**Electronically Filed**
**Supreme Court**
**SCPW-20-0000200**
**02-APR-2020**
**10:31 AM**

SCPW-20-0000200 and SCPW-20-0000213

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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SCPW-20-0000200

OFFICE OF THE PUBLIC DEFENDER, Petitioner,

vs.

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

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SCPW-20-0000213

STATE OF HAWAIʻI OFFICE OF THE PUBLIC DEFENDER, Petitioner,

vs.

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

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ORIGINAL PROCEEDING

ORDER OF CONSOLIDATION AND FOR APPOINTMENT OF SPECIAL MASTER
(By: Recktenwald, C.J., Nakayama, McKenna, Pollack, and Wilson JJ.)

On March 23, 2020, the Office of the Public Defender ("Petitioner") submitted a letter to this court, which was filed as a petition for writ of mandamus in SCPW-20-0000200, pursuant to a March 24, 2020 order. The following were named as respondents: 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; and Dwight K. Nadamoto, Acting Prosecuting Attorney, City and County of Honolulu.

On March 26, 2020, Petitioner filed a petition for extraordinary writ in SCPW-20-0000213. The following were named as respondents: David Y. Ige, Governor, State of Hawai‘i; Nolan P. Espinda, Director, State of Hawai‘i Department of Public Safety; and Edmund (Fred) K.B. Hyun, Chairperson, Hawai‘i Paroling Authority.[1]

The petitions seek a reduction of inmates held within correctional centers and facilities housing Hawai‘i prisoners to prevent loss of life and other public health impacts that would result from the introduction and spread of COVID-19 within those facilities.

The COVID-19 pandemic has caused a public health emergency that is impacting Hawai‘i's community correctional centers and facilities. Responding to these petitions requires a careful consideration of interests, both for public health and public safety.

[1] The respondents in both petitions will collectively be referred to as "Respondents."

There is a significant interest in reducing inmate populations to protect those who work at or are incarcerated in these overcrowded facilities. COVID-19 outbreaks within overcrowded facilities or facilities in which appropriate physical distancing is not possible will not only place inmates at risk of death or serious illness, but will also endanger the lives and well-being of staff and service providers who work in the facilities, their families, and members of the community at large. Also, outbreaks within these facilities will severely tax the limited resources of community health care providers, including hospital beds, ventilators, and personal protective equipment because of virulent spread within close quarters, and will also require the utilization of additional resources to provide constitutionally mandated medical care.

This court also recognizes, however, the significant public safety concerns regarding the release of inmates.

With respect to the petition in SCPW-20-0000200, Petitioner requests the release of inmates with short term sentences incarcerated at Hawai‘i’s community correctional centers -- (1) inmates serving a sentence (not to exceed one year or eighteen months) as a condition of felony probation; and (2) inmates serving district court sentences who were convicted of a petty misdemeanor or misdemeanor. A specific category of inmates--those serving intermittent sentences--was brought to this court’s attention by the materials submitted in response to the March 27, 2020 Interim Order in SCPW-20-0000200. These sentences involve defendants serving a sentence that requires them to repeatedly come in and go out of correctional centers, which appear to directly contravene the intent of the current Department of Public Safety policy of disallowing visits from those in the community in an effort to prevent the introduction of COVID-19 into correctional centers.

With respect to the petition in SCPW-20-0000213, Petitioner requests the release of additional categories of inmates, including pretrial detainees, but also seeks the release of inmates from prisons housing State prisoners. Petitioner further seeks, among other relief, the release of "high risk" inmates (e.g., based on age or medical conditions) and an order directing district, family, and circuit courts to vacate all bench warrants and cease the issuance of new bench warrants for failure to appear.

At this time, this court declines to enter a blanket order releasing large numbers of inmates. Rather, to address 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, a collaborative effort should first be undertaken.

Thus, as suggested by Petitioner and agreed to by Respondents and the amicus Hawai‘i Correctional Systems Oversight Commission, this court appoints a Special Master to assist in this collaborative effort. With the appointment of a Special Master and pursuant to the provisions set forth in this order, this court establishes 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, some of which are discussed below.

Accordingly, upon consideration of the submissions and records in SCPW-20-0000200 and SCPW-20-0000213, and pursuant to this court's authority under Hawai‘i Revised Statutes ("HRS") §§

602-5(3) & (6),[2] the authority of the circuit, district, and family courts pursuant to HRS § 706-625,[3] Governor David Y. Ige's March 16, 2020 Supplemental Emergency Proclamation, and HRS § 601-1.5(a),[4]

IT IS HEREBY ORDERED that:

1. SCPW-20-0000200 and SCPW-20-0000213 are consolidated.

2. To the extent there are individuals serving intermittent sentences, the custodial portion of such

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[2] HRS § 602-5 provides that this court shall have jurisdiction and powers, as follows:

> . . . .
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> (3) To exercise original jurisdiction . . . arising under writs of mandamus directed to public officers to compel them to fulfill the duties of their offices . . .;
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> . . . .
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> (6) To make and award such judgments, decrees, orders and mandates, issue such executions and other processes, and do such other acts and take such other steps as may be necessary to carry into full effect the powers which are or shall be given to it by law or for the promotion of justice in matters pending before it.

[3] HRS § 706-625 provides, in relevant part:

> **§ 706-625 Revocation, modification of probation conditions.** (1) The court, on application of . . . the defendant, or on its own motion, after a hearing, may . . . reduce or enlarge the conditions of a sentence of probation, pursuant to the provisions applicable to the initial setting of the conditions . . . .

[4] HRS § 601-1.5(a) provides, in relevant part:

> **§ 601-1.5 Emergency period; suspension of deadlines.** (a) During an emergency period proclaimed by the governor under chapter 127A, the chief justice shall be authorized to order the suspension, tolling, extension, or granting of relief from deadlines, time schedules, or filing requirements imposed by otherwise applicable statutes, rules, or court orders, in civil or criminal cases or administrative matters, in any judicial circuit affected by the governor's proclamation. The chief justice shall determine the judicial circuits so affected.

defendants' intermittent sentence shall be suspended until the conclusion of the COVID-19 pandemic or deemed satisfied, at the discretion of the sentencing judge.

3. This court appoints the Honorable Daniel R. Foley (ret.) as Special Master to immediately begin assisting the parties in this consolidated proceeding.

a. **Compensation.** The court will fix the Special Master's compensation.

b. **Term of Service.** The Special Master's term of service will be effective upon the filing of this order of appointment and will end when his duties are completed or upon termination by this court, whichever comes first.

c. **Diligence.** The Special Master shall proceed with all reasonable diligence and as expeditiously as possible to perform his duties.

d. **Scope of Work.** The role of the Special Master is 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 Special Master may include, as part of these efforts and discussions, members of the public health community and other affected agencies.

Safety of the inmates, staff, and the public are imperative. The 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.).

e. **Meetings/Discussions.** The Special Master shall convene and conduct meetings with the parties and any community agency that the Special Master deems important, in his discretion, to carrying out his role. The Special Master shall facilitate meetings and discussions by adhering to social

distancing mandates. Meetings and discussions with the Special Master should be held remotely, by telephone, video conferencing, or other electronic means. The parties shall utilize their best efforts to make themselves available upon reasonable request of the Special Master.

f. **Authority.** The Special Master shall have the authority to take appropriate measures to perform his duties fairly and efficiently, consistent with this order and understanding the urgency of the issues involved in this matter.

g. **Ex Parte Communications.** The Special Master shall serve as a neutral and unbiased Special Master. The Special Master may engage in ex parte communications for the purposes of gathering documents and information, and to facilitate the collaborative effort.

h. **Report/Recommendation.** The Special Master may file periodic reports regarding progress in his efforts, but shall file an initial summary report by April 9, 2020. The Special Master may also provide periodic recommendations to this court proposing orders to effectuate the goals of these consolidated proceedings, even without agreement of all parties, but shall file initial recommendations for orders by April 9, 2020. In his discretion, the Special Master may file confidential documents under seal.

i. **Other Matters.** The Special Master shall enjoy the same protections from being compelled to give testimony and from liability for damages as those enjoyed by judicial officers performing similar functions. The Special Master will preserve records relating to his work as Special Master until relieved of this obligation by order of the court.

4. 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 Department of Public Safety's authority under the law to release inmates.

5. This court reserves its authority to take emergency measures based on changed circumstances.

DATED: Honolulu, Hawai'i, April 2, 2020.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

/s/ Sabrina S. McKenna

/s/ Richard W. Pollack

/s/ Michael D. Wilson