comparative and require an awareness and knowledge by the Authority members of offense circumstances and past Authority decisions."**

Guidelines for Establishing Minimum Terms of Imprisonment, Hawaii Paroling Authority (1989).

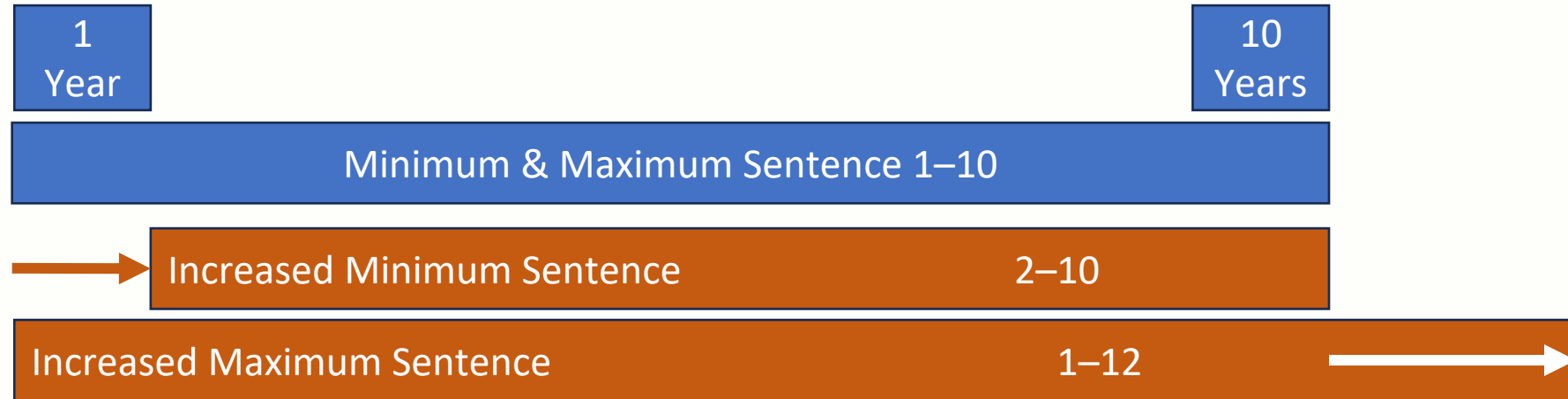
Examples of HRPP Rule 40 Case Law that Has Affected HPA Minimum Setting.

1. “[J]udicial 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.”
2. “[N]either Chapter 706 nor Chapter 353 of the Hawai`i Revised Statutes (HRS) prohibit the HPA from setting a prisoner's minimum term at a period equal to his or her maximum sentence.”
3. “[D]ue process under Article I, section 5 of the Hawai`i Constitution requires that the prisoner have timely access to all of the adverse information contained in the HPA file.”
4. “[T]he HPA is required to set forth a written justification or explanation (beyond simply an enumeration of any or all of the broad criteria considered) when it determines that the minimum term of imprisonment for the felony offender is to be set at a Level II or Level III punishment.”

The cases reflect the courts requiring basic due process and at least cursory explanation of the HPA’s justification for a minimum within the broad ranges of the guidelines.

Williamson v. Hawai`i Paroling Authority, 35 P.3d 210 (Haw. 2001); *Coulter v. State of Hawai`i*, 172 P.3d 493 (Haw. 2007); *De la Garza v. State*, 129 Hawai`i 429, 302 P.3d 697 (Haw. 2013); *Lewi v. State*, 145 Hawai`i 333, 452 P.3d 330 (2019); Hawaii Rules of Penal Procedure R. 40.

A sentencing factor that increases the min or the max triggers the right to a jury finding on that factor.



Examples: the SCOTUS has held that these factors, which increased the min or max based on judicial determinations, violated the right to a jury:

- **Defendant's hate crime motivation**
- **Defendant possessed an additional 556 grams of crack**
- **Defendant acted with deliberate cruelty**
- **Defendant was organizer, leader, manager, or supervisor in the criminal activity**

Hawai'i's guideline minimums side-step this 6th Amendment constitutional requirement.

The Hawai`i approach moves the 'amount-of-punishment' decision—the length of time a person absolutely has to serve—away from the judicial and jury process altogether.

Aggravating Guideline Factors for Level III:

- **"The offender displayed a callous and/or cruel disregard for the safety and welfare of others"**
- **"The offense was committed against the elderly, a handicapped person, or a minor"**
- **"The offense involved the manufacture, importation, distribution or cultivation of substantial quantities of drugs"**
- **"The offender's actions prior to or during the instant offense seem to indicate that he or she played a substantial role or was the instigator or leader"**

Guidelines for Establishing Minimum Terms of Imprisonment, Hawaii Paroling Authority (1989)

Extended sentences can be based on similar criteria but require 6th Amendment compliance.

§706-662 CRITERIA

- Defendant is a professional criminal
- Defendant is a multiple offender
- Defendant is an offender against the elderly, handicapped, or a minor
- Defendant is a hate crime offender

“Act 1, Second Special Session Laws 2007, amended Hawaii's extended sentencing statutes, §§706-661, 706-662, and 706-664, to ensure that the procedures used to impose extended terms of imprisonment comply with the requirements of the United States Supreme Court and the Hawaii supreme court.”

Task Force mock hearings illustrated positive and negative issues.

- HPA interactions with all parties were conducted in a courteous manner by the HPA members.
- Guideline factors provide a framework for argument.
- Guideline factors can point different directions, as mitigating and aggravating considerations.
- Delays are sometimes inherent from interplay with the courts.
- Minimum setting is all about determining punishment and not tied to expectations of program availability or placement.

Annual reports from FY 2018–2023 show average minimum sentences across major offense categories are at the low end of the Level III guideline range.

Felony Grade	Stat. Max.	HPA Range			<i>Average Min. FY2018–2023</i>
		Level I	Level II	Level III	
2 nd Degree Murder	Life w/ Parole	5–10	10–20 yrs	20–50	n/a
Class A	20 yrs	2–5	5–10	10–20	10.4 (52% of max)
Class B	10	1.5–3	3–5	5–10	5.6 (56% of max)
Class C	5	1–2	2–3	3–5	3.1 (62% of max)

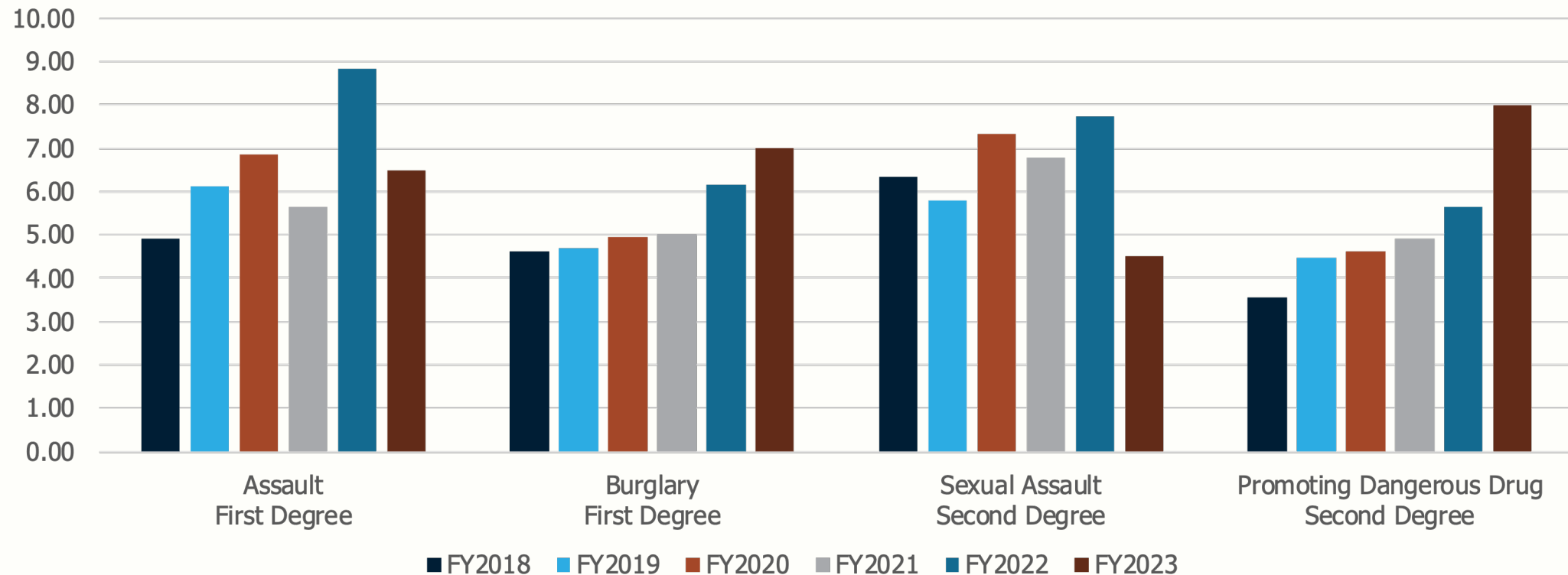
Class A (Manslaughter, Robbery, Sexual Assault 1st, PDD 1st)

Class B (Assault 1st, Burglary 1st, Sexual Assault 2nd, PDD 2nd)

Class C (Assault 2nd, Burglary 2nd, Sexual Assault 3rd, PDD 3rd)

Annual reports from FY 2018–2023 show the potential for average minimums to vary and creep up over time.

Minimum Terms Set for Selected Class B Offenses



Prior JRI findings illustrate release decisions were not timed to the minimum sentence, despite the HPA setting the minimum in the first place.

The **parole release approval rate** declined from 40 percent to 34 percent from 2006 to 2011.

- 65 percent of denials were for failure to complete required programs.
- The volume of people in prison beyond their minimum parole eligibility date increased by 77 percent.

The **volume of people “maxing out”** (leaving prison without supervision) grew by 104 percent from 2006 to 2011.

- The proportion of max-outs assessed as high risk grew from 12 percent to 41 percent.
- The max-out population had three-year rearrest rates almost double those for people released to parole supervision.

The FY 2023 Annual Report depicts 447 paroles granted from 1,685 parole consideration hearings.

“Justice Reinvestment in Hawai‘i: Analyses & Policy Options to Reduce Spending on Corrections & Reinvest in Strategies to Increase Public Safety” (New York: CSG Justice Center, 2014); “Justice Reinvestment Analyses & Policy Framework” (New York: CSG Justice Center 2012).

Key Points

1. HPA's authority to set minimums is uncommon, and using a hearing to establish the minimum is unique.
2. About two-thirds of states with parole release, including Hawai`i, have fixed minimums for some or all of the prison population.
3. Hawai`i is one of 5 states that provide no time credits; 39 other states use some time crediting system that gives the corrections agency discretion to advance mandatory release, independent of parole.
4. Hawai`i already uses fixed minimums for repeated offenses and use of firearms.
5. Minimum setting is explicitly subjective and has required court oversight under Rule 40.
6. The Hawai`i system sidesteps the Constitution by moving the "amount-of-punishment" decision away from the judicial and jury process altogether.
7. Average minimums are higher than the mid-range and are increasing over time.
8. Parole release rates are low despite HPA setting the minimum in the first place; max-outs have been historically common.

Presentation Outline

I. Parole System Models

II. The HPA Model

- a. Legal Structure
- b. Data Analysis

III. Policy Option Discussion

The HCR 23 Mandates

1. **Study whether parole system models** used by other states might be suited for Hawai`i.
2. **Recommend** whether the administration of justice may be better served by removing the **responsibility of setting minimum sentences** from the Hawai`i Paroling Authority.
3. **Examine and make recommendations** regarding existing procedures of the Hawai`i Paroling Authority setting the **minimum terms of imprisonment** to increase efficiency of the procedures.
4. **Examine and compare the minimum sentences** issued by the Hawai`i Paroling Authority and the courts to determine whether there are significant differences.

House Concurrent Resolution 23, Thirty-second Legislature, Reg. Sess. (Hawai`i 2023)

Stakeholders appear to be divided.

Agencies and crime victim advocates favor the status quo.

Judges are unprepared for setting minimums and concerned about inconsistency.

Defense lawyers highlight the delay in programming inherent in the HPA process.

Community advocates view the HPA process as arbitrary and opaque.

Pre-sentence investigations, judicial training, and court security are topics to address in any scenario.

PSIs provide important information for the HPA and HDCR.

- Courts need sufficient funding for staffing to make PSIs possible, and statute should make clear that *post*-sentence (pre-supervision) investigations may and shall be provided to the HPA and HDCR.

The judicial branch should ensure there is victim-focused and trauma-informed training for judges.

Court security should be enhanced to help victims feel safe in and around the courthouse.

If the status quo is retained, consider reversing some case law by statute.

1. Judges currently have limited authority to reduce legislated mandatory minimums for “strong mitigating circumstances” under §706.606.5(6). But that authority can be defeated by action of the HPA, resetting the judicial minimum to a longer term.

- **The legislature could clarify that a judicially mitigated mandatory minimum under § 706.606.5(6) cannot be increased by the HPA.**

2. The Supreme Court of Hawai`i has held that “neither Chapter 706 nor Chapter 353 of the Hawai`i Revised Statutes (HRS) prohibit the HPA from setting a prisoner’s minimum term at a period *equal to his or her maximum sentence*.”

- **The legislature could explicitly prohibit HPA from setting a minimum equal to the maximum.**
 - Preserve a degree of indeterminacy, to reinforce the legislature’s discretion to determine which conduct merits “no parole.”
 - Reconcile §706.669 with the general duty of the HPA in §353-62 to “consider for parole all committed persons . . .”

The guidelines should not reach the max and should use midpoint, presumptive minimums in each level; departures should have explanations.

Felony Grade	Stat. Max.	HPA Range					
		Level I	Midpoint	Level II	Midpoint	Level III	Midpoint
2 nd Degree Murder	Life w/ Parole	5–10	7.5	10–20 yrs	15	20–40 50	30
Class A	20 yrs	2–5	2.5	5–10	7.5	10–16 20	13
Class B	10	1.5–3	27 mos	3–5	4	5–8 10	6.5
Class C	5	1–2	18 mos	2–3	2.5	3–4 5	3.5

The HCR 23 Mandates

1. **Study whether parole system models** used by other states might be suited for Hawai`i.
2. **Recommend** whether the administration of justice may be better served by removing the **responsibility of setting minimum sentences** from the Hawai`i Paroling Authority.
3. **Examine and make recommendations** regarding existing procedures of the Hawai`i Paroling Authority setting the **minimum terms of imprisonment** to increase efficiency of the procedures.
4. **Examine and compare the minimum sentences** issued by the Hawai`i Paroling Authority and the courts to determine whether there are significant differences.

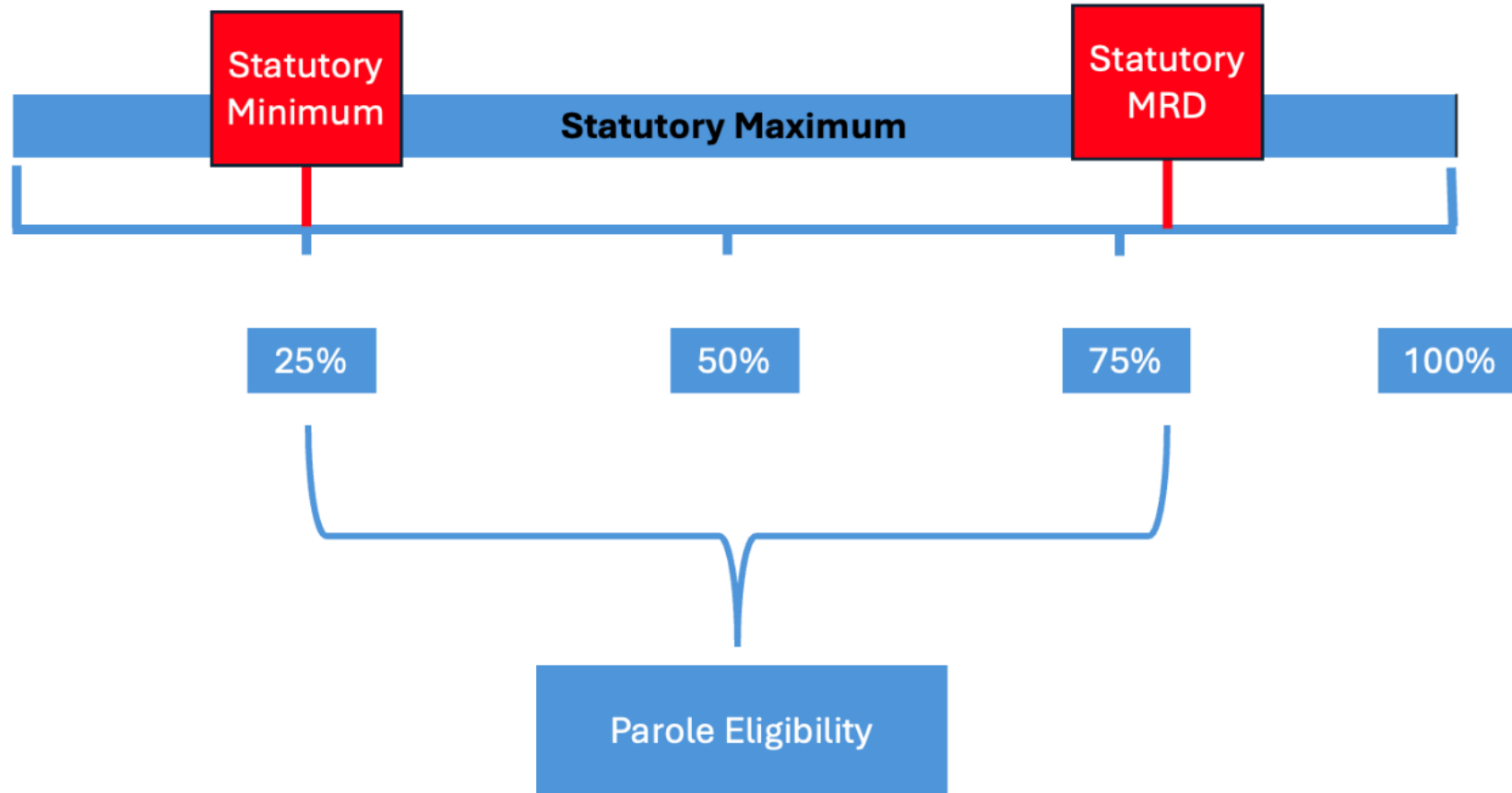
House Concurrent Resolution 23, Thirty-second Legislature, Reg. Sess. (Hawai'i 2023)

The Task Force outcome should advance the Oversight Commission's statutory mission to improve the administration of justice.

1. Oversee . . . Investigate complaints . . . facilitate a correctional system transition to a rehabilitative and therapeutic model;
2. . . . inmate population limits . . . policies and procedures
3. . . . *monitor and review the comprehensive offender reentry program, including facility educational and treatment programs, rehabilitative services, work furloughs, and the Hawaii paroling authority's oversight of parolees . . .*
4. *Ensure . . . programs and services that result in the timely release of inmates on parole when the minimum terms have been served*

H.R.S. §353L-3 Hawaii correctional system oversight commission; powers and duties. [Subsection effective until December 31, 2023.]

No single state is a model for Hawai`i but two very common features should be considered: fixed minimums and mandatory release to supervision.



Benefits of Simply Fixing Minimums by Statute

1. Certainty of release decision timing for victim
2. Certainty of minimum for the incarcerated person to work toward
3. Cleanly cures “right to a jury” issue and delays from interplay with courts
4. Simplifies work for HPA, courts, AG’s office, prosecution, defense
5. Immediate movement from RAD to programs
6. Opportunity for program modules based on predictable minimums

Fixed minimums would advance the comprehensive reentry system required under Chapter 353H and the statutory objective to “provide programs and services that result in the timely release of inmates on parole when the minimum terms have been served.”*

*H.R.C. §353L-3 Hawaiʻi correctional system oversight commission; powers and duties.

The fixed minimum could be a “default” with some flexibility built in.

By statute, define the default minimum sentence as a fixed percentage of the maximum. It should be lower than 33 percent to stay aligned with existing mandatory minimums.

To individualize exceptional cases,

- Allow the default minimum to be increased as part of judicial sentencing, subject to constitutional safeguards; and
- Allow the default minimum to be reduced by the HPA to preserve their current feature of incentivizing behavioral effort in prison.

Key Points Revisited

1. HPA's authority to set minimums is uncommon, and using a hearing to establish the minimum is unique.
2. About two-thirds of states with parole release, including Hawai`i, have fixed minimums for some or all of the prison population.
3. Hawai`i is one of 5 states that provides no time credits; 39 other states use some time crediting system that gives the corrections agency discretion to advance mandatory release, independent of parole.
4. Hawai`i already uses fixed minimums for repeated offenses and use of firearms.
5. Minimum setting is explicitly subjective and has required court oversight under Rule 40.
6. The Hawai`i minimum system sidesteps the Constitution by moving the "amount-of-punishment" decision away from the judicial and jury process altogether.
7. Average minimums are higher than the mid-range and are increasing over time.
8. Parole release rates are low despite HPA setting the minimum in the first place; max-outs have been historically common.

Thank You!

Join our distribution list to receive updates and announcements:

<https://csgjusticecenter.org/resources/newsletters/>

For more information, please contact:

Jennifer Kisela at jkisela@csg.org

Carl Reynolds at creynolds@csg.org

This project was supported by Grant No. 2019-ZB-BX-K002 awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Department of Justice's Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and the SMART Office. Points of view or opinions in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.

© 2024 The Council of State Governments Justice Center