

Re: Proposal to Amend Rules 40 and 43 of the Hawai'i Rules of Penal Procedure

*POST CONVICTION PROCEEDINGS AND
PRESENCE OF THE DEFENDANT*

The Supreme Court of Hawai'i seeks public comment regarding proposed amendments to the Hawai'i Rules of Penal Procedure, Rule 40, Post-Conviction Proceedings and Rule 43, Presence of the Defendant to conform to House Bill 1325 (relating to wrongful convictions), House Bill 125 (relating to criminal procedure), and Senate Bill 226 ((relating to criminal procedure), and include technical amendments and formatting changes.

The Ramseyer version of the proposed rule amendments are attached. The proposed language to be added is underscored, and the language to be deleted is bracketed and stricken as illustrated in this [~~example~~].

Comments should be submitted in writing **no later than Friday, October 25, 2024** to the Judiciary Communications & Community Relations Office by mail to 417 South King Street, Honolulu, HI 96813, by facsimile to 808-539-4801, by email to pao@courts.hawaii.gov or via the [Judiciary website](#).

Attachment.

**PROPOSED AMENDMENTS TO THE
HAWAI'I RULES OF PENAL PROCEDURE**

(Deleted material is bracketed and stricken; new material is underlined.)

Rule 40. POST-CONVICTION PROCEEDING.

(a) Proceedings and grounds. The post-conviction proceeding established by this rule shall encompass all common law and statutory procedures for the same purpose, including habeas corpus and coram nobis; provided that the foregoing shall not be construed to limit the availability of remedies in the trial court or on direct appeal. Said proceeding shall be applicable to judgments of conviction and to custody based on judgments of conviction, as follows:

(1) FROM JUDGMENT. At any time but not prior to final judgment, any person may seek relief under the procedure set forth in this rule from the judgment of conviction, on the following grounds:

~~[(i)]~~(A) that the judgment was obtained or sentence imposed in violation of the constitution of the United States or of the State of Hawai'i;

~~[(ii)]~~(B) that the court which rendered the judgment was without jurisdiction over the person or the subject matter;

~~[(iii)]~~(C) that the sentence is illegal;

~~[(iv)]~~(D) that there is newly discovered evidence; or

~~[(v)]~~(E) any ground which is a basis for collateral attack on the judgment.

For the purposes of this rule, a judgment is final when the time for direct appeal under Rule 4(b) of the Hawai'i Rules of Appellate Procedure has expired without appeal being taken, or if direct appeal was taken, when the appellate process has terminated, provided that a petition under this rule seeking relief from judgment may be filed during the pendency of direct appeal if leave is granted by order of the appellate court.

For the purposes of this rule, "newly discovered evidence" must be evidence that has been discovered after trial or an entry of a plea of guilty or nolo contendere, could not have been discovered prior to trial or plea by the exercise of due diligence, is admissible and not merely cumulative, corroborative, collateral, or impeaching, and is material on the issue of guilt or punishment. The types of "newly discovered evidence" that may be raised includes, but is not limited to:

(i) Relevant forensic scientific evidence that undermines evidence presented at trial; and

(ii) An opinion of an expert relating to forensic scientific evidence that has either been repudiated by the expert who originally provided the opinion at a hearing or trial that has been undermined by further scientific knowledge or later scientific research or technological advances.

"Forensic science" is the application of scientific or technical practices to the recognition, collection, analysis and interpretation of evidence for criminal and civil law or regulatory issues.

"Forensic scientific evidence" shall include scientific or technical knowledge; a testifying forensic analyst's or expert's scientific or technical knowledge or opinion; reports and/or testimony offered by experts or

forensic analysts; scientific standards; or a scientific method or technique upon which the relevant forensic scientific evidence is based.

“Scientific knowledge” includes knowledge of the general scientific community and all fields of scientific knowledge upon which those fields or disciplines rely.

(2) FROM CUSTODY. Any person may seek relief under the procedure set forth in this rule from custody based upon a judgment of conviction, on the following grounds:

(i)(A) that sentence was fully served;

(ii)(B) that parole or probation was unlawfully revoked; or

(iii)(C) any other ground making the custody, though not the judgment, illegal.

(b) Institution of proceedings. A proceeding for post-conviction relief shall be instituted by filing a petition with the clerk of the court in which the conviction took place. The clerk shall then docket the petition as a special proceeding, and in cases of ~~pro-se~~ self-represented petitions, promptly advise the court of the petition.

(c) Form and content of petition.

(2) NONCONFORMING PETITION. Where a post-conviction petition deviates from the form annexed to these rules, it shall nevertheless be accepted for filing and shall be treated as a petition under this rule provided that the petition

(i)(A) claims illegality of a judgment or illegality of "custody" or "restraint" arising out of a judgment,

(ii)(B) is accompanied by the necessary filing fee or by a well-founded request to proceed without paying filing fees, and

(iii)(C) meets minimum standards of legibility and regularity.

When treating a nonconforming petition as a petition under this rule, the court shall promptly clarify by written order that the requirements of this rule apply and, if the information in the petition is incomplete, may require the petitioner to file a supplemental petition in the form annexed to these rules before requiring the ~~s~~State to respond.

(d) Response. The State of Hawai‘i shall be named as the respondent in the petition, and the petitioner shall serve the petition on the respondent by delivering a filed copy thereof to the prosecutor. Service may be made by the attorney for the petitioner, or the petitioner in a ~~pro-se~~ self-represented case. If it appears that the petitioner is unable to effect prompt service of a filed copy of the petition or other pleading under this rule, the court shall direct court staff to effect service on behalf of the petitioner.

Within 30 days after the service of the petition or within such further time as the court may allow, the respondent may answer or otherwise plead, but the court may require the State to answer at any time. Where the petition makes a showing of entitlement to immediate relief, the court may shorten the time in which to respond to the petition. The respondent shall file with its answer any records that are material to the questions raised in the petition which are not included in the petition.

Rule 43. PRESENCE OF THE DEFENDANT.

(a) **Presence required.** The defendant shall be present at the arraignment, at the time of the plea, at evidentiary pretrial hearings, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this Rule. However, a defendant need not be present in court, and shall be considered to have waived the right to be present if:

(1) the defendant has previously been apprised by the court of the rights that will be waived by failing or refusing to appear; and

(2) the defendant, while in custody, is voluntarily absent from two or more consecutive court appearances, as determined by a judge after evidentiary hearing.

(c) **Presence not required.** A defendant need not be present either physically or by video conference if:

(1) the defendant is a corporation and appears by counsel; or

(2) the proceeding is a conference or argument upon a question of law; or

(3) the proceeding is a reduction of sentence under Rule 35 of these Rules.
