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SCPW-20-0000200 and SCPW-20-0000213

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

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SCPW-20-0000200

OFFICE OF THE PUBLIC DEFENDER, Petitioner,

vs.

CLARE E. CONNORS, Attorney General of the State of Hawai‘i;  
DONALD S. GUZMAN, Prosecuting Attorney, County of Maui;  
MITCHELL D. ROTH, Prosecuting Attorney, County of Hawai‘i;  
JUSTIN F. KOLLAR, Prosecuting Attorney, County of Kaua‘i;  
DWIGHT K. NADAMOTO, Acting Prosecuting Attorney, City and County of Honolulu,  
Respondents.

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SCPW-20-0000213

STATE OF HAWAI‘I OFFICE OF THE PUBLIC DEFENDER, Petitioner,

vs.

DAVID Y. IGE, Governor, State of Hawai‘i;  
NOLAN P. ESPINDA, Director, State of Hawai‘i Department of Public Safety;  
EDMUND (FRED) K.B. HYUN, Chairperson, Hawai‘i Paroling Authority;  
Respondents.

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**INITIAL SUMMARY REPORT AND INITIAL RECOMMENDATIONS  
OF THE SPECIAL MASTER**

**EXHIBITS “1” – “5”**

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## **I. INTRODUCTION**

This Initial Summary Report and Initial Recommendations of the Special Master is provided pursuant to the order of the Hawai‘i Supreme Court, entered on April 2, 2020 in SCPW-20-0000200 and SCPW-20-0000213. The Special Master was given one week to perform the required duties, thus all observations and recommendations should be read in this light. Nevertheless, this report addresses many of the pressing issues raised in the petitions for writs of mandamus filed by the Office of the Public Defender (OPD) and responses by other parties in these consolidated proceedings.

## **II. BACKGROUND**

### **A. Correctional Facilities**

The Corrections Division of the Department of Public Safety (DPS) oversees four jails situated on the four most populous islands: Hawai‘i Community Correctional Center (HCCC), Kaua‘i Community Correctional Center (KCCC), Maui Community Correctional Center (MCCC), and O‘ahu Community Correctional Center (OCCC)). The DPS also oversees four prisons: Halawa Correctional Facility, Waiawa Correctional Facility, Kulani Correctional Facility, and the Women’s Community Correctional Center (WCCC).<sup>1</sup>

The DPS’s End of Month Population Report dated March 31, 2020, attached at Exhibit 1, describes with particularity the categories of inmates housed in each correctional facility.

Generally, jails house criminal defendants (male and female) before trial, those convicted of misdemeanors and sentenced to short terms, those who have violated the terms of their

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<sup>1</sup> The DPS also houses inmates at facilities on contract with the State of Hawai‘i; namely, at the Saguaro Correctional Center and Red Rock Correctional Center in Eloy, Arizona, and the Federal Detention Center in Honolulu, Hawai‘i. Given the scope of the OPD’s petitions for writ of mandamus, this interim report focuses on those correctional centers and facilities located in Hawai‘i. However, the DPS should nevertheless take similar steps to ensure the safety and well-being of Hawai‘i inmates held at off-island correctional centers.

probation, and those convicted of felonies who have either not yet been transferred to prison or who have almost completed their sentences and are returning to the community. Prisons house those convicted of felonies and sentenced, and those who have violated the terms of their parole.

Trial courts have jurisdiction over the release of those in custody pretrial, those sentenced for petty misdemeanor and misdemeanor offenses, and those serving part of the felony probation sentence in custody. The Hawai'i Paroling Authority (HPA) has jurisdiction over those sentenced felons who are not on probation.

Facilities contain different housing configurations, which largely determine the ability to maintain the social distancing urged by the Centers for Disease Control and Prevention (CDC), Hawai'i Department of Health, and other public health professionals and public officials during the ongoing coronavirus (COVID-19) pandemic.

In these facilities, individuals are housed in cells or dormitories, though the number per cell and the amount of personal space possible by the density of the dormitories may vary. At OCCC, for example, dormitories provide for an operational capacity of 100 (Annex 1), 114 (Annex 2), 80 (Module 20), 24 (Pan Makai) and 24 (Pan Mauka), for a total of 342.<sup>2</sup> The remainder of the 858 inmate capacity is located in cells.<sup>3</sup> The other community correctional centers also contain a mix of cells and dorms. All inmates in the Halawa Correctional Facility are in cells, while all housed at Waiawa Correctional Facility are in dorms. WCCC houses inmates primarily in dorms, with additional cells and bedrooms.

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<sup>2</sup> Descriptions and the capacity referred to in this paragraph are based on the State of Hawai'i Corrections Population Management Commission's (CPMC) 2001 Annual Report. *See generally* CORRECTIONS POPULATION MANAGEMENT COMMISSION, 2001 ANNUAL REPORT (Dec. 2001), available at <https://dps.hawaii.gov/wp-content/uploads/2013/12/report2001.pdf>. The CPMC is administratively attached to the DPS. For more information on the CPMC, see <https://dps.hawaii.gov/about/cpmc/>.

<sup>3</sup> The CPMC report considers Laumaka Work Furlough Facility's 96 dormitory beds of operational capacity to be part of the OCCC's 954 operational capacity. Laumaka, including its bed space and operational capacity, are omitted here because it is physically a separate facility.

While actual counts of cells serving double, triple, or quadruple occupancy are yet unknown to the Special Master in the short time available for this interim report, a credible source has advised that in some modules personal space appears downright impossible with over 160 individuals in 48 cells of two modules at MCCC, or 175 individuals in 54 cells at HCCC. The Star Advertiser reported on April 8 that in at least part of OCCC, individuals “continue to be housed three or four to a cell.”<sup>4</sup> I must emphasize that in the short timeframe that I have had to complete this report, I was not yet able to fully determine the density of the populations in each facility, but it seems that in at least some areas the circumstances are critical.

**B. Supreme Court Proceedings**

**1. SCPW-20-0000200 Office of the Public Defender v. Connors**

**a. March 23 Petition for Writ of Mandamus**

On March 23, 2020, the OPD submitted a letter to the Hawai‘i Supreme Court (March 23 Petition), which was filed as a petition for writ of mandamus in SCPW-20-0000200, pursuant to a March 24 order from the supreme court. In light of the national health crisis caused by the ongoing spread of COVID-19, the OPD’s March 23 Petition asked the Hawai‘i Supreme Court to “commute or suspend jail sentences currently being served by inmates in the community correctional centers across the State of Hawai‘i, either as a condition of felony probation or because of an imposed sentence received upon conviction of a misdemeanor or a petty misdemeanor.” The OPD expressed concern that “the virus will spread into the jails and prison facilities, and, when that happens, the health and well-being of inmates and staff members will be at tremendous risk.” The OPD further expressed that it is “incumbent upon the criminal justice

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<sup>4</sup> Pang, Gordon, *Corrections officers complain about lack of basic protection at facilities*, STAR ADVERTISER (Apr. 8, 2020), available at <https://www.staradvertiser.com/2020/04/08/hawaii-news/corrections-officers-complain-about-lack-of-basic-protection-at-facilities/>.

system to reduce our state jail populations to the extent possible without compromising public safety.”

In the March 23 Petition, the OPD requested that the Hawai‘i Supreme Court provide relief in the following ways:

1. For inmates serving a jail sentence as a condition of probation, the custodial portion of the sentence shall either be served at the conclusion of the probationary portion of the sentence or converted into a “time served” condition, at the discretion of the sentencing judge, after input from counsel.
2. For inmates serving a jail sentence as a result of a district or district family court conviction, the custodial portion of the sentence shall be suspended until the conclusion of the COVID-19 pandemic or deemed satisfied, at the discretion of the sentencing judge, after input from counsel.

Rather than placing the onus on the OPD and other defense attorneys to file motions seeking release of individuals on a case-by-case bases, the OPD proposed having the prosecutors object to release in specific cases.

**b. March 24 Order of the Hawai‘i Supreme Court**

The March 24 order from the Hawai‘i Supreme Court ordered Clare Connors as Attorney General of the State of Hawai‘i (Attorney General), Donald Guzman as Prosecuting Attorney of the County of Maui (Maui Department of the Prosecuting Attorney), Mitchell Roth as Prosecuting Attorney of the County of Hawai‘i (Hawai‘i Office of the Prosecuting Attorney), Justin Kollar as the Prosecuting Attorney of the County of Kaua‘i (Kaua‘i Office of the Prosecuting Attorney), and Dwight Nadamoto as Acting Prosecuting Attorney for the City and County of Honolu (Honolulu Department of the Prosecuting Attorney) (collectively, “SCPW-20-0000200 Respondents”) to file an answer to the OPD’s March 23 Petition. The SCPW-20-0000200 Respondents were ordered to “include in their answer all steps, if any, they are taking to

address the issues raised in the [March 23 Petition] and the expected time frame to effectuate these steps.”

**c. Answers to Petition for Writ of Mandamus**

**i. Attorney General**

On March 26, 2020, the Attorney General filed its answer to the OPD’s March 23 Petition, acknowledging its commitment to “protecting the public and the fair administration of justice,” and also its “countervailing interests in reducing the jail population to protect the health, safety and welfare of the inmates, staff and public.” To this end, the Attorney General shared its intent to do the following by the time specified:

1. By March 26, 2020, obtain an inmate listing from the Department of Public Safety (DPS) for the following categories:
  - a. inmates charged with a petty misdemeanor or misdemeanor;
  - b. inmates serving jail sentences as a condition of felony probation;
  - c. inmates serving jail sentences for petty misdemeanor and misdemeanor.
2. By March 26, 2020, review the misdemeanor inmate listings with DPS to identify any misdemeanor releases by the DPS Director as authorized by Section 353-36, Hawai‘i Revised Statutes (HRS), Release of misdemeanants to prevent overcrowding.
3. By March 26, 2020, provide a copy of DPS’s listings, as provided in paragraph 1, to the Petition, the Deputy Prosecuting Attorneys for each county, the Prosecuting Attorneys in the Criminal Justice Division (CJD) of the Department of the Attorney General and the Hawai‘i State Judiciary for review.
4. By March 27, 2020, coordinate and facilitate a meeting with the Petition, Deputy Prosecuting Attorneys, CJD Prosecuting Attorneys and the Hawai‘i State Judiciary to discuss the possible release, commutation or suspension of jail sentences for each identified inmate.

**ii. Kaua‘i Office of the Prosecuting Attorney**

On March 26, 2020, the Kaua‘i Office of the Prosecuting Attorney filed its answer to the OPD’s March 23 Petition, providing that inmates serving sentences for a sexual assault conviction, family abuse conviction under HRS § 709-906, and any felony conviction contained in HRS Chapter 707, as well as Burglary, Robbery, and Unauthorized Entry in a Dwelling, should not be released unless their remaining term of incarceration is 45 days or fewer.

Meanwhile, the Kaua‘i Office of the Prosecuting Attorney argued that the following categories of inmates should be immediately released in light of the COVID-19 pandemic:

A. Age: Release to parole individuals age 60 and older who have five years or fewer on their sentence, and who have been determined to be low risk by the DPS’s internal evaluation, including current classification score or intake assessment.

B. Health: Release to parole/supervision individuals who are immunocompromised or who are medically vulnerable because of diabetes, heart disease, respiratory conditions, or otherwise, who have five (5) years or fewer to serve of their sentence, and who have been determined to be low risk by any DPS internal evaluation, as defined above.

To encourage a reduction of the number of inmates being held at the correctional facilities, the Kaua‘i Office of the Prosecuting Attorney further recommended (1) acceleration of release to parole of those already found suitable for parole by HPA and (2) release to parole of all individuals deemed low risk by DPS internal evaluations who have less than 2 years remaining on their sentence.

As for steps being taken to address the issues raised in the OPD’s petition, the Kaua‘i Office of the Prosecuting Attorney shared that it sent Governor Ige and the Attorney General a letter requesting emergency release of inmates based on an individual’s COVID-19 risk, density reduction measures for DPS correctional facilities, suggestions for reentry and transitional



housing, measures to ensure prisoner physical and mental health during the COVID-19 pandemic, and policies and procedures inside correctional facilities.

Furthermore, the Kaua‘i Office of the Prosecuting Attorney shared that it has begun requesting supervised release of pretrial detainees in custody for non-violent misdemeanors as early as March 17, 2020. The Kaua‘i Office of the Prosecuting Attorney further shared that, on March 16, 2020, it transmitted to Chief of Police of the Kaua‘i Police Department, Todd Raybuck, a memorandum specifying that its office would charge cases on a custody bases where there has been an on-view arrest or arrest on a grand jury or information charge warrant and the offense is murder or attempted murder, any class A felony, any class B or C felony involving violence or threatened violence, abuse of a family or household member, and operating a vehicle under the influence of an intoxicant.

For cases involving misdemeanors, petty misdemeanors, or violations, the Kaua‘i Office of the Prosecuting Attorney recommended the offender be issued a citation with a court date and not held in custody. Further, the Kaua‘i Office of the Prosecuting Attorney recommended that, for bench warrant arrests where bail has been set by a judge, the on-call judge be contacted for authorization to release the arrestees on their own recognizance with a court date set in the future. The Kaua‘i Office of the Prosecuting Attorney also asked that the Kaua‘i Police Department refrain from serving bench warrants for petty misdemeanors and misdemeanors in light of the ongoing COVID-19 pandemic.

### **iii. Maui Department of the Prosecuting Attorney**

On March 27, 2020, the Maui Department of the Prosecuting Attorney filed an answer to the OPD’s March 23 Petition, and strongly opposed the mass release of inmates based on the custody statuses listed in the petition. The Maui Department of the Prosecuting Attorney argued

that modification or suspension of sentences due to COVID-19 is within the jurisdiction of the district and circuit courts and, therefore, should be decided on a case-by-case basis. The Maui Department of the Prosecuting Attorney further argued that the Maui Department of the Prosecuting Attorney, OPD, and the Second Circuit courts had already been assessing, on a case-by-case basis, whether modification or suspension of a jail term is appropriate for a given defendant.

To reduce the inmate population at MCCC, the Maui Department of the Prosecuting Attorney began to only charge the following matters on a custody basis: Murder or attempted murder, any class A felony, any class B or C felony involving violence or threatened violence, Abuse of Family or Household Member and violations under HRS Chapter 586, and Operating a Vehicle Under the Influence of an Intoxicant. In cases involving misdemeanors, petty misdemeanors, and violations, the Maui Department of the Prosecuting Attorney recommended that the Maui Police Department issue a citation in lieu of making an arrest. Like the Kauaʻi Office of the Prosecuting Attorney, the Maui Department of the Prosecuting Attorney recommended that, for bench warrant arrests where bail has been set by a judge, the on-call judge be contacted for authorization to release the arrestee on their own recognizance. The Maui Department of the Prosecuting Attorney also asked that the Maui Police Department avoid serving bench warrants for petty misdemeanor and misdemeanor offenses.

The Maui Department of the Prosecuting Attorney also shared that its office would consider supervised release or release on their own recognizance for pre-trial detainees who are non-violent and do not otherwise pose a significant risk of danger to the community or victims. Supervised release or release on their own recognizance would also be considered for pre-trial detainees who entered into a plea agreement with the State that would impose jail time beyond

credit for time already served, where the detainee is non-violent and does not otherwise pose a significant risk of danger to the community or victims while pending sentencing.

The Maui Department of the Prosecuting Attorney reiterated its position that sentenced inmates who are serving a jail term as a condition of felony probation or as the result of a misdemeanor or petty misdemeanor conviction should be considered on a case-by-case basis for a modification of the terms of their probation or a suspension of sentence, and only where they are non-violent and do not otherwise pose a significant risk of danger to the community or victims. The Maui Department of the Prosecuting Attorney also noted that any stipulation for the modification of probation or suspension of sentence is to include terms that require the inmate to undergo screening for symptoms of COVID-19, and require the inmate to abide by all state and county-wide COVID-19 “stay-at-home” orders while released.

**iv. Honolulu Department of the Prosecuting Attorney**

On March 27, 2020, the Honolulu Department of the Prosecuting Attorney filed its answer to the OPD’s March 23 Petition. The Honolulu Department of the Prosecuting Attorney argued that the OPD’s petition requests the Hawai‘i Supreme Court to exercise powers that are held by the governor as head of the executive branch, not the Hawai‘i Supreme Court. The Honolulu Department of the Prosecuting Attorney further argued that OPD’s petition fails to identify a legal duty being neglected or fails to demonstrate an indisputable right to relief.

The Honolulu Department of the Prosecuting Attorney noted that its office has taken the following steps to address the issues raised in the OPD’s petition:

- Changed its charging criteria to forego or delay charging non-violent offenses during the ongoing COVID-19 pandemic in an effort to prevent an increase in the jail population.
- Working with the Honolulu Police Department to decrease arrests in a manner that does not jeopardize public safety.

- Maintaining sufficient staffing of deputy prosecuting attorneys and support staff (including investigators, clerical, and fiscal officers) in order to accommodate, inter alia, requests for supervised release, release on own recognizance, and any other court-related matter that cannot be delayed or postponed.
- Using available databases to identify inmates posing the least danger to the public, and as such, may be appropriate candidates for release.
- Have engaged with [the OPD], representatives from the Department of the Attorney General, Donald Guzman of the Department of the Prosecuting Attorney for the County of Maui, Mitchell Roth of the Office of the Prosecuting Attorney for Hawai‘i County, and Justin Kollar of the Office of the Prosecuting Attorney for the County of Kaua‘i in discussions regarding the en masse release of inmates. Prosecutors from other counties have agreed that any en masse release of sentenced inmates should not contradict the Governor’s coordinated effort to stop the spread of COVID-19 in the community.
- Will engage with the Department of Public Safety to determine whether they are able to quarantine inmates with the Governor’s directive.

**v. Hawai‘i Office of the Prosecuting Attorney**

On March 27, 2020, the Hawai‘i Office of the Prosecuting Attorney issued its answer to the OPD’s March 23 Petition and noted its opposition to “mass release of both felony inmates serving a jail sentence as a condition of probation and family court and misdemeanor/petty misdemeanor inmates serving a jail sentence.” The Hawai‘i Office of the Prosecuting Attorney shared the steps it has taken to prevent the spread of COVID-19:

1. Instructing deputies to minimize defendants in custody by considering [release on own recognizance (ROR)] for certain information chargeable felony offense. . . .
2. Not objecting to ROR or supervised release for traffic and minor crimes offenders with warrants, so long as the offender is not a career criminal. . . .

3. An agreement with Police Chief Paul Ferreira that police will issue citations for non-violent petty misdemeanor crimes where the offender is not a career criminal. . . .
4. Working with Warden Cramer Mahoe and Department of Public Safety Michael Hoffman to review the intermittent inmates lists and to obtain and review lists of offenders of concern to the public defender to take proactive actions to release inmates where appropriate. . . .
5. Discussions are being held between Prosecutor Mitch Roth and interim Chief Judge Melvin Fujino to make video conferencing more readily available to avoid the necessity of transport of inmates to and from the jail. Discussions also include ways to reduce jail populations.
6. The prosecutor has received and responded to individual motions for release, with regard to a) verification on of healthy conditions of the inmate, b) risk of flight, c) risk of reoffending and protection of the community.

The Hawai'i Office of the Prosecuting Attorney requested that those inmates applying for release provide the following information:

1. Where they will stay during release;
2. Who has given the inmate permission to stay there, with a phone number and address provided for verification;
3. That the person offering shelter is also willing to provide food and necessities so that the inmate does not have to leave the shelter for any reason;
4. That if released, the person released agrees to remain at the location specified without leaving the house for any reason until next court appearance;
5. Whether the inmate's sentence requires release directly from jail into a program and if there is a program currently willing to accept the inmate, the name and phone number of a program director who can verify the same;
6. That the person will report to court on a date set forth in the court's release order to receive instructions about returning to jail or otherwise.

**c. Interim Order of the Hawai'i Supreme Court**

On March 27, 2020, the supreme court entered an interim order ordering the OPD to “provide a list of inmates held in State community correctional facilities who meet the following criteria, by name and case number(s):”

1. Inmates serving a sentence (not to exceed 18 months) as a condition of felony probation except for (a) inmates serving a term of imprisonment for a sexual assault conviction; or (b) inmates serving a term of imprisonment for any felony offense contained in HRS ch. 707, burglary in the first or second degree (HRS §§ 708-810, 708-811), robbery in the first or second degree (HRS §§ 708-840, 708-841), and unauthorized entry in a dwelling in the first degree and in the second degree as a class C felony (HRS §§ 708-812.55, 708-812.6(1) & (2));
2. Inmates serving sentences for misdemeanor or petty misdemeanor convictions except those convicted of abuse of family or household members (HRS § 709-906), violation of a temporary restraining order (HRS § 586-4), violation of an order for protection (HRS § 586-11), or violation of a restraining order or injunction (HRS § 604-10.5); and
3. All pretrial detainees charged with a petty misdemeanor or a misdemeanor offense, except those charged with abuse of family or household members (HRS § 709-906), violation of a temporary restraining order (HRS § 586-4), violation of an order for protection (HRS § 586-11), or violation of a 3 restraining order or injunction (HRS § 604-10.5).

The OPD was ordered to circulate the list to the parties in this case, the DPS, and the Office of the Administrative Director of the Courts.

**d. OPD Response to March 27 Interim Order**

On March 30, the OPD filed its response to the March 27 Interim Order, reporting that “[r]ather than creat[ing] a new list, which would have been time-consuming, the [OPD] utilized the list provided by the Department of Public Safety and highlighted (in yellow color) the names of the inmates who the Office of the Public Defender is informed and is of the belief and to the

best of its knowledge, meet the criteria set forth in the March 27, 2020 Interim Order.” Furthermore, the OPD noted that, “[b]ecause a list of inmates housed at the Women’s Community Correctional Center (WCCC) was not provided, the Office of the Public Defender, utilizing the Department of Public Safety’s Facility Locator list, created a list of inmates who fell into one of the above categories.” The OPD also included names of inmates classified as Sentenced Intermittent Felon Probationers and Sentenced Intermittent Misdemeanants, as well as other inmates who did not meet the criteria set forth in the March 27 Interim Order but who the OPD felt would be appropriate for release. The OPD circulated these lists to the parties in the case, the DPS, and the Office of the Administrative Director of the Courts via email.

**2. SCPW-20-0000213 Office of the Public Defender v. Ige**

**a. OPD Petition for Extraordinary Writ and/or for Writ of Mandamus**

On March 26, 2020, the OPD filed an additional Petition for Extraordinary Writ Pursuant to HRS §§ 602-4, 602-5(5), and 602-5(6) and/or for Writ of Mandamus (March 26 Petition) to the Hawai‘i Supreme Court in SCPW-20-0000213. The OPD named as respondents, Governor of Hawai‘i, David Ige; Director of the DPS, Nolan Espinda; and Chairperson of the HPA, Edmund Hyun (collectively, “SCPW-20-0000213 Respondents”). In its March 26 Petition, the OPD further requested the following relief “[t]o mitigate the harm that the COVID-19 pandemic will inflict upon people incarcerated and detained in prison and jail, correctional staff, and the people of Hawai‘i”:

1. Appoint a special master with full authority to reduce the population of its Correctional Centers and Correctional Facilities to allow for the social separation and other measures recommended by the CDC to prevent the spread of COVID-19, including by taking the following actions:

- a. At a minimum, reduce the population of its Correctional Centers and Correctional Facilities to their design capacity within 10 days.
- b. Release, with or without conditions, the following categories of individuals currently held pretrial or sentenced to a period of incarceration of one year or less:
  - i. individuals held on unaffordable bail;
  - ii. individuals who are at increased risk of serious illness from COVID-19, including but not limited to individuals who meet the CDC's high-risk criteria;
  - iii. individuals charged with but not convicted of a misdemeanor or lesser offense or offenses; and
  - iv. individuals sentenced to a term of imprisonment of one year or less, including individuals who have been convicted of, or pled guilty to, a felony offense or offenses and has been sentenced to probation with a term of incarceration of one year or less.
- c. Release, with or without conditions, all individuals who were sentenced to probation (including those in the HOPE probation program) and are incarcerated solely for a technical violation of the probation rules.
- d. Release, with or without conditions, the following categories of individuals serving sentences of incarceration of one year or more:
  - i. individuals who are at increased risk of serious illness from COVID 19, including but not limited to individuals who meet the CDC high risk criteria;
  - ii. individuals whose most serious offense is a class C felony, robbery in the second degree, theft in the first degree, a class B offense against property, or a class B drug offense;
  - iii. individuals who have one year or less on their maximum term of imprisonment;



- iv. individuals who are incarcerated as a result of a finding of a violation of parole that does not include the allegation of a new criminal offense;
  - v. individuals who meet the Department of Public Safety's medical release criteria, COR.11.1G.11; and
  - vi. any other individual for whom a release is appropriate.
2. Order the Department of Public Safety to adhere to the CDC's Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in all Community Correctional Centers and Correctional Facilities.
3. Order District, Family and Circuit Courts to consider the serious health risk posed by detention to the defendant, other incarcerated individuals, and the community in bail determination hearings, probation and parole revocation hearings, and sentencing.
4. Order District, Family and Circuit Courts to vacate all bench warrants, and cease the issuance of new bench warrants for failing to appear.
5. Order District, Family and Circuit Courts to suspend all probation or pretrial conditions—including drug testing, employment requirements, and housing requirements—whose adherence would require the individual to violate the CDC's physical distancing instructions.

**b. March 27 Hawai'i Supreme Court Order**

On March 27, 2020, the Hawai'i Supreme Court ordered the SCPW-20-0000213 Respondents to file answers to the OPD's March 26 Petition, which was to include "all steps, if any, they are taking to address the issues raised in the petition for extraordinary writ and the expected time frame to effectuate those steps."

**c. Answer to March 26 Petition**

On March 31, 2020, the SCPW-20-0000213 Respondents, through the Attorney General, filed their answer to the March 26 Petition. In the answer, they argued that OPD's request for

release of inmates based solely on conviction classifications ignores the health and safety of both the public and the inmates themselves. Furthermore, they argued that the court should allow the respondents, the OPD, and other government officials to continue efforts to fashion a plan to reduce the jail population, which had been ongoing. The SCPW-20-0000213 Respondents agreed to the appointment of a special master, but, before an inmate is released, would want every inmate to be assessed for the risk to the victims, family, and public; have a safe place to live; and be subject to reasonable monitoring and other conditions to ensure public health and safety. They also noted that the Attorney General, county prosecuting attorneys, and the OPD conferred on March 31 to discuss a release plan as follows:

1. The prosecuting attorneys will review [the OPD's] March 30, 2020 listing and identify pre-trial detainees who they do not object to being released. Pre-trial detainees were focused upon because DPS Intake Service Center monitors that group and DPS participated on the conference call. Adult Client Services, which monitors probationers was not a participant on the conference call;
2. [The OPD] will verify a residence for those on the prosecuting attorneys' pre-trial detainee list. Verification of residence includes identifying where an inmate will reside, contacting a person who lives at that address, and confirming the person is able to live at the residence. [The OPD] objects to verified residence being a condition of release and does not waive that objection by verifying a residence;
3. Prosecutors will draft a proposed stipulation for release and forward to [the OPD];
4. Prosecutors contend that an inmate selected for release should be outfitted with an electronic bracelet to ensure the inmate remains at the verified residence. The inmate should remain quarantined in the residence for 14 days;
5. Public safety will explore securing additional electronic bracelets;
6. A continued telephone conference is scheduled for Thursday, April 1, 2020 at 11:00 a.m.

Last, the SCPW-20-0000213 Respondents urged the Hawai‘i Supreme Court “to permit the parties to continue to work towards a settlement, in which case it need not reach the constitutional issues raised by [the OPD]. But if it does, it must find that there is no constitutional violation.”

**d. OPD Reply to SCPW-20-0000213 Respondents’ Answer**

On April 1, 2020, the OPD filed a reply to SCPW-20-0000213 Respondents’ answer, seeking to address factual and legal assertions made in the answer.

**e. Hawai‘i Correctional Systems Oversight Commission’s Amicus Letter in Support of OPD’s March 26 Petition**

On April 1, 2020, the Hawai‘i Correctional Systems Oversight Commission (Oversight Commission) filed an amicus letter in support of the OPD’s March 26 Petition. The letter reiterated the Oversight Commission’s “deep and growing concerns regarding the ability of Hawai‘i’s correctional system to cope with an outbreak of COVID-19 in any of its facilities.” The Oversight Commission expressed its support of the OPD’s request to “identify appropriate individuals to be considered for immediate release and for lower courts to adopt measures to reduce the rate of intake of inmates in the correctional system.” The Oversight Commission expressed its willingness to support the work of the Special Master if appointed and its willingness to assist with oversight of the DPS to ensure it adheres to established guidelines.

**3. Consolidated Proceedings**

**a. Hawai‘i Supreme Court Order of Consolidation and for Appointment of Special Master**

On April 2, 2020, the Hawai‘i Supreme Court entered an order consolidating SCPW-20-0000200, Office of the Public Defender v. Connors, and SCPW-20-0000213, Office of the Public Defender v. Ige, proceedings. Notably, the court ordered that, “[t]o the extent there are

individuals serving intermittent sentences, the custodial portion of such defendants' intermittent sentence shall be suspended until the conclusion of the COVID-19 pandemic or deemed satisfied, at the discretion of the sentencing judge.” However, for all other classifications of inmates, the court declined to enter a blanket order releasing large number of inmates at this time.

Instead, the supreme court ordered that a collaborative effort be taken first “to address the competing public health and safety concerns and to ensure that social distancing measures are being or can be effectuated within the State’s jails and prisons for the safety of the inmates, the staff, and the public[.]” To effectuate this effort, the supreme court appointed a Special Master, as suggested by OPD and agreed upon by the SCPW-20-0000213 Respondents and the amicus of the Oversight Commission.

The Honorable Daniel R. Foley (ret.) was thus appointed as Special Master “to work with the parties in a collaborative and expeditious manner to address the issues raised in the two petitions and to facilitate a resolution while protecting public health and public safety.” The order provides that “[t]he parties shall consider viable options to keep inmates and the public safe (e.g., bracelet monitoring, alternative locations to house inmates, inmate categories such as age or medical condition, etc.)” The court notes its intent to establish a “process for the expedited but appropriate consideration of the request to reduce inmate populations within correctional facilities, while preserving the ability of the State to object to the release of specific inmates or to suggest alternative measures.”

The order further provides that the Special Master may engage in *ex parte* communications for the purposes of gathering documents and information, and to facilitate the collaborative effort, and may include, as part of these efforts and discussions, members of the

public health community and other affected agencies. Notably, the supreme court’s order also explicitly provides that “[t]he appointment of the Special Master does not limit the ability of the parties or others to request, or of the trial courts to grant, modifications of sentences or bail[,]” and that the order “also does not affect the Department of Public Safety’s authority under the law to release inmates.” The Special Master was directed to file an initial summary report by April 9, 2020.

**b. Additional Amici Curiae in Support of the OPD’s March 26 Petition**

**i. American Civil Liberties Union and Lawyers for Equal Justice’s Amicus Curiae Brief in Support of the OPD’s March 26 Petition**

Also on April 2, 2020 after the Hawai‘i Supreme Court entered its order appointing a Special Master, the American Civil Liberties Union of Hawai‘i Foundation and Lawyers for Equal Justice filed an amicus brief urging the Hawai‘i Supreme Court to “exercise its broad supervisory jurisdiction over the judicial system to appoint a special master with full authority to make prompt decisions to reduce the number of people detained or incarcerated in Hawai‘i correctional centers and correctional facilities.” The letter further emphasized that:

(A) time is of the essence, (B) overcrowding amid a pandemic is unconstitutional, (C) the Petition seeks relief that many other state supreme courts have already granted, (D) a special master process ensures rapid but individualized review, and (E) imposing more blanket conditions of release would be unlawful and irrational.

**ii. Public Health and Human Rights Amicus Curiae Brief in Support of the OPD’s March 26 Petition**

On April 6, 2020, Robert L. Cohen, M.D., Joe Goldenson, M.D., Kathryn Hampton, MSt, Ranit Mishori, M.D., Michael Puisis, D.O., Rae S. Seitz, M.D., and Brie Williams, M.D., M.S., filed an amicus curiae brief in support of the OPD’s March 26 Petition. The amici emphasized that the COVID-19 pandemic requires proactive social distancing measures, and that jails and prisons are at a heightened risk for the spread of COVID-19. The amici maintained that the Special Master should facilitate release before the April 9 deadline.

### **C. Summaries of Telephone Conferences with Parties**

While the OPD’s petitions were under consideration by the Hawai’i Supreme Court, criminal justice stakeholders in Hawai’i continued to have meaningful conversations about COVID-19 and the jail and prison system.

#### **1. Telephone Conference - March 27, 2020**

On March 27, 2020, the Attorney General hosted a telephone conference that included representatives from the four county prosecutors’ offices; the DPS, including the Healthcare Division and Office of Intake Services Center (ISC); OPD; and the Judiciary.<sup>5</sup> As summarized below, this group discussed (1) an initial approach and a potential process and criteria for identification and review of individuals who might be subject to release, (2) potential assurances that those released are not COVID-19 positive, and (3) potential housing and monitoring of those released.

The Attorney General articulated that, consistent with the strong views of prosecutors who seek individual determinations as to the appropriateness of release, individuals in some categories, such as felony probationers, have already been reviewed individually by judges with the benefit of thorough pre-sentence reports by professionals, and arguments by prosecutors and

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<sup>5</sup> The representative of the Judiciary made clear to all that the participation was to monitor only, and did not engage in substantive discussions while the matter was pending before the Hawai’i Supreme Court.

defense counsel. This occurred largely before the COVID-19 pandemic. Further, the Attorney General maintained that judges have already ordered these individuals serve parts of their sentences in the communities and parts of their sentences in custody. Accordingly, each person in this category has already been reviewed individually and deemed appropriate to integrate into the community. Those serving intermittent sentences (i.e., individuals who report to custody for weekends and are released during weekdays) have also been previously reviewed individually by judges with the benefit of thorough pre-sentence reports and arguments by prosecutors and defense counsel, and judges have determined it appropriate for each to be in communities.

The Attorney General clarified, and OPD agreed, that inmates whose charges were related to sex-assault or domestic violence should not be released. OPD agreed that it would not seek categorical release of those in custody due to violation of a protective order if release would pose a danger to victims. The Attorney General and OPD also agreed that those released would be required to return to jail for the remainder of their custodial sentences at a later time.

Parties also discussed potential assurances that those released are not COVID-19 positive. A representative of the DPS's Healthcare Division explained that, before release, each individual is reviewed for epidemiological criteria, such as contact with anyone who may have or is suspected of having COVID-19, fever, cough, or shortness of breath. This is also occurring before every intake. For those who meet one or more of these criteria, the Healthcare Division conducts other measures to rule out other viruses, such as the flu, before testing for COVID-19. The representative explained that this is consistent with the guidance of the Hawai'i Department of Health.

The Honolulu Department of the Prosecuting Attorney argued that due to the Governor's stay-at-home proclamation, each person released must have a residence in the community. The

parties discussed the time required to obtain such information, including the difficulty communicating with each inmate in custody, and the difficulty of verifying information received. The parties also discussed potential monitoring of those released by the DPS's ISC, OPD, or probation officers of the Adult Client Services Branch of the Judiciary. OPD emphasized their objection to a verified residence being a condition or requirement for an individual to be released.

At the conclusion of the call, the Attorney General proposed the following occur before another conference call on March 31:

1. Simultaneously (a) prosecutors review lists of individuals in custody and advise the OPD of those for whom they do not object to release and those for whom they do object, and (b) the OPD send lists to prosecutors of those for whom they seek release. Names to be provided on an ongoing basis.
  2. The OPD will attempt to verify residences of those for whom release has not been objected.
  3. Prosecutors will draft a list of conditions for release and share with the PD. Those proposed conditions may differ among counties.
  4. DPS will provide a list of felony pretrial detainees to the Attorney General for distribution. Prosecutors will also review this list and, as they deem appropriate, object to release of certain individuals.
- 2. Telephone Conference - March 31, 2020**

On March 31, 2020, the Attorney General hosted a telephone conference among the same entities as that on March 27. This call generally covered the same three subjects discussed on March 27: (1) An initial approach and a potential process and criteria for identification and review of individuals who might be subject to release, (2) potential assurances that those released are not COVID-19 positive, and (3) potential housing and monitoring of those released. This



discussion added slightly more detail regarding the exchange of lists of names, and objections and potential monitoring by the DPS's ISC, including possible electronic monitoring.

Pursuant to the March 27 telephone conference, the OPD sent to county prosecutors lists of individuals who satisfy the criteria stated by the Hawai'i Supreme Court. Prosecutors from Kaua'i, Maui, and Hawai'i counties noted that they have already sent to the OPD lists of those for whom they object to release and may supplement those objections; the Honolulu Department of the Prosecuting Attorney advised that it was working on doing so. Neighbor island prosecutors also reported that they had each made significant progress with their local OPDs and planned to continue these efforts, although they did not detail the progress on the call. The Attorney General advised that Halawa Correctional Facility and Waiawa Correctional Facility also house several individuals who meet the criteria in the Supreme Court order of March 27, 2020. The Attorney General committed to providing parties with those names shortly.

Prosecutors continued to seek assurances that those released are not COVID-19 positive. The DPS's Healthcare Division repeated the precautions it explained during the March 27 telephone conference with the same entities, and added that conducting COVID-19 tests where not warranted by the individual circumstances, would be inconsistent with the Hawai'i Department of Health's guidance, and would overload the system and create a backlog in the community for high priority tests, such as those of healthcare workers.

The Honolulu Department of the Prosecuting Attorney again argued that due to the Governor's stay-at-home proclamation each person released must have a residence in the community. The Attorney General requested that once the OPD is notified of no objection to release of a particular individual, the OPD should verify an address and then call the person at the address to confirm they are willing to allow the person to stay at that residence for at least 14

days and also willing to report if the individual leaves. The OPD objected to this as a condition for release, but agreed to do so.

Prosecutors also discussed their hope for each person released to be monitored. ISC explained that it customarily monitors individuals pretrial, while probation officers of the Judiciary's Adult Client Services Branch monitors those who have been sentenced. Electronic monitoring using bracelets was discussed. ISC noted that it could obtain additional bracelets from a vendor, but anticipates staffing shortages to perform this type of time-consuming monitoring. Participants to the call also discussed e-monitoring, noting that it is not typically ordered for certain categories under consideration (e.g., those pretrial charged with misdemeanors). There are varying views on whether a different approach would be advisable.

As the call concluded, the Attorney General proposed: (1) Prosecutors review the lists of individuals provided by the OPD for pretrial detainees for whom they do not object to release; (2) the OPD would attempt to verify residences for those pretrial detainees for whom prosecutors do not object to release;<sup>6</sup> (3) prosecutors would draft proposed stipulations for release; (4) individuals selected for release would be provided with an e-monitoring bracelet to ensure they remain at the verified residence for 14 days;<sup>7</sup> and (5) the DPS would attempt to secure additional e-monitoring bracelets.

Following the call, the Attorney General representative implored parties by email that, "Reducing the inmate population without jeopardizing public safety involves difficult decisions, compromise and a willingness to assume new responsibilities and to do things differently. This process does not replace other efforts to protect inmates from the COVID-19 virus."

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<sup>6</sup> The Attorney General noted that the OPD objects to verification of a residence being a condition for release and that OPD does not waive that objection by attempting to do so.

<sup>7</sup> The Attorney General noted that this is an attempt to satisfy the Honolulu Prosecutor's desire for each individual to be tested for COVID-19.

### 3. Telephone Conference - April 2, 2020

On April 2, the Attorney General hosted a telephone conference among the same entities as that on March 27 and 31; however, the Kaua‘i Office of the Prosecuting Attorney did not participate on this call. This call included discussion of (1) the Hawai‘i Supreme Court’s April 2 appointment of Judge Daniel Foley (ret.) as Special Master; (2) the DPS’s recent reports of population counts in correctional facilities; and (3) verification of residences.

The Judiciary representative underscored the following portion of the Hawai‘i Supreme Court’s order issued just minutes before the call: “The appointment of the Special Master does not limit the ability of the parties or others to request, or of the trial courts to grant, modifications of sentences or bail. This order also does not affect the DPS’s authority under the law to release inmates.

The Attorney General highlighted a report by the DPS of the population count of individuals in correctional facilities, which the Attorney General representative summarized as indicating that HCCC is 110 individuals over operational capacity, KCCC 7 below, MCCC 50 above, and OCCC 12 below operational capacity, so a total across the state of approximately 150 over operational capacity at the time of the call.<sup>8</sup>

<sup>8</sup> The DPS’s most recent Jail Population Report, which was provided to on April 8, 2020, has been combined with the population count as stated in the DPS’s April 2, 2020 Media Release:

<b>Jail Population Report</b>						
Facility (Design Capacity/Operational Capacity)	Mar. 2	Apr. 2	Apr. 8	Population Above Design Capacity	Population Above Operational Capacity	Population Decrease
HCCC (206/226)	395	336	310	100	80	89
KCCC (110/128)	143	121	110	-2	-20	35
MCCC (209/301)	450	351	334	123	31	118
OCCC (628/954)	1201	942	916	278	-48	295
<b>TOTAL</b>	<b>2189</b>	<b>1750</b>	<b>1652</b>	<b>499</b>	<b>43</b>	<b>537</b>

The OPD noted that it received from the Honolulu Department of the Prosecuting Attorney a list of those individuals whom they do not object to release. This list contained a total of 13 individuals who were all being held pretrial with misdemeanor charges. The OPD noted that after two full days of work, it was able to verify a residence for three of those individuals. Accordingly, the OPD argued, this process was far too time-consuming and not expeditious enough, and further claimed that DPS was not helpful in the OPD's attempts to communicate with clients in custody. DPS representatives on the call advised it would provide the OPD with the OCCC Warden's direct line.

Parties stated their preference to end the call due to appointment of the Special Master.

#### **4. Telephone Conference - April 6, 2020**

On April 6, 2020, the Attorney General hosted a telephone conference among the same entities as in prior calls, along with Special Master Judge Daniel Foley and the HPA. This telephone conference was convened at the request of the Special Master, who had been appointed by the Hawai'i Supreme Court on April 2. This discussion covered a wide range of process issues. At the outset, Special Master expressed eagerness to work with all and encouraged an "open door" to speak with any of the parties at any time. The Special Master also invited parties to submit comments and concerns to be appended to his interim report.

DPS's population reports were highlighted, as were reductions of populations in recent weeks nearing operational capacities of the community correctional centers. The OPD advised that they sought population reductions to design capacities, rather than operational capacities, because the latter would still not allow for social distancing.

As a follow-up to prior discussions regarding exchange of lists of individuals, Hawai'i and Kaua'i county prosecutors advised that they had transmitted lists to OPD, and Maui county

prosecutors advised they had transmitted two lists and were working on a third, relating to pretrial defendants. Honolulu prosecutors advised that they had transmitted a list of pretrial misdemeanants. The OPD advised that this process in Honolulu was too slow, and the OPD was continuing to have difficulty reaching clients in custody. DPS offered further support.

It was also highlighted that processes for release motions among some, but not all, judges in the Fifth Circuit led to logistical and health concerns by the OPD. Namely, it was shared that in some instances individuals in custody were required to be transported to the courthouse for an in-person review with their OPD of revised terms and conditions of release, and then the individual was also required to attend multiple subsequent in-person hearings in the courthouse before release could be finalized. This was contrasted with practices in Maui and Hawai'i counties, where video-conferencing from the courthouses to the community correctional centers is used. It was noted that multiple Fifth Circuit judges do not require multiple in-person hearings, nevertheless, DPS and the Judiciary committed to immediately attempt to improve the video-conferencing capabilities from the KCCC to the local courthouse.

Along these lines, it was noted that in the First Circuit, the limited number of modules at OCCC and courtrooms with video-conferencing capability functionally results in limited time for hearings by video-conference, even after an exponential increase of scheduled hearing time in recent weeks.

The Attorney General sought continuation of the process of identifying those on probation who might be subject to release. Honolulu prosecutors committed to identify probationers whom it would not object to release and submit those names to the OPD by approximately Wednesday, April 8, 2020. Prosecutors for the other counties had already done so.

The HPA explained that it is reviewing individuals in custody who might be subject to release beginning with those who are scheduled for release before February 2021, those potentially at high risk for contracting COVID-19 due to medical conditions, and others for potential medical release. It was also noted that prosecutors for all islands are screening all cases and not filing charges that might add to the inmate population unless urgent or there was concern for public safety.

### **III. REPORTS OF PARTIES AND OTHERS CONCERNED**

The Special Master invited those involved in the collaborative effort to reduce prison populations at Hawai‘i’s correctional centers and facilities to submit any comments on this effort for inclusion in this report. Reports were received from the OPD, the Attorney General, the Maui Department of Prosecuting Attorneys, the Hawai‘i Office of the Prosecuting Attorney, and the Kaua‘i Office of the Prosecuting Attorney. In addition, comments were received by the Hawai‘i House of Representatives, and a number of concerned clinicians. These reports and comments are attached as Exhibit 2.

### **IV. PROCESS OF THE SPECIAL MASTER**

I was appointed Special Master by the Hawai‘i Supreme Court on April 2, 2020. Upon my appointment, I began reviewing all documents filed in these consolidated proceedings, and have continued to review documents that have since been filed. I also reviewed numerous emails, notes, and documents received by Deputy Administrative Director of the Courts Brandon Kimura who, prior to my appointment, was assigned to observe the above-described telephone conferences regarding the efforts of the Attorney General, prosecutors, OPDs, and judges to reduce jail and prison populations in Hawai‘i’s community correctional centers and facilities.

The materials supplied to me by Mr. Kimura gave me a good idea of what had transpired prior to my appointment.

I then began having separate phone conversations with prosecuting attorneys and deputy prosecutors in every circuit, and with representatives of the offices of the Attorney General and OPD. These conversations were done on a confidential basis so all could speak with absolute candor. The purpose of these calls was to get a sense as to what these attorneys and their offices were doing in the ongoing process to reduce jail and prison populations, and to solicit their views on how reductions of these populations should take place. The attorneys provided me with documents, and these encounters continue throughout my investigation.

The next round of confidential telephonic conversations were with judges. I spoke with the chief and deputy judges of every circuit. As with the attorneys, the purpose of these conversations was to update me on what had been going on in their courts to reduce jail and prison populations, and what their views were on improving the process. The judges also provided me with documents. As with the attorneys, these encounters continue throughout my investigation.

I then began communication by email, phone calls, and video conference calls with members of Hawai'i Correctional Systems Oversight Commission. The Oversight Commission supplied me numerous documents, some which are attached to this report. Communication with Oversight Commission members continue throughout my investigation. As with the judges and attorneys, all conversations were confidential. Documents and recommendations made to me by the Oversight Commission that are part of this report are done with the knowledge and consent of the Oversight Commission. My communications, which are ongoing, with Oversight Commission members was to bring me up to speed on conditions within Hawai'i's correctional

centers and facilities, and to provide information about the threat of COVID-19 to the health and safety of staff and inmates in these facilities.

Once amici curiae briefs were filed by the American Civil Liberties Union of Hawai'i and Lawyers for Equal Justice, and Public Health and Human Rights Experts, I began confidential email and phone conversations with counsel for amici to solicit their views as I had done with the other attorneys, judges, and Oversight Commission members.

I also had phone conversations with former and current officials that have worked in and with correctional centers and facilities, including the Director of DPS and Chair of HPA, and members of community organizations that work with and advocate for inmates. These conversations are also ongoing.

## **V. OBSERVATIONS AND RECOMMENDATIONS**

Because of the limited amount of time I have had to carry out my order of appointment, it is important that all those concerned in this process, including amici, be given at least a limited amount of time to file objections, corrections, and comments on my interim report, and any proposed orders, prior to the Court acting on my recommendations.

### **A. Hawai'i Correctional System Oversight Commission Letter**

The Oversight Commission was created pursuant to Act 179, SLH 2019, which provides that the Oversight Commission shall, inter alia, “establish maximum inmate population limits for each correctional facility and formulate policies and procedures to prevent the inmate population from exceeding the capacity of each correctional facility.” To this end, Act 179 provides that “[t]he department of public safety shall provide full access to all information requested by the



oversight coordinator and commission.”<sup>9</sup> In light of COVID-19, the Oversight Commission has expressed concerns about how DPS plans to mitigate potential COVID-19 spread should exposure occur in the correctional centers and facilities.

**1. The Process of Reconsidering, Lowering, and Monitoring the Operational Capacities of the State Correctional Centers and Facilities Should Begin, as Requested by the Oversight Commission**

The operational capacities of Hawai‘i’s correctional centers and facilities were set by the Corrections Population Management Commission in 2001. These operational capacities have served as a measure of overcrowding at the various correctional centers and facilities in Hawai‘i. With the threat of COVID-19 being introduced by incoming inmates or corrections staff that come in and out every day, these operational capacities are no longer valid.

The opinion of the Oversight Commission is that these operational capacities must be reconsidered, lowered, and monitored in light of the threat of COVID-19. The Oversight Commission shared these concerns in a March 27, 2020 letter to Governor Ige, which is attached as Exhibit 3.

The Director of DPS responded to the Oversight Commission’s March 27 letter on March 30, 2020 in a letter attached as Exhibit 4. The DPS letter did not specifically respond to the Oversight Commission’s request to convene a working group on current operational capacities. However, the DPS’s letter and attachments set forth DPS’s Pandemic Response Plan, CDC Guidelines on COVID-19, efforts and plans to combat and prepare for the introduction and spread of the virus in DPS correctional centers and facilities, and its efforts to reduce the population in these correctional centers and facilities. The Oversight Commission seriously

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<sup>9</sup> The idea of such a commission was a recommendation in the HCR 85 Prison Reform Task Force. The Final Report of the HCR85 Task Force on Prison Reform (2018) is available at [https://www.courts.state.hi.us/wp-content/uploads/2018/12/HCR-85\\_task\\_force\\_final\\_report.pdf](https://www.courts.state.hi.us/wp-content/uploads/2018/12/HCR-85_task_force_final_report.pdf).

studied this document. DPS's plans and efforts confirmed the Oversight Commission's belief that operational capacities must be set at lower levels as soon as possible.

The threat of something like COVID-19 was not a consideration in the establishment of operational capacities in 2001. Therefore, it is my recommendation that the process of reconsidering, lowering, and monitoring the operational capacities of the Hawai'i's correctional centers and facilities begin as requested by the Oversight Commission.

## **2. DPS Should Share Information About and Provide a Progress Update on Its Pandemic Response Plan**

In addition to the operational capacities, the Oversight Commission has serious concerns about how DPS intends to implement its Pandemic Response Plan. In reviewing the DPS's plan, the Oversight Commission has questions regarding medical isolation and quarantine, which may be difficult to achieve given the current populations. These concerns would persist even if the centers were below current operational capacity, especially in the smaller correctional centers on Hawai'i, Maui, and Kaua'i. In the opinion of the Oversight Commission, DPS needs to develop plans to address these concerns and report on its progress. It is my recommendation that DPS provide to the Oversight Commission its plans in these seven areas.

1. Plans for segregating new inmate who are arriving into facilities from other inmates until the medical screening process is complete. These plans should identify the specific space within each facility where segregation will occur.
2. Plans for medically isolating inmates with suspected or confirmed COVID-19 and inmates with mild respiratory illness. These plans should identify the specific space within each facility where medical isolation will occur.
3. Plans for quarantine of inmates who have been exposed to anyone with suspected or confirmed COVID-19. These plans should identify the specific space within each facility where quarantine will occur.

4. Plans for facilities in which segregation, medical isolation, or segregation cannot be effectively implemented should there be any inmates of staff with suspected or confirmed COVID-19.
5. For items 2, 3 and 4 above, the plans should address:
  - a. A relatively minor outbreak of suspected or confirmed COVID-19. (i.e., The number of suspected or confirmed cases does not exceed the capacity of the specific space identified for medical isolation; number of inmates requiring quarantine does not exceed the capacity of the specific space identified for quarantine.)
  - b. A moderate outbreak of suspected or confirmed COVID-19. (i.e., The number of suspected or confirmed cases exceeds the capacity of the specific space identified for medical isolation, or number of inmates requiring quarantine exceeds the capacity of the specific space identified for quarantine. Additional space is needed and can be identified within the facility or in outside facilities such as hospitals.)
  - c. A major outbreak of suspected or confirmed COVID-19. (i.e., The number of suspected or confirmed cases exceeds the capacity of the specific space identified for medical isolation and/or number of inmates requiring quarantine exceeds the capacity of the specific space identified for quarantine. No additional spaces can be identified without significant outside help or without release of inmates.)
6. The progress, if any, DPS has made with its efforts to expand capacity through transfer of inmates to the Federal Detention Facility, contract facilities, or to temporary housing established specifically for DPS.
7. Results, if any of efforts DPS has made to secure the assistance of providers of homeless services, substance abuse treatment, mental health services, and other supportive services, especially for detainees identified as candidates for releases.

If plans have not been created, my recommendation is that DPS create plans accordingly and share them with the Oversight Commission. For example, as evidenced in a letter attached as Exhibit 5, on April 8, 2020, the Director of DPS was informed by the warden of the Federal Detention Center (FDC) that FDC can accept a maximum of 100 additional inmates from DPS after April 13. I also recommend that DPS provide to the Oversight Commission an update on its progress in implementing its Pandemic Response Plan.

## **B. Criminal Justice Stakeholder Population Reduction**

Criminal justice stakeholders have also begun their efforts to thoughtfully and safely reduce the number of individuals being held at Hawai‘i correctional centers and facilities in light of COVID-19, as summarized in Part 2.C of this report. According to numbers from DPS, as of April 8, 2020, the populations of Hawai‘i’s correctional centers are as follows:

- HCCC – 306, which is down 89 from March 2.<sup>10</sup> This is 80 above its operational capacity of 226, and 100 above its design capacity of 206.
- KCCC – 108, which is down 35 from March 2. This is 20 below its operational capacity of 128, and 2 below its design capacity of 110.
- MCCC – 332, which is down 118 from March 2. This is 31 above its operational capacity of 301, and 123 above its design capacity of 209; and
- OCCC – 906, which is down 295 from March 2. This is 48 below its occupational capacity of 954, and 278 above its design capacity of 628.

The correctional centers have, therefore, reduced its populations by 537 individuals in one month, which is significant. This population reduction is ongoing as I write. It is being accomplished by a collaborative effort between the county prosecutors, OPD, Attorney General, and DPS with a recognition that the First Circuit has unique challenges due to the size of its population. Given the amount of time allotted to complete this interim report, this report could not address all areas of consensus amongst stakeholders, such as the neighbor island efforts to refrain from serving bench warrants for certain offenses. Nevertheless, all participants are to be commended for their efforts under trying circumstances, and encouraged to continue this collaboration.

### **1. DPS Should Provide Bi-Monthly Population Reports**

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<sup>10</sup> Prosecutors and judges I spoke to on Hawai‘i contend the March 2 population level was significantly lower.

These ongoing conversations have benefited from DPS's reports on the population count for each of the correctional centers and facilities. For years, DPS has issued monthly reports, which describe the following for each correctional center and facility: Design capacity, operational capacity, total males, total females, sentenced felons, sentenced felony probationers, sentenced misdemeanants, pretrial felons, pretrial misdemeanants, other jurisdictions, parole violators, and probation violators. This is an extraordinarily helpful tool for all justice stakeholders. In light of the current COVID-19 crisis, the tremendous ongoing collaborative effort of many stakeholders, and the decreasing population in the correctional centers as described throughout this interim report, my recommendation is that, until the end of July 2020, DPS produce twice monthly population reports so that all interested stakeholders are kept abreast of the changes in population. During this time of significant simultaneous actions, all stakeholders would benefit from more frequent reporting, which will help to achieve a more accurate understanding of the current population of inmates and further meaningful collaboration.

**2. DPS Should Provide OPD Sufficient Information About Inmates, and the OPD Should Provide Sufficient Information About Those for Whom It Seeks Release**

In issuing its April 2 Order consolidating the OPD's petitions for writ of mandamus and recognizing the competing interests of public health and public safety, the Hawai'i Supreme Court stated that the collaborative effort that was already underway by stakeholders should continue. I was appointed as Special Master to assist in this process. In the April 2 Order, the Hawai'i Supreme Court also noted its goal of establishing "a process for the expedited but appropriate consideration of the request to reduce inmate populations within correctional centers

and facilities, while preserving Respondents' ability to object to the release of specific inmates or to suggest alternative measures."<sup>11</sup>

Prior to its April 2 Order appointing the Special Master, the Hawai'i Supreme Court issued its March 27 Interim Order, which directed OPD to provide all respondents, DPS, and the Office of the Administrative Director of the Courts a list of inmates held in state community correctional centers and facilities who meet the criteria, by name and case numbers: (1) Inmates serving a sentence (not to exceed 18 months) as a condition of felony probation with exceptions; (2) Inmates serving sentences for misdemeanor or petty misdemeanor convictions with exceptions; and (3) All pretrial detainees charged with a petty misdemeanor or a misdemeanor offense with exceptions. The inclusion of exceptions to the types of offenses included in the criteria demonstrates the Hawai'i Supreme Court's recognition of and concern for public safety.

Pursuant to the March 27 Interim Order of the Hawai'i Supreme Court, the OPD submitted its lists of inmates for whom it sought release, which were annotated versions of lists initially prepared by DPS. Many of the lists included errors and omissions, which increased the length of time for consideration of inmates' cases and has caused considerable frustration. The courts have had to do their own research on the status of each inmate listed, which is adding unnecessary time and workload to the courts. Some, but not all, lists have been adequate. Where problematic, lists have lacked criminal numbers and other information that would expedite the consideration of whether release would be appropriate. Other lists included inmates whose release had already been adjudicated. Because of this, some prosecutors have issued blanket objections since they cannot identify the inmates that would be released and whether their release would truly be a risk to public safety.

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<sup>11</sup> In its April 2 Order, the Hawai'i Supreme Court suspended the custodial portion of defendants' intermittent sentences; therefore, this category is no longer part of the discussion amongst stakeholders involved in this collaborative effort.

To expedite this collaborative effort, reduce the workload on already overworked trial courts, and encourage prosecutors to make more surgical objections, it is recommended that the DPS provide sufficient information to the OPD about the inmates listed, so that the OPD can clearly state each individual for whom they seek release. The information provided should include: (1) The inmate's name, (2) all criminal numbers for which the inmate is held, (3) the trial or sentencing judge in each case, (4) the correctional center or facility where the inmate is housed, and (4) the inmate's status (i.e., pretrial felon, sentenced felon probationer, pretrial misdemeanor, petty misdemeanor, etc.).

### **3. Courts Should Maintain Judicial Discretion**

The trial courts have the discretion to determine if an inmate should be granted release, and also have the discretion to make decisions on release by non-hearing motions. It is clearly in the interest of expediting this collaborative effort to have the courts maintain their judicial discretion in this regard, and the judges I spoke to support this as well. Prosecutors would still retain their right to object, and state the legal arguments and factual circumstances supporting their objections. Decisions for release would be based on the record, along with anything put forth by the public defender in support of its motion, and anything submitted by the prosecutor objecting to release or requesting conditions for release. I recommend it be made clear that trial court judges maintain this discretion, and that non-hearing motions are the preferred means of deciding public defender requests for release.

The judges I spoke to further recognize that requests for release should be decided as quickly as possible, and that is clearly what trial judges have done and are attempting to do under trying circumstances. Therefore, I recommend, that the time to dispose of motions for release be left to each circuit and continue to be within the discretion of the courts.

**4. No Cash Bail Options Should Be Widely Utilized Where Defendant Is Not a Threat to Public Safety or a Flight Risk**

Trial judges are not merely waiting for motions from OPD, but are taking the initiative to reduce the pretrial populations through means within their discretion where doing so would be consistent with public safety. This concern for public safety also incorporates concern for public health. The issue of cash bail for pretrial detainees has been discussed in the Judiciary and the Legislature for the past couple of years.<sup>12</sup> However, COVID-19 was not part of that discussion at that time. Because the Judiciary has been part of pretrial reform discussion and has been fully apprised of the relevant arguments, there is no need for me to review the history again here.

In order to reduce the pretrial population at correctional centers, I recommend that the practice of no cash bail, including unsecured bond, release on own recognizance, or supervised released, be regularly employed. Pretrial detainees who are a threat to public safety or a flight risk should not be released pending trial, but pretrial detainees who are poor and not a risk to public safety should not be held simply because they do not have the means to post bail.

**5. Collaboration Should Be Encouraged to Find Residences and Resources for Released Inmates, but Verified Residence Should Not Be Required for Release**

Prosecutors have raised concerns with release of inmates who do not have a verifiable residence. A verifiable residence is of course preferable, especially for sentenced felon probationers. It also may be appropriate where a prosecutor makes a compelling argument based on the factual circumstances of an individual and a judge agrees that in that instance it is a matter of public safety. It does not make as much sense for inmates sentenced for misdemeanors and petty misdemeanors, and in the normal course, housing is not required when individuals are

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<sup>12</sup> The Final Report of the HCR134 Criminal Pre-Trial Task Force (2018) is available at [https://www.courts.state.hi.us/wp-content/uploads/2018/12/POST\\_12-14-18\\_HCR134TF\\_REPORT.pdf](https://www.courts.state.hi.us/wp-content/uploads/2018/12/POST_12-14-18_HCR134TF_REPORT.pdf).



released upon serving their sentences. For pretrial detainees, requiring a verifiable residence essentially amounts to jailing the homeless who also remain presumed innocent as they have not yet been proven guilty.

The OPD should reach out to community groups, nonprofits, and church groups to attempt to identify temporary housing and resources for inmates requesting early release who do not have a verifiable residence. State and county public officials have raised concerns with the prospect of increasing the number of homeless individuals and the impacts that may have on available resources and throughout communities. I encourage those with these valid concerns and those advocating for release of inmates to provide options to the OPD. I have attempted to connect the OPD with the Behavioral Health and Homelessness Statewide Unified Response Group. This group was formed to oversee the majority of the state's public health behavioral health and homelessness services systems. Partners include the Department of Health's Behavioral Health Administration, Governor's Office, Department of Human Services' Homeless Program Office, and all four counties. To the extent that other groups may be interested in finding a way to aid the transition of these inmates during these challenging times, collaboration should be encouraged.

#### **6. The HPA Should Continue Its Review of Parolees**

One area that is rightfully being explored in reducing inmate populations at correctional centers and facilities is early release for inmates that have had their parole revoked for technical violations of their terms of parole (i.e. curfew violation, failure to report as directed, etc.). As seen in Exhibit 1, the DPS's March 31, 2020 population count of inmate parole violators shows that there are 628 men (532 at Halawa Correctional Facility) and 57 women (55 at WCCC) in Hawai'i's correctional centers and facilities. Presumably, many are there for technical parole

violations. The HPA has begun a review of these individuals' case files. The HPA is also communicating with DPS officials and staff to identify inmates with technical parole violations, and to set early parole hearing dates for those not considered a risk to public safety.

In addition, the HPA is actively looking at the option of holding early parole hearings and release for sentenced felons that been granted community or minimum security classifications, who are also near the end of their minimum or maximum sentences. Because of the COVID-19 threat, the HPA began this process before the instant actions were filed, and the HPA is actively working with the DPS to improve video parole hearings at centers and facilities that contain inmates under its jurisdiction. It is expected that the results of the HPA's initiative will begin to be seen by the end of the month.

There is precedent for what the HPA is doing. This is what the HPA did when it assisted the State in reducing prison populations at WCCC and OCCC, before Halawa Correctional Facility was available, pursuant to the mandate of a 1985 federal court consent decree. Setting an early parole hearing does not necessarily mean release, and prosecutors will have the opportunity to object. However, some inmates deemed not a threat to public safety could be released, and the correctional center and facility population reduced. Thus, the HPA should be encouraged to continue its review of parolees under its jurisdiction.

#### **7. A Similar Process for Probationers Should Be Explored**

The Adult Client Services Branch (ACSB) of the Judiciary's First Circuit has implemented changes in how services to the community and supervision of offenders are conducted, but there has been no changes to the level of these services and supervision. ACSB continues to perform all court related responsibilities as ordered by the court, which includes Presentence Investigation Reports, restitution studies, community service

supervision, monitoring of all offenders placed on court ordered supervision (e.g., deferral status, probation, interstate compact cases, intrastate courtesy supervision cases, and conditional release) in the criminal calendars of the circuit, district, and family courts.

There are over 11,000 defendants that are being supervised by Adult Probation Officers, and over 1,800 Presentence investigations that are conducted each year. Additionally, the Specialty Courts (Drug Court, Mental Health Court, and Veterans Treatment Court) of ACSB provide treatment and specialized supervision for defendants who meet each program's specific eligibility criteria. Each program has different Tracks which include post-arrest, pre-trial, and post-conviction.

ACSB has continued to provide timely reports to the court, as requested, including for those defendants who may be subject to release during this COVID-19 health crisis. Also, ACSB has been supervising those defendants who have been released from custody and on court ordered supervision. No defendant has been turned away, as all are instructed to contact the probation office, or if they do not have a telephone, can walk-in to the ACSB offices and they will be serviced.

ACSB has suspended taking HOPE probationers into custody and instead have continued to supervise the defendant and assist with referrals to service providers so that the defendant can continue to engage with services. This temporary suspension has reduced the number of probationers who would normally be taken into custody and held at OCCC.

Due to high caseloads, limited service provider resources, and with most probation officers teleworking, current supervision of those already supervised by ACSB has been challenging, therefore, ACSB would not be able to take on additional defendants who were not on court ordered supervision. Nevertheless, a process of review similar to that being done for

parolees could be explored for probation violators. This process could be explored as a possible option for the nearly 410 men (303 at OCCC) and 63 women (36 at OCCC, and 16 at MCCC) who are being held for probation violations, as evidenced in Exhibit 1.

## **VI. CONCLUSION**

My observations and recommendations are meant to support an ongoing collaborative effort that is significantly reducing populations at Hawai‘i’s correctional centers and facilities during this unprecedented health crisis. The parties should continue the effort to decrease inmate populations and lower the currently set operational capacities in light of COVID-19.

Furthermore, it is critical that concurrent efforts continue, which should include the DPS sharing their plans and efforts to implement its Pandemic Response Plan as requested by the Oversight Commission.

Dated: Honolulu, Hawai‘i, April 9, 2020

/s/ Daniel R. Foley  
Special Master  
The Honorable Daniel R. Foley (ret.)