

HAWAI'I STATE BAR ASSOCIATION
COMMITTEE ON JUDICIAL ADMINISTRATION

REPORT OF THE
2022 CRIMINAL LAW FORUM

June 2023

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ACKNOWLEDGMENTS

The Hawai'i State Bar Association Committee on Judicial Administration was established for the purpose of maintaining a close relationship with the Judiciary on matters of mutual concern to the bench and bar. Since 2012, the Bench-Bar Conferences and in alternate years, the Criminal, Civil, and Family Law Forums have been positive and constructive because of the enthusiasm of Hawai'i Supreme Court Chief Justice Mark E. Recktenwald, who has supported the endeavors of the committee. The committee appreciates his commitment to making these efforts a priority.

The committee acknowledges the many hours that Lisa Lum, Special Assistant to the Administrative Director of the Courts, contributed to facilitating the Criminal Law Forum via Zoom. The committee is also grateful to the moderators and panelists: Christin Johnson, Robert Merce, Associate Justice Michael D. Wilson, Kirsha Durante, Judge Dexter D. Del Rosario (ret.), Judge Michael A. Town (ret.), Thomas Brady, Edmund "Fred" Hyun, Megan Kau, Alan Komagome, Kelden Waltjen, Richard Sing, Judge Rowena A. Somerville, William Bento, Sara Haley, Tricia Nakamatsu, and Mark Tom. A special thank you to the reporters: Jessica Domingo, Wilson Unga, and Lauren Yamaguchi.

Hawai'i State Bar Association
Committee on Judicial Administration

REPORT OF THE 2022 CRIMINAL LAW FORUM

I. Welcome

On Friday, October 7, 2022, Associate Justice Simeon R. Acoba (ret.), co-chair of the Judicial Administration Committee ("JAC") of the Hawai'i State Bar Association ("HSBA"), welcomed all participants to the 2022 Criminal Law Forum. Justice Acoba acknowledged Carol Muranaka, James Kawashima, Steven Chow, and Vladimir Devens for their work in leading the JAC, and recognized the HSBA's continued support of the committee under the leadership of 2022 President Shannon Sheldon and Executive Director Patricia Mau-Shimizu. Justice Acoba thanked Chief Justice Recktenwald for his active support of the Bench-Bar Conferences and Law Forums. Justice Acoba expressed that the ultimate purpose of these programs is to advance the administration of justice through the Judiciary and the bar, and that the exchange of views brings greater understanding and important changes for the benefit of the public. Recent advancements in the area of criminal law are reflected in the Judiciary's willingness to work closely with the Department of Public Safety ("DPS"), and its support of a compensation increase for court-appointed counsel.

Chief Justice Recktenwald welcomed all participants and thanked the JAC, HSBA, and all the speakers and moderators for their time and commitment. He highlighted the importance of the Law Forums in shaping some of the most significant criminal law reforms in the State. Of note was the 2016 Criminal Law Forum's focus on pretrial reform.

This led to a legislative resolution to create a task force that recommended major legislation during the 2019 session. Chief Justice Recktenwald recognized the creation of the Criminal Justice Research Institute, which uses data analysis to achieve better outcomes in the criminal justice system. He also discussed the 2019 legislature's inclusion of prison reform and the creation of the Hawai'i Correctional System Oversight Commission ("HCSOC") which he believed was one of the most significant developments in the area of criminal justice in recent years. Chief Justice Recktenwald emphasized the last legislative session's attention to women in the criminal justice system, noting one of the most significant developments was the creation of the Women's Treatment Court Pilot Project.

Vladimir Devens, co-chair of the JAC, welcomed and thanked the Forum participants for attending and specifically acknowledged the JAC Criminal Sub-committee for their work on this year's Forum.

HSBA President Shannon Sheldon expressed her appreciation for the JAC's efforts and emphasized that the point of the Law Forums and Bench-Bar Conferences is to connect judges and lawyers to discuss matters of mutual concern which are then presented in a published report.

Hayley Cheng, chair of the JAC's Criminal Sub-committee, recognized the Criminal Sub-committee members and Lisa Lum for their instrumental roles in the development and execution of the Forum.

II. Prison Reform

Christin Johnson, Oversight Coordinator for the HCSOC, first provided historical information about the HCSOC and then discussed the current state of Hawai'i's

correctional facilities. Former Vice-chair of the House Concurrent Resolution 85 Task Force on Prison Reform, Robert Merce, presented on the new jail by addressing the proposed jail's planning process, potential design problems, and recommendations for alternatives. He proposed rethinking the function of the jail for the 21st century. At the conclusion of both presentations, Ms. Johnson and Mr. Merce answered questions.

A. Current State of Hawai'i's Jails and Prisons

Ms. Johnson began her presentation with background information about the HCSOC's history. In 2015, a select group - Associate Justice Michael D. Wilson, Gregg Takayama (then chair of the House Committee on Corrections, Military and Veterans), Robert Merce, Bert Matsuoka (then chair of the Hawai'i Paroling Authority ("HPA")) and James Hirano (then warden of Maui Community Correctional Center) toured correctional facilities in Norway and met with correctional experts from Norway, Sweden, Ireland, and England. Following the trip, a legislative task force was created which subsequently released the Hawai'i Concurrent Resolution 85 Task Force on Prison Reform ("HCR 85 Task Force") Report.¹ The report found Hawai'i's correctional system was not producing acceptable, cost-effective, or sustainable outcomes and needed immediate and profound change. One of the report's key recommendations was the creation of a Correctional Oversight Commission. In 2019, House Bill 1552 incorporated the HCR 85 Task Force's oversight recommendations and Act 179 established the HCSOC and appointed

¹ HCR 85 Task Force, *Creating Better Outcomes, Safer Communities: Final Report of the House Concurrent Resolution 85 Task Force on Prison Reform to the Hawai'i Legislature 2019 Regular Session*, (December 2018), https://www.courts.state.hi.us/wp-content/uploads/2018/12/HCR-85_task_force_final_report.pdf.

Commissioners Mark Patterson (chair), Ted Sakai, Martha Torney, Judge Ronald Ibarra (ret.), Judge Michael A. Town (ret.) and Oversight Coordinator, Ms. Johnson.

The powers and duties of the HCSOC are:

- Investigation: Oversee the State's correctional system, have jurisdiction over investigations of correctional facility complaints and facilitate a transition to a rehabilitative and therapeutic correctional system model.
- Set population limits: Establish maximum inmate population limits and formulate policies and procedures to prevent inmate populations from exceeding the maximum capacity.
- Reentry: Work with DPS on the comprehensive offender reentry program with authority to make recommendations to the HPA and the legislature regarding reentry and parole services.
- Monitor: Ensure the existing comprehensive reentry system is working properly to effectuate the timely release of inmates.

Ms. Johnson noted numerous national organizations with publications on the minimal standards of confinement. She highlighted the Department of Justice's "Federal Standards for Prisons and Jails," the American Bar Association's "The Treatment of Prisoners" and the American Correctional Association's accreditation process.

Ms. Johnson began the discussion of Hawai'i's facilities by presenting updated data on inmate populations. The four state jails O'ahu Community Correctional Center ("OCCC"), Hawai'i Community Correctional Center ("HCCC"), Maui Community Correctional Center ("MCCC") and Kaua'i Community Correctional Center ("KCCC") have a combined design capacity of 1,154. A recently updated inmate count of 1,794 was

156% over capacity. Pretrial inmates represented 78% of the jail population (116% over capacity), meaning the pretrial population alone exceeds maximum capacity. The four state prisons, Halawa Correctional Facility (“Halawa”), Women’s Community Correctional Center, Waiawa Correctional Facility, and Kulani Correctional Facility are less crowded with a combined design capacity of 1,338 and an inmate count of 1,239, putting the prisons at 93% capacity.²

Ms. Johnson emphasized that Hawai‘i’s jails and prisons are in worse condition than the facilities on Riker’s Island in New York where she has done extensive work. She pointed to several reasons including:

- Severe overcrowding, particularly in the jails. Many pretrial inmates are held only because they cannot afford to post nominal bail.
- Severe staffing shortages. When the facilities lack adequate staff, programs and other rehabilitative options are cut.
- Facilities are very old. Built in 1987, Halawa is the newest facility while the other jails were built in the early 1970s. Constant repairs and upgrades are extremely costly.
- Dry-cells (cells without sinks, toilets, or water access) used as permanent housing. These cells are typically used as a temporary holding space while staff coordinates the inmate’s permanent housing. Because of overcrowding, inmates are being housed in dry-cells. These inmates will not have direct access to toilets or water unless directly escorted by a corrections officer. The staffing shortages raise serious concerns about whether these inmates are checked on adequately and consistently.

² Population data for Hawai‘i’s inmates housed at the Saguaro Correctional Center in Eloy, Arizona were not included in the presentation as Saguaro is a privately-run facility.

- Padlocks. This is extremely dangerous because if there is a fight, assault, suicide attempt or any type of medical emergency, the padlocks significantly delay entry to the cells.
- Lack of access to out-of-cell activities. Inmates are not able to access day rooms, fresh air, recreation areas, and law libraries due to staff shortages and overcrowding.

Ms. Johnson next reviewed Hawai'i's Corrections Budget for the 2023 fiscal year and the correctional costs. The 2023 budget is \$274,079,501. Housing a single inmate costs approximately \$247 per day, which is extremely high compared to the national standard of about \$100 per inmate, per day. The state's failing facilities are a main contributor to the high costs. Correctional costs also include programs, healthcare and administrative services.

Ms. Johnson then discussed the issue of recidivism. Recidivism is defined as any new arrest or the revocation of probation or parole within three years from the start of supervision or release. The recidivism rates in Hawai'i are very high. While the nationwide recidivism rate is 30% or less, Hawai'i's overall recidivism rate in 2016 was 53.8%. Although there are various reasons for the high rates, Ms. Johnson emphasized the lengthy duration of Hawai'i's probation and parole terms compared to other states. Individuals typically involved in the criminal justice system are those with the least resources such as money and family support. Lengthy probation or parole terms equate to longer opportunities for failure and recidivism.

Ms. Johnson then presented the HCSOC's efforts to address the previously discussed issues. The HCSOC holds monthly public meetings which she encouraged

Forum participants to attend.³ The meetings cover many topics including the conditions of confinement, updated DPS COVID-19 statistics, plans for building the new jail, mental health programs, restrictive housing, and proposed actions from the HCSOC. Ms. Johnson publishes monthly public reports on the actions taken by herself or the HCSOC, and the expenses for the preceding month. The reports, accessible on the HCSOC website, have thus far focused on the facilities' current conditions and Ms. Johnson's first impressions.⁴ She highlighted her recent report covering HCCC and her shock at the observed conditions. Those who set bail or impose sentences should be aware of the conditions of those incarcerated. Ms. Johnson clarified that the current reports are her initial impressions, and she has not yet had the opportunity to review logbooks, videos, conduct surveys, or have extensive discussions with staff or inmates. HCSOC also issues annual reports which include all actions it took during the preceding year, recommendations to DPS, and proposed legislation.

In closing, Ms. Johnson recognized the dedication of the Commissioners and the extensive experience they have with the criminal justice system. She also highlighted the inclusion of the word "system" in the HCSOC's official title. This was intentional as the authors of the bill recognized corrections reform cannot be solely focused on corrections, but rather can only be achieved by a system-wide approach.

³ HCSOC meetings are held at 9:00 am on the third Thursday of each month. Attendees can participate either in-person or virtually.

⁴ HCSOC website: hcsoc.hawaii.gov.

B. The New Jail

Mr. Merce opened by emphasizing the importance of the new jail because of the profound impact it will have on the entirety of Hawai'i's criminal justice system. The new jail is one of the largest public works projects ever undertaken by the State, however it has not received a lot of coverage and the community needs to understand its development.

Mr. Merce discussed the State's initial plan for the new jail. The jail will be located at the current Animal Quarantine Station in Halawa Valley with a design for a total of 1,308 beds that will cost around one billion dollars to build. This will likely make it the most expensive jail nation-wide. As presently planned, the new jail will be developed under a public-private partnership ("P3"), meaning the private partner will design, finance, construct and own the facility. The private partner will lease the facility to the State which will be operated using State employees. The State has so far spent more than ten million dollars on the planning process. Last year, the legislature denied the State's request for an additional fifteen million dollars.

Mr. Merce next discussed problems with the proposed jail. First, the community was shut out of the planning process. There was only one public hearing limited to the environmental impact of the new jail and not on the facility itself. Existing literature states the community must be an integral part of planning a new jail. Incorporating community values and public engagement is necessary to build a facility that addresses unique community needs.

Second, Mr. Merce pointed to the State's lack of system planning, and its necessity to successfully plan a jail. System planning views jails within the context of the larger

criminal justice system, identifies and addresses the policies and practices that drive the jail population, strives to make the jail as small as possible, and controls the jail population by controlling the policies that drive the population. An example of policy control is bail reform, which was passed by the legislature last year but vetoed by the Governor.⁵ Bail reform would have resulted in less people in the jail and the ability to build a smaller and less expensive facility. As of October 3, 2022, OCCC had 669 pretrial detainees costing the State \$159,000 per day. Statewide there were 1,042 pretrial detainees costing the State \$248,000 per day. The new jail's plan includes enough beds to continue costing taxpayers \$248,000 daily. The high number of incarcerated probation violators, many resulting from the HOPE probation program, is another policy concern.⁶ As of October 3, 2022, OCCC was housing 253 probation violators and prior to COVID-19, the number was higher at about 300-350. The community must decide whether to continue the policy of incarcerating probation violators for short periods of time which necessitates increased bed space at a new jail. Policy decisions directly impact both the cost of constructing a new jail and the cost of daily facility maintenance.

In 2018, the HCR 134 Task Force on Criminal Pretrial Practices ("HCR 134 Task Force") identified other policies driving the jail population and made several recommendations. These recommendations included: (1) encouraging police to increase the use of citations (rather than arrest) for non-violent class C felony offenses; (2)

⁵ HB1567: Relating to Criminal Pretrial Reform.

⁶ HOPE probation (Hawaii's Opportunity Probation with Enforcement) was launched in 2004 with the goal of reducing "probation violations by drug offenders and others at high risk of recidivism...." Probationers in HOPE Probation receive swift, predictable, and immediate sanctions - typically resulting in several days in jail - for each detected violation, such as detected drug use or missed appointments with a probation officer. (https://www.courts.state.hi.us/special_projects/hope/about_hope_probation).

expanding diversion initiatives to prevent the arrest of low-risk defendants; (3) providing meaningful opportunities for lawyers to address bail at initial appearances; (4) expediting risk assessment reports; (5) expanding alternatives to pretrial detention; (6) setting bail in amounts defendants can afford; and (6) eliminating money bail for low-level, non-violent offenses. Mr. Merce expressed that system planning which incorporates policy decisions is the only way to build a jail based on community needs.

According to Mr. Merce, the third major problem with the new jail is the failure to address the problems of the detainees. Specifically, Mr. Merce presented the following as indicators of how inmate needs are not met: (1) 81% of the OCCC population is charged with a class C felony or lesser offense; (2) per DPS statistics, 10-12% of the OCCC population are mentally ill, and, on average, cycle through the jail three times per year, with some cycling through up to eight times per year; (3) in 2017, DPS reported 696 severe and persistently mentally ill detainees passed through OCCC, and between 450-600 of those inmates were at some point on suicide watch; and (4) many incarcerated individuals are homeless, meaning they have a life expectancy of 53 years, almost 30 years less than the general population. Mr. Merce highlighted that this information is reflective of the profile of people who enter Hawai'i's jails.

Mr. Merce then addressed the need to design a "problem-solving" jail. The new jail must break the cycle of people who often have the same identifiable problems such as homelessness, mental illness, disabilities, substance disorders, and/or cognitive impairment. These individuals often go to a hospital emergency room ("ER"), are stabilized and released, and are subsequently incarcerated for offenses related to their situation such as sleeping on the sidewalk or shoplifting. After confinement, they are

released in the same condition as when they entered the facility with their problems unaddressed. Mr. Merce advocated redefining the function of the jail as a facility that would improve public health by addressing the physical and psychological needs of those who enter. He referenced a program at Queen's Medical Center ("QMC") aimed to assist those who over-utilize the ER, some of whom cycle through up to 30 times a year. The program is designed to assist these individuals with housing and other needs and has been successful in reducing the overutilization of ERs. Mr. Merce shared that many people in the QMC program also frequently cycle through the cellblock and jail. This highlights the need to treat the underlying problems. The jail should incorporate a system designed to admit, screen for issues, assess needs, implement treatment while in jail, develop a discharge plan, and provide support after discharge. If implemented, such a system will reduce the number of people entering the jail, reduce recidivism rates, and improve public health in Hawai'i.

Mr. Merce pointed out additional problems with the proposed jail: (1) lack of a "mission statement" or articulated philosophy; (2) mental health units which do not have a therapeutic design; (3) lack of outdoor space requiring inmates to stay inside at all times; (4) no contact visits (except for attorneys); (5) a punitive, "custody and control" design with few rehabilitative features; (6) no courtroom requiring all inmates to be transported for court hearings; (7) no classrooms; (8) no "open booking" - a booking process with open seating and phone access rather than in a holding cell; (9) institutionalized dayroom designs and furnishings; (10) lack of an environmentally sustainable design (whether the jail complies with Hawai'i's environmental and sustainability goals is unknown); (11) no reference to "rehabilitation" in the Jail Master Plan; (12) largely ignoring recommendations

of the HCR 85 Task Force and the HCR 134 Task Force; and (13) development through a P3 rather than government financing.

Mr. Merce discussed the Las Colinas Detention and Rehabilitation Facility (“Las Colinas”) in Santee, California, as an example of a facility with a rehabilitative design. Opened in 2014, Las Colinas was built on 45 acres, has 26 buildings, functions like a campus, has a library, clinic, hospital, classrooms, gyms, cafeterias, and significant outdoor access. Rather than the traditional high, medium, and low security levels, there are seven different graduated levels of security with various types of housing. Features within the different security levels are designed to specifically address the inmates at each level with the goal of providing the maximum level of normality for the designated security level. Specifically, Mr. Merce pointed out the Las Colinas minimum-security housing has open housing (no cells), desks, storage space, and windows and numerous educational, recreational, and wellness programs. Mr. Merce noted he has not personally visited Las Colinas so he was unable to comment on the facility’s functionality but offered it as an example of concepts and features which should be considered in our jail.

Mr. Merce shared the following recommendations for building the new jail:

- (1) Begin the planning and design process anew by determining the capacity of the jail through a systems planning approach.
- (2) Fund the jail through a general obligations bond not through a P3.
- (3) Plan the jail using best practices as outlined in the National Institute of Corrections (“NIC”) Jail Design Guide and NIC Jail Capacity Planning Guide.
- (4) Build an efficient and sustainable jail that coincides with the State’s energy and environmental policies and goals.

(5) Hire a correctional planning consultant or professional project manager to direct the planning process in collaboration with the community.

(6) The HCSOC should lead the planning effort and convene an advisory committee (comprised of an equitable balance of people from public, private, and government sectors) who will collaborate as a full partner in the planning process.

(7) The HCSOC should prepare a “scope of work” for the project that reflects a commitment to implement a rehabilitative and therapeutic approach to corrections.

(8) The HCSOC should prepare a budget for completion of the predesign planning process as outlined in the NIC Jail Design Guide and submit the budget to the legislature for funding.

(9) Consult local resources including the Final Report of the HCR 85 Task Force, the Recommendations of the HCR 134 Task Force, “Getting it Right: Recommendations and Action Plan for a Better Jail” by The Correctional Reform Working Group, and “Getting it Right: Better Ideas for a New Jail” by Robert K. Merce.

In closing, Mr. Merce emphasized building a new jail is an opportunity to improve the correctional and criminal justice systems, which will improve public health and make the community safer.

C. Participant questions

(1) Understanding that long probation terms increase recidivism, do the in-facility support programs like drug treatment, work training and job assistance also increase recidivism?

- Ms. Johnson and Mr. Merce noted they were not familiar with the specifics of probation but did highlight that Hawai'i has the longest

probation terms of any state in the nation. The jails do not have programs that help people re-enter the community.

(2) Addressed to Mr. Merce: It appears the Judiciary has tried to implement some aspects of pretrial bail reform such as expedited risk assessments (bail reports) and bail hearings at initial appearances. Has that been taken into consideration when proposing this information?

- Implementation of those two recommendations by the HCR 134 Task Force is positive. However, those are the only areas where there has been any progress. Bail is still set very high, requiring lawyers to file motions to request bail reductions. It is important to look at every facet of the pretrial process and people should be released from custody within the margins of safety.

(3) The risk assessment tools for bail and release studies seem to penalize defendants for being homeless and/or unemployed. Should these factors be considered when determining risk? What are your general thoughts?

- Mr. Merce: These factors penalize defendants. Unemployment is very common for homeless individuals making release less likely. All the risk assessment tools must be validated and perhaps reevaluated to ensure they achieve their intended purpose. During the HCR 85 Task Force, representatives from other state governments believed Hawai'i's risk assessment tools needed to be revalidated as too many people were found to be high risk. There needs to be a focus on "housing first," which gets people into housing before addressing anything else. This has

worked well in other jurisdictions. The money spent on incarcerating people could be used to build the infrastructure to support them so they do not cycle back into jail.

- Ms. Johnson: There are two different subgroups within the homeless community – those who want housing and are making best efforts to improve their situation, and those who prefer homelessness. The United States has done a horrendous job in criminalizing the homeless instead of caring for them. By contrast, Grand Rapids, Michigan created a homeless outreach task force utilizing social workers to respond to calls. While Hawai'i has a similar program, Grand Rapids implemented additional measures such as building permanent public restrooms for the homeless population and collaborating with gyms and community centers to offer showers. These measures have been very successful and eased the general public's fear about the homeless community. The program humanized the homeless population instead of criminalizing them. Hawai'i can do the same.

(4) Is it possible to build a facility that would address the need for interim temporary housing? It seems problematic to release people, like those with mental health issues, when they have nowhere to go.

- Ms. Johnson: The current facilities have mental health units but they are not rehabilitative. They are designed to keep the inmates in cells. Other facilities across the nation have mental health units with case workers who collaborate with community-based case workers to assist upon the

inmate's release. A mental health unit should be run by mental health providers with a focus on stabilization and re-entry support such as medication and therapy. Correctional officers should not be tasked with this responsibility and lack proper training to handle mental health concerns. The new jail plans must include a mental health unit, as the facility inevitably deals with that population but does not have the resources to do it. Consequently, those with mental health concerns are re-traumatized because they are confined to cells, not receiving the help they need and may end up in a worse position than when they entered the jail.

- Mr. Merce: We need a mental health facility besides Hawai'i State Hospital, which is currently filled with forensic cases. For the population that is psychotic in the community and apt to hurt themselves, there is nowhere to take them. If we build a smaller jail, we will not need to use the jail for these purposes. We can instead build the facilities necessary to address the mental health population as part of our community infrastructure.

(5) What is the impact of the Governor's veto on the bail reform legislation? Did it set back overall reform, and if so, how much? Are you aware of efforts to create dialogue with law enforcement and other interest groups who opposed the bill?

- Mr. Merce: The HCR 134 Task Force included police chiefs and prosecutors from all counties and recommended bail reform. Groups

backtracked and the bill was vetoed. A new bill will be introduced that could reduce the jail population and save the state money.

- Ms. Johnson: Cash bail criminalizes poverty. Those with money are released not because they deserve it but because they can afford it. As Oversight Coordinator, the goal is collaboration with judges, prosecutors, police, and the community to find solutions for homelessness and mental health. Bail plays a large role in that. This effort will start on the Big Island as HCCC is in the worst situation, and then expand to other islands.

(6) On O'ahu, the standard bail for a class C felony, including non-violent offenses, is routinely set at \$11,000. If the bail was significantly lower, how much of an impact would that have on the jail's pretrial population?

- Mr. Merce: HPA's annual report reveals the average prison term for the class C felony offense of Promoting a Dangerous Drug in the Third Degree ("PDD3") is more than two years. HPA sets minimum prison terms for more PDD3 cases than all other types of drug cases combined. There was a prior bill that would have created a new "class 4" drug offense making minor, trivial amounts of drugs a misdemeanor.
- Ms. Johnson: Not many people can pay \$11,000 out of pocket. Pretrial incarceration should depend on whether someone is a danger to the community and the likelihood they will appear at court. An ideal assessment should consider those factors regardless of financial status. Cash bail creates inequities within the system. Two years ago, Illinois

eliminated the use of cash bail. They incorporated a two-year period from the law's passage to educate the judges and the community about the new law. We should look to models in other jurisdictions that are proving successful, including Washington D.C. and New Jersey.

(7) Is there a specific person or agency to contact to report issues within the correctional facilities?

- Ms. Johnson: HCSOC is the agency, and she as Oversight Coordinator is the specific person to contact.⁷ Requests to report issues anonymously are taken very seriously and the issues will be raised with DPS without revealing the source's identity.

III. Mandatory Sentencing, Hawai'i Paroling Authority, and Mandatory Minimum Terms of Imprisonment

With Kirsha Durante moderating, Associate Justice Michael D. Wilson, First Circuit Court Judge Dexter D. Del Rosario (ret.), First Circuit Court Judge Michael A. Town (ret.) (former HPA board member), Thomas Brady, First Deputy Prosecuting Attorney of the City and County of Honolulu, Edmund "Fred" Hyun, HPA chair, Megan Kau, private defense attorney, Alan Komagome, First Circuit Deputy Public Defender, and Kelden Waltjen, Prosecuting Attorney for the County of Hawai'i, discussed various aspects of mandatory sentences, mandatory minimum terms of imprisonment, and the role of the HPA. The discussion followed a question-and-answer format, as reflected here.

⁷ HCSOC email: hcsoc@hawaii.gov; Christin Johnson's email: christin.m.johnson@hawaii.gov

A. What are individual panelist's thoughts on mandatory sentences?

- Judge Del Rosario: Not in support of mandatory sentences as uniform sentences only work if there are uniform defendants. Many mandatory sentencing laws grew out of the “tough on crime” sentiment from the late 1980s and 1990s. There was a belief that harsher penalties would act as a deterrent or correct behavior and that has proven to be inaccurate. Since then, the approach has shifted from crime and punishment to crime evaluation and treatment. Mandatory sentences do not lend themselves to this approach.
- Mr. Brady: The Honolulu Prosecutor's Office is generally not in favor of mandatory sentencing. Each case and each defendant are different and should be assessed individually. For example, the Honolulu Prosecutor's office supports modifying the mandatory one-year jail term under the Habitual Property Offender statute to include early release to treatment. Most of these offenders have substance problems and need treatment, not years in prison. There are, however, some mandatory sentences that are beneficial to society, such as the two-day mandatory sentence for Abuse of Family or Household Member, and the mandatory jail terms for Driving on a Suspended License after Operating a Vehicle Under the Influence of an Intoxicant.
- Mr. Waltjen: The Third Circuit Prosecutor's Office is supportive of mandatory sentencing and mandatory minimum terms of imprisonment to the extent that victims have a sense of security knowing an offender will be sentenced to a definite amount of prison time. However, the office will often use the plea negotiation process to amend the charge to allow a defendant to be sentenced

with the option to request probation or without a mandatory minimum prison term. Mandatory sentences are also used when there are aggravating factors such as special status of the victim or use of a firearm. There are situations when mandatory sentences are necessary and appropriate to ensure public safety. Regarding the Habitual Property Offender statute, the Third Circuit judges, the defense bar, and the prosecutors collaborated and agreed that the statute does not expressly prohibit suspension of the mandatory one-year jail term. In some situations, judges in the Third Circuit have taken the mandatory jail sentence under advisement.

- Judge Town: In agreement with Judge Del Rosario to assess each person individually including any program participation and their overall conduct. Mandatory sentences tie the judge's hands.
- Ms. Kau: The judges are in a better position to determine sentences. The federal sentencing scheme is preferable as it now allows some discretion, and the offense guideline ranges are based on certain factors regarding the underlying offense and the characteristics of the defendant.
- Mr. Komagome: The judge is in a better position to determine the sentence. During the pendency of a case, judges have the opportunity to observe the defendant and sometimes have interactions with the defendant's family. There are several instances when the prosecution, defense and the judge want to impose an alternate sentence but are unable to because of the mandatory statutory sentence.

- Mr. Hyun: Hawai'i is one of 33 states that has indeterminate, nondiscretionary sentencing. Historically, Hawai'i was a very progressive state until the late 1960s. The original master plans for the county correctional facilities adopted a more liberal approach to pretrial detention. The community reacted negatively and wanted increased incarceration for criminal offenders. This led to indeterminate sentencing, the removal of discretion from the judges, open term sentencing, and extended term sentencing. As a result, the inmate population increased and the facilities became overcrowded. The response was to build more space to accommodate the growing population. Although there are some good aspects of indeterminate sentencing, the judges should have the responsibility and the discretion to render appropriate sentences. Mandatory sentences (indeterminate sentences) are different from mandatory minimum terms which are usually reserved for repeat offenders.

B. Do mandatory prison sentences impact the ability to resolve cases?

- Ms. Kau: Yes. As a former deputy prosecutor in the Honolulu Prosecutor's office, cases could not be resolved and were forced to proceed to trial because the Defendant faced a mandatory prison sentence. In one case, an offer to eliminate the mandatory minimum term of imprisonment was extended to a defendant who made a genuine effort to get long-term drug treatment. The defendant continues to do well today. When a defendant must decide between entering a change of plea or proceeding to trial, there is nothing to lose by going to trial if facing mandatory prison. Mandatory sentences make plea negotiations difficult and tie the hands of both the prosecution and the defense.

- Mr. Komagome: Yes. Mandatory sentences prevent the resolution of cases because the judge has no discretion to consider mitigating factors. Because of mandatory sentences, certain cases proceed to trial and this may not be the best use of jury trials, especially post-Covid.
- Mr. Waltjen: The prosecutors in the Third Circuit routinely waive mandatory minimum terms of imprisonment while still considering victim input and desired outcome.
- Mr. Brady: The Honolulu Prosecutor's office works to identify those individuals who belong in prison, namely, dangerous and violent people, and those who repeatedly commit theft. For those individuals, the deputies should advocate for prison. However, that is a small percentage of all defendants. Many defendants, perhaps the majority, should be placed on probation, given deferrals or placed in drug court, mental health court or HOPE probation. The goal is to have credibility in the courtrooms and demonstrate that the deputies are not always advocating for prison.

C. How did HPA's role in setting mandatory minimum terms of imprisonment factor into former judges' sentencing decisions?

- Judge Town: Hawai'i is the only state where minimum terms are set by the paroling authority. HPA should not set the minimum terms. HPA's role should be to track whether the inmate's conduct while incarcerated has been compliant.
- Judge Del Rosario: The courts are limited to the relevant statutes. If the prosecution meets all statutory elements, then the legislature has proscribed

certain mandatory sentences. The judge only has discretion to reduce the mandatory minimum terms of imprisonment. For any reduction, the judge must find strong mitigating factors and issue written findings.⁸ Parties often try to get around the statute and it seems to get in the way rather than achieving a just result.

D. How does HPA set mandatory minimum terms?

- Mr. Hyun: After an individual is sentenced to a prison term, the HPA Board must hold a minimum hearing within six months of the person's admission to the correctional facility. The Board generally conducts about 4,000 hearings per year and 25% of those hearings are to set minimum terms. For board members, minimum hearings require the most preparation because of the varying documents, including pre-sentence investigation reports ("PSI"), police reports, criminal history, clinical or forensic documents, and victim-witness statements. Victims and their families are allowed to participate in minimum hearings. HPA also has the authority to grant reductions of minimum terms based on conduct within the facility, accomplishments, and recommendations. A minimum term can be reduced by any number of years the Board deems appropriate. The guidelines for setting mandatory minimum terms are

⁸ Hawaii Revised Statute ("HRS") § 706-606.5(6) provides in part as follows:

(6) ...The court may impose a lesser mandatory minimum period of imprisonment without possibility of parole than that mandated by this section where the court finds that strong mitigating circumstances warrant the action. Strong mitigating circumstances shall include, but shall not be limited to the provisions of section 706-621.

published.⁹ There are three levels of punishment and the criteria considered are: nature of offense, degree of injury to person or property, criminal history, character and attitude, efforts made to live a pro-social life prior to prison, probation revocation, youth adult offender, and involvement of offender in the instant offense. Generally, the Board cites the criteria it used when deciding a minimum term. For example, if someone is given a Level 3 minimum term based on prior criminal history, that person would have been convicted of three or more felonies cases as an adult. Once the level is determined, the Board has the discretion to determine the number of years to be served. For example, for an inmate with a class C felony that has been designated as a Level 3, the Board has the discretion to set a minimum term between 3.1 to 5 years. The minimum term is the minimum amount of time an incarcerated individual must serve before becoming eligible for parole. If someone was previously on probation and had accrued previous detention credit, that time will be applied to any minimum term to be served. The inability to complete recommended programs before the expiration of the minimum term may prevent an inmate's release at the end of their minimum term. The Board expects completion of recommended programs before release on parole.

E. What are the panel's general thoughts on minimum terms?

- Justice Wilson: Judges should have a sense of the dire conditions of incarceration. Our Federal Court has become concerned about whether the

⁹ Hawaii Paroling Authority, *Guidelines for Establishing Minimum Terms of Imprisonment*, <https://dps.hawaii.gov/wp-content/uploads/2012/09/HPA-Guidelines-for-Establishing-Minimum-Terms-of-Imprisonment.pdf>.

- conditions are constitutional. In the past, when a defendant faced a mandatory sentence, sentencing hearings were often continued to allow for a period of treatment and performance so the defendant could demonstrate appropriateness for early release. HPA is aware of the over-incarceration occurring in Hawai'i. Given the questionable conditions of the correctional facilities, it is important that HPA is aware of the opportunities to release people.
- Judge Town: HPA should be encouraged to set minimum terms as low as possible and look at time already served especially if the individual has completed a long-term treatment program. The Board used to utilize "walk-thru" paroles which was a good practice under former chair, Max Otani. Mr. Hyun confirmed the current Board no longer considers walk-thru paroles. The goal should be transformative justice, improving people's lives, and rehabilitative and restorative justice. The goal is not punitive justice.
 - Judge Del Rosario: In some cases, attorneys advocated for walk-thru parole and requested defendants be permitted to complete treatment programs. Successful completion of a treatment program was a strong mitigating circumstance and mandatory minimum terms were often reduced to what the defendant had already served, in some cases as low as one day. A factor in determining the appropriateness of a sentence is readiness to change. A person may be ready to change due to pretrial incarceration, having a period of contemplation, and willingness to enter a treatment program. Mandatory sentences can sometimes work against the rehabilitative process. The person is ready to change, but then is left in prison for a year before starting the facility

treatment program. The court has the ability to address this and has to be creative with the appropriate defendants.

F. What is the impact, if any, of a court-ordered minimum reduction on HPA's setting of a minimum term?

- Mr. Komagome: Ultimately, the Board can match the reduced minimum or go above it. A comparison of the HPA minimum term guidelines and the sentencing factors under HRS § 706-621 reveal most factors are almost identical.¹⁰ The judges previously considered many of the same factors as the Board. The limited time for minimum hearings can make it challenging for defense attorneys to effectively advocate and explain a client's lifetime of experiences. When focusing only on the minimum term guidelines, the Board becomes married to the facts of the underlying case or the client's lack of success on probation. Often much has happened during the pendency of the case and is unfortunately not considered by the Board. In one instance, the

¹⁰ HRS § 706-621(2) provides as follows:

- (2) The following factors, to be accorded weight in favor of withholding a sentence of imprisonment:
- (a) The defendant's criminal conduct neither caused nor threatened serious harm;
 - (b) The defendant acted under strong provocation;
 - (c) There were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;
 - (d) The victim of the defendant's criminal conduct induced or facilitated its commission;
 - (e) The defendant has not history or prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime;
 - (f) The defendant's criminal conduct was the result of circumstances unlikely to recur;
 - (g) The character and attitude of the defendant indicate that the defendant is unlikely to commit another crime;
 - (h) The defendant is particularly likely to respond affirmatively to a program of restitution or probationary program or both'
 - (i) The imprisonment of defendant would entail excessive hardship to the defendant or the defendant's dependents; and
 - (j) The expedited sentencing program set forth in section 706-606.3, if the defendant has qualified for that sentencing program.

- judge monitored a client's completion of a long-term residential treatment program, received progress updates and saw the client's ups and downs. Presenting that same information comprehensively to the Board was difficult.
- Justice Wilson: It is unfortunate that the individual circumstances of each defendant are not considered when setting the mandatory minimum. A concern for the appellate courts, especially when addressing extended or consecutive sentences, is whether there was an adequate opportunity to consider any change that has taken place during either the life of the defendant or in the correctional environment. Hopefully in the future there will be a full and complete opportunity for due process. This may be done by examining ways we can reform the correctional justice system, perhaps by providing HPA with more time and additional resources.
 - Mr. Hyun: The Board generally does not consider the court's reduction of a defendant's mandatory minimum. The Board takes each case on its own merits and looks at the information presented at the minimum hearing. The courts do a good job in minimizing the number of individuals admitted into prison. There are about 18,000 people on probation compared to the 484 people admitted into prison last year. Many of those who end up in prison have exhausted the available treatment programs and their opportunities on probation. At minimum hearings, defense attorneys give clients excellent representation and make compelling arguments to the Board. However, sometimes what the client wants is not in their best interest or in the best interest of the community. Those considerations must be balanced by the Board members at each hearing. The

Board also considers representations and letters from the prosecutors and considers the victims. There are cases when an individual is sentenced to an open five-year prison term and has already accrued two years of incarceration credit while on probation. In that situation, there is often inadequate time for the individual to complete programming in the facility. There is also a process to later request a minimum reduction and hopefully this fosters good institutional behavior.

G. Why does HPA not consider court-ordered reductions of minimum terms?

- Mr. Hyun: There are very few occasions when the Board will entertain a court-ordered minimum reduction. For example, if someone has previously completed a program such as sex-offender therapy or a drug treatment program, that will be given consideration. It is case by case, but generally the Board will set a minimum term without consideration of a minimum term reduction by the court.
- Judge Town: It is concerning that requests to reduce the HPA set minimum terms are handled through a paper-review rather than an in-person hearing. The preference would be to have a full and complete hearing to inquire about program completion, misconduct history, and evaluate whether that person is a threat to the community. People do change. Due process is not being honored by this procedure and there must be consideration of the harm caused while in prison.

- Mr. Hyun: The paper review is based on the facility's documentation of accomplishments and recommendations by the facility unit team, the branch, and the division head of public safety. The Board has reconsidered and reduced a considerable number of minimum terms. In one instance, a minimum term on a life-sentence was reduced by ten years. Generally, the reductions will be between six months and 1-2 years. Inmates can apply for a reduction every year, if not every other year, if they can show considerable and improved progress and recommendations by correctional staff.
- Justice Wilson: There appears to be an opportunity in the correctional justice system to improve rather than traumatize an incarcerated individual. There has been concern raised that there is not an adequate chance to address these opportunities. DPS has acknowledged a problem with over-incarceration. Because of the need to build a new jail, there is a current restructuring in the criminal justice system with a need to decide how to distribute between 500 million to one billion dollars. Perhaps HPA needs more commissioners or a bigger budget. This is an opportunity to improve the system overall. We have the talent to be able to improve it, but not necessarily the resources.

H. Given that HPA has acknowledged it rarely considers court-ordered reductions of minimum terms, how will that impact the plea negotiation process going forward?

- Mr. Brady: The role of HPA is not detrimental to plea negotiations. Both the prosecution and the defense may review HPA's annual reports to predict the possible minimum term. It is preferred that HPA continue to set minimum terms as it provides consistency that may be lost if determined by individual judges.

- Mr. Waltjen: Minimal impact since the Third Circuit uses other practices in the plea negotiation process. For example, the prosecution will agree to a cap on the recommended level or minimum term or will agree to forgo appearing before the Board (without precluding the victims from appearing). Regarding the discussion about the new jail and the problems at HCCC, HCCC has been overcrowded for the last forty years and has ongoing issues including lack of programs and services within the facility which contribute to recidivism. Spikes in violent crimes are also related to staffing shortages within the police force, the prosecutor's office and in the judiciary's probation department. In an effort to accelerate the resolution of cases, the Third Circuit previously utilized waivers of PSIs and views the preparation of abbreviated PSIs, especially for lower-level felony offenses, as one other available alternative.
- Mr. Hyun: There is a statutory clause that allows for the waiver of a PSI. When the Third Circuit exercised this clause, it severely hurt the intake and diagnostic process of sentenced felons entering prison. Without the information in the PSI, the Board and prison have no information on how to recommend programs for the newly admitted inmates. There is a risk that the inmate may come out worse at the end of their prison term. There can be an ongoing dialogue about ways to expedite the process, but the importance of the PSI for HPA and DPS purposes cannot be understated.
- Justice Wilson: It is important to continue vocalizing the needs of the Third Circuit – such as Mr. Waltjen's summary of the breakdown of the system resulting in housing inmates in storage containers – so the incarcerated can be

adequately housed, the correctional staff taken care of, and the correctional work environment improved.

I. What are other arguments, if any, for why HPA should continue to set the minimum terms of imprisonment?

- Judge Del Rosario: Existing law only allows the court the options of probation or prison. Judges try to avoid incarceration and first provide opportunities for rehabilitation. There are cases where the resources of the courts and the probation department have been exhausted. HPA considers factors that the court does not because a person is at a different stage when appearing before the Board.
- Judge Town: Unless HPA had a substantially larger parole commission and received additional funding, the Board should only focus on parole and not on setting minimum terms until it can do so fairly and adequately. The paper-review process for determining minimum term reductions is particularly concerning.
- Mr. Hyun: HPA setting the minimum terms helps the correctional facilities. It establishes the baseline populations for the prisons. It also provides the Board with the foundation to reduce minimum terms. On the other hand, if the courts set the minimum terms it would allow the Board to focus only on parole considerations.
- Ms. Kau: Both the HPA and the judges are overburdened. The two entities must maintain their roles within the justice system because unless the whole system gets over-hauled, the best approach is to improve the existing roles.

The Board does a good job and strives to determine the minimum terms based on the facts and circumstances of each case.

- Mr. Komagome: The trial judge is better positioned to determine the minimum term and the parole board is in the best position to decide when a defendant should be released.
- Mr. Waltjen: There seems to be a lot of potential advantages to having the judges set minimum terms as opposed to HPA.
- Justice Wilson: The reality is the system is not working. We do not give proper attention to individual determinations at sentencing. As a former Circuit Court judge on the criminal calendar, the opportunity to determine minimum terms would have been embraced. The judges are paid to make the right decisions regarding the length of time citizens should spend in jail during an open proceeding accessible to the public. Reform is imperative to achieve fair sentencing and reduce over-incarceration. HPA can focus on parole matters and assess the rehabilitation efforts and conduct of individuals while incarcerated.

IV. Knock-and-Announce Law in Hawai'i

Richard Sing presented on the knock-and-announce law in Hawai'i by first highlighting concerns and national statistics related to the execution of search and arrest warrants. Mr. Sing then reviewed Hawai'i's statutory authority and relevant case law. At the conclusion of the presentation, there was an opportunity for Forum participants to pose questions to Mr. Sing.

A. National Concerns and Statistics

There is nationwide controversy over methods used during the execution of warrants. There are legitimate issues related to the potential loss of evidence due to a delayed search. On the other hand, there are concerns for the safety of law enforcement officers, civilians, and suspects. As of 2020, most states have some form of no-knock warrants or quick knock warrants. These types of warrants are executed by Special Services Divisions (SSD) or Special Weapons and Tactics (SWAT) teams. One study examined 818 SWAT deployments by 20 law enforcement agencies across 20 states, from 2010 through 2013. The study found that 62% of the deployments were drug searches and 60% of them were forcible entries. Another study found that SWAT teams were deployed 91% of the time for these types of warrants, and 68% of those deployments involved forcible entry.¹¹ A New York Times investigation found that between 2010-2016, there were 81 civilian and 13 law enforcement deaths as a consequence of forcible entry warrants.¹² Law enforcement officers represent about 10% of those killed as a result of forcible entry warrants. That statistic increases to 20% of the fatalities for no-knock warrants. These types of warrants are not only dangerous for civilians and suspects, but there is also an increased risk of danger for law enforcement.

As of 2020, although most states permit the use of some form of no-knock warrants, Hawai'i does not. As of 2021, 22 states, including Hawai'i, had introduced bills

¹¹ Council on Criminal Justice Task Force on Policing, *No-Knock Warrants and Police Raids: Policy Assessment*, https://assets.foleon.com/eu-west-2/uploads-7e3kk3/41697/pdf_-_no_knock_warrants.afc61934d317.pdf, (January 2021).

¹²Sack, Kevin, *Door-Busting Drug Raids Leave a Trail of Blood*, N.Y. Times, (March 18, 2017) <https://www.nytimes.com/interactive/2017/03/18/us/forced-entry-warrant-drug-raid.html?smid=pl-share>.

or city ordinances that proposed either a ban or restriction on no-knock warrants.¹³ Hawai'i's bill would have implemented a complete ban on no-knock warrants. Although the bill gained traction, it was ultimately quashed while in conference and will be reconsidered during the next legislative session.

B. HRS Sections 803-11 and 803-37

Federal law enforcement is guided by a 2003 United States Supreme Court decision which held that forced entry after waiting 15-20 seconds from the knock and announcement of a search warrant was reasonable.¹⁴ Hawai'i has two existing statutes that control warrant executions. First, HRS § 803-11 is implicated when there is an arrest warrant and law enforcement must enter a premise to serve the warrant. The statute allows forced entry but generally requires that law enforcement first demand entrance in a loud voice and explain their purpose (either that they have warrant for arrest, or that they are there to execute a lawful arrest without a warrant).¹⁵

HRS § 803-37 applies to the execution of search warrants and is essentially identical to the requirements set forth in § 803-11.¹⁶ Significantly, forced entry is

¹³ Related to Policing, S.B. 726, 31st Legis. § 1 (2021).

¹⁴ U.S. v. Banks 124 S.Ct. 521 (2003).

¹⁵ HRS § 803-11 provides as follows:

Whenever it is necessary to enter a house to arrest an offender, and entrance is refused, the officer or person making the arrest may force an entrance by breaking doors or other barriers. But before breaking any door, the officer or person shall first demand entrance in a loud voice, and state that the person is the bearer of a warrant of arrest; or if it is in a case in which arrest is lawful without warrant, the officer or person shall substantially state that information in an audible voice.

¹⁶ HRS § 803-37 provides as follows:

The officer charged with the warrant, if a house, store, or other building is designated as the place to be searched, may enter it without demanding permission if the officer finds it open. If the doors are shut, the officer shall declare the officer's office and the officer's business and demand entrance. If the doors, gates, or other bars to the entrance are not immediately opened, the officer may break them. When entered, the officer may demand that any other part of the house, or any closet or other closed place in which the officer has reason to believe the property is concealed,

authorized if the premises are not immediately opened after law enforcement announced their purpose and demanded entrance.

Article I, section 7 of the Hawai'i State Constitution protects against unreasonable search and seizures and includes privacy protections. The Hawai'i Supreme Court has used this Article to evaluate the reasonableness of warrant executions and the time lapse between a knock-and-announce and forcible entry.¹⁷

C. Survey of Hawai'i cases

Analysis of individual cases starts with first determining whether the premises was open, and secondly, if force was used to gain entry. If not, the statutes are not triggered and law enforcement is not required to knock-and-announce. Whether a premise is considered open or closed is subject to many different factual considerations as illustrated by State v. Keanaaina, 151 Hawai'i 19, 508 P.3d 814 (2022). Law enforcement obtained a search warrant for a particular homeless encampment. The encampment had tarped shelters with open sides used as residences allowing people to easily walk in and out. Upon arrival police saw people within the shelter, announced their presence and waited outside for two minutes before entering. The police did not demand entrance. The Court

may be opened for the officer's inspection, and if refused the officer may break them. If an electronic device or storage media is designated as the item to be searched, the court may authorize the officer to obtain technical assistance from individuals or entities, located within or outside the State, in the examination of the item; provided that the office shall submit a sworn statement to the judge or magistrate, certifying the reliability and qualifications of the individuals or entities, and the reason their assistance is necessary, provided further that no individual or entity shall be compelled to provide technical assistance without their consent.

¹⁷ Haw. Const. art. I, § 7 provides as follows:

The right of the people to be secure in their person, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications to be intercepted.

held that the premises were open and demand for entrance was not required as HRS § 803-37 was not triggered.

Keanaaina also addressed whether force was used to gain entry to the premise when an officer moved aside some fabric on the shelter and moved a couch while entering. The Court held that these actions were incidental to the entry and were not necessary to gain entry to the shelter. The Court also opined on other factors that contributed to the validity of law enforcement's actions. Specifically, the Court found the loud knock-and-announce and time lapse until entry reduced the potential of violence and risk of property damage. The Court also noted that the officers acted with as much respect possible to the privacy interests of the residents given the open nature of the tarped premises.

In State v. Harada, 98 Hawai'i 18, 41 P.2d 174 (2002), two undercover female officers knocked on Harada's residence door during the execution of a search warrant. Harada opened the door, saw additional officers, and attempted to close the door. Officers then pushed the door open and gained entry. The Court held it legally permissible to use the ruse of undercover officers to get Harada to the door. However, the officers were required to comply with HRS § 803-37 as force was used when they pushed the door open. Although the officers announced their presence and purpose while pushing the door open, they did not specifically demand entry. Harada is instructive as it required strict compliance with the procedures set forth in HRS § 803-37.

State v. Maldonado, 108 Hawai'i 436, 121 P.3d 901 (2005) addressed whether the statutory requirements were met during the service of an arrest warrant. At Maldonado's door, the police knocked, announced their presence, demanded entry, and

simultaneously entered the residence by opening a screen door. The police failed to announce their purpose and therefore violated the requirements of HRS § 803-11.¹⁸ The Court rejected the argument that substantial compliance with the statute is adequate and held strict compliance is required.

In State v. Monay, 85 Hawai'i 282, 943 P.2d 908 (1997), during execution of a search warrant, police knocked on Monay's door, announced their presence and purpose and almost immediately opened the door. Officers failed to specifically demand entry and were thus in violation of HRS § 803-37.

Currently, the leading issue for execution of warrants is the time lapse between the knock-and-announce and entry. This is where the considerations for safety and destruction of property apply. In Hawai'i, the case law addressing the issue of the time lapse is somewhat unclear. State v. Garcia, 77 Hawai'i 461, 887 P.2d 671 (1995) held that a lapse of ten seconds before entry is probably insufficient. Monay held that a two second lapse before entry was insufficient. The amount of time must be reasonable to allow the occupant to voluntarily comply with the demand for entrance.

Last year's legislative bill attempted to address this issue by specifically prohibiting no-knock warrants, imposing a thirty-second wait time before entry, requiring officers to be uniformed with activated body-worn cameras, and prohibiting officers from obscuring their identity or office.¹⁹

¹⁸ The Court also held that the law enforcement's failure to wait a reasonable amount of time after demanding entry before opening the door was another violation of HRS § 803-11.

¹⁹ Related to Policing, *supra* note 10.

D. Participant questions

- (1) There was mention that eliminating the element of surprise is a policy behind Hawai'i's knock-and-announce statutes. Given that, is there a difference between no-knock warrants and use of a ruse to obtain entry?**

According to the case law, use of a ruse is legally permissible. The policy behind eliminating the element of surprise is safety-related which has been problematic nationwide. There is not necessarily a dichotomy between a no-knock warrant and a knock-and-announce warrant. The real issue is how much time should lapse before forcible entry is made. The policy considerations center around how much risk the community is willing to tolerate to secure evidence without comprising safety.

- (2) What are your recommendations on these issues?**

The safety of the civilians and law enforcement is most important. It is also important to combat offenses like drug distribution. Executing warrants with less surprise may have an impact on the amount of drugs seized and the ability of people to escape. A firm rule with an articulated time period is preferable as the reasonableness standard can be problematic. However, a concern arises with the firm time rule when executing a warrant at a studio apartment versus a large home.

- (3) Under federal law, suppression is not the remedy for failure to knock-and announce. Is suppression the remedy under Hawai'i law?**

Yes. The remedy for failure to comply with the statutory requirements is suppression of the seized evidence.

V. 2022 Legislative Review

Members of the legislative teams from the City and County of Honolulu's Department of the Prosecuting Attorney ("DPA"), Mark Tom and Tricia Nakamatsu, and the Office of the Public Defender ("OPD"), William Bento and Sara Haley, discussed various legislative items from the 2022 session. First Circuit Court Judge Rowena A. Somerville introduced each legislative item and moderated the discussion. The panelists were asked to share the positions and concerns of their respective offices on each bill as reflected here. Responses representing the respective offices have been combined and summarized to the extent possible. At the conclusion of the panel discussion, Forum participants were invited to ask questions of the panelists.

A. Negligent Homicide (SB2163)

This bill increases Negligent Homicide in the First Degree from a class B felony to a class A felony if the following conditions are met: If at the time of the offense a person (1) has been convicted one or more times of Operating a Vehicle Under the Influence of an Intoxicant ("OVUII") within the past 15 years, (2) is in violation of HRS § 291E-62 (Operating a Vehicle After License and Privilege Have Been Suspended or Revoked for OVUII), or (3) if the person is a highly intoxicated driver under HRS § 291E-1.²⁰ The court can impose a lesser sentence for the class A felony if there is a finding of strong mitigating circumstances with a written opinion stating the court's reasons for imposing the lesser sentence.

²⁰ HRS § 291E-1 provides in part as follows:

"Highly intoxicated driver" means a person whose measurable amount of alcohol is:

- (1) .15 or more grams of alcohol per one hundred milliliters or cubic centimeters of the person's blood; or
- (2) .15 or more grams of alcohol per two hundred ten liters of the person's breath.

DPA: This bill was the result of a policy decision of the legislature. The original version included a 20-year look-back period but was subsequently amended to 15 years.

OPD: The office had advocated for the possibility of a probation sentence with a finding of strong mitigating circumstances. Defense practitioners should be mindful that juvenile adjudications and convictions under HRS § 291E-64 (Operating a Vehicle After Consuming a Measurable Amount of Alcohol; Persons Under the Age of Twenty-One) are counted as prior convictions. It may be necessary to request dismissals in the interest of justice for juvenile cases or apply for expungement of convictions under HRS § 291E-64 to avoid accumulating prior convictions.

B. Catalytic Converters (SB2279)

This bill establishes several provisions to regulate the purchase of catalytic converters. Violation of the provisions or theft of catalytic converter is a class C felony.

DPA: Every vehicle has a catalytic converter which can be stolen in a matter of minutes and easily sold. Previously, the theft of a catalytic converter could not be charged as a felony offense because of the relatively low resale value. The bill follows the approach that was taken several years ago when theft of copper was a problem. According to the Honolulu Police Department (“HPD”), theft of copper immediately decreased once that law was passed so hopefully this bill will likewise significantly decrease catalytic converter theft.

OPD: The office did not take a position on this bill.

C. Uniform Controlled Substances Act (SB3140)

The bill requires those who hold a controlled substances registration to immediately verbally report the theft, embezzlement, fraud, or diversion of a controlled

substance. The submission of a subsequent written report is required. Failure to knowingly report as required or prevent another from reporting is a misdemeanor.

DPA: The office did not comment on this bill.

OPD: Likewise, the OPD did not comment on this bill. Private practitioners are more likely to represent those who are registered to possess controlled substances such as pharmacies, doctors, dentists, or veterinarians.

D. Operating a Vehicle Under the Influence of an Intoxicant (SB3165)

The bill includes the following amendments: (1) increases the license revocation period for first offenses from one year to no less than one year and no more than 18 months, (2) a person may apply for early termination of the license revocation under certain circumstances, (3) requires a person to have a government-issued identification in their immediate possession if operating a vehicle with an ignition interlock, (4) extends the lookback period under HRS § 291E-62 from 5 years to 10 years, (5) a person convicted of OVUII and an offense under HRS § 291E-62 arising from the same incident shall be sentenced to jail in both offenses and the jail terms shall be served consecutively, (6) expands the offense of tampering with an ignition interlock to include obstruction of the camera lens and failure to provide a picture of the driver, and (7) extends the lookback period for tampering with an ignition interlock from five years to ten years.

DPA: This bill was the result of the coordinated effort by the Department of Transportation and Highway Safety (“DOT”), all county prosecutor offices and all of the county police departments. It was strongly supported by the legislature because OVUIIs are a significant problem in Hawai‘i. Both the DOT and Mothers Against Drunk Driving

believe ignition interlocks are a key component in decreasing OVUIIs and helping offenders rehabilitate. To encourage more OVUII offenders to install an ignition interlock, the bill requires a longer license revocation period and also allows those with an ignition interlock to apply for early termination of the license revocation if the device has been installed for at least 9 months of which the last 3 months were violation free. The amendment that mandates consecutive sentencing for those convicted of both OVUII and driving with an OVUII-related license suspension or revocation recognizes that there should be an enhanced penalty for those who should not have been driving in the first place. HRS § 291E-62 was amended to change the mandatory sentence for a third offense of one-year jail to a range of 6 months to one-year jail.

OPD: The office strongly opposed this bill. HRS § 291E-62 disproportionately affects those with less financial means and this bill helps those who can afford to get an ignition interlock. Many of the license revocations imposed by the Administrative Driver's License Revocation Office ("ADLRO") are for one year. If the court were to impose an 18-month revocation, it would be greater than what is typically imposed by the ADLRO. A positive change was the reduction of the mandatory one-year jail sentence to a possible 6-month sentence for third offenses under HRS § 291E-62. However, that is still an extremely high sentence for a driving offense. The extended lookback period under HRS § 291E-62 will increase the number of convictions. These offenses are poverty crimes as those who can afford to install an ignition interlock will not be convicted of these offenses.

DPA: There is an indigency fund for those who cannot afford an ignition interlock device. Although not completely free, with appropriate documentation such as proof of

welfare benefits or other services from the Department of Human Services, the installation and monthly fee can be reduced by 50%.

OPD: Although there is an ignition interlock indigency fund, it has become increasingly difficult to qualify for it. For example, a person must own a vehicle and the vehicle cannot be shared with anyone else including other family members. For public defender clients, there is only a small percentage that will be able to obtain an ignition interlock device.

E. Unauthorized Control of Propelled Vehicle (HB1469)

This bill creates an affirmative defense for anyone charged with Unauthorized Control of Propelled Vehicle (“UCPV”), where the defendant purchased the vehicle and reasonably believed themselves to be the actual owner of the vehicle.

OPD: The creation of an affirmative defense results in more litigation because now the defendant has the burden of establishing a reasonable belief as to their ownership of a vehicle after purchase. The hazard of that is seen in situations where an individual is duped into buying a vehicle and then criminally charged because they were operating the vehicle. There is also concern for those who purchased a vehicle but did not do it in a smart way, i.e., failed to get a copy of the title or believed the seller’s promise that the title would be provided at a later time. For practitioners, the defense will now be responsible for gathering evidence such as documentation or witnesses to effectively utilize this affirmative defense. The use of the term “reasonably believed” is worrisome as it is not defined in the law.

DPA: Back in 2020, Hawai‘i had one of the highest auto theft rates in the nation per 100,00 people. On O‘ahu alone there were 3,000 motor vehicle thefts, and of those

about 500-600 resulted in arrests. This is a huge problem for the State and respective counties. There is shared concern over the term “reasonably believed” which was not the language in the original bill. Support for the creation of the affirmative defense results from instances of defendant testifying mid-trial that the car was purchased from a particular person. At that point in the trial, the State is unable to investigate or introduce evidence to challenge the defendant’s testimony. The jury is left to think that the police or prosecutor failed to do a thorough investigation as to defendant’s possible purchase of the vehicle.

F. Theft in the First Degree (HB1486)

Most vehicle thefts are charged under the UCPV or Theft in the Second Degree statutes which are class C felonies. This bill amends Theft in the First Degree, a class B felony, to include theft of motor vehicle or motorcycle.

DPA: This bill stemmed from the concern over the high rates of motor vehicle theft in Hawai’i. As it is a policy issue, the prosecutor’s office did not submit testimony. However, the general premise behind the bill is to address the loss of the vehicle to the owner regardless of the monetary value of the vehicle. Those who commit a theft of a motor vehicle should be charged consistently, regardless of the actual value of the vehicle or regardless of whether the prosecution can prove the defendant knew the value of the vehicle at the time it was stolen.

OPD: Classifying the theft of a vehicle as a class B felony is purely punitive. It is not reflective of the existing levels of theft that are aligned with monetary value. It is also problematic that the definition of a vehicle does not state that the vehicle must be operable. Under this bill, theft of an inoperable vehicle with nominal monetary value would

still result in Theft in the First Degree. Whether the police or prosecutors will use their discretion in those types of situations is unknown. This bill will add to the prison population and will lead to longer terms of imprisonment.

G. Credit for Time of Detention Prior to Sentence (HB2074)

In response to State v. Abihai, 146 Hawai'i 398, 463 P.3d 1055 (2020), this bill clarifies that defendants who are convicted of crimes while serving a prison term cannot receive credit for any presentence time served for the new offense if it overlaps with time being served for the old offense. The bill is not retroactive.

OPD: Constitutional issues are triggered when evaluating earned detention credit. The purpose of the bill is to deny pretrial detention credit to those already serving prison time. Part of the proposed reasoning was that it would act as a deterrent against committing crimes while in prison, especially violent crimes against other inmates and the correctional staff. The actual bulk of the cases are comprised of people charged with Escape after absconding from work furlough. The language of the bill does not achieve the legislature's intended purpose because it uses the term "any periods of detention." The hope was that people would not get credit for their presentence detention time, but in reality, it has become a de facto consecutive sentencing statute as it does not specify that it only applies to presentence detention credit. DPS could choose to deny periods of earned credit. This bill takes away discretion from the courts to balance out and consider mitigating circumstances. Additionally, this bill penalizes those who proceed to trial as they will have more presentence credit than a person who resolves their case by pleading.

DPA: The Department of the Attorney General took the lead on this bill and wanted to give the legislature the opportunity to revisit the original enactment of the statute that

was addressed in Abihai. The language of the bill makes it clear that it only applies to presentence detention.

H. Firearms (HB2075)

Yukutake v. Connors, 554 F.Supp.3d 1074 (D. Haw. 2021) invalidated Hawai'i's ten-day expiration period for a permit to acquire a pistol or revolver (holding stayed by the court) and invalidated the requirement that all firearms be physically inspected at the time of registration. The State is appealing the decision, the legislature supports the appeal and introduced this bill in response. The bill enacts a three-year physical inspection requirement at the time of registration for firearms which were: (1) manufactured without serial numbers, (2) transported into the State from another jurisdiction, and (3) obtained in private sales and transfers. The bill sunsets on June 30, 2025.

DPA: The prosecutor's office took no position on this bill.

OPD: The bill allows for physical inspection but for a much smaller category of firearms. A significant change is that New York State Rifle & Pistol Assn., Inc. v. Bruen 597 U.S. ___, 142 S.Ct. 2111 (2022) was decided this year and changed the test that was used in the Yukutake decision. Cases are continuing to be decided which will reveal how the federal district courts are handling the Bruen decision.

I. Public Safety (HB2171)

This bill in part establishes: (1) a new Department of Law Enforcement to consolidate and administer enforcement and investigative functions of the State, (2) DPS (to be renamed Department of Corrections and Rehabilitation) as an independent department to administer the corrections, rehabilitation and reentry of the inmate

populations, and (3) a training center, and appropriates funds for the newly created department.

OPD: No position was taken on this bill.

DPA: The office generally supported this bill.

J. Criminal Pretrial Reform (HB1567)

The bill eliminates the use of monetary bail and requires defendants to be released on their own recognizance for certain non-violent offenses (subject to exclusions). The bill was vetoed on July 12, 2022.

OPD: This bill would significantly address the problem of overcrowding in the correctional facilities. There were enough considerations to adequately address community safety concerns.

DPA: (No response sought as the bill was vetoed).

K. Participant Questions

- (1) Is the application for early termination of a license revocation under the new OVUII law submitted to the ADLRO, the court, or the entity who originally imposed the revocation?**

DPA: The ADLRO statutes were not amended as a part of this bill. The application process would only apply to revocations imposed by the court.

- (2) With the development of the Department of Corrections and Rehabilitation, it seems like a great opportunity to provide input on topics like the training curriculum for law enforcement officers, or the manner in which determinations are made for pretrial inmate's treatment needs. Are either the prosecutor's office or the public defender's office participating in this restructuring?**

OPD & DPA: Neither office is currently participating but both expressed they will follow up with their administration and would appreciate the opportunity to be involved.

VI. Closing Remarks

Ms. Cheng thanked the participants, speakers and panelists and expressed that the purpose of the Forum is to not only learn new information, but to facilitate dialogue amongst the Judiciary and the bar about significant issues within the criminal justice system.

2022 CRIMINAL LAW FORUM PARTICIPANTS

The HSBA Committee on Judicial Administration in 2022 comprised of the following co-chairs and members: Hawai'i Supreme Court Associate Justice Simeon R. Acoba, Jr. (ret.), Co-Chair, Vladimir Devens, Co-Chair, Judge Ronald Ibarra (ret.), Judge Blaine J. Kobayashi, Judge Brian Costa, Judge Rowena A. Somerville, Chief Judge Randal G. Valenciano, Judge Wendy DeWeese, Judge Summer M. Kupau-Odo, Judge M. Kanani Laubach, Judge Clarissa Y. Malinao, Hayley Cheng, Dennis Chong Kee, Steven J.T. Chow, Kahikino Noa Dettweiler, Kirsha Durante, Tred Eyerly, Daylin-Rose Heather, Edward C. Kemper, Erin Kobayashi, Simeona Mariano, Dyan Mitsuyama, Carol K. Muranaka, Kyleigh Nakasone, Richard Sing, Audrey Stanley, Wilson Unga, and Dawn West.

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The Criminal Law Subcommittee is comprised of the following committee members: Hayley Cheng, Chair, Judge Blaine J. Kobayashi, Judge Summer M. Kupau-Odo, Judge M. Kanani Laubach, Judge Clarissa Y. Malinao, Judge Rowena A. Somerville, Kirsha Durante, Richard Sing, Wilson Unga, and Dawn West.

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Honorable Michael D. Wilson, Associate Justice, Hawai'i Supreme Court
Honorable Lisa M. Ginoza, Chief Judge, Intermediate Court of Appeals
Honorable Keith K. Hiraoka, Associate Judge, Intermediate Court of Appeals
Honorable Sonja M. McCullen, Associate Judge, Intermediate Court of Appeals
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