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SCPW-20-0000200 and SCPW-20-0000213

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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.

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.

INITIAL SUMMARY REPORT AND INITIAL RECOMMENDATIONS
OF THE SPECIAL MASTER

EXHIBITS "1" - "5"

REPORTS

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OFFICE OF THE PUBLIC DEFENDER

April 6, 2020

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

Re: Addendum to the Special Master's Initial Summary Report/Recommendation

Dear Judge Foley:

At the inception of the COVID-19 pandemic, it was impossible to predict where we would be today. We learned of the potential public health disaster that the coronavirus posed in a closed environment such as a prison or jail due to substandard hygiene, dense overcrowding where social distancing is virtually impossible, and a revolving list of visitors ranging from family and attorneys to facility staff and new detainees. In addition to contracting the virus, inmates suffer tremendous anxiety and have been overcome with a paralyzing sense of fear, chaos, and uncertainty. Anecdotally, there were stories of inmates who had written farewell letters to their loved ones in anticipation of catching the dreaded virus and ultimately dying in jail.

Across the country as the devastating effects of the coronavirus unfolded, we witnessed prison advocacy groups, community groups, and Public Defender offices urging for the immediate reduction in prison and jail populations. In other states, law enforcement, public safety, prosecuting agencies, court systems, and public defenders and prison advocacy groups came together in an unprecedented coordinated effort to move with speed and purpose to have prisoners released in response to the COVID-19 pandemic thereby avoiding, or at least limiting, a full-blown outbreak. States like New York, California, Ohio, and Florida made substantial inroads into alleviating overcrowded conditions in the jails and prisons and protecting vulnerable inmates and prison staff. We believed, perhaps naively, that an effort in Hawaii to have similar releases from the state's correctional facilities might be met with a collaborative and cooperative spirit in recognition of the dire situation that existed. Instead, the idea was met with pushback and resistance and the response, "why should the coronavirus mean that they get a 'get out of jail free card'?"

In order to be proactive in response to the COVID-19 pandemic, the Office of the Public Defender (OPD) needed to move quickly and impress upon the courts, law enforcement, public safety, and the prosecuting agencies that (1) there was an urgency to the releases as this ticking time bomb could explode at any moment in a facility that was ill or unequipped to handle such an outbreak and that things could not continue as "business as usual" and (2) an outbreak in a jail or

prison would not only affect those inmates afflicted with the coronavirus, but would have far-reaching effects into the community at large.

Efforts in the Trial Courts

On March 22, 2020, an e-mail to the OPD felony attorneys statewide instructed each individual attorney to file motions for release on behalf of the majority of their clients. Our felony attorneys were instructed to file motions for release on the following clients: (1) newly-assigned cases where the client was in custody; (2) “older” custody cases even where supervised release had been denied previously; and (3) presentence cases where the client was eligible for probation. Attorneys were advised to use their best judgment on filing motions for release on any other of their other clients. The motion for release was entitled “Motion for Emergency and Humanitarian Release Due to the COVID-19 Pandemic.”

Although the volume of motions inundated the Circuit Court judges, it was important that OPD did not sit idly by when many of their clients faced an uncertain fate in custody. At the same time, we had hoped that the sheer number of motions filed would express an urgency to the courts that this was indeed a life or death situation. Some of the courts, understanding the emergency nature of our motions, quick set many motions and/or granted motions for release without a hearing. However, other courts, especially in the First Circuit Court, have treated the motions as any other motion and scheduled hearings in the normal course and/or denied motions without a hearing, depriving our attorneys and defendants the opportunity to be heard.

In regard to the juvenile detainees, OPD has determined that the Hawai'i Youth Correctional Facility (HYCF) and the Detention Home at the Ronald T.Y. Moon Judiciary Courthouse do not have an overcrowding problem. Nonetheless, OPD is seeking to release a few detainees by filing release motions before the Family Court.

Efforts with Department of Public Safety

On March 20, 2020, a letter was sent to Mr. Edmund “Fred” Hyun, chair of the Hawai'i Paroling Authority (HPA) urging the Board to alleviate the overcrowding at the Halawa Correctional Facility and to consider releasing inmates, especially the most vulnerable high-risk individuals. Additionally, the letter requested that since parole consideration hearings had been rescheduled, HPA should examine parole plans for inmates who were up for parole hearings and grant parole without an actual hearing where deemed appropriate and consistent with public safety concerns. The letter also requested that the inmates in custody for parole violations based on technical, minor, or non-substantive violations be released to continue on parole. Lastly, the letter requested that HPA advise its parole officers to use their discretion in revoking current parolees for minor violations but explicitly made an exception for violations that were serious or violent in nature.

On March 23, 2020, Public Defender James S. Tabe sent a letter to the Director of the Department of Public Safety (“PSD” or “DPS”) Nolan Espinda requesting the following: the release of inmates charged with misdemeanors and petty misdemeanors pursuant to PSD Policy No. COR.16.11; increased telephone privileges for inmates; and to provide inmates with the appropriate supplies to disinfect and to avoid the transmission of the coronavirus. A response from

Director Espinda indicated that the PSD was in the process of looking closely at low-risk, non-violent inmates as well as inmates with serious medical conditions. Director Espinda, however, was awaiting “authorization to release certain inmates from incarceration.”

Efforts with Law Enforcement

OPD approached the Honorable Melanie Mito May to discuss the ways in which the number of custody arraignments in Courtroom 7C at the Honolulu District Court could be reduced. Specifically, we spoke to Judge May in an effort to have Honolulu Police Department (HPD) instruct its beat officers to exercise discretion in arresting individuals for non-violent offenses such as park closure, simple trespass, liquor in public, disorderly conduct, and the like and to consider holding off on executing traffic warrants. This was an effort to minimize new arrests which would lead to additional persons entering the already over-crowded population at OCCC.

OPD also engaged in discussions with Mr. Mark Yuen of the Screening Division at the Department of the Prosecuting Attorney of the City and County of Honolulu (“Honolulu Prosecutor’s Office”) to exercise its discretion in charging felonies that were “old” and holding off on charging non-violent felony offenses such as promoting a dangerous drug in the third degree, thefts, UCPVs, UEMVs, and the like.

Efforts in the Supreme Court

On March 23, 2020, Mr. Tabe sent a letter to the Honorable Chief Justice Mark E. Recktenwald via electronic mail. The letter requested the release of two categories of inmates: those convicted of a misdemeanor or petty misdemeanor and serving a jail sentence, and those sentenced on felony probation and serving a period of incarceration as a special term and condition of probation. As we had been from the beginning, Mr. Tabe was mindful of the public safety aspect of releasing prisoners, indicating, “[I]t is therefore incumbent upon the criminal justice system to reduce our state jail populations to the extent possible without compromising public safety.” In his letter, Mr. Tabe also set forth a specific process for the release of certain inmates and cautioned the Chief Justice that there is “simply not enough time to allow these matters to be addressed through traditional channels.” On March 24, 2020, the Hawai‘i Supreme Court deemed the letter as a petition for writ of mandamus pursuant to Rule 21 of the Hawai‘i Rules of Appellate Procedure, and filed the petition/letter under case number SCWC-20-0000200. The Supreme Court designated the Office of the Public Defender as the petitioner and the Department of the Attorney General and the prosecuting agencies of all four counties as respondents.

Following the filing of the letter/petition, the Honorable Judge R. Mark Browning and the Honorable Shirley Kawamura held a telephone conference meeting with the OPD and the Honolulu Prosecutor’s Office on March 24, 2020. Preliminary discussions were held; another meeting was scheduled for March 25, 2020. The second meeting concluded once the Honolulu Prosecutor’s Office insisted that each inmate released will need to be tested negative for COVID-19. OPD would not agree to the condition especially in the light of the fact that test results are not timely and the facilities will not be able to quarantine inmates individually while results are pending.

On March 26, 2020, OPD filed a Petition for Extraordinary Writ Pursuant to HRS §§ 602-4, 602-5(5), and 602-5(6) and/or For Writ of Mandamus (hereinafter, “second petition”) under case number SCWC-20-0000213. The second petition requested an order directing the Honorable David Y. Ige, Governor, PSD Director Nolan P. Espinda, and HPA Chair Edmund Hyun to take immediate steps to significantly reduce the population of its Correctional Centers and Correctional Facilities to prevent the massive loss of life and harm that the spread of COVID-19 would cause in such facilities.

Following the filing of the second petition, the OPD participated in the first teleconference on Friday, March 27, 2020 with representatives from the Attorney General, prosecutors from each of the four counties, representatives from the PSD, and Mr. Brandon Kimura, a judiciary representative. It was evident from the tone of the first meeting that we would be experiencing major push-back from most of the prosecuting agencies. PSD appeared to be interested in assisting in any way they could. While the prosecuting agencies on the neighbor islands appeared to be willing to work with OPD in releasing inmates, despite their good intentions, the process has been slow and tedious and not happening at the speed that is required given the current circumstances.

On March 27, 2020, the Supreme Court issued an Interim Order, directing OPD to provide a list of inmates who meet the criteria set forth in said Order. OPD provided a list of inmates to the Attorney General and the prosecuting agencies by the March 30, 2020 4:00 p.m. deadline.

After the second meeting held on March 31, 2020, OPD received from the Attorney General and the prosecuting agencies a list of inmate names of either who they objected to release or those who they did not object to be released. The Honolulu prosecutors’ list consisted of only thirteen names of pretrial misdemeanants. OPD was tasked with finding verified residence addresses for each of the thirteen inmates. After an entire day of research, consisting of telephone calls to OCCC and the families of the inmates, the attorneys were only able to track down two verified residence addresses. Although OPD submitted the two addresses to the prosecuting attorney, the two inmates remain in custody because of the now additional requirements of a possible signed stipulation, possible COVID-19 testing, possible medical screening, and a possible agreement as to terms and conditions of release. This process with the Honolulu Prosecutor’s Office is unworkable and not responsive to the current crisis as it is simply too drawn out and time-consuming. This frustration was expressed in OPD’s filed reply to the Attorney General’s Answer to the second petition.

There appears to be a misconception or misunderstanding that OPD is requesting that the inmates released into the community are to be unmonitored or unsupervised. OPD opposes the use of electronic monitoring and that released inmates must have a “verifiable residence.” Many years ago, when PSD was required to reduce the prison population, all pretrial detainees with the bail amount of \$10,000 or under were released; OPD is of the belief that those released were not required to provide a “verifiable residence.” Therefore, such a condition should not be required at this time.

OPD agrees that released inmates will need supervision. Felony and misdemeanor probationers are currently supervised by the Adult Service Branch; therefore, inmates who are sentenced on probation can be supervised by the Adult Service Branch as they would be on a standard release. Likewise, pretrial detainees are currently supervised by Intake Service Center; therefore,

Intake Service Branch can supervise the released pretrial detainees. Finally, inmates sentenced to indeterminate terms of imprisonment may be supervised by the HPA as they would normally be.

Extra-judicial Efforts: Community Outreach

OPD has reached out to several organizations and community groups that are advocating for the release of prisoners from State jails and prisons because of the coronavirus and are organizing to support prisoners reentering the community. OPD continues to work with the following groups:

- (1) The American Civil Liberties Union of Hawai‘i (ACLU) and the Lawyers for Equal Justice (LEJ) were instrumental in preparing OPD’s second petition. OPD continues to consult with ACLU and LEJ.
- (2) A group led by Monica Espitia, Director of the ACLU’s Smart Justice campaign, is trying to tamp down irrational fears over the release of low-level offenders and urging government officials to release selected prisoners to militate against the spread of COVID-19 in our overcrowded correctional facilities. The hashtag for their social media campaign is #FreeOurOhana.
- (3) A group organized by Robert Merce, who served as vice chair of the HCR 85 Task Force on Prison Reform, is focused on finding housing for inmates who might be released but do not have a place to live, and providing services and support to inmates reentering the community. This group, now known as the Emergency Reentry Project, includes Hawai‘i Health and Harm Reduction Center, the Office of Hawaiian Affairs, ACLU’s Smart Justice Campaign, Community Alliance on Prisons, the Innocence Project, Medical Legal Partnership for Children in Hawai‘i, and several individual prison reform advocates. This group has opened discussions with relevant State and County agencies, as well as service providers statewide, to merge with the coordinated homelessness response to prevent homelessness for those being considered for release.
- (4) The Hawai‘i Correctional Systems Oversight Commission which was established by Act 179 (2019 Legislature) is in discussions with OPD. In addition to filing an amicus letter, the commission has provided OPD with information regarding PSD’s policies and Hawai‘i’s correctional facilities.
- (5) OPD is also in discussions with Mr. Kevin Lanyard of the Hawai‘i Community Bail Fund who may be offering up to \$20,000 to post bail for a number of vetted and approved inmates into the community.

In sum, the Office of the Public Defender has been working on multiple fronts and with multiple agencies to address the issues that the COVID-19 pandemic presents not only to their

clients but also to the community at large. OPD seeks to significantly reduce the population of its Correctional Centers and Correctional Facilities to not only prevent the massive loss of life and harm that the spread of COVID-19 would cause in such facilities but also to assist the “flattening the curve,” as a virulent spread within close quarters will tax the limited resources of the community health care providers.

Sincerely,

Lee S. Hayakawa
Assistant Public Defender

**OFFICE OF THE PROSECUTING
ATTORNEY (Kauai)**

Justin F. Kollar
Prosecuting Attorney

Jennifer S. Winn
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April 3, 2020

Hon. Daniel R. Foley, Special Master

Via email

RE: Report to Special Master on efforts by the County of Kaua'i Office of the Prosecuting Attorney's efforts to decrease congestion at the Kaua'i Community Correctional Center in light of risk posed by the COVID-19 pandemic.

Judge Foley:

In early March of 2020, it became apparent that the United States was at risk from the spreading global outbreak of the COVID-19 Coronavirus. On March 2, 2020, the inmate head count at the Kaua'i Community Correctional Center (KCCC) was 143 inmates. The operational capacity of KCCC is 128. In order to allow for proper social distancing at KCCC, it is desirable to reduce the population to a number below that, in the event that inmates need to be isolated in the event of an outbreak inside the facility.

At the beginning of March, we began regular reviews of the KCCC inmate roster with the intent of identifying inmates suitable for temporary release on supervised release and/or inmates serving short jail terms that might be suitable for suspension or modification. We also began collaborative conversations with our police, judges and Public Defenders on Kaua'i and implemented policies designed to result in a gradual and sustained decrease in the jail population without jeopardizing the public safety. Our communications to police and our internal policies are attached as exhibits to our Office's response to the Petition for Writ filed in this matter and are incorporated herein by reference.

As a result, our Office was able to immediately file, on our own initiative, motions for supervised release in a number of cases involving inmates being detained pretrial on misdemeanor and petty misdemeanor cases. We also

worked together with our Public Defenders and identified another contingent of sentenced inmates serving shorter sentences (primarily misdemeanants) and serving jail terms as a condition of probation, and stipulated to modifications or suspension of those sentences.

As a result, we were able to achieve a reduction in the jail headcount to 120, as of April 3. We anticipate further reduction in the near future. We were able to achieve that without releasing sentenced felons serving open terms, violent felons, sex offenders, domestic violence offenders, or offenders accused of impaired driving or of violating protective and/or temporary restraining orders.

Please do not hesitate to contact me if you have any comments or concerns.

Yours Sincerely,

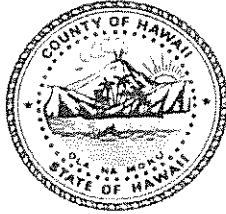
A handwritten signature in black ink, appearing to read "Justin F. Kollar", with a long, sweeping horizontal line extending to the right.

JUSTIN F. KOLLAR
Prosecuting Attorney

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OFFICE OF THE PROSECUTING ATTORNEY

April 6, 2020

Honorable Daniel R. Foley
Special Master
Sent via email to:
JudgeFoley2000@hotmail.com

Dear Judge Foley,

This letter summarizes the ongoing efforts by this office and other partners in Hawaii County to respond to the COVID-19 emergency as it relates to the criminal justice system.

Hawaii Community Correctional Center (HCCC) and the County of Hawaii

HCCC is a 226 bed facility located on two sites, the main facility is on three acres in downtown Hilo and Hale Nani is in Panaewa. HCCC provides for the secure incarceration of pretrial and short-term sentenced population. Longer term sentenced population serve their sentences at 5 prisons, 4 within the state and 1 out of state. Some inmates originating from this county may be held at OCCC due to medical or mental health need unable to be met at HCCC. HCCC may also serve transitional prisoners completing their sentences and returning to the community. For several years, HCCC has been overcrowded with population counts exceeding 400. Hawaii's failure to invest in the facilities is well documented, one report indicating that "Hawaii has the lowest percentage of total criminal justice spending allotted to corrections in the entire country." Page 8 <https://dps.hawaii.gov/wp-content/uploads/2019/02/2018-June-UH-System-Mapping-and-Gap-Analysis.pdf>

The crime statistics for Hawaii County indicate an upward trend in violent crime of the course of the last decade. In 2017, 13.9% of the State of Hawai'i's population resided in Hawai'i

County, where 13.4% of the State's Index Crimes, 14.2% of the violent crimes, and 13.3% of the property crimes were reported throughout the year. From 2016 to 2017, in Hawai'i County, the total number of reported Index Crimes increased 9.0%, with an increase in violent Index Crimes of 8.8%, and in property Index Crimes of 9.0%. Of the Index Crimes, six recorded an increase between 2016 to 2017: rape, by 23.5%; robbery, by 11.6%; aggravated assault, by 3.6%; burglary, by 6.0%; larceny-theft, by 5.3%; and motor vehicle theft, by 39.2%. In addition, the rate of reported violent crimes increased 7.3% from 2016 to 2017. The rate of reported rapes increased by 21.8%; aggravated assaults, by 2.3%; robberies, by 10.1%; and property crimes, by 7.6%. In 2017, of the 508 violent crimes reported, aggravated assault accounted for 55.9%; rape for 28.0%; robbery for 15.2%; and murder for 1.0%. Firearms, knives/cutting instruments, and strongarm weapons were involved in the violent crimes reported. In the ten-year period between 2008 - 2017, Hawai'i County experienced a population increase of 13.2% and correspondingly, a concerning and disturbing increase in violent crime of 15.2%.

Despite significant concerns we can only touch upon here, the criminal justice partners in Hawaii County, the various courts, probation officers, police, public defender, corrections, intake service center workers, and many nonprofit service providers, work well together with a long history of collaboration and flexibility to solve problems respectfully, and finding common ground where possible.

Rapidly Evolving COVID-19 Situation

On January 31, 2020, the Secretary of Health and Human Services declared a public health emergency relating to COVID-19. By mid-February, 2020, this office began receiving and distributing information about COVID-19 prevention and education materials. On February 28, 2020, Hawaii County Mayor Harry Kim filed an emergency proclamation declaring a state of

emergency due to imminent danger on Hawaii Island. Supplementary Proclamations were filed March 24, and April 1, 2020. Governor David Ige filed an emergency proclamation on March 4, 2020. Supplementary proclamations responding to COVID-19 were filed March 16, 21, 23 and 31. Each of these proclamations raised increasing alarm over the danger of COVID-19. On March 11, 2020, although numbers of cases in Hawaii County remained low, the World Health Organization declared the coronavirus outbreak a worldwide pandemic. On March 13, 2020, the President of the United States declared a national emergency concerning the COVID-19.

On March 16, 2020, Chief Justice Mark Rectenwald issued an order regarding court proceedings, requiring the chief judges of each circuit to devise a circuit specific plan to significantly reduce the need for in-court appearances. Chief Judges of each circuit quickly filed specific orders implementing their plans, essentially suspending most cases and deadlines and requiring social distancing in the courthouse.

Hawaii County Office of the Prosecuting Attorney Responses to COVID-19

During the rapidly evolving situation involving COVID-19 described above, this office participated with the County's emergency response. The pandemic continuity of operations plans for each county agency which were originally drafted in 2010 were updated to reflect current staffing and operations. Daily meetings were held at the civil defense to update agencies on the ever-evolving county response.

Frequent discussions occurred between Prosecutor Mitch Roth and Chief Judge Melvin Fujino and other judges as well as Chief Court Administrator Lester Oshiro on how to make the courtroom safer for all participants, including inmates. Prosecutor Roth and Chief of Police Paul Ferreira also discussed different strategies on how to limit the number of arrestees being held with a view towards reducing the numbers held in the police cellblock as well as the population

at HCCC. Normal practices were adjusted so that certain offenders would be cited, others would be released on own recognizance.

Deputy Prosecutors were instructed so that only the defendants who committing crimes of violence, a flight risk, career criminal and high risk to the community would be detained. At hearings deputies were instructed not to object to offenders served with traffic and minor crimes warrants to being placed on own recognizance or supervised release status as long as the offender was not a career criminal.

Before the Office of the Public Defender submitted its letter, which was filed as a petition for writ of mandamus, this office had already requested the Department of Public Safety to send us a list of all offenders ordered to intermittent sentences. On March 25, 2020, we made a request to Chief Judge Fujino to suspend all intermittent jail sentences in the circuit. His response was to encourage the parties to submit stipulations and orders to expedite processing those requests. All drug court intermittent sentences were suspended by instructions to drug court probation. Deputies immediately began working with defense counsel to file stipulations to suspend intermittent jail. First Deputy Prosecuting Attorney Dale Ross spoke to Supervising Probation Officer Dean Hiraki to confirm that all intermittent jail mittimus issued at the discretion of probation officers would be suspended. By the time the Order of consolidation and for Appointment of Special master was filed on April 2, 2020, only a small number of stipulations needed to be processed as to intermittent jail. Our goal is to have all intermittent jail orders suspended until the emergency is over.

After the petitions for writs of mandamus were filed, this office participated in statewide discussions regarding the public defender's concerns. The public defender's office identified 87 offenders for release (excluding intermittent sentenced defendants) under the Order filed March

25, 2020. This office notified the public defender that we do not object to the release of 30 offenders. A streamlined process to prepare, have offenders sign, and then file these stipulations have been worked out with the cooperation of HCCC Warden Mahoe and his staff and Supervising Deputy Public Defenders Ann Datta and Jeff Ng. Warden Mahoe agreed to print, seek inmate's signature for the stipulation, then scan and email the document to the attorneys. The document would be presented to the court who would expedite the process, potentially allowing for the release within a day.

In order to balance the protection of the community at large with the desire to reduce the jail population, the public defenders and this office has agreed to specific language in the stipulations to include a verified residence, commitment to abide by stay at home orders, self-monitoring and immediate contact with the department of health (numbers provided) should the defendant observe symptoms like fever, coughing and shortness of breath, and other conditions of supervised release or probation, remaining in effect.

In all other cases, the plan is for the public defender to prepare motions. The courts are able to quickly set these hearings, recently hearing 10 motions in one day. Inmates appear by video and if ordered to be released, are asked to sign the new order which is emailed to the HCCC. The signed order is scanned and emailed back to the court and release can be immediate.

Over the past few weeks, this office has also reviewed multiple motions for release of offenders not on the list. Our position is determined on a case by case basis. We believe our deputies are taking a reasonable approach to these motions, agreeing to some and opposing other motions based on guidelines to oppose the release of offenders committing crimes of violence, who are a flight risk, career criminal and high risk to the community.

Since February 29 to April 3, 2020, the population at HCCC has been trending downward, from 408 to 326. With the stipulations expected to be filed shortly, and the changes in procedures limiting the number of detained offenders, we should see a further decrease. This work to reduce jail populations, while important, must be balanced with community safety needs.

Ongoing Concerns during COVID-19 Pandemic

During the numerous conversations with multiple partners, several concerns have arising which requires addressing:

1. Increase capacity of communication between inmates and their attorneys and others by phone and/or video conference. Defense counsel should minimize in person contact with inmates during this emergency, however, there is only one video conference connection which is reserved for the court. Inmates also need communication with their families particularly now that personal visits have been suspended.

<https://dps.hawaii.gov/wp-content/uploads/2020/03/PSD-Pandemic-Response-Plan.pdf>

2. Department of Public Safety has procedures relating to infectious diseases and a specific plan for COVID-19. However, even if the population is reduced to minimum levels, it is anticipated that more space may be required for screening, isolation, quarantine and housing inmates. We have received suggestions for other spaces: Federal Detention Center in Honolulu (requires air transport) and Kulani Prison on the Big Island.

Design capacity for jail facilities (to allow for social distancing) is much lower than operational capacity. While we can hope that the stay at home order will result in fewer calls to police, it is unlikely that we will be able to reach design capacity goals without additional space. It is imperative that any plans for permanent upgrades to HCCC continue to be worked on, and that we also look for temporary expansion of space.

3. Transport of inmates to the hospital. There continues to be mentally ill defendants who should be at the state hospital rather than HCCC. There's confusion regarding whether or not these transports can continue to occur.
4. Re-entry work furlough and treatment releases. It is common for courts in cases involving defendants with substance abuse problem to be sentenced to probation with jail and early release to treatment. The movement of inmates to treatment has likely been disrupted due to the COVID-19 emergency. Even before the emergency, referrals to treatment was slow and often inmates served their entire jail term. The one exception has been and continues to be the Big Island Drug Court which has been able

to place their clients into treatment beds even during this emergency. There is a need to fix this process by increasing opportunities for treatment, perhaps with a combination of housing, electronic monitoring and telemedicine and good case management so that these releases can occur with more regularity. Similarly, work furlough has been suspended. Work options are extremely limited now that thousands of people have lost their jobs. We need to figure out a way for work furlough releases to continue, again perhaps with a combination of electronic monitoring, housing in non-facility beds, and innovative work options in essential fields. If required to work in hazardous conditions, we have to ensure that inmates are provided with adequate protection so they do not get sick.

5. Public perception of release of inmates. This office has received concerns from the public regarding the release of inmates. Prosecutor Roth has taken calls and received emails expressing fear and concern about inmates being released in large numbers by explaining what intermittent jail and assessments for different levels of risk are. Since working on this issue, the police rearrested two recently released inmates. As prosecutors, we must be concerned about recidivism and victim notification and safety. Rearrests increase the risk of exposure to the facilities as well.

The Hawaii County Office of the Prosecuting Attorney understands and appreciates the significance of the situation and will continue to work with all parties concerned to protect the health and safety of our community. This has required this office to make assessments, using defendant history, seriousness of offense, victim input, and known defendant information on the danger of releasing offenders to the community versus the dangers of a covid-19 outbreak at the jail. We will further make ourselves available to the Special Master.

Sincerely,

A handwritten signature in black ink, appearing to read 'M. Roth', with a long horizontal flourish extending to the right.

MITCHELL D. ROTH
Prosecuting Attorney

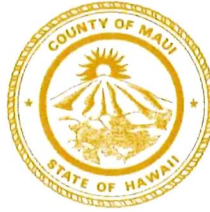
**DEPARTMENT OF THE
PROSECUTING ATTORNEY
(Maui)**

MICHAEL P. VICTORINO
Mayor

DON S. GUZMAN
Prosecuting Attorney

ROBERT D. RIVERA
First Deputy Prosecuting Attorney

ANDREW H. MARTIN
Second Deputy Prosecuting Attorney



DEPARTMENT OF THE PROSECUTING ATTORNEY
COUNTY OF MAUI
150 SOUTH HIGH STREET
WAILUKU, MAUI, HAWAII 96793
PHONE (808) 270-7777 • FAX (808) 270-7625

April 7, 2020

Honorable Daniel R. Foley
Special Master
C/O Supreme Court of the State of Hawai'i
Ali'iolani Hale
417 South King Street
Honolulu, Hawai'i 96813-2943

Re: Status on the Collaborative Efforts Within the
Second Circuit to Address the Inmate Population
in Light of COVID-19

Dear Judge Foley:

It was a pleasure speaking with you last week. As we discussed over the phone, and in order to assist you in your duties as Special Master, we are writing to update you on our efforts to reduce the inmate population at MCCC due to the COVID-19 health emergency. The cooperative efforts of the Second Circuit Courts, Office of the Public Defender, private defense bar, Maui Police Department, the Prosecuting Attorney, Adult Client Services, the Department of Health, and the Warden and staff at MCCC have resulted in a significant reduction in the inmate population over the past several weeks. This Department's focus has been, and shall remain, the health and safety of our entire community and the rights of our victims to remain free from threats or harm.

The task at hand is therefore to continue to reduce the inmate population in order to best protect the ACO's, staff, and inmate population at MCCC, while simultaneously protecting the health and safety of our community and individual victims of crime. Our approach has been multi-faceted and effective.

According to MCCC, the inmate population stood at **459** as of the **end of February**. Operating capacity at MCCC is 301. Generally, the inmate population at the facility is comprised of

Honorable Daniel R. Foley

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a mixture of pre-trial misdemeanants and felons; sentenced misdemeanants; sentenced felony probationers; felons sentenced to indeterminate terms of imprisonment; probation violators; parole violators; drug court participants; and those serving intermittent sentences. Minimum security inmates are housed in dorms (there are seven total) and higher security inmates are housed in the modules (there are four modules). As you might expect, the population is constantly in flux as inmates have their sentences expire or pre-trial detainees have their custody status amended to release (for a variety of reasons), thus reducing population, and new arrestees and/or sentenced inmates add to the population on a daily basis. Our approach has been to attempt to address both aspects of the population flux in order to safely reduce it.

Beginning the week of March 9, 2020, our office advised our deputies to begin agreeing to OR/SR conditions for in-custody pre-trial detainees at the time of arraignment, bail hearing, or where otherwise appropriate for those offenders who were non-violent and did not otherwise pose a significant danger to the community. This included defendants who were pending probation violations and those pending sentencing. An explanation of our initial approach was included in our Answer to OPD's Application for Writ of Mandamus, which we filed on March 27, 2020. (See attached).

On March 17, 2020, Mr. Guzman issued the attached memorandum, addressed to the Maui Police Department (MPD), advising them that our Department would only charge the following offenses on an in-custody basis: Murder/Att. 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 Chapter 586; and Operating a Vehicle Under the Influence of an Intoxicant. In addition, we requested that MPD issue citations for any other misdemeanors, petty misdemeanors or violations with court dates issued after June 1, 2020. Finally, for those cases that fall outside our listed criteria where an arrest/bench warrant is served, the memo asks MPD to contact the on-call judge and request for authorization to release the arrestee OR.

On March 24, 2020, upon the filing of OPD's Application for Writ of Mandamus with respect to sentenced probationers, we requested from MCCC a list of sentenced felony probationers and sentenced misdemeanants. That original list was comprised of eighty-eight (88) defendants. Of those 88 defendants, our

Honorable Daniel R. Foley
Page 3
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Department identified twenty-six (26) inmates who were serving sentences for non-violent offenses. Of those 26 defendants, we identified sixteen (16) for whom we had no objection to a modification of their jail term (where only a minimal amount of time was left to serve) or a suspension of their sentence (where the defendant could be released on conditions to serve the remainder of their term at a future date). After exchanging lists with OPD, we identified three (3) additional inmates for whom we had no objection to release. As of April 1, 2020, defendants released by way of stipulation included terms requiring defendants to submit to COVID-19 screening, self-isolation at a verified residence for 14 days, telephonic screening with DOH for COVID-19 symptoms at the expiration of their self-isolation period, and electronic monitoring where appropriate. Mr. Guzman secured emergency funding for electronic monitoring of up to 20 probationers, to be provided to indigent defendants.

As of this morning, **April 7, 2020**, the inmate population at MCCC stands at **334** (that's a reduction of 25 inmates since we spoke just last week). Over the next two weeks, we will continue to work closely with OPD and the private defense bar to reduce the inmate population at MCCC where it is appropriate and safe for the community. Currently, we are assessing a list of thirty-one (31) pre-trial detainees for possible release on conditions. We do not anticipate that we will be able to agree to conditions for all 31, but for those where we can, we will notify defense counsel immediately. We are also reviewing any cases sent to us for consideration by the defense. We continue to work cooperatively, on a case-by-case basis, in order to safely reduce the inmate population at MCCC and proceed in a manner that is consistent with our law enforcement obligation and ethical duty to seek justice.

We are objecting to the release of defendants where doing so would place the community at risk. This includes raising objections to the release of any violent offender as well as those who may otherwise pose a significant risk to the community as a whole. These assessments are not made upon the nature of charges alone, but instead are based upon an individualized assessment of a defendant's case, criminal history, and any other relevant factors. If additional conditions of release are possible that would mitigate against possible risk, we have been open to consideration of those terms. However, where the facts and circumstances do not adequately provide for the sufficient mitigation of risk to the community, it is our duty to object.

Honorable Daniel R. Foley
Page 4
April 7, 2020

In those instances where we object to release, we are notifying the defense (usually via written e-mail) of the reasons for our objections so that they may take appropriate action with the Court by way of motion. Fortunately, our cooperative approach to the current situation has resulted in the majority of cases proceeding by way of agreement. Where agreements cannot be reached, defense motions are being filed and timely heard.

For the reasons described herein, we are respectfully requesting that the cooperative approach currently employed here in the Second Circuit continue without further order of the Court. Our methods here have been effective, reducing the inmate population by over 27% in a very short time period. The reduction has significantly reduced the risk to the inmates and staff at MCCC, as well as their families. Perhaps most importantly, our current approach allows us to proceed in a way that best ensures the safety of our community and victims.

We thank you for the opportunity to provide you with our comments on the current status of our cooperative efforts to safely reduce the inmate population at MCCC in light of COVID-19. Please do not hesitate to contact us should you have any questions or concerns.

Very truly yours,




ANDREW H. MARTIN

Second Deputy Prosecuting Attorney

Attachment

APPROVED:

for 
DON S. GUZMAN
Prosecuting Attorney

SCPW-20-0000200

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

OFFICE OF THE PUBLIC)	RESPONDENT DONALD S.GUZMAN'S
DEFENDER,)	ANSWER TO PETITIONER'S
)	APPLICATION FOR WRIT OF
Petitioner,)	MANDAMUS; DECLARATION OF
)	ANDREW H. MARTIN; CERTIFICATE
v.)	OF SERVICE
)	
CLARE E. CONNORS, Attorney)	ORIGINAL PROCEEDING
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.)	
)	

RESPONDENT DONALD S. GUZMAN'S ANSWER TO
PETITIONER'S APPLICATION FOR WRIT OF MANDAMUS

DECLARATION OF ANDREW H. MARTIN

CERTIFICATE OF SERVICE

DEPARTMENT OF THE PROSECUTING ATTORNEY 207

DONALD S. GUZMAN 7371
Prosecuting Attorney

By
ANDREW H. MARTIN 8307
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Email: Andrew.Martin@co.maui.hi.us

Attorney for Respondent

SCPW-20-0000200

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

OFFICE OF THE PUBLIC)	RESPONDENT DONALD S. GUZMAN'S
DEFENDER,)	ANSWER TO PETITIONER'S
)	APPLICATION FOR WRIT OF
Petitioner,)	MANDAMUS; DECLARATION OF
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CLARE E. CONNORS, Attorney)	ORIGINAL PROCEEDING
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Acting Prosecuting Attorney,)	
City and County of Honolulu,)	
)	
Respondents.)	
)	

RESPONDENT DONALD S. GUZMAN'S ANSWER TO
PETITIONER'S APPLICATION FOR WRIT OF MANDAMUS

COMES NOW Respondent STATE OF HAWAI`I ("State"), by and through its attorney ANDREW H. MARTIN, Second Deputy Prosecuting Attorney for the County of Maui, and hereby presents Respondent Donald S. Guzman's Answer to Petitioner's Application for Writ of Mandamus, respectfully requesting that this Honorable Court deny

Petitioner's Petition for Writ of Mandamus ("Petition") filed March 24, 2020, by Petitioner OFFICE OF THE PUBLIC DEFENDER ("OPD") in the above-referenced matter.

I. ARGUMENT.

The State strongly opposes the mass release of inmates based upon their custody status as either: 1) serving a jail term as a special condition of felony probation; or 2) as the result of misdemeanor or petty misdemeanor convictions. The health and safety of our community as a whole and the rights of our victims to remain free from threats or harm are of paramount concern. The State recognizes the significant public health emergency that COVID-19 poses to our community and to the Adult Correction Officers, jail staff, and inmate population. With all due respect, weighing these co-occurring and equally important concerns is best left to the jurisdiction of the District and Circuit Courts to be determined on a case-by-case basis.

In the Second Circuit, the Department of the Prosecuting Attorney has already implemented a number of measures to reduce the inmate population at the Maui Community Correctional Center ("MCCC"). These measures are ongoing and have been successful, in no small part, due to the cooperation of the District and Circuit Courts, the Prosecuting Attorney, the Office of the Public Defender ("OPD"), the private defense bar, the Maui Police Department, and the Warden and staff at MCCC.

Cooperatively approaching these concerns on a case-by-case basis is necessary to ensure that the State carries out both its law enforcement obligation and ethical duty to seek justice.

Such an approach is required as it best addresses the health and safety concerns of the community and of our victims, while providing for the release of non-violent inmates who do not pose a significant threat, where appropriate. Specifically with regard to the inmates for whom OPD now seeks relief, the majority of sentence modifications or suspensions are occurring by way of stipulation, without the need for further court hearings.

If this Honorable Court were to grant the relief sought by the OPD, and all of the procedures it will require, it would frustrate a process already in place within the Second Circuit, potentially putting the community and victims at risk. Petitioner's writ should therefore be denied.

A. THE MODIFICATION OR SUSPENSION OF SENTENCES DUE TO COVID-19 IS WITHIN THE JURISDICTION OF THE DISTRICT AND CIRCUIT COURTS AND SHOULD BE DETERMINED ON A CASE-BY-CASE BASIS.

The matter of sentencing falls within the province of the trial court. Hawai'i Revised Statutes ("HRS") § 706-605(3) provides that the court may in its discretion sentence a person convicted of a misdemeanor or petty misdemeanor to a suspended sentence, except where prohibited by the enacting statute. HRS § 706-605(3). For example, HRS § 291E-61(b) prohibits probation or suspension of sentence for Operating a Vehicle Under the Influence of an Intoxicant. HRS § 291E-61(b) (emphasis added). In regard to probation for both felony and non-felony offenses, HRS § 706-625 provides that the sentencing court can revoke probation and may in its discretion modify probation. HRS § 706-625. Furthermore, Hawai'i Rules of Penal Procedure ("HRPP") Rule 35 allows the court to correct an illegal sentence or reduce a

sentence within the specified time limits. HRPP Rule 35. The foregoing provisions empower the sentencing court, not the appellate courts.

In its Petition, OPD cites to Governor Ige's March 16, 2020, Supplemental Emergency Proclamation which authorized the suspension of certain laws deemed to hinder state and county responses to COVID-19. Specifically, OPD cites to Section 4(u) of the Supplemental Emergency Proclamation which suspends:

Sections 706-669, 706-670, and 706-670.5, HRS, disposition of convicted defendants, to the extent that these sections and related administrative rules prescribe time limits for matters before the Hawaii Paroling Authority.

HRS §§ 706-669, 706-670, and 706-670.5 address procedures for determining minimum terms of imprisonment, parole, and final unconditional release. As these sections apply to inmates serving indeterminate terms of imprisonment, their limited suspension in no way affects the status of those prisoners for whom OPD now seeks relief - defendants serving jail terms as a condition of felony probation or as the result of a misdemeanor or petty misdemeanor conviction. Since the Governor's Supplemental Emergency Proclamation does not suspend the power of the trial court to modify or suspend sentence, this Honorable Court lacks the required jurisdiction to order the relief sought. This Honorable Court must dismiss the case if it lacks jurisdiction.¹ See State v. Johnston, 63 Haw. 9, 10, 619 P.2d 1076, 1077 (1980).

¹ Note that the Order of the New Jersey Supreme Court that was attached to OPD's letter was entered after all parties reached a mediated agreement on its terms.

This Honorable Court recognizes the principle that "[w]hether a defendant should be imprisoned or given a suspended sentence is a matter which lies within the discretionary province of the trial court." State v. Sacoco, 45 Haw. 288, 292, 367 P.2d 11, 13 (1961). Accordingly, when this Honorable Court vacates sentence, it remands the case for resentencing rather than altering the sentence itself. The trial court having heard the facts of the case is best suited to weigh the factors of HRS § 706-606 and to provide opportunity for the parties, the probation department, and other members of the public to provide recommendations. Furthermore, the emergency powers provided to the judicial branch are limited by HRS § 601-1.5, which authorizes the Chief Justice to suspend deadlines in the event of a Statewide emergency. OPD's Petition proposes to add powers not granted to this Honorable Court by the State Legislature. The United States Supreme Court in its wisdom reminds us that government must act with restraint even in times of emergency.

Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the federal government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system.

Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426, 54 S.Ct. 231, 235 (1934). In light of the foregoing, the instant case should be dismissed for lack of jurisdiction.

B. THE PUBLIC HEALTH WILL BE PUT AT INCREASED RISK.

The Petition fails to recognize that the 14-day incubation period makes COVID-19 difficult to detect. A "blanket" release of inmates as proposed by the Petition could increase community spread, especially by transients. Therefore, the Petition increases the risk to public health by not requiring all inmates to be medically screened before being released and allowing infected individuals to go unmonitored in the community.

Furthermore, the Petition assumes that the court system is inadequate to take necessary action. Section 706-625 of the HRS provides that the court, "on application of the probation officer, prosecuting attorney, the defendant, or on its own motion," may reduce or modify a sentence of probation. HRS § 706-625(1) and (4). HRS § 706-625 therefore provides the defendants for whom OPD seeks relief with a means to obtain a modification or suspension of a jail term through the trial courts. Cases are already being reviewed by the courts of the Second Circuit, with input from the parties, in response to the present emergency. Allowing the Second Circuit to continue its cooperative effort best ensures public health and safety.

C. SECOND CIRCUIT COURTS ARE ALREADY REVIEWING CASES IN RESPONSE TO THE PRESENT EMERGENCY.

OPD argues that their writ must be granted as "it is better to put the onus on the State to object to release rather than forcing [OPD] (and many private attorneys) to file motion after motion seeking new sentencing hearings." However, the State is not requiring OPD to file "motion after motion." Given the current crisis, all the State asks is that OPD pick up a

phone or send an e-mail. To that end, the State has endeavored to work collaboratively with OPD in the Second Circuit (as well as the private defense bar) in order to assess, on a case-by-case basis, whether modification or suspension of a jail term is appropriate for a given defendant.

When assessing whether modification or suspension of sentence is appropriate, the State is giving consideration to those defendants who are non-violent and do not otherwise pose a significant risk of danger to the community. Such assessments are made on a case-by-case basis so that, where possible, the parties can stipulate to the modification or suspension of the jail term. This approach eliminates the need for the filing of a motion, the setting of a hearing, and dispenses with the need for potential appellate review. It is an efficient response that allows the State to ensure the health and safety of the community and individual victims of crime.

As of March 24, 2020, there were eighteen (18) inmates serving jail terms at MCCC as the result of misdemeanor or petty misdemeanor convictions. Seventy (70) inmates are currently serving jail terms at MCCC as a condition of felony probation.²

As of the filing of this Answer, of the eighty-eight (88) sentenced inmates described above, the State has agreed to

² The State has been in communication with the Department of Public Safety, Maui Community Correctional Center ("MCCC"), and is in receipt of a list of inmates currently in custody within the Second Circuit. The list is current as of March 24, 2020. The State has shared this list with OPD in an effort to further hasten the steps already taken to assess whether a modification or suspension of sentence is appropriate for a given defendant.

stipulate to modify or suspend sentences for six (6) inmates who are currently in custody and serving sentences that include a jail term. Requests for review are continuing to be made by OPD. Eight (8) are currently under review at the time of this filing and many others are expected to be submitted.

D. THE STATE HAS TAKEN SEVERAL STEPS TO SAFELY REDUCE THE INMATE POPULATION AT MCCC WHILE PROTECTING THE COMMUNITY AND THE SAFETY OF VICTIMS.

Over the past twenty-six (26) days, the inmate population at MCCC has decreased by 18%.³ The Maui County Department of the Prosecuting Attorney has taken the following steps to significantly contribute to that reduction:

1. The Department is charging only the following matters on a custody basis:
 - A. Murder or Attempted Murder;
 - B. Any Class A felony;
 - C. Any Class B or C felony involving violence or threatened violence;
 - D. Abuse of Family or Household Member and violations under HRS Chapter 586;
 - E. Operating a Vehicle Under the Influence of an intoxicant.

In cases involving misdemeanors, petty misdemeanors and violations, we have recommended that MPD issue a citation and not make an arrest. Return court dates are being issued for dates after June 1, 2020.

These measures have already been implemented.

2. For arrests made on bench warrants where bail has been set by a Judge, or where an arrest is made on a grand jury or felony information charge that falls outside of the charges listed in item 1,

³ A reduction from 459 inmates to 376 inmates as of March 26, 2020, according to information provided by MCCC.

above, we have asked MPD to contact the on-call judge to request authorization to release the defendant on their own recognizance ("ROR").

This measure has already been implemented.

3. The State has requested that MPD avoid serving bench warrants for misdemeanor and petty misdemeanor offenses.

This measure has already been implemented.

4. Pre-trial detainees who are non-violent and do not otherwise pose a significant risk of danger to the community or victims are to be considered, on a case-by-case basis, for supervised release ("SR") or ROR as appropriate.

This measure has already been implemented.

5. Pre-trial detainees who entered into a plea agreement with the State that exposes them to jail time beyond credit for time already served, are to be considered, on a case-by-case basis, for SR or ROR where they are non-violent and do not otherwise pose a significant risk of danger to the community or victims, pending sentencing.

This measure has already been implemented.

6. 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 are to be considered, on a case-by-case basis, for a modification of the terms of their probation or a suspension of sentence (to a future date certain where appropriate) where they are non-violent and do not otherwise pose a significant risk of danger to the community or victims.

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 pursuant to the policies and procedures of the Department of Safety, MCCC, and the Department of Health, and that they abide by all state and county-wide "stay-at-home" orders due to COVID-19.

This measure has already been implemented.

By allowing the State to continue its cooperative efforts to determine, on a case-by-case basis, whether an inmate

is appropriate for sentence modification or suspension, it ensures that the danger posed by COVID-19 to inmates, ACO's, and jail staff are met in a manner that best protects the safety of the community and victims of crime.

The Petition should be denied.

III. CONCLUSION.

Based on the foregoing, the State respectfully requests that this Honorable Court deny the Petition in the above-referenced matter.

DATED: Wailuku, Hawai'i, March 27, 2020.

Respectfully submitted,

DEPARTMENT OF THE PROSECUTING ATTORNEY
DONALD S. GUZMAN, PROSECUTING ATTORNEY

By /s/ Andrew H. Martin
ANDREW H. MARTIN
Deputy Prosecuting Attorney
County of Maui
Attorney for Respondent State of Hawai'i

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

OFFICE OF THE PUBLIC)	RESPONDENT DONALD S.GUZMAN'S
DEFENDER,)	ANSWER TO PETITIONER'S
)	APPLICATION FOR WRIT OF
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)	ANDREW H. MARTIN; CERTIFICATE
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CLARE E. CONNORS, Attorney)	ORIGINAL PROCEEDING
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Prosecuting Attorney, County)	
of Kaua`i; DWIGHT K. NADAMOTO,)	
Acting Prosecuting Attorney,)	
City and County of Honolulu,)	
)	
Respondents.)	
)	

DECLARATION OF ANDREW H. MARTIN

I, ANDREW H. MARTIN, do hereby declare as follow:

1. I am Second Deputy Prosecuting Attorney for the County of Maui, State of Hawai`i, and is presently assigned to represent Respondent STATE OF HAWAI`I in the above-referenced matter;

2. I am aware, based upon the prevalent reporting on the current COVID-19 health crisis, and from being present during County of Maui Emergency Management briefings, that once exposed to coronavirus, in infected individual may begin showing symptoms of COVID-19 within 14 days of exposure. The virus is highly

contagious and can be spread from person to person easily, even if an infected individual is asymptomatic;

3. Between March 24 and March 26, 2020, I was in contact with the Warden and records staff at the Maui Community Correctional Center regarding the number of inmates currently housed at MCCC;

4. Based upon information provided to me by MCCC, as of March 24, 2020, there were eighteen (18) inmates at the facility serving jail terms due to misdemeanor or petty misdemeanor convictions and seventy (70) inmates serving a jail term as a special condition of felony probation;

5. Based upon information provided to me by MCCC, as of March 26, 2020, the facility was housing 376 inmates, down from 459 inmates at the end of February;

6. I have requested that all deputies keep me informed of requests by OPD or private defense attorneys to modify or suspend sentence for those defendants currently serving a jail term. I have also requested that OPD carbon copy me on their e-mails to deputies regarding requests to modify or suspend sentence. To date, the State has stipulated to modifications or suspensions of sentence in at least six (6) cases. There are at least eight (8) additional requests under review with more expected.

I DECLARE UNDER PENALTY OF LAW THAT THE FOREGOING IS
TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

/s/ Andrew H. Martin
ANDREW H. MARTIN
Second Deputy Prosecuting Attorney

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

OFFICE OF THE PUBLIC)	RESPONDENT DONALD S. GUZMAN'S
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Prosecuting Attorney, County)	
of Kaua'i; DWIGHT K. NADAMOTO,)	
Acting Prosecuting Attorney,)	
City and County of Honolulu,)	
)	
Respondents.)	
_____)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing
Respondent Donald S. Guzman's Answer to Petitioner's Writ of
Mandamus; Declaration of Andrew H. Martin, was served upon:

OFFICE OF THE PUBLIC DEFENDER
James S. Tabe
1130 N. Nimitz Hwy, Suite A254
Honolulu, Hawaii 96814

Petitioner

MS. CLARE E. CONNORS
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MR. CRAIG Y. IHA
MS. MICHELLE L. AGSALDA
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by use of the Judiciary Electronic Filing and Service System on
March 27, 2020.

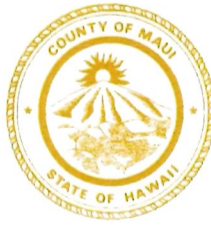
/s/ Andrew H. Martin
ANDREW H. MARTIN
Second Deputy Prosecuting Attorney
County of Maui

MICHAEL P. VICTORINO
Mayor

DON S. GUZMAN
Prosecuting Attorney

ROBERT D. RIVERA
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DEPARTMENT OF THE PROSECUTING ATTORNEY
COUNTY OF MAUI
150 SOUTH HIGH STREET
WAILUKU, MAUI, HAWAII 96793
PHONE (808) 270-7777 • FAX (808) 270-7625

March 17, 2020

MEMORANDUM:

TO: Chief Tivoli Faaumu
Maui Police Department

FROM: Don S. Guzman
Prosecuting Attorney 

RE: Department of the Prosecuting Attorney's charges
on Custody during COVID-19 emergency period

The purpose of this memorandum is to set forth criteria under which the Department of the Prosecuting Attorney for Maui County will file charges on a custody basis during the period of the Governor's and Mayor's Emergency Proclamations relating to the COVID-19 virus.

The Department will charge cases on a custody basis as follows:

1. Where there has been an on-view arrest or arrest on a grand jury or information charge warrant; AND
2. The offense is:
 - a. Murder or Attempted Murder;
 - b. Any class A felony;
 - c. Any class B or C felony involving violence or threatened violence;
 - d. Abuse of a Family or Household Member and violations under Chapter 586;
 - e. Operating a Vehicle Under the Influence of an Intoxicant.

In cases involving misdemeanors, petty misdemeanors, or violations, we recommend the offender be issued a citation with a court date and not taken into custody. We respectfully request that the court date be issued past June 1, 2020.

Memo to Chief Tivoli Faaumu
Page 2
March 17, 2020

For bench warrant arrests where bail has been set by a Judge (including grand jury indictments that fall outside the above criteria and information charging cases), we will recommend that the on-call Judge be contacted for authorization to release the arrestee on their own recognizance with a court date set past June 1, 2020. We are also asking that your Department avoid serving bench warrants for petty misdemeanors and misdemeanors at this time.

This policy is temporary in nature and exceptions may be made with the approval of the Prosecuting Attorney, the First Deputy or the Second Deputy. This policy is intended to protect the staff of this Department and the community in general and to minimize the spread of COVID-19 among vulnerable populations.

We appreciate your cooperation and attention in this matter. Please do not hesitate to contact me if you have any questions or inquiries at 270-7632.

xc: MPD Assistant Chiefs
Chief Judge Richard T. Bissen, Jr.
Supervising Deputy Public Defender Danielle L. Sears
Mayor Michael P. Victorino
Attorney General Clare E. Connors

**DEPARTMENT OF THE
ATTORNEY GENERAL**

DAVID Y. IGE
GOVERNOR



CLARE E. CONNORS
ATTORNEY GENERAL

DANA O. VIOLA
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
425 QUEEN STREET
HONOLULU, HAWAII 96813
(808) 586-1500

April 7, 2020

The Honorable Daniel R. Foley
Special Master
c/o Supreme Court of Hawaii
417 South King Street
Honolulu, Hawaii 96813

Re: SCPW-20-0000200 and SCPW-20-0000213

Dear Judge Foley:

We appreciate your participation and guidance in this challenging effort to address the health and welfare of our inmate population during this global health crisis, while also considering the safety of the general public, our communities, and victims of crime. In response to your invitation to the parties to submit comments or concerns regarding the release of inmates being held in custody by the Department of Public Safety (DPS), the Department of the Attorney General ("the Department") offers the following comments.

The Department has organized and facilitated regular teleconferences with the county prosecutor offices, the Office of the Public Defender, and the DPS to address the concerns about our inmate population. We have appreciated Mr. Brandon Kimura, Deputy Administrative Director of the Courts, monitoring all of the teleconferences to help keep the Judiciary informed of our efforts. Representatives of the Hawaii Paroling Authority (HPA) and the Judiciary's Adult Client Services branch also have participated on some of the calls.

The release of inmates must be decided on an individual basis, and not by general categories (i.e., felony probationers, sentenced misdemeanants, pretrial misdemeanants, etc.). It is important to: accurately assess the risk of danger an inmate presents to the community or to certain individuals; confirm that the inmate has a safe place to stay; and make sure that there is an adequate system in place to monitor or track the released inmate.

In short, any inmate released into the community must have a verified address where the inmate will reside. An inmate cannot be released onto the street without means of support or safe shelter during this crisis. Doing so would place the inmate at

tremendous risk, while also creating an additional risk to the general public. A verified residence also will ensure inmate compliance with the emergency proclamation orders and rules. And, if necessary, it will allow for the imposition of necessary quarantine periods to help prevent the spread of infection in the community.

For those inmates who may present a greater risk, electronic monitoring bracelets may be required to track inmates, assure compliance with quarantine orders, emergency rules, and/or conditions of release.

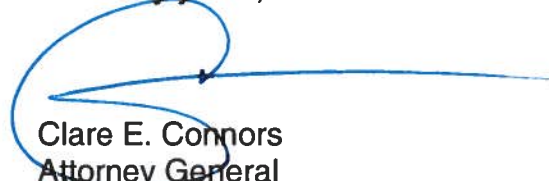
The reduction of inmate populations during this health crisis should be addressed from multiple angles, including with the efforts of the group of interested parties participating in our teleconferences, the efforts of the DPS through its administrative and statutory authority, the efforts of the HPA, along with the filing of individual motions for release by defense counsel, and the decisions of prosecutors to delay the charging of certain defendants who do not present a risk danger to the community. We also continue to work with the DPS to explore transferring inmates to the Federal Detention Center (FDC) in Honolulu, as we understand it has capacity to house additional state inmates. FDC has so far refused to assist, but we will continue to pursue this option.

Each county in Hawaii should have flexibility in how it addresses its inmate populations, as the situation in each county is different. The judges in each circuit are also addressing situations differently, sometimes because of facility or operational limitations.

Finally, as you know, DPS is aware of the COVID-19 risks in jails and prisons, and has taken proactive measures to minimize the health risks to inmates, staff and the public. In addition to its longstanding outbreak management plans, DPS has adopted and implemented a COVID-19 comprehensive response plan.

We appreciate this opportunity to share our concerns and look forward to working with you and the other interested parties during this difficult time.

Sincerely yours,



Clare E. Connors
Attorney General
State of Hawaii

HOUSE OF REPRESENTATIVES



HOUSE OF REPRESENTATIVES

STATE OF HAWAII
STATE CAPITOL, ROOM Q17
HONOLULU, HAWAII 96813

April 8, 2020

The Honorable Daniel R. Foley (Ret.)
1003 Bishop Street
Pauahi Tower, Suite 1155
Honolulu, HI 96813

Dear Judge Foley:

We write to express our strong opposition to the release of inmates at this time.

In addition to public safety concerns raised by Speaker Scott Saiki, enumerated in the letter to you dated April 6, 2020 (see attached), we are also concerned for the health and safety of the released population. As you know, the State's hospitals and health care systems are already overwhelmed with caring for the ongoing health crisis due to COVID-19. If any of the released inmates become ill, they will have difficulty obtaining prompt medical care.

Also, some of the inmates who were most recently released sought the assistance from homeless providers. An additional release of the inmate population will overly burden the homeless services providers many, if not all, of which have removed current residents from their facilities and denied entry to new residents. Providers are unable to effectively provide needed assistance to the most vulnerable population, especially at a time when funding and supplies are scarce. Please do not view this issue only from the perspective of the criminal defense bar. The Judiciary, like the Legislature, has a prevailing duty to protect the health and safety of all Hawaii residents. The mistimed release of inmates will violate this duty.

Sincerely,

SCOTT K. SAIKI
Speaker of the House

HENRY J.C. AQUINO
District 38

DELLA AU BELATTI
District 24

TOM BROWER
District 22

The Honorable Daniel R. Foley (Ret.)

April 8, 2020

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ROMY M. CACHOLA
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CEDRIC ASUEGA GATES
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District 42

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TROY N. HASHIMOTO
District 8

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LINDA ICHIYAMA
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District 15

JUSTIN H. WOODSON
District 9

RYAN I. YAMANE
District 37

KYLE T. YAMASHITA
District 12

Attachment



HOUSE OF REPRESENTATIVES
STATE OF HAWAII
STATE CAPITOL, ROOM 431
415 SOUTH BERETANIA STREET
HONOLULU, HAWAII 96813

April 6, 2020

Honorable Daniel Foley
Special Master
SCPW-20-0000200

Re: Proposed Release of Inmates

Dear Judge Foley:

I join with law enforcement and service providers in strongly urging the Hawaii Supreme Court to exercise restraint if it decides whether to release inmates.

Any recommendation to release inmates must consider whether the inmate:

1. Presents a risk to any person;
2. Has suitable housing upon release;
3. Has earned or unearned income opportunities upon release;
4. Will receive substance abuse treatment, if needed;
5. Will have a service plan in place; and
6. Will be monitored upon release.

The general public expects that the Judiciary will ensure that those released do not become susceptible to criminal activity and/or homeless. Therefore, please inform me whether the Special Master will consider these factors.

Thank you for your time and attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Saiki', with a stylized, cursive flourish.

Scott K. Saiki
Speaker of the House

cc: Mark Patterson, Chair, Hawaii Correctional System Oversight Commission
Chief Justice Mark E. Recktenwald

CONCERNED CLINICIANS

**CONCERNED CLINICIAN'S RESPONSE TO PUBLIC DEFENDER'S
MOTION FOR RELEASE OF INCARCERATED PEOPLE**

DATE: APRIL 6, 2020
TO: HAWAI'I SUPREME COURT
FROM: CONCERNED CLINICIANS - NAMES BELOW
RE: Supporting the Hawai'i Public Defender's March 23 & 26, 2020
documents requesting release of certain incarcerated people

This is an urgent appeal by concerned clinicians in support of the Hawai'i Public Defender's March 23 & 26, 2020 documents to the Hawai'i Supreme Court requesting release of certain incarcerated people.

Incarcerated people, including the **elderly, pregnant**, and those with **high risk medical needs**, should be immediately released and provided with reentry services including case management, linkage to health care, and housing, in order to protect the lives of people incarcerated, those who work in the jails and prison, and other Hawai'i residents.

The CDC's current guidelines recommend physical distancing, limited contact, personal protective equipment (PPE) utilization, and frequent hand washing and sanitation. These conditions cannot be met at Hawai'i's jails and prisons. Institutions across the country have concluded that releasing people who are incarcerated is in the best interest of the public's health. Our Supreme Court needs to lead this initiative.

I. FACTS AND CONDITIONS IN HAWAI'I'S JAILS AND PRISONS:

1. Jails and prisons are designed to maximize control and punishment of incarcerated people, not to minimize disease transmission, or to efficiently deliver health care.
2. Control and security priorities are compounded by over crowded and unsanitary conditions, poor ventilation, lack of adequate access to hygienic materials including soap, warm water, hand sanitizers, poor nutrition, and failure to meet public health standards for the prevention, screening, and containment of disease.
3. Infectious disease detection and prevention is inhibited by the facilities that are frequently transferring individuals from different locations, and admitting newly detained individuals from the community into the facilities.
4. Timely responses to reported and observed symptoms are needed to interrupt viral transmission, but delays in testing, diagnosis, and access to healthcare are systemic in jails and prisons.
5. The transmission of infectious diseases in jails and prisons is incredibly common, especially by respiratory droplets and airborne transmission. It is estimated that up to a quarter of the United States prison population has been infected with tuberculosis, with a

rate of active TB infection that is 6-10 times higher than the general population. Flu outbreaks are regular occurrences in jails and prisons across the US. COVID-19's mortality rate is 10 times greater than the seasonal flu and it has a higher R0 (the average number of individuals who can contract the disease from a single infected person) than Ebola. It is paramount to prevent the spread of the Corona virus in jails and prisons.

II. OUR URGENT APPEAL:

The most vulnerable incarcerated people including the **elderly, pregnant, individuals with high risk medical needs**, e.g., those with serious mental illness, diabetic, etc., should be released immediately to avoid preventable deaths and mitigate the harm from a COVID-19 outbreak.

DATE: April 6, 2020

CLINICIAN NAMES:

Robert J. Bidwell, MD
Seiji Yamada, MD, MPH
Kathryn Braun, Dr. Public Health
Sheareen Gedayloo, MD
Graham T. Chelius, MD
Kuo-Chiang Lian, MD, FHM
Dr. LS Ka'opua, PhD, DCSW, LSW
Hannah Preston-Pita, Psy. D. CSAC
Kara Berlin CNM, FNP

CONTACT INFORMATION:

Lorenn Walker, JD, MPH P: (808) 218-3712 E: lorenn@hawaii.edu
Hawai'i Community Corona Virus Prison Releases Advocates Group

Email copies to:

Clare E. Connors, Attorney General, 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 & County of Honolulu
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.

PABLO STEWART, M.D.

April 7, 2020

BY EMAIL

Hon. Judge Daniel R. Foley
Judgefoley2000@hotmail.com

Re: Situation at OCCC and other correctional facilities

Dear Judge Foley,

My name is Pablo Stewart and I am a physician licensed to practice in Hawai'i with a specialty in clinical and forensic psychiatry. I have worked in correctional psychiatry since 1986, and have developed extensive clinical, research, and academic experience regarding health care issues in correctional and other institutional contexts. My curriculum vitae is attached to this letter. In May 2016, I began serving as the court-appointed monitor in the *Rasho v. Baldwin* federal lawsuit regarding psychiatric and prison conditions in the Illinois Department of Corrections.¹ Since July 2019, I have been working as the attending psychiatrist supervising the psychiatric residents from the John A. Burns School of Medicine Department of Psychiatry, where we provide psychiatric care to people detained at the Oahu Community Correctional Center ("OCCC"). Additionally, since the middle of March 2020, I have been visiting and providing care at OCCC at least four times per week. I have thus become familiar with the jail's conditions and the State of Hawai'i Department of Public Safety's ("DPS") response to the novel coronavirus.

It is from this unique vantage point—as someone who has over three decades of correctional health care experience, who serves as a court-appointed monitor in a prison conditions lawsuit, and who has been inside OCCC as recently as this morning—that I share my observations about DPS's efforts to address COVID-19 within its correctional facilities. **In short, the present efforts to safeguard against a COVID-19 outbreak within DPS facilities are dangerously inadequate. I urge your honor not only to take action to reduce the jail and prison populations, but to do so immediately.**

The most alarming attribute of COVID-19 is what makes it so dangerous in the correctional context: COVID-19 can spread rapidly through asymptomatic carriers—*i.e.*, individuals who outwardly show no symptoms of having contracted the disease. Passing a temperature check or filling out a questionnaire cannot eliminate the possibility that someone is an asymptomatic or pre-symptomatic carrier of the virus. Despite this reality, DPS continues to admit people off the street, and we are also seeing the continued transfer of people from neighbor islands. This constant circulation of people into and out of correctional facilities increases the likelihood of a devastating outbreak. In other words, it is just a matter of time before a COVID-19 outbreak happens.

¹ The settlement agreement can be found here: <https://www.clearinghouse.net/detailDocument.php?id=83326>

The level of “churn” within correctional facilities is especially frightening given current conditions within OCCC.² The various modules are so far beyond their design or operational capacities that it is physically impossible to effectively implement social distancing measures. DPS also has done very little to implement other preventative measures. For example, DPS has not distributed masks, other personal protective equipment (PPE), hand sanitizer, or alcohol wipes. Additionally, people detained in OCCC have little opportunity to wash their hands or take showers. Together, these conditions mean that OCCC is a COVID-19 ticking time bomb.

DPS’s ineffective implementation of its “Pandemic Response Plan,” which was published on March 23, 2019, gives only a false sense of safety and compounds these dangers. Although the Plan calls for measures that would help reduce the risk of a mass outbreak, I have not seen *any* noticeable change to hygiene protocols within OCCC. I have observed that the vast majority of people detained in OCCC are still triple- or at least double-bunked in each cell, which remain dangerously filthy. Making matters worse, correctional staff themselves do not practice social distancing or adhere to proper hygiene protocols. And I have not noticed any changes to the procedures correctional staff follow to clean and keep hygienic OCCC’s facilities, or any indication that correctional staff take seriously the risk of a COVID-19 outbreak.

Further, while I have heard of DPS reports stating that the OCCC population is smaller than it was a month ago, one would not know that from visiting the facility. As a clinician who moves throughout the facility almost daily, I have not observed any appreciable reduction in the jail population. The end result is that detainees are no more able to maintain social distance and proper hygiene today than they were one month ago.

To the extent that DPS has been implementing changes to its protocols, they are coming far too late, and without the needed urgency. For example, OCCC only just began screening people entering OCCC for COVID-19 symptoms, even though the Plan called for such screening to begin over two weeks ago. I do not know what accounts for such delay, but it is emblematic of the overall ineffectiveness of the ongoing effort to implement prevention measures. This slow roll-out will only magnify the eventual suffering caused by an outbreak.

Everyone is put at risk by the failure to take meaningful action in Hawaii’s correctional facilities. It goes without saying that people detained or incarcerated will suffer most. And within those populations, given that an estimated 32% of people in prisons and 40% of people in jail report having at least one disability,³ they will be particularly susceptible to COVID-19. For example, people with mental health conditions will only see their conditions exacerbated by isolation and quarantine. And once an outbreak breaks out of the jail walls—as will be inevitable given the high daily rate of “churn” in and out of correctional facilities⁴—it will overwhelm local hospitals and everyone’s health will suffer.

² While these observations are based on my first-hand experiences visiting and providing care at OCCC, I understand that practically all DPS jails and prisons face substantially similar problems.

³ <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5500>

⁴ <https://www.nytimes.com/2020/03/31/upshot/coronavirus-jails-prisons.html>

As a court monitor over Illinois's jails and prisons, I have observed up close what happens when steps are not taken fast enough. While many would believe that what happens in correctional facilities remains contained in those facilities, that is a dangerous and untrue belief. I have observed how COVID-19 has recently gained a strong foothold in a major Illinois detention facility.⁵ Those outbreaks have gotten correctional staff sick, which in turn has reduced the ability of the facility (which already is limited in its medical care capacity) to treat people on-site. This in turn means that the local hospitals and health care facilities are being overwhelmed by sick people in correctional facilities. The fate of those who are in our jails and prisons are inextricably intertwined with our broader community.

I hope my observations and expertise will aide your Honor in making decisions that will ensure the health and wellbeing of everyone in our state. I am available to speak with or provide other information if that would be helpful.

Sincerely,


Pablo Stewart, M.D.

pablo.stewart.md@gmail.com

⁵ <https://www.chicagoreporter.com/stateville-prison-outbreak-signals-covid-19-threat-to-inmates-surrounding-hospital-systems/>; <https://www.chicagotribune.com/coronavirus/ct-coronavirus-cook-county-jail-death-20200406-42b3dkcqsbeyzflms06s2j4wi-story.html>.