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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

DISSENT TO (1) ORDER GRANTING RESPONDENT STEVEN S. ALM’S  
MOTION TO AMEND THE AUGUST 27, 2020 ORDER RE:  
PETTY MISDEMEANOR, MISDEMEANOR, AND FELONY MATTERS  
AND (2) ORDER TO SHOW CAUSE  
(By: Wilson, J.)

Introduction

Over seven months ago, on August 27, 2020, this court responded to the overcrowded conditions and the “COVID-19 pandemic . . . caused . . . public health emergency” at the O‘ahu Community Correctional Center (“OCCC”) by ordering the release of people on their own recognizance or supervised release who are awaiting trial for misdemeanors and petty misdemeanors.<sup>1</sup>

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<sup>1</sup> Misdemeanor charges of abuse of family or household members arising under HRS 709-906(7) and (8) were excluded from consideration under the Order. Order Re: Petty Misdemeanor, Misdemeanor, and Felony Defendants at 4, In re: Individuals in Custody of the State of Hawai‘i, SCPW-20-0000509, docket #81, filed Aug. 27, 2020 [hereinafter “Order”].

Order Re: Petty Misdemeanor, Misdemeanor, and Felony Defendants at 2, In re: Individuals in Custody of the State of Hawai'i, SCPW-20-0000509, docket #81, filed Aug. 27, 2020 [hereinafter "Order"]. To provide for protection of the public and ensure attendance of the accused misdemeanants at future proceedings, the Order also instructed the trial courts that they "may impose conditions of release under HRS § 804-7.1." Order at 4. In accordance with the Order, misdemeanor and petty misdemeanor pretrial detainees have been released from custody during the past seven months; however, the conditions of confinement at OCCC continue to be overcrowded<sup>2</sup> and the COVID-19 pandemic remains an officially declared statewide emergency.<sup>3</sup>

The August 27, 2020 Order Provides Adequate Public Safety Protection

The government now contends that this court's Order does not provide trial courts with "the authority, and thus the discretion, to address each offender on the individual facts of

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<sup>2</sup> As of March 22, 2021 there are 873 inmates at OCCC. Dep't of Pub. Safety, Department of Public Safety Weekly Population Report (Mar. 22, 2021), <https://dps.hawaii.gov/wp-content/uploads/2021/03/Pop-Reports-Weekly-2021-03-22.pdf>. OCCC's current population exceeds the facility's design capacity of 628, see id., which provides cause for concern as reduction of the population to design capacity was a reason for this court's intervention nearly a year ago on April 15, 2020, Interim Order at 2, Off. of Pub. Def. v. Ige, SCPW-20-0000213, docket #88, filed Apr. 15, 2020.

<sup>3</sup> See Eighteenth Proclamation Related to COVID-19 Emergency, Off. of Governor of Haw. (Feb. 12, 2021), [https://governor.hawaii.gov/wp-content/uploads/2021/02/2102078-ATG\\_Eighteenth-Proclamation-Related-to-the-COVID-19-Emergency-distribution-signed.pdf](https://governor.hawaii.gov/wp-content/uploads/2021/02/2102078-ATG_Eighteenth-Proclamation-Related-to-the-COVID-19-Emergency-distribution-signed.pdf) (last visited Mar. 30, 2021).

a case to ensure public safety and deterrence.”<sup>4</sup> The prosecutor seeks amendment of the Order to exclude all petty misdemeanor and misdemeanors in chapter 707 from the release provisions of the Order.<sup>5</sup> In the view of the government, it is a threat to public safety to allow the release provisions to continue to apply to even those who are incarcerated awaiting trial for the petty misdemeanors of indecent exposure and mutual affray assault third. I respectfully dissent from the Majority’s decision to endorse this surrender of constitutionally required protection of the incarcerated people awaiting trial for misdemeanors and petty misdemeanors at OCCC.

The single case relied upon by the prosecutor for the proposition that the misdemeanor and petty misdemeanor release provisions of the Order unduly limit the court’s discretion to protect the community is inapplicable. The prosecutor in that case did not request the court to impose conditions of release for the defendant, Randy Jacob, during the three times he appeared in court for arraignment on March 4, March 9, March 12, 2021; the court gave no indication of being unable to exercise

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<sup>4</sup> Resp’t Steven S. Alm’s Mot. to Amend the August 27, 2020 Order Re: Petty Misdemeanor, Misdemeanor and Felony Defendants at 3, In re: Individuals in Custody of the State of Hawai’i, SCPW-20-0000509, docket #112, filed Mar. 17, 2021 [hereinafter “Mot. to Amend”].

<sup>5</sup> There are fourteen misdemeanors and petty misdemeanors in chapter 707. See HRS §§ 707-704; 707-706; 707-712; 707-712.6; 707-714; 707-714.5; 707-717; 707-722; 707-727; 707-733; 707-734; 707-759; 707-767; 707-786.

sufficient discretion to protect the public; and, rather than release Jacob, the court took him into custody when he appeared in court accused of the misdemeanor offense of sex assault in the fourth degree on March 17, 2021. At the next court appearance two days later on March 19, 2021, the court exercised its discretion to order Jacob to remain in custody to be examined for fitness and penal responsibility pursuant to chapter 704.

The prosecutor's criticism of the trial court's release of Jacob arises from the conclusion that Jacob "has reoffended multiple times but . . . continues to be released by the trial courts due to this Court's August 27, 2020 Order mandating the release of misdemeanants and petty misdemeanants." Mot. to Amend at 3. Jacob had not reoffended when he appeared before the district court on March 4, March 9, March 12, 2021. He was accused of misdemeanor offenses, but had not been convicted. Thus, the release decisions of the court concerned a pretrial defendant who stood accused of several misdemeanor offenses, not one proven to have reoffended.

The prosecutor's contention that Jacob continued to be released by the court due to this court's Order is also unsupported. As noted, Jacob was eventually taken into custody. During the three court appearances prior to being taken into custody there is no evidence the court was prevented by the

Order from imposing conditions on Jacob's release that would adequately protect the public. It is common practice pursuant to HRS § 804-7.1<sup>6</sup> to require a defendant awaiting trial on

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<sup>6</sup> HRS § 804-7.1 states:

Upon the defendant's release on bail, recognizance, or supervised release . . . the court may enter an order:

- (1) Prohibiting the defendant from approaching or communicating with particular persons or classes of persons, except that no such order should be deemed to prohibit any lawful and ethical activity of defendant's counsel;
- (2) Prohibiting the defendant from going to certain described geographical areas or premises;
- (3) Prohibiting the defendant from possessing any dangerous weapon, engaging in certain described activities, or indulging in intoxicating liquors or certain drugs;
- (4) Requiring the defendant to report regularly to and remain under the supervision of an officer of the court;
- (5) Requiring the defendant to maintain employment, or, if unemployed, to actively seek employment, or attend an educational or vocational institution;
- (6) Requiring the defendant to comply with a specified curfew;
- (7) Requiring the defendant to seek and maintain mental health treatment or testing, including treatment for drug or alcohol dependency, or to remain in a specified institution for that purpose;
- (8) Requiring the defendant to remain in the jurisdiction of the judicial circuit in which the charges are pending unless approval is obtained from a court of competent jurisdiction to leave the jurisdiction of the court;
- (9) Requiring the defendant to submit to the use of electronic monitoring and surveillance;
- (10) Requiring the confinement of the defendant in the defendant's residence;
- (11) Requiring the defendant to satisfy any other condition reasonably necessary to ensure the appearance of

(continued . . .)

supervised release to report regularly to court, to abstain from frequenting certain geographic areas, to refrain from the use of illegal drugs, etc. Conditions of supervised release are monitored by the intake service center. Violations of the conditions of release are punishable by revocation of release and incarceration.<sup>7</sup> Thus, the court was equipped with ample authority to impose conditions of release to protect the public and, if necessary, take Jacob into custody if he violated the conditions.

The condition of release contained in the Order of this court for misdemeanors and petty misdemeanors has ensured that those accused of the least serious crimes do not lose their freedom because they are poor or homeless. This condition also benefits the incarcerated people at OCCC--the state's largest correctional facility--who face overcrowded conditions during

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(. . . continued)

the defendant as required and to ensure the safety of any other person or community; or

(12) Imposing any combination of conditions listed above;

provided that the court shall impose the least restrictive non-financial conditions required to ensure the defendant's appearance and to protect the public.

The judicial officer may revoke a defendant's bail upon proof that the defendant has breached any of the conditions imposed.

<sup>7</sup> "After hearing, and upon finding that the defendant has intentionally violated reasonable conditions imposed on release on bail, recognizance, or supervised release, the court may impose different or additional conditions upon defendant's release or revoke defendant's release on bail, recognizance, or supervised release." HRS § 804-7.3.

the COVID-19 emergency.<sup>8</sup> A reduced population reduces the risk to the incarcerated population, the correctional staff, and the outside community of contracting and spreading COVID-19. Excluding all chapter 707 offenses from the Order's release provisions would remove the public health protection afforded to incarcerated people by the original Order and would contribute to the overcrowding this court sought to prevent in the first place.

#### Dissent to the Order to Show Cause

The court's order to show cause is premised on the conclusion that the severity of the threat to OCCC inmates from the COVID-19 emergency has reduced to a level that no longer justifies court intervention. Paradoxically, this premise is directly in opposition to the position also taken by the Majority that the threat of COVID-19 at OCCC is so severe, that it is necessary to protect judges and court staff from the exposure to infected inmates by suspending inmates' rights to

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<sup>8</sup> The prosecutor proposes that the efforts of the Department of Public Safety make unnecessary the continued protection afforded by the condition. See Resp. of Dep't of Pub. Safety and Haw. Paroling Auth. to Resp't Steven S. Alm's Mot. to Amend the August 27, 2020 Order Re: Petty Misdemeanor, Misdemeanor and Felony Defendants, In re: Individuals in Custody of the State of Hawai'i, SCPW-20-0000509, docket #118, filed Mar. 24, 2021. This position fails to account for the persistent overcrowding at OCCC and the extensive measures necessary to prevent rapid spread of infection within OCCC.

attend in-person court proceedings under Rules 5 and 10 of the Hawaii Rules of Penal Procedure.<sup>9</sup>

This court exercised emergency jurisdiction over eleven months ago on April 15, 2020 with an admonition that “[e]fforts shall be undertaken to reduce the inmate population of correctional centers and facilities to design capacity.” Interim Order at 2, Off. of Pub. Def. v. Ige, SCPW-20-0000213, docket #88, filed Apr. 15, 2020. Nine days later, we again ordered that “[e]fforts shall continue to be undertaken to reduce the inmate population of correctional centers and facilities to design capacity.” Third Interim Order at 2, Off. of Pub. Def. v. Ige, SCPW-20-0000213, docket #108, filed Apr. 24, 2020. Subsequently, the conditions deteriorated, engendering widespread infection of inmates and staff.<sup>10</sup> In a cell designed for no more than two people, where three inmates infected with COVID-19 were housed, one inmate was beaten to death.<sup>11</sup> Twice, a

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<sup>9</sup> See Dissent to Amended Order Re: Felony Defendants (filed August 18, 2020); Order Re: Petty Misdemeanor, Misdemeanor, and Felony Defendants at Maui Community Correctional Center, Hawai‘i Community Correctional Center, and Kaua‘i Community Correctional Center (filed August 24, 2020); Order Re: Petty Misdemeanor, Misdemeanor, and Felony Defendants (filed August 27, 2020); and Order Denying Petitioner’s “Motion to Compel Compliance with This Court’s Orders” (filed September 1, 2020) at 27-37, In re: Individuals in Custody of the State of Hawai‘i, SCPW-20-0000509, docket #110, filed Feb. 18, 2021 [hereinafter “Omnibus Dissent”].

<sup>10</sup> See Omnibus Dissent at 10-11.

<sup>11</sup> Kevin Dayton, 2 Inmates Killed in 2 Weeks In Hawaii Correctional System, Honolulu Civil Beat (Sept. 1, 2020), <https://www.civilbeat.org/2020/09/2-inmates-killed-in-2-weeks-in-hawaii-correctional-system/>.



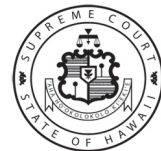
qualified medical expert experienced in monitoring prison conditions opined that conditions within OCCC were inconsistent with reasonable medical practices necessary to prevent the spread of infection.<sup>12</sup> The expert--who regularly provides psychiatric care at OCCC--has noted that the description of the conditions communicated to this court by DPS does not comport with the true conditions at OCCC.<sup>13</sup>

To date, the Department of Public Safety has failed to remedy the persistent overpopulation at OCCC, notwithstanding the history of infection that has transpired. At 873 inmates, the population far exceeds the design capacity of 628. In light of this record and the continuing pandemic emergency, the recent reduction in the infection rate does not provide a basis for an order to show cause premised on the assumption that the unconstitutional conditions at OCCC have ended.

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

/s/ Michael D. Wilson

Associate Justice



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<sup>12</sup> Apr. 13, 2020 Decl. of Pablo Stewart, M.D. at 4-5, Off. of Pub. Def. v. Ige, SCPW-20-0000213, docket #80, filed April 13, 2020 (describing the conditions in OCCC as "dangerously inadequate" and "a COVID-19 ticking time bomb"); Sept. 23, 2020 Decl. of Pablo Stewart, M.D. at 9, In re Individuals in Custody of Hawai'i, SCPW-20-0000509, docket #94, filed Oct. 27, 2020 (observing that "the inability to socially distance and overcrowding . . . [in OCCC] has stayed constant throughout the pandemic").

<sup>13</sup> See Sept. 23, 2020 Decl. of Pablo Stewart, M.D. at 4-10, In re Individuals in Custody of Hawai'i, SCPW-20-0000509, docket #94, filed Oct. 27, 2020.