HCR 23 Task Force
The Council of State Governments Justice Center
Memorandum to the Chair,
Hawai'i Correctional System Oversight Commission

December 5, 2024

Justice Center
THE COUNCIL OF STATE GOVERNMENTS

Examining Minimum Sentencing Policies in Hawai'i

The Hawai'i Paroling Authority (HPA) is primarily responsible for setting the minimum amount of time a person must serve in prison before becoming eligible for parole. This decision is made within six months of the individual's admission to prison. Once the person has served the minimum term, the HPA evaluates whether to grant parole at that point. Additionally, the HPA has the authority to reduce a previously set minimum term as a reward for prosocial behavior demonstrated by the individual while in prison.

HCR 23 directed the Hawai'i Correctional System Oversight Commission (HCSOC) to convene a working group to do the following:

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.[1]

The Council of State Governments (CSG) Justice Center provided HCSOC with technical assistance to meet these objectives, with funding and support provided by the Bureau of Justice Assistance through the Justice Reinvestment Initiative (JRI) Assessment Center (JAC). BJA is a component of the Department of Justice's Office of Justice Programs. Specifically, the CSG Justice Center provided four presentations to the Task Force:

1. HCR 23 Task Force - The CSG Justice Center (Sep. 12, 2023) Background on various state systems for sentencing and release from prison
2. HCR 23 Task Force - The CSG Justice Center (Nov. 2, 2023) Constitutional and statutory framework for each of the roles represented on the task force (judges, prosecution, defense, HPA, victims, etc.)
3. HCR 23 Task Force - The CSG Justice Center (June 6, 2024) Common features of states using parole, statutory minimums used in Hawai'i, litigation involving HPA minimums, and data analysis based on HPA annual reports
4. HCR 23 Task Force - The CSG Justice Center (Sep. 12, 2024) (Sep. 12, 2024) Data analysis of 18 years of Department of Corrections and Rehabilitation (DCR) administrative data

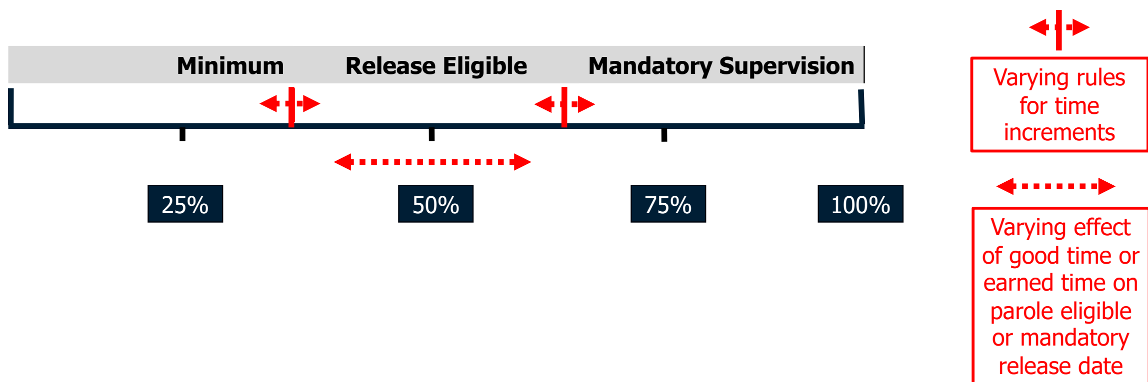
The following are key points from these presentations:

- In 2023, among the 34 states with paroling systems, it was not uncommon for parole boards to have authority over setting minimum terms and granting parole. In 6 states, parole boards had some authority to set minimum terms, typically following fixed rules outlined in board policy.
- Hawai'i is one of only five states that do not provide time credits to individuals serving prison sentences. [2] This means there are no "good time" credits for consistent good behavior or "earned credits" for completing programs or reaching

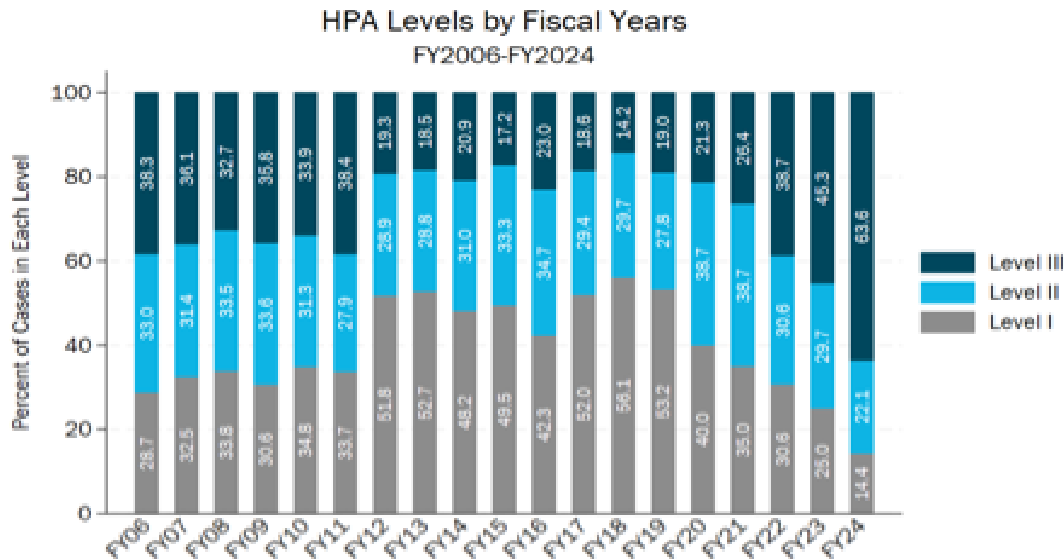
specific milestones. In Hawai'i, individuals must serve their full sentence day-for-day up to the maximum term, with only the Hawai'i Paroling Authority (HPA) having the discretion to adjust the time served.

- In most state systems that use parole (excluding Hawai'i), the sentence length is determined either by a sentencing judge or within a statutory range. The sentence must include the maximum term and may also include both minimum and maximum terms. In these systems, a paroling authority decides the actual length of time a person serves in prison after they reach the minimum and become eligible for parole (represented by the red vertical line on the left below). Additionally, "good time" or "earned time" credits can reduce the time served, potentially leading to a mandatory release before the maximum term (represented by the vertical red line on the right below).

Typical Paroling State Sentence Schema



- Hawai'i uses statutory "fixed minimums" in two situations: cases that include the use of firearms and cases that involve repeat offenses.
- Analysis of 18 years of Department of Corrections and Rehabilitation (DCR) administrative data showed that a higher proportion of people are receiving a Level III (aggravated) minimum term than in prior years. This has resulted in more people spending longer periods of time in DCR custody prior to reaching eligibility for parole release.[3]
- As shown below, in FY 2024 there were fewer Level I outcomes and significantly more Level III outcomes than in any prior year in the analysis.[4]



- The length of minimum sentences has also increased over time. On average, people serve over 50 percent of their maximum sentence before parole eligibility, regardless of felony class.[5]
- The HPA guideline factors that are used to justify a Level III minimum term closely resemble sentencing factors that, *if relied upon by a judge* to set the minimum, would violate Supreme Court of the United States doctrine on the Sixth Amendment right to a jury.[6] The courts in Hawai'i have upheld the HPA process in cases challenging the system on this theory.[7]
- Case law summarized in the Appendix demonstrates that the courts have been regularly involved in regulating HPA minimum setting, as it implicates due process of law.

Recommendations for Improving Minimum Sentencing Policies in Hawai'i
To enhance the effectiveness, equity, and transparency of minimum sentencing policies in accordance with the charge of the HCR 23 Task Force to evaluate efficiencies, discrepancies in sentences, and how the administration of justice is served, the State of Hawai'i may consider the following recommendations. These address the CSG Justice Center's conclusion about HPA minimums and, in the event that changes in minimum setting are not adopted, other critical areas such as data systems, fairness in sentencing, pre-sentence investigations, and institutional incentives. These recommendations provide a foundation for data-driven policy changes tailored to Hawai'i's justice system.

1. **Adopt Fixed Minimums**
   - The State of Hawai'i should consider adopting statutory, default fixed minimums, taking into account the existing mandatory minimums. Judges should be given discretion to deviate from the default minimum within a relatively narrow range of options and with written findings to explain the departure. People would enter prison with a known minimum sentence and could enter into programming

almost immediately, and victims would know when parole consideration would first occur. Victims would need to be given statutory permission to present at parole release hearings, as they have currently for minimum hearings.

2. **Enhance Data Systems**
   - Hawai'i's current data systems lack the capacity to provide policymakers with the information needed to assess whether the existing approach to minimum sentencing is optimal. Improved data collection and analysis are essential for understanding the impact of minimum sentences across the state. Key data points that should be captured include the following:
     - Levels selected by the Hawai'i Paroling Authority (HPA) for setting minimum sentences
     - Criteria used by HPA to determine minimum sentence levels
     - Requests for reductions in minimum sentences
     - Approval and denial rates for sentence reduction requests by the DCR and HPA
     - The extent of sentence reductions granted
     - Frequency of victim impact statements at judicial and HPA hearings

3. **Ensure Fairness and Equity in Sentencing**
   - Fairness and equity in sentencing, meaning similarly situated people can reasonably expect similar sentences, are critical, regardless of whether minimum terms are set by HPA or judges. Data systems must be upgraded to allow for consistent tracking of sentencing outcomes to ensure that individuals in similar circumstances are treated equitably. If standardized minimum terms are adopted (e.g., requiring individuals convicted of Class C felonies to serve 25 percent of their maximum sentence before becoming parole-eligible), the system must also capture HPA parole release decisions to ensure fairness in release determinations.

4. **Mandate Pre-sentence Investigations (PSIs)**
   - PSIs are vital tools for informed decision-making by judges and HPA. Currently, DCR intake data is used in cases without a PSI, but this information is less comprehensive. To address this, the state should do the following:
     - Require PSIs or equivalent assessments for all minimum sentence hearings.
     - Ensure courts receive adequate funding to provide PSIs in as many cases as possible.
     - Amend statutes to mandate that post-sentence (pre-supervision) investigations, conducted in some circuits, are shared with DCR and HPA when applicable.

5. **Promote Rehabilitation Through Institutional Incentives**

- Currently, the reduction of minimum terms is the only incentive system available in DCR. To encourage positive behavior and program participation, DCR should consider implementing the following:
  - **Good time credits**: Reductions in sentence length for maintaining good institutional conduct
  - **Earned time credits**: Additional sentence reductions for completing rehabilitative programs. These measures not only support rehabilitation but also enhance institutional safety by incentivizing positive behavior.

These recommendations aim to create a more effective, fair, and transparent minimum sentencing framework for Hawai'i aligned with the state's unique needs and challenges.

Appendix—Case Law on Minimum Setting

***Williamson v. Hawai`i Paroling Authority*, 35 P.3d 210 (Haw. 2001)**

- "[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." [Reversing the ICA on this point, see ICA opinion at 34 P.3d 1055, 97 Hawai`i 156 (2000).]
- "[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."

***Coulter v. State of Hawai`i*, 172 P.3rd 493 (Haw. 2007)**

- "An HRPP Rule 40 petition is an appropriate means to challenge a minimum term of imprisonment set by the HPA."
- "HPA failed to follow its own rules with a minimum-term order that failed to specify either the level of punishment or the significant criteria upon which the decision was based."
- "[There are roughly 32 cases citing *Coulter*, including all the cases listed below except *Rideout*.]"

***Fukusaku v. State*, 126 Hawai`i 555, 273 P.3rd 1241 (App. 2012)**

- "We conclude that Fukusaku's Second Petition presented a colorable claim that the HPA 'acted arbitrarily and capriciously so as to give rise to a due process violation[,]' *Williamson*, 97 Hawai`i at 195, 35 P.3d at 222, by increasing Fukusaku's aggregate minimum term without providing an adequate justification. We also conclude that given the lack of pertinent evidence in the record regarding the HPA's justification for the increased aggregate minimum term, Fukusaku's Second Petition presented a colorable claim of actual vindictiveness."

***De la Garza v. State*, 129 Hawai`i 429, 302 P.3rd 697 (Haw. 2013)**

- "[T]he HPA issued a second notice and order (Second Minimum Term Order), imposing a minimum term of five years imprisonment on each count, to expire on June 22, 2014. The new minimum term [after victim input] was more than three times the initial term that had been set after the first hearing [lacking victim input]."
- "In light of the critical nature of the HPA's determination of the prisoner's minimum term of imprisonment, due 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.'"

***St. Clair v. State*, No. CAAP-11-0000359 (App. 2013)**

- "St. Clair contends that the HPA violated its Guidelines in placing him in the Level III level of punishment. St. Clair asserts that he did not meet the Level III standard under either the Nature of Offense or Degree of Injury/Loss to Person criteria, which the HPA relied upon to justify his Level III level of punishment. We disagree with St. Clair's claim as to the Nature of Offense, but agree with his claim regarding Degree of Injury/Loss to Person."
- "[T]he HPA erred in relying upon the Degree of Injury/Loss to Person in placing St. Clair within the Level III level of punishment. To fall within Level III under this criteria [sic], the injury or loss suffered by the victim must be 'more than those experienced by similarly situated victims."

***Fagaragan v. State*, 320 P.3rd 889 (Haw. 2014)**

- "Included in Level III classification are offenses that involve manufacturing, importation, distribution, or cultivation of substantial quantities of drugs. The State would essentially expand this list to include 'possession' offenses in order to allow the HPA to make an inference that the offender was manufacturing, importing, distributing, or cultivating substantial quantities of drugs, despite the fact that the offender was never charged, much less, convicted of such activity."
- "The legislature specifically provided in HRS § 706-669(8) that '[t]he guidelines shall be public records and shall be made available to the prisoner[.]' (Emphasis added). Thus, the legislature contemplated that the HPA Guidelines would be an informational tool for the prisoner. The applicable statute, HRS § 706-669, is entitled 'Procedure for determining minimum term of imprisonment,' and clearly stated guidelines are an essential part of the process. The importance of an offender being adequately informed of the applicable criteria cannot be overstated. The determination of whether the offender is classified for Level II punishment as opposed to Level III punishment for a Class A felony is a potential difference of 10 years of incarceration based upon the range of punishment established by the HPA. In this case, the actual difference was 10 years of imprisonment, as Fagaragan's minimum term was set at 20 years."

***Rideout v. State*, 132 Hawai`i 519, 323 P.3d 163 (2014)**

- This citation is to one of several ICA entries saying simply "Summary dispositional order affirmed." Including that citation, there are 8 cases by Monty Rideout in 2013–2014, in the ICA and Supreme Court of Hawai`i, but none appear to involve HPA minimum-setting.

***Nichols v. State,* 134 Hawai`i 390, 341 P.3d 1190 (2014)**

- "The HPA set the prisoner's level at Level III and set his minimum term of imprisonment at the maximum term, listing only the following 'Significant Factors' as its written justification: 'Nature of Offense.'"

- “Where the HPA has taken the extraordinary action of setting the minimum term of imprisonment at the maximum term, thereby effectively eliminating the opportunity for parole, the HPA’s explanation of the reasons for its action, beyond simply listing the significant factors under the Guidelines, would assist the court in reviewing whether the HPA’s action was arbitrary and capricious.”

***Webster v. State*, 134 Hawai`i 306, 339 P.3d 1107 (2014)**

- “Webster received a new minimum sentencing hearing pursuant to *Coulter v. State*, which requires that the Hawaii Paroling Authority (HPA) state the level of punishment and the significant criteria upon which the level of punishment is based. A Notice and Order of Fixing Minimum Term(s) of Imprisonment set Webster’s minimum sentence for each count again at the maximum terms, except for Count III in Cr. No. 98-0613, which was set at 8 years instead of the maximum term of 10 years. The notice identified Webster’s Level of Punishment as Level III and the significant factors identified in determining the level of punishment were ‘(1) Nature of Offense; (2) Degree of Injury/Loss to Person.’”
- “Webster argues that the Circuit Court erred in denying him relief because the HPA deviated from its Guidelines when the order fixing his minimum sentence only noted Nature of Offense and Degree of Injury/Loss to Person as the significant criteria, without providing additional written explanation as to what facts or evidence were used to satisfy the callous and/or cruel disregard for the safety and welfare of others for the Nature of Offense definition.”
- “The HPA Guidelines do not specify any initial starting point such as Level I or II. The HPA Guidelines state, ‘[i]n reaching a decision on a minimum term, the criteria to be taken into consideration are discussed in Part IV.’ All relevant criteria are evaluated, and a level of punishment is determined; the HPA’s decision is not based on an initial starting point, which allows for the level to increase or decrease based on the criteria.”

***Draizen v. State,* 134 Hawai`i 477, 344 P.3d 361 (2015)**

- “Draizen’s minimum term was set at 50 years by the Hawaii Paroling Authority (HPA). . . . Draizen’s request for a new minimum sentencing hearing, pursuant to *Coulter v. State* was granted. Draizen was appointed legal counsel for the new minimum sentencing hearing. ‘[A]fter a hearing, the HPA again set Draizen’s minimum sentence at 50 years and specified the Level of Punishment as Level III, citing the significant factors of Nature of Offense and Degree of Loss/Injury to Victim.’”
- “The HPA Guidelines do not specify an initial starting point such as Level I or II. The HPA Guidelines state: ‘In reaching a decision on a minimum term, the criteria to be taken into consideration are discussed in Part IV.’ All relevant criteria are evaluated, and a level of punishment is determined; HPA’s determination is not based on an initial starting point, which allows for the level to increase or decrease based on the criteria.”

- “When imposing a minimum sentence, the HPA does not determine a defendant’s degree of penal responsibility.”

***Karagianes v. State*, 144 Hawai`i 68, 435 P.3d 1082 (2019) (emphasis added)**

- “Karagianes claims that the HPA lacked authority to set his minimum sentence at 30 years because the Circuit Court imposed a mandatory minimum of only 15 years. Contrary to his claim, the HPA set Karagaines’s minimum term sentence *for parole eligibility purposes, not a minimum sentence*. Keawe v. State, 79 Hawai`i 281, 289-90, 901 P.2d 481, 489-90 (1995).” In Territory v. Waiamau, 24 Haw. 247, 249 (Haw. Terr. 1918), the court stated:

  > Where a sentence is imposed under the indeterminate sentence laws of this Territory the term of the sentence is the maximum period fixed by the court. After the prisoner has served the minimum term provided by law or imposed by the sentence of the court he may be allowed to go on parole but he is still in the legal custody and control of the prison authorities and is deemed still to be serving out the sentence imposed upon him. In re Gertz, 21 Haw. 526[(Haw. Terr. 1913)]; Ughbanks v. Armstrong, 208 U.S. 481[(1908)]; Commonwealth v. Kalck, 239 Pa. 543[(Pa. 1913)]

- Thus, the HPA did not impose a minimum *sentence* upon Karagianes.

***Lewi v. State,* 145 Hawai`i 333, 452 P.3d 330 (2019)**

- “[T]he HPA initially set all of Lewi’s minimum terms at the maximum duration: 20 years on Count 1, 10 years on Count 3, and 5 years on Count 5. The HPA also set Lewi’s level of punishment at Level III, the highest level, for all three counts, stating ‘Significant factors identified in determining the level of punishment: (1) Nature of Offense; (2) Degree of Injury/Loss to Person.’”
- “[Some years later:] [N]ew substitute counsel was able to secure a new minimum term hearing for Lewi before the HPA. The HPA reduced Lewi’s minimum term on Count 1 to 16 years (down from 20 years), his minimum term on Count 3 to 5 years (down from 10 years), and his minimum term on Count 5 to 3 years (down from 5 years). The HPA also reset Lewi’s punishment level to Level II (down from Level III) on Counts 3 and 5.”
- “[Lewi] stated a colorable claim that the Hawai`i Paroling Authority (‘HPA’) violated his due process rights by arbitrarily and capriciously determining that he was a "Level III" offender for purposes of calculating his minimum term of imprisonment on a manslaughter conviction.”
- “[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.”
- “This ruling applies to Lewi and to all cases that are on direct review or not yet final as of the date of this decision.”

Notable Post-2019 Cases on *HPA Minimum Setting*

***Clement v. State*, No. CAAP-17-0000736 (App. 2020)**

- "Clement contends that in 2014 the HPA considered a letter from the Department of the Prosecuting Attorney, dated July 19, 2000, containing adverse information, that was produced for the first time during the 2014 minimum term hearing by the deputy prosecuting attorney handling the hearing. Clement contends the letter was not provided to his attorney at any point before the 2000 minimum term hearing or the 2014 minimum term hearing. Clement had 'a right to disclosure of adverse materials' in preparation for [his] minimum term hearing, so that '[he] is given reasonable notice and a meaningful opportunity to be heard on the issue of the minimum term.'"
- "Clement contends that HPA arbitrarily and capriciously determined that he was a Level III offender and fixed a minimum term of 25 years on the murder count, because it failed to adequately consider all of the relevant factors. The Minimum Term Order issued on January 28, 2014, stated:

  > Level of Punishment: Level III.
  > Significant factors identified in determining level of punishment:
  > (1) Nature of Offense; (2) Character and Attitude of Offender with Respect to Criminal Activity or Lifestyle; (3) Involvement of Offender in Instant Offense."
- *"Lewi* applies to this case because we are directly reviewing Clement's appeal from the minimum term of imprisonment set by the HPA, and our review was not final as of November 7, 2019. Accordingly, we remand for the circuit court to determine whether the 2014 Minimum Term Order complied with the rule established by *Lewi*."

***Mason v. Hawaii Paroling Authority*, No. CAAP-19-0000026 (App. 2021)**

- "Mason argues, inter alia, that HPA violated its guidelines because the Minimum Term Order failed to specify either the level of punishment or the significant criteria upon which the decision was based, as required by the HPA Guidelines. Mason argues that the failure to include this information was arbitrary and capricious. The merit of this argument has been acknowledged by the HPA's administrator, Johnson, and the State, and was explained by the supreme court in *Coulter*."
- "As the initial Minimum Term Order was clearly arbitrary and capricious, and the record before us is inadequate to determine whether a colorable claim for relief might yet exist concerning the new minimum term order, we conclude that questions remain as to whether HPA adequately justified its minimum term determination, and Mason should not be required to initiate a new HRPP Rule 40 proceeding to raise any outstanding issues concerning HPA's new determination of his minimum term."

***Ventrella v. State*, No. CAAP-20-0000448 (App. 2022)**

- "Ventrella contends that he had 'a right to a minimum term sentence that is uniform to those issued to similarly-situated defendants.' He argues that 'his minimum term sentence should be set at a comparable number of years to others who were convicted of the same offense in the same fiscal year.' Contrary to Ventrella's argument, the Guidelines require HPA to consider multiple factors when setting minimum terms."
- "Although '[t]he purpose of minimum sentencing guidelines is to provide a degree of uniformity and consistency in the setting of minimum terms[,]' see Guidelines at 1, there is no requirement that the minimum terms of prisoners convicted of the same offense in the same fiscal year be uniform."

***Webster v. State*, No. CAAP-20-0000297 (App. 2022)**

- "Webster claims the imposition of a 'minimum term of imprisonment' under the Hawai` i Paroling Authority's (HPA) 'Level of Punishment' framework equates to raising the floor of an offender's sentence in violation of *Alleyne v. United States*, 570 U.S. 99 (2013)."
- "The 'parole minimum' set by the HPA is distinct from an offender's 'sentence.' See Star, 2018 WL 4327325, at *2. The 'Level of Punishment' framework Webster challenges is simply the framework that HPA utilizes during a minimum term hearing; it does not implicate elements of the charged offense that change an offender's 'sentence.' See id. As such, the imposition of a Level I, II or III punishment under the 'Level of Punishment' framework does not violate the constitutional principles stated in *Alleyne*."

***Kwolek v. State,* No. CAAP-21-0000134 (App. 2023)**

- "The record shows HPA categorized Kwolek as a Level II offender. The record, however, does not reflect what information was in Kwolek's file or what information the HPA provided Kwolek before his June 4, 2019 hearing. The record also does not contain a transcript of the June 4, 2019 hearing."
- "In advance of the hearing, HPA was required to provide Kwolek with adverse information in their HPA file."
- "If Kwolek's claim that HPA considered adverse information without providing it to him in advance of the June 4, 2019 hearing is taken as true, Kwolek presents a colorable claim."

Endnotes

[1] A fourth requirement in HCR 2023 could not be addressed due to lack of data: examine and compare the minimum sentences issued by the Hawai'i Paroling Authority and the courts to determine whether there are significant differences.

[2] The others are Idaho, Michigan, Montana, and Wisconsin. See Reitz, K., Rhine, E., Lukac, A., & Robin Institute, *American Prison Release Systems* (Minneapolis, MN: University of Minnesota, 2022), https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/2022-05/american_prison-release_systems.pdf.

[3] Admissions data was provided by the (DCR) for January 2000 to May 2024. The DCR data included all pretrial admissions, misdemeanor and felony sentence admissions, as well as admissions due to revocations of probation or parole. From this large data file of over 200,000 cases, a cohort was created of people admitted to prison to serve a felony sentence either as a new commitment or as a probation revocation. Any decisions by HPA that were made following a parole revocation had to be excluded because it was unclear in the data whether a new sentence had been imposed. Additionally, data from CY 2000 to CY 2004 was excluded, as well as data from CY 2024. The earlier years were unreliable in terms of data accuracy, and the 2024 sample year was incomplete. The analysis also excluded outlier cases, defined as people convicted for life sentences and for people whose maximum sentence length exceeded the statutory maximum.

The goal of the second round of data analysis was to determine if there has been a change over time in the setting of minimum terms for people convicted of felony offenses and sentenced to prison. The analysis involved calculating the minimum amount of time to serve and then categorizing cases into the three HPA minimum term levels based on offense severity and sentence length. Due to data limitations, the final analysis was limited to providing a historical trend of minimum terms set by HPA from 2005 to 2023.

It was not possible to replicate the HPA process of setting minimum terms for each offense in the sentencing record. Only the most serious offense was available in the DOCR data, along with the severity level and sentence length associated with the most serious offense available, to calculate estimates of minimum terms. No additional data was available that would have enabled a more robust analysis. The lack of a complete criminal history for each case restricted our ability to incorporate one of the most significant factors into the analysis of how minimum terms are determined. While it was possible to estimate an individual’s prior number of admissions using the DOCR data, this approach potentially biases older cases in the data. Further, risk and needs data were not available, nor was programming participation included.

[4] Analysis of Hawai’i Department of Corrections and Rehabilitation data conducted by The Council of State Governments Justice Center, August 2024.
[5] Ibid.
[6] See *Apprendi v. New Jersey,* 530 U.S. 466 (2000*); Blakely v. Washington* 542 US 296 (2004); *Booker v. United States,* 543 U.S. 220 (2005); *Alleyne v. United States*, 570 US 99 (2016).

[7] See, e.g., *Webster v. State*, No. CAAP-20-0000297 (Haw. App. June 16, 2022).