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SCMF-20-0000152

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

In the Matter of the Judiciary’s Response
to the COVID-19 Outbreak

ORDER REGARDING TEMPORARY MODIFICATION OF
HAWAI‘I RULES OF PENAL PROCEDURE RULE 43(e) (1)
(FIFTH CIRCUIT)

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

The COVID-19 pandemic has caused a public health emergency. In response to the declared state of emergency, the Judiciary postponed non-urgent court business and limited in-person proceedings in an effort to ensure the health and safety of court users and Judiciary personnel, and to minimize the risk of spreading COVID-19 in the courts. As a result, the Judiciary has been utilizing existing technology to facilitate remote proceedings, as an alternative to in-court hearings, and has implemented new technologies, including the use of video conferences to conduct hearings and resume court operations to the extent possible. Criminal proceedings have proceeded in-person and by video conference in accordance with court rules and as feasible.

In recent weeks, a number of active positive COVID-19 cases has been reported at the Kaua'i Community Correctional Center ("KCCC"). As a result, KCCC is in lockdown with limited or restricted movement of inmates within the correctional center, and the transport to court of custody defendants is suspended. It has also been brought to our attention that there has recently been a COVID-19 positive case at the Kaua'i Police Department ("KPD") cell block, which has resulted in KPD suspending its transport to court of defendants from cell block pending clearance from the Department of Health.

With the suspension of transports to court, remote proceedings are necessary. KCCC and KPD, however, have limited staff and limited equipment for video conferences from their facilities, but have equipment for telephonic hearings. This has impacted the Fifth Circuit's ability to proceed with criminal proceedings in some instances, particularly arraignments where the court accepts a plea of not guilty, as provided under Hawai'i Rules of Penal Procedure ("HRPP") Rule 43(e),¹ which allows certain matters to be conducted by video conference but is silent on the use of telephone hearings.

¹ HRPP Rule 43(e) governs presence by video conference in certain matters:

- (e) Presence may be by video conference.
- (1) The court may conduct by video conference, without the consent of the defendant, an arraignment wherein it accepts a plea of not guilty;

Health and safety continue to be paramount during this unprecedented time. The current trajectory of the pandemic and its impact on our community require continued flexibility and vigilance in adapting to these extraordinary circumstances, and the continued need to protect court users and Judiciary personnel during this unprecedented time remains vital. Under the current circumstances, a temporary modification of HRPP Rule 43(e) (1) to allow the Fifth Circuit to conduct an arraignment where it accepts a plea of not guilty, by telephone or video conference, is necessary.

Accordingly, pursuant to article VI, section 7 of the Hawai'i Constitution and Hawai'i Revised Statutes §§ 601-1.5 and 602-5(a) (6), and Governor David Y. Ige's Emergency Proclamations,

IT IS HEREBY ORDERED that, as to the Fifth Circuit, HRPP Rule 43(e) (1) is temporarily modified to allow presence by telephone or video conference. Judges, however, are strongly encouraged to utilize video conferencing technology to the

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- (2) The court may conduct by video conference, with the oral or written consent of the defendant,
 - (A) an arraignment wherein it accepts, or takes under advisement, a plea of guilty or no contest,
 - (B) a pre-trial evidentiary or non-evidentiary proceeding, or
 - (C) a post-conviction evidentiary or non-evidentiary proceeding, other than a sentencing hearing.
 - (3) The court may conduct a sentencing hearing and impose sentence by video conference with the oral or written consent of both the prosecution and the defendant.

extent possible. This modification does not affect any other provision under this rule, which remains in effect.

This order is effective as of the date of filing and shall expire on October 4, 2021, unless otherwise modified or extended.

Dated: Honolulu, Hawai'i, August 31, 2021.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

/s/ Sabrina S. McKenna

/s/ Michael D. Wilson

/s/ Todd W. Eddins

