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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 ORDER CONCLUDING PROCEEDING

(By: Wilson, J.)

Dr. Pablo Stewart,<sup>1</sup>--the expert whose three sworn statements submitted to this court remain unrebutted by expert testimony--concludes that "the health and safety measures that have been implemented inside DPS remain completely inadequate and ineffective at mitigating the risks and addressing the harms created by COVID-19."<sup>2</sup>

Dr. Stewart's opinion is based on his personal observations as a trained court monitor who has provided

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<sup>1</sup> Apr. 6, 2021 Decl. of Pablo Stewart, M.D. ¶ 3, In re Individuals in Custody of Hawai‘i, SCPW-20-0000509, docket #162, filed Apr. 8, 2021 [hereinafter "Apr. 6, 2021 Stewart Decl."].

<sup>2</sup> Id. ¶ 22.

psychiatric services at O'ahu Community Correctional Center ("OCCC") one to four times a week for the last year of the pandemic.<sup>3</sup> He explains that the testing and vaccination done by the Department of Public Safety ("DPS") could support the conclusion that zero inmates have been fully vaccinated:

So far, the State has presented no data on how many people--whether in Hawai'i at large or within DPS facilities--are fully vaccinated. Based on the State's data, it is possible that, at present, zero percent of the inmate population has been fully vaccinated. Additionally, DPS has not shared its plans on whether and when people will get a second dose. . . . Finally, DPS has shared nothing about the level of correctional staff vaccination.

Apr. 6, 2021 Stewart Decl. ¶ 25.

As an example of the failed testing and vaccination procedures at OCCC Dr. Stewart notes that during his thirteen months of work within OCCC he has never been tested:

Then, as now, what DPS is doing when it comes to COVID-19 testing remains a complete mystery to me. I have been visiting and working at OCCC at least once a week (and, at times, four times a week) consistently throughout the pandemic. In that entire 13-month period, no one at DPS has ever explained to me how DPS's testing program works. And throughout my entire time working at OCCC, I have never once been approached, offered, or mandated to get a COVID-19 test.

Apr. 6, 2021 Stewart Decl. ¶ 16. In Dr. Stewart's opinion, COVID-19 "remains a serious and lethal threat" to incarcerated people at OCCC.<sup>4</sup>

In support of his conclusion that the present conditions of incarceration are cruel and unusual he describes

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<sup>3</sup> Id. ¶¶ 8, 16.

<sup>4</sup> Id. ¶ 23.

the extreme toll to inmates from overcrowding in the midst of the COVID-19 threat:

In some ways, because DPS facilities are so overcrowded, DPS is engaging in mitigation strategies that end up doing even more harm to the people in their custody. For example, when someone suspected of having COVID-19 is brought into a quarantine module, the entire group of people in that module will restart their quarantine period, even if some of those people would have been nearing the end of their quarantine. The end result is that people are kept in a prolonged state of quarantine, which dramatically and negatively impacts their mental and physical well-being. . . .

Apr. 6, 2021 Stewart Decl. ¶ 22. Dr. Stewart emphasizes DPS's failures:

I truly mean this. Then, as now, DPS has failed to "ensure reasonably safe living conditions within OCCC." Decl. ¶ 8. Then, as now, "conditions inside OCCC remain dire and unsafe." Decl. ¶ 15. There is an absence of social distancing. Decl. ¶¶ 26-27. Hygiene practices are weak. Decl. ¶ 28. Cleaning and sanitation is inadequate. Decl. ¶¶ 29. Finally, the quarantining and medical isolation procedures implemented by DPS—including the use of what is in effect near--solitary confinement--are largely imperfect and directly worsen psychiatric conditions (for those who have them) and overall mental health. Decl. ¶¶ 30-32.

Apr. 6, 2021 Stewart Decl. ¶ 15.<sup>5</sup>

The crowding referred to by Dr. Stewart is approximately the same as it was in August 2020 when this court intervened with the intent to cause a reduction of the inmate population. The most recent figures cited by DPS place the population at OCCC at 878 inmates,<sup>6</sup> significantly in excess of

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<sup>5</sup> (citing Sept. 23, 2020 Decl. of Pablo Stewart, M.D., In re Individuals in Custody of Hawai'i, SCPW-20-0000509, docket #94, filed Oct. 27, 2020 [hereinafter "Sept. 23, 2020 Stewart Decl."])

<sup>6</sup> See Dep't of Pub. Safety, Department of Public Safety Weekly Population Report (Apr. 5, 2021), <https://dps.hawaii.gov/wp-content/uploads/2021/04/Pop-Reports-Weekly-2021-04-05.pdf>.

the design capacity of 628 that we cited as a goal approximately one year ago.<sup>7</sup> Since our original order referring to the design capacity goal, the Hawai'i Correctional System Oversight Commission ("Oversight Commission") has designated "infectious disease emergency capacities," the reduced population limits necessary to protect inmates during the COVID-19 pandemic; the limit recommended for OCCC is 425--approximately 450 less than the present number of inmates.<sup>8</sup> The severe crowding at OCCC requires incarceration of as many as three inmates in a cell,<sup>9</sup> with one person forced to sleep with his head next to the toilet.<sup>10</sup> Dr. Stewart confirms that men at OCCC "remain crammed in small cells, often on thin, decrepit mattresses, and without the ability to move around or get outside."<sup>11</sup>

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<sup>7</sup> See Interim Order at 2, Off. of Pub. Def. v. Ige, SCPW-20-0000213, docket #88, filed Apr. 15, 2020 ("Efforts shall be undertaken to reduce the inmate population of correctional centers and facilities to design capacity.").

<sup>8</sup> See Br. of Amicus Curiae ACLU at 20, In re Individuals in Custody of Hawai'i, SCPW-20-0000509, docket #162, filed Apr. 8, 2021 [hereinafter "ACLU Brief"].

<sup>9</sup> See Sept. 23, 2020 Stewart Decl. ¶ 27.

<sup>10</sup> Apr. 7, 2021 Decl. of George Cordero ¶ 9, In re Individuals in Custody of Hawai'i, SCPW-20-0000509, docket #162, filed Apr. 8, 2021 (summarizing an incarcerated individual's observation that "[t]o have all 3 people fit into each tiny cell, one person sleeps on the floor with his head next to the toilet").

<sup>11</sup> Apr. 6, 2021 Stewart Decl. ¶ 17.

The threat from overcrowding worsens with the recent increase in COVID-19 cases in the community:

The simple truth, from a public health standpoint, is that the COVID-19 dynamics in DPS facilities (and especially the jails) will mirror the dynamics in the broader Hawai'i community, given the high number of people who are cycling in and out of such facilities on a daily basis. And what we are seeing in the broader community is not a stabilization of infection rates, but rather a dramatic regression and uptick. In fact, during the past week, the 7-day average of daily COVID-19 cases reported in Hawai'i has generally been higher than the 7-day average that was reported on September 23, 2020, the day I submitted my last declaration.

Apr. 6, 2021 Stewart Decl. ¶ 20.

Dr. Stewart describes a "stark contrast" between the attitude of DPS and the approach of the Illinois Department of Corrections, with whom he is working to vaccinate inmates and "implement a very aggressive outreach and education program directed at the incarcerated populations."<sup>12</sup> "Alarmed" is his reaction to the State's "flippant attitude" as it encourages this court to ignore "the proportion of the incarcerated population that has declined to receive the COVID-19 vaccine in determining whether to lift emergency court measures."<sup>13</sup> Rather than refusing to accept accountability for the threat posed by inmates who decline vaccination, Dr. Stewart urges DPS and this court to help inmates understand the importance of being vaccinated:

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<sup>12</sup> Id. ¶ 29.

<sup>13</sup> Id. ¶¶ 27, 29.

Having worked with incarcerated people for 35 years, and in light of the long history of medical abuse and neglect within correctional systems, I know full well how distrustful incarcerated people can be of “the system.”

The State’s attitude toward this issue also raises serious questions both about what efforts DPS has actually made to inform incarcerated people, and on what basis the State is concluding that an inmate has “refused” a vaccine. The undertone of the State’s representations—including the State’s use of the word “refused”—is that incarcerated people do not matter. In other words, if a significant proportion of the incarcerated population chooses not to get vaccinated (for whatever reason), that is a decision that is “on them,” and that is not a valid reason to retain the public health and safety measures that would protect them from the serious harms posed by COVID-19.

Apr. 6, 2021 Stewart Decl. ¶¶ 27–28.

Dr. Stewart urges this Court to reject the “flippant attitude” and “rosy” statements of DPS<sup>14</sup> and to acknowledge the falsity of the proposition that “the conditions that necessitated swift action by this court in August 2020 are no longer prevalent.”<sup>15</sup> Instead we are implored to recognize that “COVID-19 poses just as serious a threat to people inside DPS today as it did in August 2020.”<sup>16</sup> Dr. Stewart cautions that to “make the exact same mistake . . . made last June by deciding, again, that the pandemic has subsided[ ]. . . would almost certainly be a deadly error.”<sup>17</sup>

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<sup>14</sup> Id. ¶ 29.

<sup>15</sup> Order to Show Cause at 2, In re Individuals in Custody of Hawai‘i, SCPW-20-0000509, docket #124, filed Mar. 31, 2021.

<sup>16</sup> Apr. 6, 2021 Stewart Decl. ¶ 18.

<sup>17</sup> Id. ¶¶ 30–31.

The Majority chooses not to heed Dr. Stewart and instead embraces the mirror-opposite view. Notwithstanding the entreaties contained in Dr. Stewart's sworn affidavit, the Majority concludes, "[T]he conditions that necessitated swift action by this court in August 2020 are no longer prevalent. Conclusion of this matter is therefore appropriate."<sup>18</sup>

In support, the Majority posits that the rate of positive cases in DPS facilities has declined since the petition was filed in August 2020. As noted previously, Dr. Stewart directly refutes the Majority's view that "the COVID-19 situation inside DPS facilities is "stabilizing."<sup>19</sup> The Majority's position fails to recognize that the "COVID-19 dynamics in DPS facilities . . . mirror the dynamics" in the broader community.<sup>20</sup> The recent dynamics of COVID-19 in Hawai'i

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<sup>18</sup> Order Concluding Proceeding at 2, In re Individuals in Custody of Hawai'i, SCPW-20-0000509, docket #164, filed Apr. 16, 2021.

<sup>19</sup> Apr. 6, 2021 Stewart Decl. ¶ 20.

<sup>20</sup> Dr. Stewart explains,

The simple truth, from a public health standpoint, is that the COVID-19 dynamics in DPS facilities (and especially the jails) will mirror the dynamics in the broader Hawai'i community, given the high number of people who are cycling in and out of such facilities on a daily basis. And what we are seeing in the broader community is not a stabilization of infection rates, but rather a dramatic regression and uptick. In fact, during the past week, the 7-day average of daily COVID-19 cases reported in Hawai'i has generally been higher than the 7-day average that was reported on September 23, 2020, the day I submitted my last declaration.

Id.

are alarming: as the ACLU emphasizes, between February 20 and April 3, the seven-day positive case average leaped from 40 to 117, a 192.5% increase.<sup>21</sup> And as previously noted, a state of emergency declared by the Governor remains in effect.<sup>22</sup>

The Majority's contention that "the conditions that necessitated swift action by this court in August 2020 are no longer prevalent" also ignores the chronic overcrowding that has been a signature purpose of our intervention in the last year. There is no acknowledgement by the Majority of the rampant infections that have coursed through Hawai'i's correctional facilities due to the crowded and unsanitary conditions that remain uncorrected according to Dr. Stewart's unrebutted attestations. To date, DPS reports that 1957 individuals in DPS custody have contracted COVID-19.<sup>23</sup> The Majority's apparent about-face and failure to acknowledge the continuing threat of overcrowding runs contrary to the position of the Oversight Commission, Dr. Stewart, and the previous orders of this court identifying design capacity as a critical component of reasonably safe incarceration during the COVID-19 emergency.

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<sup>21</sup> ACLU Brief at 4, 4 n.8.

<sup>22</sup> Nineteenth Proclamation Related to COVID-19 Emergency, Off. of Governor of Haw. (Apr. 9, 2021), [https://governor.hawaii.gov/wp-content/uploads/2021/04/2104031-ATG\\_Nineteenth-Emergency-Proclamation-for-COVID-19-distribution-signed.pdf](https://governor.hawaii.gov/wp-content/uploads/2021/04/2104031-ATG_Nineteenth-Emergency-Proclamation-for-COVID-19-distribution-signed.pdf).

<sup>23</sup> Dep't of Pub. Safety, Public Safety Department COVID-19 Testing Data, <https://dps.hawaii.gov/blog/2020/03/17/coronavirus-covid-19-information-and-resources/> (last visited Apr. 15, 2021).



Respectfully, the Majority's rejection of Dr. Stewart's expert opinion that "COVID-19 poses just as serious a threat to people inside DPS today as it did in August 2020" portends exacerbation of the COVID-19 emergency at OCCC. The effect of the Majority's decision will be to cancel the support trial judges received from this court to spare from the threat of COVID-19 infection people accused of nonviolent offenses held at OCCC. No longer will misdemeanants, petty misdemeanants, and those serving probation for nonviolent offenses be entitled to a presumption of release. Without the support of this court, trial judges are positioned to revert to the prior practices of requiring bail for those accused of nonviolent offenses who are experiencing homelessness or poverty. The "reversion order" of the Majority thus returns our correctional system to one that preserves and promotes overcrowding, subjects incarcerated people awaiting trial for nonviolent offenses to the threat of COVID-19 infection, and condones as punishment for nonviolent misdemeanors and petty misdemeanors incarceration under threat of the life threatening COVID-19 virus. All this, while the Majority simultaneously takes the conflicting position that the threat to judges and court staff from infected OCCC inmates is an emergency requiring the suspension of inmates' rights to

appear in court pursuant to Rules 5 and 10 of the Hawai'i Rules of Penal Procedure.<sup>24</sup>

Dr. Stewart aptly reflects:

I cannot comprehend why--or on what basis--we are in such a hurry to terminate the emergency public health measures that the Court implemented to protect the health and safety of people in the State's custody.

. . . .

I truly struggle to understand how or why the Court is now considering reverting to pre-pandemic practices.

Apr. 6, 2021 Stewart Decl. ¶¶ 12, 18.

The constitutional prohibition of cruel and unusual punishment constitutes the line beyond which lies a loss of humanity that is illegal. It is our court's duty to protect incarcerated people from punishment that crosses the line and becomes cruel. Respectfully, the Majority's order allows the line protecting the humanity of Hawai'i's incarcerated people to be crossed and in so doing condones cruel and unusual punishment of men and women who heretofore have been protected by this court from punishment that is cruel and unusual during the pandemic emergency.

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<sup>24</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.

## Conclusion

To protect judges from the lethal threat posed by inmates who have contracted COVID-19, the Majority exercised emergency jurisdiction to suspend the rights of all inmates to appear in court pursuant to Rules 5 and 10 of the Hawai'i Rules of Penal Procedure. The incarcerated people of Hawai'i are a more vulnerable population. They are captive. They deserve no less protection from the lethal threat of COVID-19 during the pandemic emergency. Emergency jurisdiction should be maintained by this court until the emergency ends or expert testimony establishes that reasonable measures--including reduction of the inmate population to design capacity--have been implemented to protect the incarcerated men and women of Hawai'i from cruel and unusual conditions.

DATED: Honolulu, Hawai'i, April 16, 2021.

/s/ Michael D. Wilson  
Associate Justice

