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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

FIRST EXTENSION OF 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 mid-August 2021, there were a number of active positive COVID-19 cases reported at the Kaua‘i Community Correctional Center (“KCCC”). As a result, KCCC was on lockdown

with limited or restricted movement of inmates within the correctional center, and the transport to court of custody defendants was suspended. At the time, it was also brought to the court's attention that there had been a COVID-19 positive case at the Kaua'i Police Department ("KPD") cell block, which 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 were necessary. However, the limited staff and limited video conferencing equipment at KCCC and KPD were impacting 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.

Thus, on August 31, 2021, as to the Fifth Circuit, this court entered an "Order Regarding Temporary Modification of Hawai'i Rules of Penal Procedural Rule 43(e)(1)," which

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;
- (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.

temporarily modified HRPP Rule 43(e)(1) to allow presence by telephone or video conference, while encouraging judges to utilize video conferencing technology to the extent possible. The order expressly provided that the modification did not affect any other provision under the rule, which remained in effect. Currently, the August 31, 2021 order expires on October 4, 2021.

Since then, the rate of positive COVID-19 cases and hospitalizations, including within our community correctional centers, continues to fluctuate. In early August 2021, statewide infection and hospitalization rates surged, with record numbers of positive cases and rapidly increasing hospitalizations being reported. Currently, it is understood that KPD is on lockdown with very minimal transport to court of custody defendants. While KCCC and KPD have been utilizing video conferencing technology, there have been instances where the technology is not available and the Fifth Circuit courts have had to communicate by telephone to continue with the court proceeding. As the pandemic conditions continue to evolve and impact the community, health and safety precautions continue to remain in place. Given the current trajectory of the pandemic and the fluidity of these conditions, flexibility and vigilance in adapting to these extraordinary circumstances is vital, and the continued need to protect court users and Judiciary personnel during this unprecedented time remains paramount. Under the present circumstances, an extension of the August 31, 2021 order for Fifth Circuit criminal matters is therefore 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 the August 31, 2021 "Order Regarding Temporary Modification of Hawai'i Rules of Penal Procedure Rule 43(e)(1) (Fifth Circuit)" is extended until November 30, 2021, unless otherwise modified or extended.

Dated: Honolulu, Hawai'i, October 1, 2021.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

/s/ Sabrina S. McKenna

/s/ Michael D. Wilson

/s/ Todd W. Eddins

