HONOLULU POLICE COMMISSION
City and County of Honolulu
State of Hawaii
Minutes of the Regular Meeting
April 29, 2020

CALL TO ORDER
Chair Alvado called the meeting to order at 2:01 p.m. on
Wednesday, April 29, 2020, via teleconference.

PRESENT
Shannon L. Alvado, Chair
Jerry Gibson, Vice-Chair
Steven H. Levinson, Member
Carrie K. S. Okinaga, Member
Richard M. Parry, Member
Loretta A. Sheehan, Member

Denise W. Wong, Deputy Corporation Counsel
James K. S. Yuen, Executive Officer
Erin Marie Yamashita, Secretary

ASCERTAINMENT
OF QUORUM
Counsel Wong ascertained that a quorum was present.

Chair Alvado announced the meeting is being held via teleconference via Section 4 (c) of the
Governor’s Supplementary Proclamation dated March 16, 2020. Commissioner Alvado
conducted a roll call prior to the beginning of the meeting, and provided instructions for asking
questions during the teleconference.

PUBLIC TESTIMONY
Chair Alvado acknowledged testimony received by the Commission and circulated to
commissioners via e-mail. Testimony was received from Mr. Scott Saiki, Speaker of the House;
Ms. Kat Brady, Coordinator of Community Alliance on Prisons; and Ms. Heather Lusk, Executive
Director of the Hawaii Health and Harm Reduction Center.

Chair Alvado also clarified that testimony is to be received on items related to the agenda, and
testimony by Ms. Lusk was not related to anything on the agenda and relates more to the LEAD
Program. She then summarized testimony from Speaker Saiki and Ms. Brady.

Chair Alvado confirmed with staff that no testimony was received other than what she
mentioned. Staff confirmed as of 1:45 p.m. no other testimony was received.

Discussion of Chief Ballard’s April 17, 2020 Letter to Chief Justice Mark E. Recktenwald
Chair Alvado then asked commissioners if they had any questions regarding testimony
received. Commissioner Levinson commented on the letter from Speaker Saiki which stated he
(Speaker Saiki) sent two letters to Judge Foley and/or Chief Justice Recktenwald and that
Chief Ballard’s letter was appropriate on procedural grounds. Commissioner Levinson stated
that his opinion regarding Speaker Saiki’s letter is that the letter is disingenuous and Speaker
Saiki did not send two letters to Judge Foley and/or Chief Justice Recktenwald.
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He (Speaker Saiki) sent one letter dated April 8, 2020 addressed to Judge Foley with carbon copies to Mark Patterson, Chair of the Hawaii Correctional System Oversight Commission and Chief Justice Recktenwald. A second letter from Speaker Saiki dated April 8, 2020 to Judge Foley was co-signed by numerous members of the State House of Representatives. Commissioner Levinson said it is significant that Speaker Saiki addressed both letters to Judge Foley, which he would discuss later in the meeting.

Chair Alivado then asked Commissioner Levinson if he was expressing his personal opinion of the disingenuousness of Speaker Saiki. Commissioner Levinson acknowledged it was his personal judgement. Vice-Chair Gibson asked Commissioner Levinson for clarification and if he meant that proper procedure was not followed or if the content of the letter was something he was not agreeing with. Commissioner Levinson said he is focusing on the fact that Speaker Saiki addressed both of the letters to Judge Foley, which was the proper thing to do.

Commissioner Sheehan asked Commissioner Levinson if his judgement was based upon the fact that Speaker Saiki said “and/or Chief Justice Recktenwald” which was the problem. Commissioner Levinson responded that what he inferred from the language is that Speaker Saiki is implying that a letter addressed to Chief Justice Recktenwald would be procedurally appropriate and if that is what Speaker Saiki is trying to imply, he is mistaken.

Vice-Chair Gibson requested opinions of fellow commissioners about Chief Ballard’s letter and shared his personal opinion that Chief Ballard’s letter is appropriate and the community should be concerned if prisoners are being released. Medical care is provided to inmates and prisons should be able to manage the population, including isolating a person requiring quarantine whether it be for COVID-19 or something else.

Vice-Chair Gibson said he is not familiar with the technicalities mentioned by Commissioner Levinson and appreciates his (Commissioner Levinson’s) knowledge as well as Commissioner Sheehan’s comments. Vice-Chair Gibson then stated after discussion he would like to make a motion that the Commission send a letter in support of Chief Ballard. Commissioner Levinson then asked Vice-Chair Gibson who the recipient of the letter would be. Vice-Chair Gibson responded the letter could be sent both Chief Justice Recktenwald and Judge Foley or whomever Commissioner Levinson would recommend.

(Chair Alivado, for the record, requested commissioners mute phones when not speaking, wait for the chair to ask commissioners if there are any questions, commissioners identify themselves prior to speaking, and if you are unable to hear to indicate you cannot hear.)

Chair Alivado then asked Commissioner Levinson to continue. Commissioner Levinson then said that on the same day Chief Ballard’s April 17, 2020 was distributed to commissioners he requested that the matter of the letter be placed on the agenda for the next meeting and that he was not contemplating the scheduling of an additional meeting.

Commissioner Levinson explained the reason for his request had nothing to do with the merits of Chief Ballard’s letter. He believes that Chief Ballard is entitled to her position and to express her position. His concern is that she was not entitled to express it in the way that she did, which is what he would like to discuss.
Chair Alivado thanked Commissioner Levinson for his point of clarification. She then asked if there was any other response to Vice-Chair Gibson’s comment with respect to Chief Ballard’s letter and her position.

Commissioner Sheehan asked if the Court’s Third Order made the issue moot. Because commissioners did not have a copy of the Third Order, Chair Alivado asked if the Order has already made a decision. Commissioner Sheehan said the court has already made its decision and sent down the rules and interpreted the rules to guide the release.

Chair Alivado appreciated Commissioner Sheehan’s point, but if the courts are still considering motions for release it may be different because it is her (Chair Alivado’s) understanding that the responsibility to object to a release is that of the Prosecutor’s. Commissioner Sheehan said that 2d of the Third Order addressed Chief Ballard’s concern of verified residence. Commissioner Sheehan thinks it is not appropriate for the Commission to send a letter because the issue has been decided by the court.

Commissioner Okinaga commented there could be more orders issued and the process is not clear and circumstances may change.

Chair Alivado said the Commission could support Chief Ballard’s position and thought it was important to call this special meeting, so if the Commission did decide to support the Chief’s position then the issue would not be moot. Commissioner Sheehan understands the desire to support Chief Ballard, but an independent decision should be made to address Vice-Chair Gibson’s comment and that overcrowding has always been a problem with prisons in Hawaii.

Commissioner Levinson suggested that commissioners discuss the issues separately as procedural concerns and the substance of Chief Ballard’s letter and whether or not a letter would be sent in support of Chief Ballard position.

Commissioner Okinaga reiterated that the situation is evolving and just because there is a third interim order doesn’t mean there would not be subsequent interim orders, so the issue is not a moot point with regard to the HPD’s position through Chief Ballard’s letter and is something that could be raised repeatedly throughout changing circumstances.

Chair Alivado understood that it was important for Commissioner Levinson to address the procedural issue and indicated it seemed that many people are not interested in discussion of procedure. She then asked if there was any objection in discussing procedure. Commissioner Sheehan said she was interested in what Commissioner Levinson had to say.

Commissioner Levinson then said it doesn’t surprise him that some people are not interested in discussing procedure but the fact remains that what Chief Ballard did was procedurally improper, and if the Chief Justice had not been assiduous in responding to receiving Chief Ballard’s letter he could have gotten into trouble. He then said if the Commission isn’t interested it is fine, but others will be interested.

Commissioner Parry said he was interested in what Commissioner Levinson had to say with regard to proper procedure by Chief Ballard.
Commissioner Levinson said he is disappointed that Chief Ballard did not call in to the meeting in order to participate because it would be helpful if she were able to respond. He then reviewed Chief Ballard’s April 17, 2020 letter and said that it was not Chief Ballard’s first letter addressed to Chief Justice Recktenwald, and it was her second, assuming there are no other letters.

Commissioner Levinson explained Chief Ballard sent a letter to Chief Justice Recktenwald dated March 31, 2020. Commissioners received copies of that letter and at the last meeting (April 15, 2020) Commissioner Levinson said he asked Chief Ballard a question based on a position that she took in the March 31, 2020 letter. He asked commissioners to note that Chief Ballard began her letter by stating, “...having reviewed the interim order issued by the Supreme Court on April 15, 2020 I would like to renew my concerns and objections to the early release of both pre-trial detainees and sentenced prisoners based on a fear of COVID-19.”

He then asked commissioners to look at the Interim Order of April 15, 2020, and said that anyone who reviewed that order would be aware of 1) the interim order is filed in the context of a lawsuit, an original proceeding in the Hawaii Supreme Court as two consolidated lawsuits.

Anyone who reviewed the April 15, 2020 order and then wrote a letter addressed to Chief Justice Recktenwald regarding the order, seeking to influence the judgement of the court, with respect to pending litigation, which is what Chief Ballard is clearly attempting to do in the letter otherwise she would not have written it as she is indicating what she would hope the court will rule.

Commissioners ought to be aware, especially if the Chief has received any legal advice with respect to her letter, that what she was doing was implicating some important provisions of the Code of Judicial Conduct. It is Commissioner Levinson’s personal inference that the Chief did not, herself, write the letter and that the letter was drafted for her signature because it is not written in her (Chief Ballard’s) voice. Chief Ballard may have indicated what she wanted in the letter, but Commissioner Levinson does not believe Chief Ballard wrote the letter, and it is likely that the letter was written by Lynne Uyema, Senior Legal Advisor. Assuming there was some involvement in the letter by a legal advisor to the chief, that person would have been aware of Rule 2.9 of the Hawaii Code of Judicial Conduct, which deals with ex-parte communication.

Commissioner Levinson then explained Rule 2.9a which states a judge shall not initiate, permit, or consider ex-parte communication and lists conditions to circumstances under which a judge may consider an ex-parte communication. One condition a judge must codify among others to permit and/or consider an ex-parte communication is that the judge gives notice to the parties in the pending lawsuit.

In Chief Ballard’s April 17, 2020 letter she addresses the letter to Chief Justice Recktenwald and carbon copied (cc’d) Special Master Daniel Foley, Mayor Caldwell, Mr. Kevin Takata, and Commission Chair Shannon Alivado. None of the persons cc’d are parties to the pending lawsuit, and none of the parties to the lawsuit were put on notice that she was making the ex-parte communication. Commissioner Levinson explained that Chief Ballard effectively forced Chief Justice Recktenwald to file a notice of ex-parte communication, which he did on April 1,
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2020 by filing Matter 20-0000200, to be distributed to all of the parties in accordance with Rule 2.9 of the Code of Judicial Conduct.

Chair Alivado asked Commissioner Levinson to clarify which letter he was discussing and if it was the March 31, 2020 letter and not the April 17, 2020 letter. Commissioner Levinson indicated Chair Alivado was correct because on April 1, 2020 he put all of the parties on notice of the March 31, 2020 letter. Commissioner Levinson does not know if the Chief Justice has filed a similar notice of ex-parte communication concerning the April 17, 2020 letter. It is understandable that he would have filed his April 1, 2020 notice because the court had not yet filed its Order of Consolidation of the two matters and the appointment of a special master. It was not until April 2, 2020 that the Hawaii Supreme Court formally decided to construe the letter of the Public Defender or communication from the Public Defender as a petition for a writ of mandamus and an application for extraordinary relief. Commissioner Levinson can understand why Chief Ballard might have innocently addressed her letter to the Chief Justice Letter on March 31, 2020 when the Public Defender was making a request by way of letter and she (Chief Ballard) wanted to comment also.

Commissioner Levinson said by April 17, 2020, when Chief Ballard wrote the second letter, the Hawaii Supreme Court had filed its interim order responding to Judge Foley’s first special master’s report and the interim order filed on April 9, 2020. On April 2, 2020 when the Hawaii Supreme Court filed its order of consolidation and appointment of special master, the court addressed ex-parte communication, which states the special master shall serve as a neutral and unbiased special master which may engage in ex-parte communication for the purpose of gathering documents and information and to facilitate collaborative effort. This was clear direction to anyone who wanted to provide input in the pending matter to provide input to the special master (Judge Foley). The Chief did not follow the direction (from the third interim order) and wrote a letter dated April 17, 2020 to Chief Justice Recktenwald, not Judge Foley and this concerned Commissioner Levinson.

Chair Alivado thanked Commissioner Levinson for his explanation and wanted to make certain that the question is whether or not Chief Ballard intentionally wrote the letter to Chief Justice Recktenwald, even after being noticed that all communication should be directed to the special master. She also asked Commissioner Levinson if he would confirm his concern is the fact that even after being notified and after Chief Justice Recktenwald filed the notification of ex-parte communication Chief Ballard still addressed the letter to him. Commissioner Levinson confirmed that was his concern, and that it would have been imprudent of Chief Ballard not to solicit the input of her legal advisor in the matter of sending another letter to the Chief Justice whether she was actually aware of the April 2, 2020 direction to submit all ex-parte communication through the special master. If Chief Ballard wrote the letter without consulting her legal advisor that would also be cause for concern.

Commissioner Sheehan added that Commissioner Levinson raised a good point and as a parallel issue one problem with the Commission’s proposed action is Rule 3.5 of the Rules of Professional Conduct which states that in an adversary proceeding a lawyer shall not communicate with a judge or official before the proceeding is pending without proper notification to opposing counsel. Commissioner Levinson added that the rule also applies to Commissioners Okinaga, Sheehan and himself as they are attorneys. Commissioner Okinaga shared that Chief Ballard is not a party nor is HPD a party to any of the litigation as captioned.
Commissioner Levinson said in retrospect it is clear to him that Chief Ballard should not have addressed her April 17, 2020 letter to Chief Justice Recktenwald.

Commissioner Parry then asked if commissioners would want to do anything about Chief Ballard’s sending the April 17, 2020 letter. Chair Alivado informed commissioners that the Commission does not have jurisdiction over procedure and whether or not the court was supposed to receive the letter from Chief Ballard.

Commissioner Levinson said that at the very least, there is one thing the Commission should not do, which is repeat the mistake of addressing a letter to Chief Justice Recktenwald.

Commissioner Okinaga, then asked what the purpose of the meeting was and if it was for Commissioner Levinson to specifically share his concerns. Commissioner Levinson stated that his request was for the discussion to be added to the regularly scheduled meeting on May 6, 2020. Commissioner Okinaga then asked Commissioner Levinson if everything he wanted to discuss had been discussed to which Commissioner Levinson indicated Commissioner Okinaga was correct. Chair Alivado reiterated that the item was agendized for a special meeting so the Commission’s discussion would be timely.

Commissioner Okinaga said there is no action item and the agenda item is discussion and it is important for agenda items to fall under responsibilities of the Commission by the charter. If the discussion today is part of a charter related duty it is understandable to have discussion and commissioners have completed discussion.

Chair Alivado appreciated Commissioner Okinaga’s input and asked Vice-Chair Gibson what his thoughts were in supporting Chief Ballard and his mention of making a motion to write a letter supporting Chief Ballard’s positions stated in her letters. Vice-Chair Gibson appreciated Commissioner Levinson’s discussion and asked if that would prevent commissioners from supporting Chief Ballard’s position with a letter addressed to Judge Foley. Commissioner Parry added that there seems to be a correct way commissioners could support Chief Ballard if they chose to do so.

Commissioner Okinaga added commissioners could write a communication to Chief Ballard expressing sentiments of the Commission. She doesn’t see the City or Commission as a party to the action. Commissioner Levinson felt that her letter was an ex-parte communication to which Commissioner Okinaga disagreed because the Chief nor HPD is named as a party.

Chair Alivado then asked why would the order(s) concern the Commission because the court could take the issue up directly with Chief Ballard, which they did through the notice. Commissioner Levinson said it concerns the Commission because the public has an expectation that the Commission will remain alert to improprieties engaged in by the Chief of Police. Chair Alivado pointed out that Commissioner Levinson also raised the question of whether it was an intentional impropriety. She thinks it is not the Commission’s call rather the Judiciary’s or Supreme Courts call to identify the impropriety as the Commission is not a legal body to analyze what Chief Ballard did was right or wrong.
Commissioner Levinson said he'd give Chief Ballard a pass on the March 31, 2020 letter addressed to Chief Justice Recktenwald because the court had not yet formally created adversary proceeding, but by April 17, 2020 whether she knew that she was meddling in an adversary proceeding involving parties and that she wasn't one or not, she (Chief Ballard) should have been aware. It is perfectly legitimate for the Commission to call her attention to it.

Commissioner Parry added that if commissioners see the Chief doing something which is wrong, whether commissioners think it is intentional or not intentional, and whether it is material or not material, commissioners should draw her attention to it and it should not be difficult. Commissioner Parry also said Vice-Chair Gibson's issue is a separate one—whether commissioners would support Chief Ballard's position. He then suggested commissioners could point out to Chief Ballard and her legal advisor that the April 17, 2020 letter addressed incorrectly.

Commissioner Levinson said he didn't want to make a big deal out of the matter be placed on the agenda, what he wanted to accomplish is essentially what is being discussed and to create a forum in which one could call the Chief's attention to something that she did that she probably wouldn't want to do again.

Commissioner Okinaga said she does not have enough information to make a broad-brush statement that the Chief did something wrong, and that probably wasn't Commissioner Levinson's intention. She also asked if Speaker Saiki's letters were inappropriate. Commissioner Levinson said that Speaker Saiki knew to address both letters to Judge Foley. Commissioner Okinaga noted that Speaker Saiki "cc'd" Chief Justice Recktenwald, which Commissioner Levinson acknowledged and said he (Speaker Saiki) was being cute, but at least the addressee of the letter was correct. As to the second letter he did not "cc" the Chief Justice as she should not have.

Chair Alivado appreciated the discussion and asked commissioners if they were agreeable to sharing the concerns with Chief Ballard in a conversation. Discussion at a future meeting is not necessary. She then asked commissioners to discuss Vice-Chair Gibson's suggestion of a possible letter in support of Chief Ballard's position.

Chair Alivado then asked commissioners if anyone had an opinion. Commissioner Levinson shared that writing a letter taking a position on the merits of the Chief's views in her April 17, 2020 letter is a minefield that would be difficult to navigate. He, fundamentally, disagrees with some of her positions and parsing out what commissioners agree or disagree on would be futile. In terms of a blanket support of Chief Ballard's April 17, 2020 letter Commissioner Levinson would vote no should there be a motion.

Commissioner Sheehan agrees that a letter addressed to the special master (Judge Foley) is possible; however, Judge Foley has done extensive investigation and review and commissioners do not know what his findings were and for commissioners to repeat a message that has been rejected by the court she 1) does not see the usefulness and 2) she would like to know more about Judge Foley's findings before sending a letter because the issue is a tricky one.
As there was no further discussion, Chair Alivado asked Vice-Chair Gibson was still considering making a motion. Commissioner Okinaga agreed with Commissioner Sheehan that commissioners may find individual points in the letter but no matter what she supports Chief Ballard’s ability to communicate concerns of her department.

Commissioner Levinson said he does support Chief Ballard but he cannot support her doing it by way of a letter addressed to the presiding judge in a pending lawsuit. Chair Alivado pointed out that Commissioner Levinson’s issue was separate to which he agreed. He then said that the Chief has the right to speak for the department but that doesn’t mean she has the right to speak in all circumstances and to all people.

Commissioner Parry said the Commission should have some sort of communication with the Chief or legal advisor just to point out a mistake was made, and could be on an informal basis. He doesn’t think commissioners should be sending a letter in support of the Chief’s position because there are some things in the letter that commissioners should understand better and he doesn’t see the necessity or the time to do that now.

Vice-Chair Gibson understands everyone’s comments and that more information may be needed. He said he was looking at the letter on its surface and appreciated Commissioner Levinson’s explanation on procedure. Vice-Chair Gibson is still, personally, concerned about the release of prisoners and he agrees with Chief Ballard on her premise of what she wrote.

Commissioner Sheehan said if commissioners truly wanted have more information on Judge Foley’s decisions, she would support inviting Judge Foley to ask about his findings.

Chair Alivado asked commissioners if they had any discussion concerning Chief Ballard’s April 17, 2020 letter in executive session, and if anyone felt the need to confer with counsel on the agenda. Commissioners indicated they did not have any discussion for an executive session.

Commissioner Parry said he would like to discuss the newspaper comment that the Commission was holding “secret meetings.” Chair Alivado indicated that the discussion of the article is not on the agenda. Commissioner Sheehan agreed with Chair Alivado that the discussion needs to be included on the agenda.

Commissioner Levinson shared his observation that the word “secret” attached to meeting in the Star Advertiser headline is not used within the article itself. Chair Alivado requested Commissioner Levinson cease discussion because discussion of the news article is not on the agenda.
ANNOUNCEMENTS
There being no executive session, Chair Alivado announced the next Police Commission meeting will be held on May 6, 2020.

Chair Alivado directed commissioners’ attention to the May 6, 2020 meeting agenda. The meeting will be offered as an in person meeting for commissioners willing to attend and feel safe to do so. Commissioner Levinson wanted to know how it came to pass that the conference room is now available. Chair Alivado explained that other options were being continuously explored—potential use of rooms at City Hall if the conference room at Alapai HQ was not available, or some other virtual platform that could involve live public participation in a safe and reliable manner. She explained that the conference room where meetings are usually held was being used a courtroom. As discussed and requested during the April 15, 2020 meeting, other venues and technology were being explored because commissioners were concerned with public access. Chair Alivado confirmed that she and HPC staff continue to research different platforms that comply with procurement laws, is reliable and could include public participation. Chair Alivado and HPC staff will keep commissioners updated.

ADJOURNMENT
At 3:10 p.m. Commissioner Levinson made a motion to adjourn the meeting. Commissioner Parry seconded the motion.

Discussion: None.

Vote: By a unanimous vote, the motion carried.
The Honorable Chief Justice Mark E. Recktenwald
Supreme Court
Ali`iolani Hale
417 South King Street
Honolulu, Hawaii 96813

Dear Chief Justice Recktenwald:

Having reviewed the Interim Order issued by the Supreme Court of the State of Hawaii on April 15, 2020, I would like to renew my concerns and objection to the early release of both pre-trial detainees and sentenced prisoners based on a fear of COVID-19.

I continue to object to the early release of inmates based on the possibility of a COVID-19 outbreak within the correctional facilities. If the Department of Public Safety is taking proper precautions and adhering to Center for Disease Control guidelines, risk to the prison population should be significantly minimized. However, should the courts order the release of an individual, the following terms and conditions of release should be included in each order:

1. The released inmate must provide a verified residential address or proof of acceptance at a specific shelter with a signed acceptance of shelter terms by the inmate;

2. The released inmate shall self-quarantine for 14 days upon re-entry into the community as is required of residents returning from the neighbor islands and mainland;

3. The released inmate shall be mandated to return to court at a specified date and time for an assessment hearing.

Any violation of the terms and conditions of the inmate’s release should result in the immediate issuance of a warrant so a hearing can be had to determine whether the inmate should be returned to jail or be allowed to remain in the community. At the end of the State of Emergency period and termination of stay at home orders, all convicted inmates who were serving sentences and who would not have otherwise been eligible for early release should return to prison to complete their sentences.

Serving and Protecting With Aloha
I understand the Court did not mandate that a verified residential addresses be required as a condition of release, however, I believe the health and safety of our community requires some assurance that released inmates have a specific location where they can self-quarantine for 14 days. The Honolulu Police Department (HPD) offers its Provisional Outdoor Screening and Triage (POST) sites as a viable option for released inmates who do not have a verifiable residential address. However, the HPD would consider it a violation of the self-quarantine condition should an inmate choose to leave the POST prior to the end of the 14 day quarantine period. Also, released inmates whose records demonstrate a lack of regard for court orders (e.g. numerous contempt of court convictions, numerous returns on warrants, numerous probation violations, etc.) should be mandated to wear ankle bracelets through the 14 day quarantine period.

During this COVID-19 pandemic, my primary concern is for the health and safety of the entire community. Releasing inmates into a vulnerable community during the pandemic is unnecessarily risky and jeopardizes what the community is working so hard to attain – a flattened curve.

Respectfully,

Susan Ballard
Chief of Police

c: Special Master Daniel R. Foley (via email)
Mayor Kirk Caldwell, City and County of Honolulu
Mr. Kevin Takata, Department of the Attorney General
Ms. Shannon Alivado, Chair, Honolulu Police Commission
April 29, 2020

Public Testimony
Ms. Shannon Alivado, Chairperson  
Honolulu Police Commission  
1060 Richards Street, Suite 170  
Honolulu, HI 96813  

Re: Testimony in Support of Chief Ballard  

Dear Chair Alivado and Members:

I am submitting this testimony in strong support of Chief Ballard's letter to Chief Justice Recktenwald.

I also sent two letters to Judge Foley and/or Chief Justice Recktenwald expressing the same concerns that Chief Ballard raised in her correspondence. The letters were sent on April 6, 2020 and April 8, 2020. Copies of both are attached for your reference.

Chief Ballard's letter was appropriate on procedural and substantive grounds. The Supreme Court's handling of this matter has been somewhat lax and informal. In fact, the proceeding was initiated by a letter that the State Public Defender sent to the Supreme Court on March 23, 2020 (see attachment). Rather than require the Public Defender to file a formal pleading, the Supreme Court deemed as a petition for writ of mandamus.

Chief Ballard's letter raises real public health and safety concerns. Her concerns align with those of the House of Representatives. It was important for Chief Ballard and the House to raise these concerns through correspondence because it was apparent that the Supreme Court was focused on the release of inmates rather than the health and safety of the general public.

The Commission should publicly commend Chief Ballard for her independent thought and inclination to protect the public. Please contact my office if you have any questions.

Sincerely,

Scott K. Saiki  
Speaker of the House

Attachments

cc: Judge Daniel Foley  
Chief Justice Mark Recktenwald  
Attorney General Clare Connors
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,

[Signature]

Scott K. Saiki
Speaker of the House

cc: Mark Patterson, Chair, Hawaii Correctional System Oversight Commission
    Chief Justice Mark E. Recktenwald
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
District 30

SCOT Z. MATAYOSHI
District 49

RICHARD P. CREAGAN
District 5

ANGUS L.K. McKELVEY
District 10

TY J.K. CULLEN
District 39

JOHN M. MIZUNO
District 28

LYNN DeCOITE
District 13

DEE MORIKAWA
District 16

STACELYNN K.M. ELI
District 43

MARK M. NAKASHIMA
District 1

CEDRIC ASUEGA GATES
District 44

SCOTT Y. NISHIMOTO
District 21

SHARON HAR
District 42

TAKASHI OHNO
District 27

MARK J. HASHEM
District 18

SEAN QUINLAN
District 47

TROY N. HASHIMOTO
District 8

CALVIN SAY
District 20

DANIEL HOLT
District 29

GREGG TAKAYAMA
District 34

LINDA ICHIYAMA
District 32

DAVID A. TARNAS
District 7

AARON LING JOHANSON
District 31

JAMES KUNANE TOKIOKA
District 15

LISA KITAGAWA
District 48

JUSTIN H. WOODSON
District 9

SAM SATORU KONG
District 33

RYAN I. YAMANE
District 37

SYLVIA LUKE
District 25

KYLE T. YAMASHITA
District 12

Attachment
The Honorable Mark E. Recktenwald  
Chief Justice of the Hawaiʻi Supreme Court  
4157 S. King Street  
Honolulu, Hawaiʻi 96813

Dear Chief Justice Recktenwald:

The Office of the Public Defender (OPD) is writing to respectfully request the Hawaiʻi Supreme Court’s consideration of an Order designed to commute or suspend jail sentences currently being served by inmates in the community correctional centers across the State of Hawaiʻi, either as a condition of felony probation or because of an imposed sentence received upon conviction of a misdemeanor or a petty misdemeanor. Consideration of this measure is warranted by the current national health crisis caused by the spread of the coronavirus (COVID-19) and by Governor David Y. Ige’s March 16, 2020 Supplemental Emergency Proclamation which authorized and invoked the following measure:

4. Sections 127A-12 and 127A-13, HRS, and suspend as allowed by federal law the following statutes and any related administrative rules, in order for state and county agencies to more effectively provide emergency relief and engage in emergency management functions, including, but not limited to, implementing social distancing measures, as a result of the COVID-19 pandemic:

u. 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.

It is inevitable that the virus will spread into the jails and prison facilities, and, when that happens, the health and well-being of inmates and staff members will be at tremendous risk. It is therefore incumbent upon the criminal justice system to reduce our state jail populations to the extent possible without compromising public safety. This is a moral imperative as well as a legal issue.

Against this backdrop, OPD is requesting this Honorable Court to consider the following relief:

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

OPD’s request targets two categories of sentenced incarcerated inmates. First, there are inmates serving jail sentences (not to exceed one year or eighteen months) as a condition of felony probation. These inmates have release dates in the reasonably near future, and, perhaps most importantly, they will remain under probation supervision once they are released into the community. Second, there are inmates serving district court sentences, having been convicted of either a misdemeanor or petty misdemeanor. They too have release dates in the reasonably near future anyway and, of course, they have been typically convicted of charges like criminal trespass, shoplifting, disorderly conduct, harassment, and the like. In other words, these inmates in both categories represent low to medium risk defendants whose release in this restricted access climate would not compromise public safety in a significant way. And, of course, their release would promote public health.

OPD recognizes that there might be some limited exceptions to these rules; therefore, OPD proposes allowing prosecutors to object in specific cases. OPD believes it is better to put the onus on the State to object to release rather than forcing my attorneys (and many private attorneys) to file motion after motion seeking new sentencing hearings. There simply is not enough time to allow these matters to be addressed through traditional channels.

OPD is enclosing (attaching) the Consent Decree filed by the Supreme Court of New Jersey on March 22, 2020, which granted the relief sought by the Office of the Public Defender of the State of Jersey -- the same relief OPD is seeking from this Honorable Court.

Respectfully submitted,

James S. Taber
Public Defender

cc: Clare E. Connors
Attorney General, State of Hawai‘i

Don S. Guzman
Prosecuting Attorney, County of Maui

Mitchell D. Roth
Prosecuting Attorney, County of Hawai‘i

Justin F. Kollar
Prosecuting Attorney, County of Kauai

Dwight K. Namamoto
Acting Prosecuting Attorney, City and County of Honolulu
IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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.

ORIGINAL PROCEEDING

ORDER
(By: Recktenwald, C.J., Nakayama, McKenna, Pollack, and Wilson, JJ.)

Upon consideration of the letter from the Office of the Public Defender dated March 23, 2020, and the document appended to the letter, which this court will deem as a petition for writ of mandamus pursuant to HRAP Rule 21,

IT IS HEREBY ORDERED as follows:

1. The clerk of the appellate court shall file the letter, including the attachment, as a petition for writ of mandamus.

2. No later than 4:30 p.m., on Wednesday, March 25, 2020, the respondents shall file an answer to the petition for writ of mandamus. Respondents shall include in their answer all
steps, if any, they are taking to address the issues raised in the letter and the expected time frame to effectuate these steps.

3. The clerk of the appellate court shall serve a copy of this order upon the respondents, as required by HRAP Rule 21(c). Service shall be effectuated electronically and by telephone.


/s/ Mark E. Recktenwald
/s/ Paula A. Nakayama
/s/ Sabrina S. McKenna
/s/ Richard W. Pollack
/s/ Michael D. Wilson
Honolulu Police Commission
Regular Meeting – April 29, 2020

Testimony re: Chief Ballard’s Letters to the Hawai’i Supreme Court
By email: policecommission@honolulu.gov

E Welina Commissioners!

My name is Kat Brady and I am the Coordinator of Community Alliance on Prisons, a community initiative promoting smart justice policies in Hawai’i for more than two decades. This testimony is respectfully offered on behalf of our families and friends who live in and who work in correctional facilities.

We submit this testimony today expressing our concerns about the letters written by the Honolulu Police Chief to the Hawai’i Supreme Court and the mis-information about the novel coronavirus cases being touted by HPD.

The Police Chief’s letters and public statements about correctional facilities being safer have been widely repeated and totally disproven by the evidence. An article published on April 24th makes the case for widespread testing in correctional facilities. Health experts say not testing staff could be a blind spot. They mention:

ARKANSAS - Cummins Unit: A farm employee was the first to test positive in early April. Now 14 staffers and more than 680 of the prison’s nearly 1,700 prisoners have the virus, according to test results reported this week.

OHIO – Marion Prison: Marion Correctional Institution has reported four deaths, but has more than 2,000 prisoners and at least 160 staffers who tested positive for the virus.

Pickaway Correctional Institution: at least nine prisoners have died, while more than 1,500 prisoners and 79 staff members have tested positive.

"Because we are testing everyone – including those who are not showing symptoms – we are getting positive test results on individuals who otherwise would have never been tested because they were asymptomatic."

Update on the Ohio Department of Rehabilitation and Corrections website

Lauren Brinkley-Rubinstein, a faculty member at the Center for Health Equity Research in the University of North Carolina School of Medicine said she thinks prisons should test as much as possible anyway.

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"If you identify who has it and who does not, you can apply better interventions," she said. As for prisons that aren’t testing at all, Brinkley-Rubinstein said they are basically saying, "We’ll just deal with the carnage. Prisoners are consigned to oblivion."

Michigan, Louisiana, North Carolina, California are among the list of states who realized that they had better test everyone after finding that people who were asymptomatic are testing positive.

"Certainly for prisons who are taking the time, effort and resources to test everybody, not testing staff would be a bit of a blind spot," said Barun Mathema, a professor of epidemiology at Columbia’s Mailman School of Public Health in New York. "The force of infection can be extraordinarily high in prisons. The most dynamic of that group is the people who work there."

The Department of Public Safety reported on April 27, 2020 that to date, sixteen (16) incarcerated persons have been tested from a population of 3,192 (0.5%); yet the public is being told that there is no infection in our correctional facilities where staff and others enter from the community and exit back into the community every day.²

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The Marshall Project has collected data³ from prison systems in all 50 states and the federal Bureau of Prisons to track how the virus has spread and how incarcerated persons and correctional workers are succumbing to it.


³ Tracking the Spread of Coronavirus in Prisons - A new Marshall Project effort has collected data on the prevalence of COVID-19 among prisoners and prison staff. FILED 3:05 P.M. 04.24.2020, By KATIE PARK, TOM MEAGHER and WEIHUA LI
As of Wednesday, April 22nd, the Marshall Project found that at least 9,437 people in prison had tested positive for the illness. The number of new cases among prisoners is more than doubling each week, showing that the curve used to measure when the virus is under control is still soaring in prisons even as some parts of the country are starting to flatten the curve through social distancing.

The week of April 22, the estimated rate of infection among prisoners more than tripled from the previous week. A small handful of states began aggressively testing nearly everyone at prisons where people have become sick.

In prisons across the country, there were an estimated 696 confirmed cases per 100,000 prisoners the week of April 22.

Among the overall U.S. population, there were about 250 confirmed cases per 100,000 people on April 22.”

In closing, Community Alliance on Prisons is concerned about mis-information being promoted by government entities that creates a distorted picture of who is actually incarcerated by Hawai‘i’s justice system. The Final Report of the HCR 85 Correctional Reform Task Force that was released in 2019 reported:

“Many people believe that Hawai‘i’s jails and prisons are filled with extremely dangerous and violent prisoners, but that is a misconception. The department of public safety’s own data from July 2018 shows that the vast majority (72%) are incarcerated for relatively low-level offenses, i.e., class C felonies or below (misdemeanors, petty misdemeanors, technical offenses, or violations). Only 28% are serving sentences for the more serious class A and B felonies, and not all of the A and B felonies are for violent crimes, many are for drug offenses. Additionally, 53% of Hawai‘i prisoners are classified as minimum or community custody inmates.”

The Marshall Project tracking article highlights the fact that only a few states have recently begun aggressively testing in correctional facilities.

An April 27th article in the Los Angeles Times reported:

- At Cook County Jail in Chicago, more than 460 inmates and 360 sheriff’s employees have tested positive. Nearly half have recovered, but six inmates and one correctional officer have died.
- At Rikers Island and other jails in New York City, roughly 378 prisoners are infected and three have died.
- In California prisons, 178 people have tested positive and one has died.

To combat the spread, authorities have sped up the release of some lower-level offenders and those with medical conditions.


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Hawa‘i does not have the death penalty, however, locking healthy people in jails and prisons where social distancing is impossible and testing for the novel coronavirus is barely happening endangers our communities across Hawai‘i nei.

Although every official in Hawai‘i has touted that there are no cases of the novel coronavirus inside our jails and prisons, THERE IS NO EVIDENCE TO SUPPORT THIS CLAIM. Sixteen (16) tests of a 3,192 incarcerated population (0.5%) provides little comfort to our communities that have been sheltering for the last month in an effort to flatten the curve.

People living and working inside, their families, and the larger community are worried that when the infection breaks out of jails and prisons and into the community, there will be little chance of stopping its spread.

"More than 80% of Marion Correctional Institution’s prison population has tested positive for COVID-19, the illness caused by the coronavirus, along with more than 160 corrections officers and other staff who live in Marion and surrounding counties, according to the Ohio Department of Rehabilitation and Correction. (…) Marion Public Health has counted at least 112 cases of "community spread," or ones in Marion County residents who are members of the general public, including about 66 linked to the prisons outbreak, Marion Public Health Commissioner Traci Kinsler said Friday."5

In a letter dated April 8, 2020 to the Hawai‘i Correctional Oversight Commission, Dr. Pablo Stewart wrote about what he has observed working at OCCC four times a week.

"Everyone is put at risk by the failure to take meaningful action in Hawai‘i’s correctional facilities. It goes without saying that people detained or incarcerated will suffer most. And within those populations, given that an estimate 32% of people in prisons and 40% of people in jail report having at least one disability, 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 facilities — it will overwhelm hospitals and everyone’s health will suffer."

It has been truly disappointing to hear the kind of mis-information, with no supporting evidence, that the Chief is spreading.

We humbly ask the Commission to ensure that information coming from the Honolulu Police Department is data-driven and defensible.

Mahalo for this opportunity to share our concerns for all of Hawai‘i nei with the Honolulu Police Commission.

5 See FN 4
April 28, 2020  
Re: LEAD Public Testimony  

Honolulu Police Commission  
Ali‘i Place  
1060 Richards Street, Suite 170  
Honolulu, Hawaii 96813  

Dear Members of the Honolulu Police Commission,  

Thank you for the opportunity to provide testimony on the Law Enforcement Assisted Diversion (LEAD) pilot project in Honolulu Police Department District 1, Sector 1.  

The Year 1 LEAD Honolulu evaluation provides evidence that the pilot obtained its primary goal of providing critical direct services to an under-served community with a history of homelessness, substance use, and incarceration. Engagement in LEAD services resulted in a reduction of recidivism rates and improved well-being for clients. Specifically, participating in the LEAD Honolulu program was found to be associated with the following:  

- 55% reduction in encounters with law enforcement resulting in citation when compared to 3 years prior to program entry  
- 40% decrease in emergency department utilization  
- 38% reduction in number of unsheltered days  
- 30% decrease in violent, traumatic experiences and/or assault  

This success would not have been possible without the vital coordination between our agency and HPD, specifically the Community Outreach Unit.  

As we near the end the LEAD Pilot’s second year, we look to strengthen the program in concert with HPD and the community at large by:  

1. Providing technical assistance from the LEAD National Support Bureau to officers in districts where LEAD is active (e.g. D151).  
2. Coordinating regularly with officers in active LEAD districts to provide updated information and systematic approaches to addressing clients needs and the needs of the community (i.e. Operational Work Group meetings).  
3. Facilitating a workflow for referral of clients who have needs outside of HHHRC’s operating hours.  

We are, as always, open to feedback for any additional ways in which you feel the LEAD pilot program can better aid both HPD and our community.  

Thank you for your time.  
Sincerely
Heather Lusk, MSW
Executive Director
Hawai'i Health & Harm Reduction Center
Email: hiusk@hhhrc.org
Phone: 808-521-2437
I suggest releasing all nonviolent pretrial inmates and release nonviolent marijuana related offenders and release all undocumented immigrants who may be in ice custody if they are only infraction is violating immigration law, with monitoring and procedure for follow up. provide PPE to all workers in the prisons and masks to all inmates and ensure Contact tracing and testing of all symptomatic people and proper isolation and social distancing to our inmates. If this cannot be accomplished then report to the governor and senator's of inability to provide necessary care to protect inmates and the surrounding communities weekly with request for necessary resources. Also governors Ige proper proclamation that prevents public meetings in regards to inmates is an overreach of government without transparency that I reject during this pandemic. Thank you for your consideration

Chelsea Pang
Kaneohe resident