

To: Candidates for Hawai'i Governor 2022

Fr: American Civil Liberties Union and American Civil Liberties Union of Hawai'i

RE: Embracing Categorical Clemency in Hawai'i

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The United States, and Hawai'i, remain in the grip of self-inflicted mass incarceration policies that have fueled severely overcrowded jails and prisons at exorbitant costs to taxpayers, with high recidivism rates in return. As Governor, your clemency powers serve as an immediately deployable, powerful corrective for the errors of the past – 'tough-on-crime' policies such as the War on Drugs, habitualization laws, low parole release rates, high rates of parole revocation for technical violations, and other avenues for early relief. Unfortunately, today, commutations tend to occur rarely and are often granted to a small handful of people. For commutations to be an effective response to mass incarceration, governors must use their executive powers in new, transformational ways through categorical clemency.

The ACLU of Hawai'i calls upon the next Hawai'i Governor to embrace clemency and the power of redemption. This is a historic opportunity for the Governor to use their executive powers in transformative ways. By statute, "*Aloha*" is acknowledged as the "*essence of relationships in which each person is important to every other person for collective existence.*"<sup>1</sup> Our next Governor "*on behalf of the people and in fulfillment of their responsibilities, obligations and service to the people*" has the power to "*give consideration to the Aloha Spirit.*"<sup>2</sup>

#### CLEMENCY IS ECONOMICALLY ADVANTAGEOUS AND ADVANCES RACIAL JUSTICE

Hawai'i's correctional system disproportionately incarcerates residents of Native Hawaiian ancestry. Native Hawaiians make up approximately 21% of the general population, but 37% of the prison population. Native Hawaiians are overrepresented at every stage of the criminal justice system. Despite numerous studies and recommendations going back at least to the 1980s, the State has not taken effective steps to address the overrepresentation of Native Hawaiians in the criminal justice system.<sup>3</sup> This overrepresentation has existed for decades and has led to intergenerational incarceration for some Native Hawaiian families.<sup>4</sup> Clemency can correct these injustices and offset the well documented racial disparities of policing, prosecution, and sentencing that lead to the disproportionate incarceration of Native Hawaiians.

In addition to the human impact, granting categorical clemency is fiscally prudent. As Hawai'i's prison population grows, so does the cost burden. Hawai'i currently spends approximately \$238 per person per day to incarcerate.<sup>5</sup> Corrections general fund spending increased by 263% between 1985 and 2017.<sup>6</sup> In 2017, the state spent \$255 million on corrections, accounting for 3 percent of the total

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<sup>1</sup> *Id.*

<sup>2</sup> H.R.S. §5-7.5

<sup>3</sup> Office of Hawaiian Affairs, Fact Sheet: The Disparate Treatment of Native Hawaiians in the Criminal Justice System (2010) [https://www.oha.org/wp-content/uploads/2014/11/factsheets\\_final\\_web\\_0.pdf](https://www.oha.org/wp-content/uploads/2014/11/factsheets_final_web_0.pdf).

<sup>4</sup> Final Report of the House Concurrent Resolution 85 Task Force on Prison Reform to the Hawai'i Legislature (Dec. 2018) available at [https://www.courts.state.hi.us/wp-content/uploads/2018/12/HCR-85\\_task\\_force\\_final\\_report.pdf](https://www.courts.state.hi.us/wp-content/uploads/2018/12/HCR-85_task_force_final_report.pdf).

<sup>5</sup> State of Hawaii Department of Public Safety Annual Report FY 2021 ("Annual Report FY '21"), p. 18, available at: <http://dps.hawaii.gov/wp-content/uploads/2021/12/PSD-ANNUAL-REPORT-2021x.pdf>.

<sup>6</sup> Annual Report FY'21.

general fund spending that year.<sup>7</sup> In 2021, correction expenditures increased to \$294 million.<sup>8</sup> Reducing prison populations through categorical clemency can help reveal or create opportunities to reduce this enormous sum. This fiscally prudent decision is made only more necessary by the state's looming budget crisis brought on by the COVID-19 pandemic – which also further reaffirms the need to safely reduce prison populations so that people are not forced to stay in severely overcrowded settings that make self-care fundamentally impossible.

## CATEGORICAL CLEMENCY WILL RELIEVE HAWAII'S OVERCROWDED CORRECTIONAL FACILITIES

### **Clemency for Individuals Incarcerated for Drug Possession**

Drug related cases are the largest contributor to Hawai'i's incarceration population. Unfortunately, the criminalization of personal possession or use of drugs is an ineffective attempt at regulating a public health problem. In 2018, more than one in 10 (12 percent) were incarcerated for a charge or sentence for a drug offense.<sup>9</sup>

### **Clemency for Individuals Incarcerated for Technical Probation/Parole Violations**

In 2018, 11% of people incarcerated under Hawai'i's jurisdiction in 2018 were there because they had been revoked from community supervision. In FY 2020-2021, the statewide probation offices managed 18,505 people, 495 of whom were returned to court for violations not related to new charges. Approximately 3.54% of those individuals were reincarcerated over the last Fiscal Year.<sup>10</sup> In fiscal year 2020, 321 of our 394 persons under parole supervision had their parole revoked. Of those 321 persons, 100% were returned to prison for technical violations of parole, not for new felony convictions.<sup>11</sup>

### **Clemency For Individuals Serving Time For Crimes That Would Receive A Shorter Sentence If Committed Today**

Although Hawai'i decriminalized some possession of marijuana in 2020 and legalized it for medical use in 2000, the law was not applied retroactively. Clemency should be granted to individuals incarcerated for repeated marijuana possession.

### **Clemency For Kūpuna/ Senior Citizens Who Have Served At More Than Half Their Sentence**

Hawai'i's prisons are grappling with rising health care costs brought on by an aging population of inmates. In 2017, 13% of all Hawai'i inmates were 55 and older.<sup>12</sup> At the Halawa Correctional Facility on O'ahu, nearly one in six inmates is over the age of 55, and about 5% of the facility's more than 1,000 inmates are disabled due to age, mobility and cognitive issues. Between 2020 and 2021, on average there were approximately 334 individuals incarcerated who are over the age of 60 years, 143 of them over the age of 65.<sup>13</sup> The growing population of senior citizens places a significant constraint on the state's resources and only further damages the individual's health. Seniors are more susceptible to

<sup>7</sup> National Association of State Budget Officers, State Expenditure Report series, <https://www.nasbo.org/reports-data/state-expenditure-report/state-expenditure-archives>.

<sup>8</sup> Annual Report FY'21.

<sup>9</sup> ACLU Smart Justice, *Blueprint for Smart Justice: Hawai'i*, p. 5 (2019).

<sup>10</sup> Judiciary Testimony on SB2514 Probation Reform (2022).

<sup>11</sup> Hawaii Paroling Authority Annual Statistical Report FY' 20.

<sup>12</sup> Star Advertiser, *Hawaii prisons struggle to deal with aging populations*, Mar. 4, 2017, available at: <https://www.staradvertiser.com/2017/03/04/breaking-news/hawaii-prisons-struggle-to-deal-with-aging-inmate-population/>.

<sup>13</sup> Annual Report FY' 21. As of May 2021, there were 416 people age 55 and older in Hawai'i's prisons (i.e. Halawa, Waiawa, Women's Correctional Center, Kulani and Saguaro in Arizona). UIPA Request to the ACLU of Hawai'i to Department of Public Safety, May 11, 2021.

health issues exacerbated by incarceration. According to the Department of Public Safety, age-related medical costs and a growing inmate population are driving up its \$24 million health care budget for correctional facilities. Social science clearly tells us that people age out of crime. As a State that values our elders, we have an obligation to care for our kūpuna. Clemency for these individuals is both humane and responsible.

### **Clemency For Property Crimes Who Have Served At Least 50% Of Their Sentences**

In 2018, more than one-quarter of all people (27 percent) incarcerated had a charge or sentence for a property crime.<sup>14</sup> Between 2020 and 2021, the average number of individuals incarcerated for a property crime was 1082.<sup>15</sup>

## **VOTERS OVERWHELMINGLY SUPPORT CATEGORICALLY CLEMENCY**

A recent poll conducted found:

- More than two thirds of voters support clemency for individuals who sold drugs and served at least three years.
- 74% of voters support clemency for individuals serving time for crimes that would receive a shorter sentence if committed today.
- 75% support clemency for senior citizens who served more than half their sentence.
- 82% of voters support clemency for crimes that are no longer illegal.
- Two thirds of voters support clemency for people sentenced for technical violations of their parole, such as missing a meeting with a parole officer.

## **PROCEDURAL CHANGES ARE ALSO NECESSARY TO IMPROVE THE CURRENT SYSTEM'S TRANSPARENCY AND EFFICIENCY**

Hawai'i's current clemency process is fraught with problems making it extremely difficult for impacted people to navigate. As Governor, we recommend you commit to several procedural changes that will make the clemency process more accessible, transparent and efficient.

### **Increase transparency in the process of clemency:**

- Regularly providing virtual workshops, question and answer segments between your administration agencies and community members.
- Create a toolkit and checklist for clemency eligibility and applications
- Publish decision summaries regarding clemency decisions including the facts in the case(s) or category, the final decision, and the reasoning behind the decision.
- Require information (i.e. issue date, recipient, text of clemency grant) be made public. Simply publishing official justifications for clemency decisions can increase accountability.
- Establish citizen participation on a Clemency Advisory Board. Creating and providing resources to an advisory board to assist in reviewing clemency applications and persons eligible for clemency and making recommendations to the Governor.

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<sup>14</sup> ACLU Blueprint.

<sup>15</sup> Annual Report FY' 21.



- Establish a reconsideration mechanism for challenging a clemency denial.

### **Improve the Efficiency by Expediting the Clemency Process**

- Establish an expedited clemency program
- Direct the creation of an online system for submission of clemency applications for faster decisions than the current inefficient paper only system.

Just as the policies that fuel this crisis were all the product of a governor's signature, you could use that same stroke of a pen to help remedy Hawai'i's incarceration crisis through their clemency powers. As Governor, you have the power to unilaterally end incarceration by commuting people's sentences—freeing people with an efficiency unmatched by other government actions.

Clemency grants, paired with supportive services for people who receive them, such as reentry planning or record clearing processes, facilitates long-term success. In turn, this act of Aloha provides a pathway to redemption that allows individuals who have learned from their mistakes to return to their 'ohana (families) and communities instead of languishing in prisons at taxpayer expense.

We welcome working with you in the future to create a better Hawai'i. We understand that clemency will require deliberate planning and execution, and will stand by you and support your decisive, bold actions on this issue. You can send a clear message to Hawai'i and the nation —Now is the time to replace the architecture of mass incarceration with a roadmap to redemption and healing.

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