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SCPW-20-0000509

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

IN THE MATTER OF INDIVIDUALS IN CUSTODY
OF THE STATE OF HAWAI‘I

ORIGINAL PROCEEDING

AMENDED DISSENT
(By: Wilson, J.)

In one day, the number of confirmed COVID-19 cases within the inmate population at the ‘Oahu Community Correctional Facility (“OCCC”) grew from sixteen infected inmates on August 12, 2020 to eighty-six infected inmates on August 13, 2020.¹ By August 13, 2020, a total of “at least” 24 staff and 92 inmates were infected by COVID-19.² During the August 14 oral argument before this court, Public Safety Director Nolan Espinda stated

¹ Compare Department of Public Safety COVID-19 Update for 8/12/20 with Department of Public Safety COVID-19 Update for 8/13/20, Department of Public Safety, available at: <http://dps.hawaii.gov/blog/2020/03/17/coronavirus-covid-19-information-and-resources/>.

² COVID-19 Cases Reach New One Day Record of 355 Infections Death Toll Rises to 40, Hawai‘i COVID-19 Joint Information Center News Release, August 13, 2020, available at: <https://governor.hawaii.gov/newsroom/latest-news/hawaii-covid-19-joint-information-center-news-release-covic-cases-reach-new-one-day-record-august-13-2020/>.

"we expect a significant number more [positive results] as we mass test . . . throughout OCCC." This exponential rise in COVID-19 cases at OCCC constitutes an alarmingly high "positive test percentage," with seventy out of the 110 inmates tested on Tuesday, August 11, 2020 testing positive, or approximately sixty-four percent.³ In the face of a now florid lethal threat to the 968 inmates currently at OCCC, the Majority of this court once again⁴ rejects its constitutionally mandated duty to protect the inmates from cruel and unusual punishment.

A compelling warning about the life threatening conditions faced by Hawai'i's incarcerated population was communicated to this court by the Office of the Public Defender ("Public Defender") over four months ago, on March 26, 2020, when it requested this court to direct DAVID Y. IGE, Governor, State of Hawai'i, NOLAN P. ESPINDA, Director, State of Hawai'i Department of Public Safety ("DPS"), and EDMUND (FRED) HYUN, Chairperson, Hawai'i Paroling Authority (collectively, "Respondents"), to "take immediate steps to significantly reduce the population of its Correctional Centers and Correctional

³ According to the Department of Public Safety COVID-19 Update for 8/13/20, 110 inmates were tested, with seventy testing positive and forty testing negative. Department of Public Safety COVID-19 Update for 8/13/20, Department of Public Safety, available at: <https://dps.hawaii.gov/wp-content/uploads/2020/03/RELEASE-PSD-COVID19-Update-8.13.20.pdf>.

⁴ Amended Dissent Re: Order Concluding Matters in This Consolidated Proceeding, Ofc. Of Public Defender v. David Y. Ige et al, SCPW-20-0000213, docket #191, filed Jun. 8, 2020.

Facilities to prevent the massive loss of life and harm that the spread of COVID-19 would cause in such facilities.” Petition for Writ of Mandamus at 1, Ofc. of Public Defender v. David Y. Ige et al, SCPW-20-0000213, docket #1, filed Mar. 26, 2020.

On behalf of the incarcerated citizens it represents, the Public Defender notified this court of its constitutional duty to protect those in state custody from the highly contagious, potentially fatal COVID-19 disease:

Both pretrial detainees and people sentenced to a term in prison have a right to a sanitary and safe detention environment. For the 2,501 people sentenced to prison or jail in Hawai‘i and the 1,414 people whose parole or probation was revoked, the Eighth Amendment and article I, section 12 of the Hawai‘i Constitution impose on the government an affirmative duty to provide conditions of reasonable health and safety to the people it holds in its custody:

[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment[.]

DeShaney v. Winnebago Cty. Dept. of Soc. Servs., 489 U.S. 189, 199-200 (1989). Conditions that pose an unreasonable risk of future harm violate the Eighth Amendment’s prohibition against cruel and unusual punishment, even if that harm has not yet come to pass. Thus, the government cannot “ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year.” Helling v. McKinney, 509 U.S. 25, 33 (1993). For example, inmates cannot be commingled with others having infectious maladies such as hepatitis and venereal disease. Hutto v. Finney, 437 U.S. 678, 682 (1978); Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974). An Eighth Amendment violation is established even though the plaintiff cannot yet “prove that he is currently

suffering serious medical problems caused by" the exposure. Helling, 509 U.S. at 32. Here, absent dramatic action by this Court and the government, 3,750 people are at high risk of contracting COVID-19 in the event of an outbreak by being held in overcrowded conditions in violation of their Eighth Amendment rights. See Wright v. Rushen, 642 F.2d 1129, 1133 (9th Cir. 1981) (conditions of confinement must be analyzed in context, and courts must "consider the effect of each condition in the context of the prison environment, especially when the ill-effects of particular conditions are exacerbated by other related conditions."); Brown v Plata, 563 U.S. 493, 131 S.Ct. 1910, 179 L.Ed.2d (2011) (upholding order from a three-judge panel requiring California to reduce its prison population to remedy unconstitutional conditions regarding mental health and medical care).

Id. at 19-21.

In support of the Public Defender's plea that incarcerated citizens be protected from this deadly virus, the American Civil Liberties Union of Hawai'i filed the sworn declaration of Dr. Pablo Stewart, an experienced medical expert, and court-appointed monitor of prison conditions. Dr. Stewart attested to the urgent action required to avoid a disastrous outbreak of COVID-19 at OCCC. Four months ago, Dr. Stewart warned that unless social distancing and reduction of the inmate population to design capacity was achieved, "a disastrous outbreak of COVID-19" would occur:

8. Last, I am intimately familiar with DPS correctional facilities. Since July 2019, I have been working as the attending psychiatrist supervising psychiatric residents from the John A. Burns School of Medicine Department of Psychiatry, where we provide psychiatric care to people detained at [OCCC]. Also, since the middle of March 2020, I have been visiting and providing care at OCCC at least four times per week. I thus have become familiar with the jail's conditions and DPS's response to the novel coronavirus.

. . . .

11. It is from this unique vantage point—as someone who has over three decades of correctional health care experience, who serves as a court-appointed monitor in a prison conditions lawsuit, and who has been inside OCCC as recently as this morning—that I share my observations about DPS’s efforts to address COVID-19 within its correctional facilities.

12. In short, the present efforts to safeguard against a COVID-19 outbreak within DPS facilities are dangerously inadequate. I urge the Court not only to take action to reduce the jail and prison populations, but to do so immediately.

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17. Further, while I have heard of DPS reports stating that the OCCC population is smaller than it was a month ago, one would not know that from visiting the facility. As a clinician who moves throughout the facility almost daily, I have not observed any appreciable reduction in the jail population. The end result is that detainees are no more able to maintain social distance and proper hygiene today than they were one month ago.

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21. In reviewing the Special Master’s Interim Report, I noticed that there was no inclusion or recommendation of a population target to deal with the COVID-19 pandemic. It is my opinion that the failure to include a population reduction target will be fatal to any attempt to meaningfully achieve the larger goal of preventing a disastrous outbreak of COVID-19 within Hawaii jails and prisons. A population reduction target is absolutely necessary here.

22. A target means that the process will result in meaningful changes that will permit people in DPS facilities to remain safe despite the ongoing threat posed by COVID-19. A target also ensures accountability, by giving all stakeholders in the system a number to work towards. Without a target, each actor in the system is drifting along without any sort of clear direction. That will also almost definitely mean that the status quo will not change. With all due respect to judges and prosecutors who made initial determinations regarding bail, or opposing release, that may have been sound originally, if the Court does not impose some firm mandate, those actors will have no reason to change their minds and order or recommend release—and the status quo will remain in place.

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26. It is clear to me that a much more significant population reduction must be achieved within DPS facilities. I spent time over the past week reviewing the

relevant data on DPS jails and prisons. Based on that review, and my thirty-plus years of expertise in correctional health care oversight, it is my opinion that the first step that the Court should take is to impose on all stakeholders the mandatory goal of reaching 100% of design bed capacity.

Declaration of Pablo Stewart, M.D. at 3-8, Ofc. of Public Defender v. David Y. Ige et al, SCPW-20-0000213, docket #80, filed April. 13, 2020.

No evidence has countered the expert testimony this court received from Dr. Pablo; no expert has disagreed with his conclusion that reduction of the inmate population to design capacity of 628 and implementation of social distancing are required to avoid a life-threatening outbreak.

Dr. Stewart's prediction of the "disastrous outbreak" was prescient. This court did not order reduction of the population to design capacity; nor did it require social distancing to be implemented.⁵ Instead, a special master was appointed who failed to achieve a "meaningful decrease in the number of inmates held at the Oahu Community Correctional Center[.]" Concurrence re Third Interim Order re Special Master's Initial Report and Recommendations at 2, Ofc. of Public Defender v. David Y. Ige et al, SCPW-20-0000213, docket #110,

⁵ The Majority of this court ordered "both cases [] closed" and terminated the service of the Special Master. Order Concluding Matters, Ofc. of Public Defender v. David Y. Ige et al, SCPW-20-0000213, docket #187, filed June 5, 2020. The Hawai'i Correctional Systems Oversight Commission did not conclude that the conditions at OCCC were no longer in need of change. It has recommended the establishment of reduced "Interim [population] Capacities that will be applicable during a pandemic or other situation that results in the quarantine or extended lock down of inmates" in order to prevent the spread of COVID-19. DPS Oversight Comm. Communications (May 1 to May 13) at 4, Ofc. of Public Defender v. David Y. Ige et al, SCPW-20-0000213, docket #150, filed May 15, 2020.

filed April. 24, 2020. Foreseeably, the population at OCCC has increased since the Majority's Order Concluding Matters on June 5, 2020. Order Concluding Matters, Ofc. of Public Defender v. David Y. Ige et al, SCPW-20-0000213, docket #187, filed June 5, 2020. As a consequence of the failure to achieve design capacity and implement social distancing, the population is now 340 inmates above the design capacity. As predicted, COVID-19 is spreading uncontrolled within OCCC.⁶ Extreme crowding has necessitated the placement of two COVID-19 infected inmates in a cell.

Dr. Stewart warned that a disastrous outbreak in Hawai'i's correctional facilities would quickly overwhelm our health facilities, diverting much-needed medical resources from the surrounding communities:

19. Everyone is put at risk by the failure to take meaningful action in Hawai'i's correctional facilities. It goes without saying that people detained or incarcerated will suffer most. And within those populations, given that an estimated 32% of people in prisons and 40% of people in jail report having at least one disability, they will be particularly susceptible to COVID-19. For example, people with mental health conditions will only see their conditions exacerbated by isolation and quarantine. And once an outbreak breaks out of the jail walls—as will be inevitable given the high daily rate of “churn” in and out of correctional facilities—it will overwhelm local hospitals and everyone's health will suffer.

⁶ There are currently 968 inmates at OCCC, which is 340 inmates beyond design capacity. At the time this court filed its Order Concluding Matters in SCPW-20-0000213, on June 5, 2020, the population at OCCC was 954. Department of Public Safety COVID-19 Informational and Procedural Updates, Department of Public Safety, June 5, 2020, available at: <https://dps.hawaii.gov/wp-content/uploads/2020/03/RELEASE-PSD-COVID-19-updates-6.5.20-final.pdf>.

20. As a court monitor over Illinois's jails and prisons, I have observed up close what happens when steps are not taken fast enough. While many would believe that what happens in correctional facilities remains contained in those facilities, that is a dangerous and untrue belief. I have observed how COVID-19 has recently gained a strong foothold in a major Illinois detention facilities [sic]. Those outbreaks have gotten correctional staff sick, which in turn has reduced the ability of the facility (which already is limited in its medical care capacity) to treat people onsite. This in turn means that the local hospitals and health care facilities are being overwhelmed by sick people in correctional facilities. The fate of those who are in our jails and prisons are inextricably intertwined with our broader community.

Declaration of Pablo Stewart, M.D. at 6-7, Ofc. of Public Defender v. David Y. Ige et al, SCPW-20-0000213, docket #80, filed April. 13, 2020 (some emphasis added).

The specter of a "catastrophic outbreak" of COVID-19 within OCCC that threatens the availability of emergency health care for 'Oahu's free citizens is upon us. The increase of new COVID-19 cases at OCCC is now exponential. Soon, 'Oahu's emergency rooms likely will be at capacity, with sick inmates competing with free citizens for life-saving care in the state's emergency rooms and intensive care units.

Our community may still have a chance to avoid the catastrophe the Public Defender's office and Dr. Stewart's unrebutted expert testimony sought to prevent more than four months ago. Every remedy requested by the Public Defender's August 13, 2020 Petition for an Extraordinary Writ and/or Writ of Mandamus is reasonable and should be granted in order to avoid this dire, yet entirely foreseeable risk to the incarcerated population, correctional staff, and the public:

To mitigate the harm that the COVID-19 pandemic will inflict upon people incarcerated and detained in prison and jail, correctional staff, and the people of Hawai'i, Petitioner respectfully requests, at minimum, the following relief:

1. Order the DPS to adhere to the CDC's Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in all correctional centers and correctional facilities.

2. Order testing for COVID-19 for all inmates, staff and ACOs.

3. Appoint a public health expert to enter into all correctional centers and correctional facilities and review protocols, the ability to social distance, and make recommendations.

4. Order the Circuit, Family and District Courts, the Department of Public Safety, and the Hawai'i Paroling Authority to reduce the population of its Correctional Centers and Correctional Facilities to allow for the social separation and other measures recommended by the CDC to prevent the spread of COVID-19 by taking immediate steps to reduce the population of its Correctional Centers and Correctional Facilities to their design capacity.

5. Order the Circuit, Family and District Courts that when adjudicating motions for release, (1) release shall be presumed unless the court finds that the release of the inmate would pose a significant risk to the safety of the inmate or the public; (2) design capacity (as opposed to operational capacity) of the correctional center or facility shall be taken into consideration; (3) and the health risk posed by the COVID-19 pandemic. Motions for release based on the foregoing are for the following categories of inmates:

a. Inmates serving a sentence (not to exceed 18 months) as a condition of felony deferral or probation except for (i) inmates serving a term of imprisonment for a sexual assault conviction or an attempted sexual assault conviction; or (ii) inmates serving a term of imprisonment for any felony offense contained in HRS chapter 707, burglary in the first or second degree (HRS §§ 708-810, 708-811), robbery in the first or second degree (HRS §§ 708-840, 708-841), abuse of family or household members (HRS § 709- 906(7)&(8)), and unauthorized entry in a dwelling in the first degree and in the second degree as a class C felony (HRS §§ 708-812.55, 708-812.6(1) & (2)), including attempt to commit these specific offenses (HRS §§ 705-500, 705-501).

b. Inmates serving sentences for misdemeanor or petty misdemeanor convictions except those convicted of abuse of family or household members (HRS § 709-906), violation of a temporary restraining order (HRS § 586-4), violation of an order for protection (HRS § 586-11), or violation of a restraining order or injunction (HRS § 604-10.5).

c. All pretrial detainees charged with a petty misdemeanor or a misdemeanor offense, except those charged with abuse of family or household members (HRS § 709-906), violation of a temporary restraining order (HRS § 586-4), violation of an order for protection (HRS § 586-11), or violation of a restraining order or injunction (HRS § 604-10.5).

d. All pretrial detainees charged with a felony, except those charged with a sexual assault or an attempted sexual assault, any felony offense contained in HRS chapter 707, burglary in the first or second degree (HRS §§ 708-810, 708-811), robbery in the first or second degree (HRS §§ 708-840, 708-841), abuse of family or household members (HRS § 709-906(7)&(8)), and unauthorized entry in a dwelling in the first degree and in the second degree as a class C felony (HRS §§ 708-812.55, 708-812.6(1) & (2)), including attempt to commit these specific offenses (HRS §§ 705-500, 705-501).

6. Order the Circuit, Family and District Courts to suspend the custodial portion of such sentence until the conclusion of the COVID-19 pandemic or deemed satisfied for individuals serving intermittent sentences.

7. Order that the practice of no cash bail, including the release of inmates on their own recognizance, on signature bonds, or on supervised release, should be regularly employed, and pretrial detainees who are poor and not a risk to public safety or a flight risk should not be held simply because they do not have the means to post cash bail.

8. Order the Hawai'i Paroling Authority to move forward to expeditiously address requests for early parole consideration, including conducting hearings using remote technology. The Hawai'i Paroling Authority should also consider release of inmates who are most vulnerable to the virus, which includes inmates who are 65 years old and older, have underlying conditions, who are pregnant, and those inmates being held on technical parole violations (i.e. curfew violations, failure to report as directed, etc.) or who have been granted community or minimum security classifications and are near the end of their sentences. The Paroling Authority shall prepare and provide periodic progress reports to the parties of their efforts and progress in this respect. The list should include the names of the inmates who have been granted

release, the names of the inmates who are under consideration for release, and the names of the inmates who were considered for release but for whom release was denied.

9. Order the DPS to cooperate and be responsive to the Hawai'i Correctional Systems Oversight Commission's requests with respect to reconsidering, lowering and monitoring the operational capacities of Hawaii correctional centers and facilities, and with respect to the conditions of confinement during the COVID-19 pandemic.

Petition for Writ of Mandamus at 14-6, Ofc. of Public Defender v. David Y. Ige et al, SCPW-20-0000213, docket #1, filed Mar. 26, 2020.

The Public Defender's requested relief is grounded in the urgent need for immediate action by this court. It is narrowly drawn to protect the public from the release of those who have committed violent offenses. And it calls for the participation of an expert to achieve social distancing and reduction of the population to design capacity--a resource of critical importance in light of the position of public safety that it is "impossible for the State's correctional facilities to remain free of COVID-19." DPS Response to Petition at 2, In re Individuals in Custody of State of Hawaii, SCPW-20-0000509, docket #9, filed Aug. 14, 2020. Public Safety's resignation to the presence of COVID-19 at OCCC is unsupported by evidence or expert opinion. It is directly contrary to Dr. Stewart's expert opinion that the inmates and staff can be protected from COVID-19. Thus, the immediate appointment of the requested expert will provide Public Safety with the expertise it now lacks to

stop the surge of COVID-19 in OCCC and eventually remove it altogether.

Rather than act immediately to implement the relief that could protect our community from the rampant, contagious, and life-threatening infection at OCCC, the Majority chooses to request information and forego immediate implementation of measures to achieve social distancing and reduction of the population to design capacity. While I have no objection to the Majority's decision to request data about incarcerated people at OCCC, this court's constitutional duty requires more than information gathering at this time.⁷ Ample evidence received during the past five months establishes the obligation of this court to order the relief requested by the Public Defender. It is now our constitutional duty, under the Eighth and Fourteenth Amendments to the U.S. Constitution and article I, sections 5 and 12 of the Hawai'i Constitution, to end the cruel and unusual punishment of the incarcerated people at OCCC and provide them an environment safe from the threat of COVID-19.

Without intervention by this court, the failure of the Department of Public Safety to provide constitutionally required safe conditions for incarcerated citizens at OCCC will continue.

⁷ With less than a sixth of the population at OCCC having received COVID-19 tests and no time-frame established for when the remaining population will be tested, it is clear that this court cannot await further testing results before taking the necessary measures to reduce the population at OCCC to design capacity.

The men and women in custody at OCCC and the staff with whom they share the threat of COVID-19 have yet to receive meaningful protection from the surging virus that threatens their lives.

I respectfully dissent.

DATED: Honolulu, Hawai'i, August 17, 2020.

/s/ Michael D. Wilson

Associate Justice

