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SCPW-20-0000509

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

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IN THE MATTER OF INDIVIDUALS IN CUSTODY

OF THE STATE OF HAWAI‘I

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ORIGINAL PROCEEDING

CONCURRENCE AND DISSENT ORDER RE:  
PETTY MISDEMEANOR AND MISDEMEANOR DEFENDANTS  
(By: Wilson, J.)

I applaud the Majority for ordering the direct release of certain classes of inmates from the ‘Oahu Correctional Center (“OCCC”) without the unnecessary delay of hearings. However, the categories of inmates identified for potential release and the prerequisite conditions imposed by the Majority demonstrate that the Majority continues to misapprehend the urgency and severity of the current crisis. The present incarcerated population of OCCC is approximately 968 men and women. The Majority’s Order will allow the release of too few inmates to affect the cruel and unusual conditions at OCCC and it

discriminates against inmates in a manner that perpetuates the unconstitutional conditions.

I. **The Majority's Order fails to establish a meaningful population reduction target**

As noted in the August 15, 2020 Dissenting Order, the goal of this court must be to immediately reduce the population at OCCC to design capacity so as to allow for meaningful social distancing. Dissenting Order at 4, In re Individuals in Custody of State of Hawaii, SCPW-20-0000509, docket #15, filed Aug. 15, 2020. To do so, court intervention is required. Medical expert and experienced court-appointed prison monitor Dr. Pablo Stewart explained 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." Declaration of Pablo Stewart, M.D. at 7, Ofc. of Public Defender v. David Y. Ige et al, SCPW-20-0000213, docket #80, filed Apr. 13, 2020.

Without a specific and measurable population reduction target, this court's actions amount to a belated, unsuccessful effort that will not protect the incarcerated citizens at OCCC from the cruel and unusual conditions that threaten their lives. Dr. Stewart noted that "[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.”

Id.

**II. The Majority Order fails to include for release those inmate categories identified by the Public Defender**

Despite the fact that the Majority’s Order does not include a population reduction target, I support all efforts by this court to urgently reduce the population at OCCC. However, the Majority’s Order must be broadened to include the categories of inmates identified for potential release by the Public Defender.<sup>1</sup>

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<sup>1</sup> The Public Defender identified the following categories for release:

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).

(. . . continued)

The Majority's order also discriminates against a select class of men and women incarcerated at OCCC: those who have been accused or convicted of a petty misdemeanor or misdemeanor and have COVID-19, are awaiting test results or who show symptoms (hereinafter "COVID-19 discrimination classifications"). Those who fall into these COVID-19 discrimination classifications are not subject to release. Under this regime, incarcerated citizens who otherwise qualify for release will not be released if they are within the COVID-19 discrimination classifications.

The classifications are arbitrary. People who are charged with petty misdemeanors punishable by no more than

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(continued. . . )

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).

Dissenting Order at 9-11, In re Individuals in Custody of State of Hawaii, SCPW-20-0000509, docket #15, filed Aug. 15, 2020.

thirty days of incarceration are held simply because they are awaiting a test; whereas a similarly situated person charged with a petty misdemeanor who has not been tested will be released. No evidence justifies discriminating against the citizen who is awaiting a test. There is no evidence that a pretrial petty misdemeanor detainee without COVID-19 symptoms awaiting a test would be more of a threat to the community than one who is not awaiting a test.<sup>2</sup> Yet, the Majority arbitrarily elects to release the one who has not been tested and subject the one who is awaiting the test to the life threatening conditions within OCCC.

The conclusion is inescapable that releasing both citizens would serve laudatory dual purposes that protect free citizens in our community as well as the incarcerated citizens at OCCC: first, they are released before they contract COVID-19<sup>3</sup> and so are not a public health threat to the community; second, they do not remain in the prison where the virus is escalating

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<sup>2</sup> The risk of introducing COVID-19 from OCCC into the community has been minimized by requiring released inmates to self-isolate for fourteen days, wear a mask when within six feet of others, and immediately report the development of COVID-19 symptoms to the Department of Health. Order re Petty Misdemeanor and Misdemeanor Defendants at 3-4, In re Individuals in Custody of State of Hawaii, SCPW-20-0000509, docket #17, filed Aug. 16, 2020.

<sup>3</sup> While an inmate is awaiting a COVID-19 test, there is no evidence that the inmate has the virus.

exponentially and become carriers that will infect other inmates.

The Majority's discrimination against accused and convicted petty misdemeanants and misdemeanants based on the status of a COVID-19 test violates their right to be free from the cruel and unusual conditions present at OCCC.

All the Majority's COVID-19 discrimination classifications are pernicious. The incarcerated citizens accused or convicted of petty misdemeanors and misdemeanors were placed in confinement per the authority of the state. The state failed to take reasonable measures to protect them from the lethal threat of COVID-19. It is a striking injustice to now discriminate against them solely because they are awaiting a test, showing symptoms, or have the disease. Once they are released, pursuant to the Majority's order, the defendants are subject to conditions that protect the public. They must self-quarantine, wear a mask, and report to the court for court review. There is no evidence to suggest the defendants will not comply with these conditions. Thus, there is no public health justification to discriminate against those within the COVID-19 discrimination classifications who have, or may have, COVID-19 as a result of state incarceration.

Those within the COVID-19 discrimination classifications remain in custody solely based on the

consequences of the state's failure to provide adequate protection from COVID-19. The incarceration is unrelated to any conduct of the defendant pertaining to the petty misdemeanor or misdemeanor offense for which he or she has been accused or convicted.

Respectfully, the Majority's Order fails to reduce the inmate population at OCCC sufficiently to address the cruel and unusual conditions of incarceration. The Majority's Order also unduly discriminates against inmates accused or convicted of petty misdemeanors and misdemeanors who are awaiting tests results for COVID-19, have symptoms, or have tested positive for COVID-19.

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

/s/ Michael D. Wilson

Associate Justice

