DISSENTING OPINION OF ACOBA, J.,
WITH WHOM LEVINSON, J. JOINS

> "When I used a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean -- neither more nor less."
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> "The question is," said Alice, "whether you *can* make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master -- that's all."

L. Carroll, Alice's Adventures in Wonderland and Through the Looking Glass 169-71 (1981) (emphasis in original). In construing statutes, we are not at liberty to resort to an "Alice-in-Wonderland" lexicon. The plain meaning of terms in a statute are curbs on any felt need we may have to render statutes more palatable to our own sense of what is appropriate. In much the same way, the text of a statute establishes limits on the discretion exercised by public officials in their execution of its provisions. Were we to make words mean what we choose to make them mean, rather than give them their true meaning, we would, like Humpty Dumpty, devolve into "Jabberwocky."[1]

The plain language of Hawai‘i Revised Statutes (HRS) §§ 706-660 (1993), -669 (1993 & Supp. 2000), -670 (1993 & Supp. 2000), 353-62 (1993), and -64 (1993) prohibits Petitioner/Respondent-Appellee Hawai‘i Paroling Authority (the HPA) from setting a prisoner's minimum term of imprisonment at a

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[1] *Jabberwocky* is one of Lewis Carroll's best known and most frequently discussed poems. The poem itself is full of nonsensical words, but Carroll weaves them in in a way that cajoles the reader to coax a story out of what would ordinarily be nonsense. See R. Kelly, Lewis Carroll (rev. ed. 1990). "Jabberwocky" has come to be defined as a "meaningless speech or writing." Merriam Webster's Collegiate Dictionary 624 (10th ed. 1993).

period equal to his or her maximum court-imposed sentence. The language of those statutes indicates that a minimum prison term is not to be set at the same length as the maximum term, although a prisoner may ultimately serve the maximum term if, in the series of parole hearings contemplated by HRS § 706-670, parole is denied each time. In my view, the pertinent parts of HRS §§ 706-660, -669, -670, 353-62, and -64, read together, establish that, while there is no right to parole, a minimum term must be set on the premise that every person indeterminately sentenced, like Respondent/Petitioner-Appellant Gregory K. Williamson (Williamson), is to be periodically considered for parole.

I.

"In interpreting statutes, the fundamental starting point is the language of the statute itself, and where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning." State v. Kalama, 94 Hawai'i 60, 64, 8 P.3d 1224, 1228 (2000) (internal quotation marks and citations omitted). Indeed, we are instructed by statute that "[t]he words of a law are generally to be understood in their most known and usual signification, without attending so much to the literal and strictly grammatical construction of the words as to their general or popular use or meaning." HRS § 1-14 (1993).

In this case, "[n]one of the parties contend and [it can]not [be] discern[ed] that the language of HRS §[§ 706-660, -669, -670, 353-62, and -64] is ambiguous inasmuch as, on its face, there is no doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression." Kalama, 94 Hawai'i at 64, 8 P.3d at 1228 (internal quotation marks and citation omitted). Thus, these statutes must be interpreted by "giv[ing] effect to the legislature's intent, which is obtained primarily from the language of the statute[.]" Dines v. Pacific Ins. Co., 78 Hawai'i 325, 332, 893 P.2d 176, 183 (internal quotation marks, brackets, and citation omitted), reconsideration denied, 78 Hawai'i 474, 896 P.2d 930 (1995). Hence, "[u]nder general principles of statutory construction, courts give words their ordinary meaning unless something in the statute requires a different interpretation." Voellmy v. Broderick, 91 Hawai'i 125, 129, 980 P.2d 999, 1003 (App. 1999) (quoting Saranillio v. Silva, 78 Hawai'i 1, 10, 889 P.2d 685, 694, reconsideration denied, 78 Hawai'i 421, 895 P.2d 172 (1995)).

We may confirm the "ordinary meaning of statutory terms" by resort to "extrinsic aids, such as dictionaries" and to our case law. Id. (citing State v. Chen, 77 Hawai'i 329, 337, 884 P.2d 392, 400 (App.), cert. denied, 77 Hawai'i 489, 889 P.2d 66 (1994)). The meaning of the words "shall," "minimum," and "maximum" are germane to this case. The word "shall," "[a]s used

in statutes . . . , is generally imperative or mandatory" and "[t]he word in ordinary usage means 'must' and is inconsistent with a concept of discretion." Black's Law Dictionary 1375 (6th ed. 1990) (emphasis added). Thus, the word "shall" in the pertinent statutory provisions "signals . . . a mandatory [statutory] provision." State v. Hamili, 87 Hawai'i 102, 107, 952 P.2d 390, 395 (1998) (citing State v. Toyomura, 80 Hawai'i 8, 21, 904 P.2d 893, 906 (1995) (parenthetical explanation omitted)). Cf. State v. Villeza, 85 Hawai'i 258, 266-67, 942 P.2d 522, 530-31 (1997); State v. Cornelio, 84 Hawai'i 476, 493, 935 P.2d 1021, 1038 (1997); Gray v. Administrative Dir. of the Court, 84 Hawai'i 138, 149-51 & n.17, 931 P.2d 580, 591-93 & n.17 (1997).

The word "minimum" is defined as "[t]he least quantity assignable, admissible[,] or possible in [a] given case and is opposed to maximum." Black's Law Dictionary at 995 (emphasis added). "Maximum" is defined as "[t]he highest or greatest amount, quality, value or degree." Id. at 979.

Additionally, we are directed that "[l]aws in pari materia, or upon the same subject matter, shall be construed with reference to each other." HRS § 1-16 (1993). See also State v. Delima, 78 Hawai'i 343, 347-48, 893 P.2d 194, 198 (1995); Zator v. State Farm Mut. Auto. Ins. Co., 69 Haw. 594, 597, 752 P.2d 1073, 1075 (1988). Thus, HRS §§ 706-660, -669, -670, 353-62, and

-64 are to be read in concert. A construction of these statutes or parts of them in isolation would not reflect their true import. The failure to construe related statutes in pari materia is as unwarranted a departure from our duty to faithfully construe statutes as is the manipulation of statutory language in the face of its plain and ordinary meaning.

II.

To say that the HPA has wide discretion is not rationally dispositive. The discretion granted the HPA to set minimum sentences is not carte blanche authority to disregard the express directives of the law. The HPA's discretion to set minimum sentences is not limitless; it is the discretion to establish such sentences, but in accordance with the legal framework prescribed by the statutes. The distinction between a maximum length of imprisonment and a minimum length of imprisonment for parole purposes is initially made in HRS § 706-660. HRS § 706-660 provides in relevant part as follows:

> **Sentence of imprisonment for class B and C felonies; ordinary terms.** A person who has been convicted of a class B or class C felony may be sentenced to an indeterminate term of imprisonment . . . . When ordering such a sentence, the court shall impose the maximum length of imprisonment which shall be as follows:
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> (1) For a class B felony--10 years; and
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> (2) For a class C felony--5 years.
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> The minimum length of imprisonment shall be determined by the Hawai'i paroling authority in accordance with section 706-669.

(Emphases added.) That the term "shall" is used in its ordinary

mandatory sense is emphasized by its juxtaposition with the term "may":

> In the past, this court has subscribed to the proposition that, "where the verbs 'shall' and 'may' are used in the same statute, especially where they are used in close juxtaposition, we infer that the legislature realized the difference in meaning and intended that the verbs used should carry with them their ordinary meanings." In re Tax Appeal of Fasi, 63 Haw. 624, 626-27, 634 P.2d 98, 101 (1981) (citations omitted). Not surprisingly, we have therefore construed the "close proximity of the contrasting verbs 'may' and 'shall' to require a *mandatory* effect for the term 'shall.'" Id. at 627, 634 P.2d at 101 (emphasis added).

Gray, 84 Hawai'i at 149, 931 P.2d at 591 (brackets omitted). Accordingly, in unambiguous terms, HRS § 706-660 dictates that "the court shall impose the maximum length of imprisonment" while "the minimum length of imprisonment shall be determined by [the HPA]." (Emphases added.) The common sense and only rational conclusion to be drawn from the function delegated to the court, as opposed to that given the HPA, is that the former designates the maximum sentence and the latter does not, and if the HPA in effect does so, by setting the minimum the same as the maximum sentence, it effectively violates the mandate of HRS § 706-660 and abdicates its duty thereunder. Thus, the authority of the HPA to determine the minimum sentence cannot overlap the exclusive authority expressly vested in the court to determine the maximum sentence. The express statutory command in HRS § 706-660, reserving the authority to determine the maximum sentence to the court and vesting only the determination of the minimum sentence in the HPA is consistent with and explains why

there is no statutory language authorizing the HPA to set the minimum term at the same length as the maximum term, and no legislative history to that effect. The maxim of expressio unius est exclusio alterius applies. See Black's Law Dictionary at 581 (defining "expressio unius est exclusio alterius" as "[w]hen certain . . . things are specified in a law, . . . an intention to exclude all others from its operation may be inferred"); In re Water Use Permit Applications, 94 Hawai'i 97, 151, 9 P.3d 409, 463 (2000) (stating that "where the legislature includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that the legislature acts intentionally and purposely in the disparate inclusion or exclusion" (brackets and internal quotation marks omitted)). As stated in HRS § 706-660, the HPA must set the minimum length of sentence, in other words, a term less than, that is, "as opposed to" the maximum sentence set by the court. Black's Law Dictionary at 995. Construing the statutes in pari materia, the minimum sentence is to be set in accordance with HRS § 706-669.

III.

A.

HRS § 706-669 establishes the interrelationship between a minimum sentence order and parole:

> **Procedure for determining minimum term of imprisonment.** (1) When a person has been sentenced to an indeterminate or an extended term of imprisonment, the Hawai‘i paroling authority shall, as soon as practicable but no later than six months after commitment to the custody of the director of the department of public safety hold a hearing, and on the basis of the hearing make an order fixing the minimum term of imprisonment to be served before the prisoner shall become eligible for parole.
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> (2) Before holding the hearing, the authority shall 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 report shall be a complete personality evaluation for the purpose of determining the prisoner's degree of propensity toward criminal activity.
>
> (3) The prisoner shall be given reasonable notice of the hearing under subsection (1) and shall be permitted to be heard by the authority on the issue of the minimum term to be served before the prisoner becomes eligible for parole. In addition, the prisoner shall:
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> (a) Be permitted to consult with any persons the prisoner reasonably desires, including the prisoner's own legal counsel, in preparing for the hearing;
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> (b) Be permitted to be presented and assisted by counsel at the hearing;
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> (c) Have counsel appointed to represent and assist the prisoner if the prisoner so requests and cannot afford to retain counsel; . . .
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> . . . .
>
> (4) The authority in its discretion may, in any particular case and at any time, impose a special condition that the prisoner will not be considered for parole unless and until the prisoner has a record of continuous exemplary behavior.
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> (5) After sixty days notice to the prosecuting attorney, the authority in its discretion may reduce the minimum term fixed by its order pursuant to subsection (1).
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> . . . .
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> (8) 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. The guidelines shall be public records and shall be made available to the prisoner and to the prosecuting attorney and other interested government agencies.

(Emphases added and brackets omitted.) Again, the juxtaposition of "shall" with "may" indicates the legislature intended to give mandatory effect to those directives preceded by the word "shall." See Gray, 84 Hawai‘i at 149, 931 P.2d at 591.

HRS § 706-669 is clear and unambiguous on its face. Inasmuch as HRS § 706-669(1) mandates that the HPA "shall hold a hearing," the HPA has no discretion to dispense with the hearing. The HPA is directed "on the basis of the hearing [to] make an order fixing the minimum term of imprisonment[.]" Id. The procedural protections in HRS § 706-669(3)(a)-(c), (6), and (8), which pertain to the hearing to fix a "minimum term," and the HPA's authority under HRS § 706-669(5) to reduce the "minimum term" do not in any way suggest that the HPA may impose a maximum term, but, on their face, are premised on the mandate that the HPA fixes a "minimum term," as opposed to the maximum sentence, a plain proposition supported by the other related statutes. Accordingly, a minimum term of imprisonment must be determined in light of the command to hold a hearing for that purpose. The minimum term that is fixed is "to be served before the prisoner shall become eligible for parole." HRS § 706-669(1) (emphasis added).

Parole is a "conditional release from imprisonment which entitles a parolee to serve the remainder of his [or her] term outside the confines of an institution, if he [or she] satisfactorily complies with all terms and conditions provided in the parole order." Turner v. Hawai'i Paroling Auth., 93 Hawai'i 298, 301, 1 P.3d 768, 771 (App. 2000) (quoting Black's Law Dictionary at 1116) (citations omitted)) (emphasis added).

Parole, by definition, then, is served before a prisoner's maximum sentence ends.

Plainly, eligibility for parole must be determined before parole is granted. The minimum sentence, in turn, is to be served "before" the prisoner shall become eligible for parole. Because the minimum sentence must precede consideration for parole, and because parole can only be served before the maximum sentence runs, the minimum sentence fixed by the HPA cannot be coincident with that of the maximum sentence; it must necessarily end before the maximum term of imprisonment set by the sentencing court is served. The HPA, however, set the minimum at the maximum sentence term. No more patent violation of a statutory command can be imagined. "Minimum," quite obviously, "is opposed to maximum." Black's Law Dictionary at 995.

B.

Setting a minimum sentence at a hearing for that purpose is, as the words "shall become eligible for parole" in subsection (1) indicate, the first stage of a process intended to afford a prisoner parole consideration. See infra and HRS §§ 706-670, 353-62, and -64. The exception to such consideration occurs when, as HRS § 706-669(4) relates, the HPA exercises its discretion to "impose a special condition that the prisoner will not be considered for parole unless and until the prisoner has a

record of continuous exemplary behavior." By expressly providing for an exception to "consider[ation] for parole," subsection (4) confirms the reciprocal and converse proposition that every other prisoner (except, obviously, those prisoners whose sentences are statutorily non-parolable, see infra note 2) is eligible for parole. The import of subsection (1), read in pari materia with subsection (4), is that the HPA is obligated to impose a "special condition" before suspending consideration of parole, as prescribed in HRS §§ 706-660, -669, -670, 353-62, and -64, and, in the absence of such a condition, a prisoner must "be considered for parole." HRS § 706-669(4).

Consistent with the statutory language, the commentary on HRS § 706-669 confirms that the Hawai'i Penal Code (HPC) "does not recognize a sentence of imprisonment not subject to . . . parole except for [the murder offenses referenced in HRS §] 706-606(a)[.]"[2] (Emphasis added.) Hence, except in the case of

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[2] HRS § 706-606 has since been renumbered. The commentary references an earlier version of HRS § 706-606(a) which, initially and prior to the 1986 amendment, provided as follows:

> **Sentence for offense of murder.** The court shall sentence a person who has been convicted of murder to an indeterminate term of imprisonment. In such cases, the court shall impose the maximum length of imprisonment as follows:
>
> (a) Life imprisonment without possibility of parole in the murder of: [types of murder listed]
>
> . . . .

HRS § 706-606 (Supp. 1972). The comparable sections presently are HRS §§ 707-701(2) (1993) and 706-656(1) (1993). HRS § 707-701(2) provides as follows:

> **Murder in the first degree.** . . .

(continued...)

murder in the first degree, see also HRS §§ 353-62 and -64, infra, or an imposed special condition under HRS § 706-669(4), every prisoner is to be considered for parole.

IV.

The setting of a minimum sentence, which takes place "as soon as practicable but no later than six months after commitment to the custody of the director of the department of public safety" discussed above, HRS § 706-669(1) (brackets omitted), is to be followed by an initial parole hearing, which occurs "at least one month before the expiration of the minimum term of imprisonment." HRS § 706-670(1).[3] The provisions of HRS

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[2](...continued)

> (2) Murder in the first degree is a felony for which the defendant shall be sentenced to imprisonment as provided in section 706-656.

HRS § 706-656(1) provides as follows:

> **Terms of imprisonment for first and second degree murder and attempted first and second degree murder.** (1) Persons convicted of first degree murder or first degree attempted murder shall be sentenced to life imprisonment without possibility of parole. . . .

The difference in statutory language does not affect the analysis.

[3] HRS § 706-670(1) provides in pertinent part as follows:

> **Parole procedure**; . . . . (1) Parole hearing. A person sentenced to an indeterminate term of imprisonment shall receive an initial parole hearing at least one month before the expiration of the minimum term of imprisonment determined by the Hawaii paroling authority pursuant to section 706-669. If parole is not granted at that time, additional hearings shall be held at twelve-month intervals or less until parole is granted or the maximum period of imprisonment expires. . . .

(continued...)

§ 706-670(1), which direct periodic review of a prisoner's status for parole, verify that a minimum sentence is to be established at less than the maximum term.

HRS § 706-670(1) provides that "[a] person sentenced to an indeterminate term of imprisonment shall receive an initial parole hearing at least one month before the expiration of the minimum term of imprisonment determined by the Hawaii paroling authority pursuant to section 706-669," and that "additional hearings shall be held at twelve-month intervals or less until parole is granted or the maximum period of imprisonment expires." HRS § 706-670(1) (emphases added).[4] In view of the fact that HRS

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[3](...continued)
(Emphases added.)

[4] The significance attributed to parole hearings is underscored by the numerous due process protections given prisoners by subsections (3) and (4) of HRS § 760-670:

> (3) Prisoner's plan and participation. Each prisoner shall be given reasonable notice of the prisoner's parole hearing and shall prepare a parole plan, setting forth the manner of life the prisoner intends to lead if released on parole . . . . The institutional parole staff shall render reasonable aid to the prisoner in the preparation of the prisoner's plan and in securing information for submission to the authority. In addition, the prisoner shall:
>
> (a) Be permitted to consult with any persons whose assistance the prisoner reasonably desires, including the prisoner's own legal counsel, in preparing for a hearing before the authority;
>
> (b) Be permitted to be represented and assisted by counsel at the hearing;
>
> (c) Have counsel appointed to represent and assist the prisoner if the prisoner so requests and cannot afford to retain counsel; and
>
> (d) Be informed of the prisoner's rights as set forth in this subsection.
>
> (4) Authority's decision; initial minimum term of parole. The authority shall render its decision regarding a prisoner's release on parole within a reasonable time after

(continued...)

§ 706-670(1) directs that an indeterminate term prisoner "shall receive an initial parole hearing at least one month before the expiration of the minimum term," (emphases added), the HPA has no discretion to deny a prisoner an "initial parole hearing." Id. See Gray, 84 Hawai'i at 149, 931 P.2d at 591. In the same vein, HRS § 706-670(1) compels "additional hearings [to] be held at twelve month intervals or less" in the event parole is not granted in the initial parole hearing. Hence, the HPA has no discretion to deny such additional hearings. If the plain language of the statute were not enough, any doubt of Williamson's right to periodic review is dispelled by the commentary on HRS § 706-670, which notes that "[s]ubsections (1) through (3)[5] are largely self-explanatory" and "[t]he procedure [therein] provides for periodic review of the prisoner's case." (Emphases added.) Such provisions are consistent with the fixing of a lesser term than the maximum allowed. A contrary construction would render the provisions in HRS 706-670

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[4](...continued)

> the parole hearing. A grant of parole shall not be subject to acceptance by the prisoner. If the authority denies parole after the hearing, it shall state its reasons in writing. A verbatim stenographic or mechanical record of the parole hearing shall be made and preserved in transcribed or untranscribed form. The authority, in its discretion, may order a reconsideration or rehearing of the case at any time and shall provide reasonable notice of the reconsideration or rehearing to the prosecuting attorney. If parole is granted by the authority, the authority shall set the initial minimum length of the parole term.

(Emphases added.)

[5] See supra notes 3 and 4.

meaningless. Thus, to conclude that the mandate of periodic review is satisfied under HRS § 706-670 because it is available for persons "eligible for parole" (i.e., those whose minimum sentences have not been set at the maximum term) is circular reasoning. Eligibility for parole, as envisioned under the procedures in HRS § 706-669 and -670 is to be determined through periodic hearings. As the commentary on HRS § 706-670 states in pertinent part, the statute "adopt[s] a procedure for parole determination . . . . The procedure . . . provides for periodic review of the prisoner's case."

V.

It is to be emphasized that HRS § 706-670(1) does not compel the HPA to grant parole. What it unconditionally directs, however, in the absence of an imposed condition under HRS § 706-669(4), is periodic review of an indeterminately sentenced prisoner's eligibility for parole through an initial parole hearing following the setting of a minimum term and, if necessary, additional parole hearings. Because additional hearings must be instituted "until parole is granted or the maximum period of imprisonment expires," HRS § 706-670(1), a prisoner is not guaranteed parole, and the HPA need not ultimately grant parole.

Nevertheless, as evident, HRS §§ 706-660 and -669(1)

mandate that a minimum term less than the maximum term be fixed by the HPA to enable periodic review by way of the initial parole hearing and additional hearings until a prisoner is successful in obtaining parole or the maximum period of imprisonment expires. See HRS § 706-670(1). As Judge Foley, who authored the opinion for the Intermediate Court of Appeals (the ICA), intimates, setting the minimum term at the maximum sentence would deny a prisoner the parole consideration envisioned under the statutes. See Williamson v. Hawai‘i Paroling Auth., No. 22882, slip op. at 9 (Haw. Ct. App. Nov. 20, 2000) [hereinafter ICA's opinion].

That denial of parole is "within legislative discretion," majority opinion at 22 (internal quotation marks and citation omitted), is not disputed, but where the legislature has expressly directed, except in the two exceptions recounted, that, "[i]n selecting individuals for parole[, the HPA shall] consider . . . all committed persons," HRS § 353-62(a)(2), and set forth the procedure to be followed in rendering such consideration, those statutory commands are entitled to recognition and enforcement, as a legislative mandate that denies parole would be. In that regard, nowhere does the legislature authorize the HPA to set the minimum sentence at the same length as that set by the court. Consequently, in setting the minimum term equal to the maximum sentence, the HPA violated the law.

VI.

HRS § 353-62(a)(2) reiterates that the HPA "shall" "consider for parole all committed persons" except those committed for life without parole:

> **Hawai'i paroling authority; responsibilities and duties**; . . . . (a) In addition to any other responsibility or duty prescribed by law for the Hawaii paroling authority, the paroling authority shall:
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> . . . .
>
> (2) In selecting individuals for parole, 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[.]

(Emphases added.) HRS § 353-62(a)(3) states that the HPA shall determine the appropriate time to grant parole to any "eligible individual." A sentence of life without parole is not an indeterminate sentence and does not come within the scope of HRS § 353-62. However, an indeterminately sentenced prisoner like Williamson falls within the category of "all committed persons." HRS § 353-62(a)(2). HRS § 353-62(a), consistent with the procedures established in HRS §§ 706-669 and -670, requires the HPA to consider all prisoners for parole "regardless of the nature of the offense committed[.]" HRS § 353-62(a)(2). Under HRS § 353-62, then, all committed persons, regardless of the offense for which they are committed, must be considered for parole.

But the manner in which consideration for parole is to take place or eligibility determined is not left to the unguided discretion of the parole board. HRS § 353-62(a)(2) and (3)

relate to the parole board's setting of sentences and therefore must be read in concert with related statutes and not in isolation. As previously elucidated, the procedure for "consider[ing] all committed persons" is governed by the provisions of HRS § 706-669, entitled "Procedure for determining minimum term of imprisonment," (emphasis added), and the eligibility for release on parole by the provisions of HRS § 706-670, entitled, in part, "Parole procedures; release on parole," (emphasis added). Accordingly, the concepts of "consider for parole" and "eligible" for parole as set forth in HRS § 353-62(a) can only be effectuated within the structure set forth in HRS §§ 706-669 and -670.

HRS § 353-64 confirms again that "[a]ny committed person confined in any state correctional facility in execution of any sentence imposed upon the committed person, except in cases where the penalty of life imprisonment not subject to parole has been imposed, shall be subject to parole in manner and form as set forth in this part[.]" (Emphases added.) Like HRS § 353-62 discussed above, HRS § 353-64 mandates that all prisoners except for those sentenced to life imprisonment without the possibility of parole "shall be subject to parole[.]" (Emphasis added.) HRS §§ 353-62 and -64 reinforce the mandate that every prisoner must be considered for parole. Consideration for parole is governed by the procedures set forth in HRS §§ 706-

660, -669, and -670 discussed previously. A HPA policy which circumvents such a mandate is illegal. Nothing grants the HPA authority or discretion to ignore this mandate.

VII.

"[T]he plain language rule of statutory construction[] does not preclude an examination of sources other than the language of the statute itself[,] even when the language appears clear upon perfunctory review" to "adequately discern the underlying policy which the legislature seeks to promulgate[.]" Bragg v. State Farm Mut. Auto. Ins. Co., 81 Hawai'i 302, 306, 916 P.2d 1203, 1207 (1996) (internal quotation marks, brackets, and ellipsis points omitted) (citing Sato v. Tawata, 79 Hawai'i 14, 17, 897 P.2d 941, 944 (1995)). In establishing the HPA, the legislature stated that

> [t]he purpose of this bill is to reconstitute the board of paroles and pardons as a full-time professional board to be known as the Hawaii Paroling Authority, in order more effectively and efficiently to achieve the dual and inseparable purposes of parole, the protection of society on the one hand and the rehabilitation of the offender on the other.

Sen. Conf. Comm. Rep. No. 314, in 1975 Senate Journal, at 959. In that respect, the function of parole supports the conclusion that a minimum sentence term is not to be set at the same length as the maximum term.

"The primary justification for parole is that it fosters rehabilitation. By permitting a structured, supervised,

gradual return to total freedom, parole bridges the difficult transition from prisoner to ex-prisoner." N.P. Cohen, The Law of Probation and Parole, § 1:15, at 1-23 (1999). Parole may also serve as a prison management tool by "encouraging prisoners to obey prison rules, for the parole board is less likely to grant parole to prisoners with a poor institutional record." Id., § 1:18, at 1-26. On the other hand, "a no-parole sentence . . . takes away from the prisoner any motivation or incentive to become a 'model prisoner' and thereby gain parole as a reward for good behavior." Id. at 1-27. Parole permits "fine-tuning" of a sentencing decision. Id., § 1:19, at 1-28. The proposition here is that "the parole board should be more accurate than the sentencing court in determining whether the needs of rehabilitation, special deterrence, and incapacitation have been met at any time after the sentence." Id.

These functions are exemplified (1) in HRS §§ 706-660 and -669, which delegate to the parole board the power to set a minimum sentence after evaluating the prisoner, see HRS § 706-669(2), (2) in HRS § 706-669(1), which charges that a minimum sentence is to be served before parole eligibility, (3) in HRS § 706-669(4), which suspends eligibility for parole upon an appropriate order, (4) in HRS § 706-670(1), which orders an initial parole hearing to be held at the end of the minimum sentence and additional parole hearings thereafter as necessary,

and (5) in HRS §§ 353-62 and -64, which confirm that all prisoners other than those convicted of murder in the first degree are "subject to" parole. Under the procedures established, periodic review is essential to the consideration of parole. Obviously, setting a minimum term which renders such periodic review meaningless would be subject to a due process challenge. See discussion infra.

VIII.

Therefore, every prisoner, except one subject to a statutory sentence excluding parole, is eligible for parole, see HRS §§ 353-62 and -64, and, thus, must be considered for parole (in the absence of a special condition under HRS § 706-669(4)) according to the procedures set forth in HRS §§ 706-660, -669, and -670. The framework of the HPC operates from the premise that parole is a critical component of post-conviction imprisonment, and the HPA has no discretion to alter those procedures by setting a minimum term at the same length as the maximum term. Thus, the framework expressly set forth in HRS §§ 706-669 and -670 does indeed contemplate that the HPA must (i.e., "shall"), in the absence of an express condition entered pursuant to HRS § 706-669(4) or a life sentence, set an initial parole hearing and additional hearings, see HRS § 706-670(1), as required because, as the commentary on HRS § 706-670

contemplates, there is to be periodic review of the prisoner's case. These provisions implement the well-established purposes of parole. See Part VII. The abrogation of such periodic review under a "minimum equals maximum" approach eliminates altogether the balance sought to be struck by the legislature between "the protection of society on the one hand and the rehabilitation of the offender on the other." Sen. Conf. Comm. Rep. No. 314, in 1975 Senate Journal, at 959.

By expressly setting forth what the HPA may do, i.e., by setting the minimum as opposed to the maximum sentence, HRS § 706-660 precludes the HPA from setting the maximum term of imprisonment. Cf. State v. Rodgers, 68 Haw. 438, 442, 718 P.2d 275, 277 (1986) ("[W]here a statute with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different legislative intent existed." (Ellipsis points and citations omitted.)). Obviously, if a prisoner is not susceptible to parole at the expiration of the minimum term, parole may be denied. The setting of the minimum term effectuates the penal code's adherence to the proposition that periodic review for parole, through an "initial parole hearing" and "additional hearings," HRS § 706-670(1), best serves the interests of the public and the prisoner. See Commentary on HRS § 706-670.

Thus, the view that periodic review is "a significant restriction," majority opinion at 15, upon the HPA's discretion looms no more than irrelevant in light of the fact that the statutes discussed above circumscribe the HPA's exercise of discretion. The penal code's adoption of periodic review embodies the public policy that, in an indeterminate sentence, i.e., a sentence that is "subject to termination by the parole board . . . after service of the minimum period", Black's Law Dictionary at 771, the evaluation for parole at one point in time--the start of the defendant's sentence--is simply insufficient to assess whether a defendant should serve the maximum term allowed under the law.

IX.

In his opening brief, Williamson made two arguments. First, he contended that the circuit court erred in treating his petition as a civil complaint and not as a petition under Hawai'i Rules of Penal Procedure (HRPP) Rule 40. Second, Williamson argued that, by virtue of HRS § 706-669(1), "[t]he HPA cannot legally set a prisoner's minimum term the same as the maximum term given by the court."

As to Williamson's first argument, the ICA held that "[a] Rule 40 petition is an appropriate means for an inmate to challenge the minimum term of imprisonment set by the HPA."

ICA's opinion at 3. It is evident that Williamson's challenge to the fixing of his minimum term of imprisonment at the same length as his maximum term "seek[s] relief . . . from custody based upon a judgment of conviction[] . . . on . . . any . . . ground making the custody, though not the judgment, illegal." HRPP Rule 40(a)(2).[6] "[B]ecause a denial of parole continues physical custody, such denial is a proper subject of a writ of habeas corpus and, therefore, an inmate denied parole may be entitled to relief through the mechanism of a HRPP Rule 40 petition." Turner, 93 Hawai'i at 307, 1 P.3d at 777. The HPA, indeed, impliedly concedes this point because it does not challenge the ICA's disposition of it.

With respect to his second argument, it is to be noted that Williamson was convicted of assault in the second degree, HRS § 707-711 (1993), and burglary in the second degree, HRS § 708-811 (1993), and sentenced by the circuit court as provided by HRS § 706-660(2) to maximum indeterminate (apparently concurrent) terms of five years of imprisonment on each count. As previously mentioned, the HPA set the minimum sentence at the

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[6] HRPP Rule 40(a)(2) states as follows:

> (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) that sentence was fully served;
> (ii) that parole or probation was unlawfully revoked; or
> (iii) any other ground making the custody, though not the judgment, illegal.

same term as the maximum sentence imposed by the circuit court. The HPA did not enter, pursuant to HRS § 706-669(4), a special condition that Williamson not be considered for parole.

First, because the court erroneously dismissed Williamson's pro se petition without a hearing, it cannot be discerned whether the HPA conducted Williamson's hearing pursuant to HRS § 706-669 or complied with any "guidelines for the uniform determination of minimum sentences," as required by HRS § 706-669(8), when it set his minimum sentence at the court's maximum sentence. A failure to conduct the hearing pursuant to HRS § 706-669 or to apply guidelines that constitute a basis for uniform determination of minimum sentences may constitute a due process violation.

Second, under the statutory framework regarding parole as discussed supra, the maximum sentence imposed by the circuit court cannot be set by the HPA as the minimum sentence. In view of such circumstances, Williamson's petition was not "patently frivolous" or "without trace of support either in the record or from other evidence[,]" HRPP Rule 40(f), and, therefore, should not have been dismissed by the circuit court. Rather, the action of the HPA violated express provisions of the law.

"[C]ourts may examine a decision denying parole in situations where the parole board has . . . arbitrarily and capriciously abused its discretion so as to give rise to a due

process violation[.]" Turner, 93 Hawai'i at 308, 1 P.3d at 778 (internal quotation marks omitted) (citing United States ex rel. O'Connor v. McDonald, 449 F. Supp. 291, 296 (N.D. Ill. 1978); Reider v. Commonwealth, Pennsylvania Bd. of Probation & Parole, 514 A.2d 967, 969-70 (Pa. 1986)). The action of the HPA in this case was a patent "arbitrar[y] and capricious[] abuse[ of] . . . discretion . . . giv[ing] rise to a due process violation." Id. (internal quotation marks and citations omitted). See also Territory v. Lake, 26 Haw. 764, 772 (1923) (holding that, by setting a minimum sentence at the same length as the maximum sentence, the court failed "to exercise the discretion vested in [it] and to fix a minimum sentence").

X.

Based on the foregoing, I would affirm the ICA's holdings that (1) a HRPP Rule 40 petition is an appropriate means for an inmate to challenge the minimum prison term set by the HPA and (2) the HPA was not authorized to set Williamson's minimum term the same as his maximum term of imprisonment. I would vacate the order of the circuit court dismissing the Petition with instructions to the court to issue an order vacating the so called "minimum" sentence imposed by the HPA and directing the

HPA to comply with the statutory procedures applicable to Williamson's case.