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SCPW-21-0000483

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

CONCURRENCE AND DISSENT OF MCKENNA, J., IN WHICH
WILSON, J., JOINS AS TO SECTIONS I AND III.A.

Since the late 1970s, Hawai'i, as with the rest of the United States, has been suffering from an over-incarceration epidemic. The over-incarceration epidemic is now overlaid with the COVID-19 pandemic. This has resulted in conditions that I believe violate constitutional rights of our incarcerated people. Therefore, although I would not grant the relief requested in the petition, I would grant the relief discussed below and would also provide the following guidance to our trial courts.

Hence, I respectfully concur and dissent.

I. Hawai‘i has been suffering from an over-incarceration epidemic that is now overlaid with the COVID-19 pandemic

From 1978 to 2016, Hawai‘i’s population increased by only 53%. During the same time period, however, Hawai‘i’s incarceration rate exploded by 670%, with the number of incarcerated people increasing from 727 to 5,602.¹ As explained by Lezlie Kī‘aha in 2016:²

The United States is currently the largest jailer in the world. Though it accounts for only 5% of the world’s total population, it holds 25% of the world’s prisoners, or nearly two-and-a-half million people. This epidemic of incarceration can be attributed to several factors, all of which led to the greater problem of mass incarceration, and consequently, the rise of the private prison industry.

In 1971, President Richard Nixon’s attack on drug use launched the country’s War on Drugs and the imposition of harsh prison sentences for drug offenses, including mandatory minimums. According to Michelle Alexander, civil rights attorney, scholar, and author of *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, “this policy single-handedly drove much of the increase in incarceration rates.”

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In Hawai‘i, non-violent crimes make up the greatest percentage of the offenses committed by incarcerated individuals.³

¹ HCR 85 Task Force, Creating Better Outcomes, Safer Communities: Final Report of the House Concurrent Resolution 85 Task Force on Prison Reform to the Hawai‘i Legislature 2019 Regular Session 1 (Dec. 2018) (“HCR 85 Task Force Report”), available at https://www.courts.state.hi.us/wp-content/uploads/2018/12/HCR-85_task_force_final_report.pdf, also available at <https://perma.cc/YDH5-PM9W>.

² Lezlie Kī‘aha, Thinking Outside the Bars: Using Hawaiian Traditions and Culturally-Based Healing to Eliminate Racial Disparities Within Hawai‘i’s Criminal Justice System (“Kī‘aha”), 17 Asian-Pac. L. & Pol’y J. 1 (2016).

³ Kī‘aha, supra note 2, at 4-5 (footnotes omitted) (emphasis added).

As explained by the Prison Policy Initiative ("PPI"), "[f]or four decades, the U.S. has been engaged in a globally unprecedented experiment to make every part of its criminal justice system more expansive and more punitive. As a result, incarceration has become the nation's default response to crime, with, for example, 70 percent of convictions resulting in confinement – far more than other developed nations with comparable crime rates." See Peter Wagner & Wendy Sawyer, States of Incarceration: The Global Context 2018, Prison Policy Initiative (June 2018), <https://www.prisonpolicy.org/global/2018.html>, also available at <https://perma.cc/U6UK-2Z68>.

According to PPI's "States of Incarceration: The Global Context 2021," 664 of every 100,000 people in the United States are incarcerated. See Emily Widra & Tiana Herring, States of Incarceration: The Global Context 2021, Prison Policy Initiative (September 2021), <https://www.prisonpolicy.org/global/2021.html>, also available at <https://perma.cc/ER9W-HPT8>. If every U.S. state were a country, thirty-four states would be the countries with the highest incarceration rates in the world. In other words, if the fifty U.S. states were treated as countries, El Salvador, with an incarceration rate of 562 out of 100,000 people (making it the country with the second highest incarceration after the U.S.) would be ranked thirty-fifth.

PPI reports Hawai'i's 2021 incarceration rate at 439 out of every 100,000 people, lower than the national average of 664. If the fifty states were treated as countries, however, Hawai'i would still be the country with the forty-fifth highest incarceration rate. In other words, in addition to the thirty-nine U.S. states that exceed our incarceration rate, only five other actual countries exceed our incarceration rate: El Salvador (562), Turkmenistan (552), Rwanda (515), Cuba (510), and Thailand (445).⁴

Hawai'i's 439 out of 100,000 2021 incarceration rate significantly exceeds that of South Africa (248), Taiwan (243), Israel (234), the Philippines (200), New Zealand (188), Mexico (166), Australia (160), Kenya (157), Scotland (136), England and Wales (130), Spain (122), China (121), Portugal (111), Republic of (South) Korea (105), Canada (104), France (93), Italy (89), Denmark (72), Germany (69), the Netherlands (63), Norway (54), and Japan (38).⁵ Id.

⁴ Ten states have incarceration rates lower than Hawai'i: Utah (435), Connecticut (394), New York (376), Minnesota (342), New Jersey (341), Maine (328), New Hampshire (328), Rhode Island (289), Vermont (288), and Massachusetts (275). Id.

⁵ Through section 15 of Act 314 of 1986, consistent with national trends, Hawai'i adopted a sentencing model that tends to prioritize punishment and incarceration over rehabilitation, which was enacted as the current version of Hawai'i Revised Statutes § 706-606:

Thus, as noted by the PPI, “[e]ven ‘progressive’ states like Hawai‘i, with incarceration rates below the national average, continue to lock people up at *more than double* the rates of our closest international allies.” Id. Hawai‘i’s incarceration rate is actually more than double that of Australia, New Zealand and the Philippines, more than quadruple that of South Korea and Canada, and more than tenfold that of Japan.

More recently, the State of Hawai‘i Department of Public Safety (“DPS”) reported a total of 4,077 incarcerated people under its jurisdiction as of September 20, 2021. This figure is down from 4,631 people as of March 31, 2020, DPS, END OF MONTH POPULATION REPORT (March 31, 2020), <https://dps.hawaii.gov/wp->

§706-606 Factors to be considered in imposing a sentence. The court, in determining the particular sentence to be imposed, shall consider:

- (1) The nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) The need for the sentence imposed:
 - (a) To reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense;
 - (b) To afford adequate deterrence to criminal conduct;
 - (c) To protect the public from further crimes of the defendant; and
 - (d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) The kinds of sentences available; and
- (4) The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

content/uploads/2020/04/Pop-Reports-EOM-2020-03-31.pdf, also available at <https://perma.cc/2W24-JDRV>, 5,137 people as of March 31, 2019, DPS, END OF MONTH POPULATION REPORT (March 31, 2019), <https://dps.hawaii.gov/wp-content/uploads/2019/04/Pop-Reports-EOM-2019-03-21.pdf>, also available at <https://perma.cc/3R73-VXCP>, and the 5,325 people as of December 31, 2016 referenced above. Based on an estimated statewide population of about 1.46 million, however, the DPS incarceration rate is still 279 per 100,000 people, which does not include people placed in custody by Hawai'i's federal court.⁶

Due to Hawai'i's exploding incarceration rates, for many years, inmate populations at Hawai'i correctional centers and facilities ("CCFs") have greatly exceeded the number intended by planners and architects ("design capacity"). Overcrowding has even led CCFs to exceed "operational capacity," which is defined by the United States Department of Justice as "[t]he number of inmates that can be accommodated based on a facility's staff,

⁶ The 5,602 Hawai'i prisoners as of 2016 reported by Ki'aha included people placed in custody by federal and state courts as of the end of 2016. Jennifer Bronson & E. Ann Carson, *Prisoners in 2017* 4, (U.S. Dep't of Justice: Bureau of Justice Statistics Bulletin NCJ 252156, April 2019) available at <https://bjs.ojp.gov/content/pub/pdf/p17.pdf>, also available at <https://perma.cc/8LSQ-EWYE>. As of December 31, 2016, the state DPS reported a total of 5,325 people incarcerated by state courts. Thus, 95% of Hawai'i's prisoner population was in state custody as of the end of 2016.

existing programs, and services.”⁷ Some Hawai‘i CCFs incarcerate multiple people in cramped cells designed to house one person; people are sometimes forced to sleep on floors next to in-cell toilets.

Thus, Hawai‘i has, for many years, been suffering through an over-incarceration epidemic. To the sometimes deplorable prison conditions caused by over-incarceration, we now overlay the COVID-19 pandemic.

II. The Hawai‘i Constitution prohibits the imposition of “punishment” as well as the setting of excessive bail pending trial

According to DPS, as of September 20, 2021, 783 of the 4,077 people in DPS custody were incarcerated based on pending felony charges, while 125 more were incarcerated based on pending misdemeanor charges. DPS, END OF MONTH POPULATION REPORT (March 31, 2020), <https://dps.hawaii.gov/wp-content/uploads/2021/09/Pop-Reports-Weekly-2021-09-20.pdf>, also available at <https://perma.cc/5VWG-AYB7>. Thus, as of September 20, 2021, up to 908 people, or 23% of the 4,077 people incarcerated under DPS custody, were apparently being incarcerated pre-trial because they were unable to post bail.

⁷ *Operational capacity*, Bureau of Justice Statistics: Glossary, <https://bjs.ojp.gov/glossary?title=operational+capacity#glossary-terms-block-1-irrqiipyxfvlnp-ak>, also available at <https://perma.cc/EKH5-4GJE> (last visited Sept. 29, 2021).

It is a due process violation under both the federal and state constitutions to punish a person before an adjudication of guilt. See Gordon v. Maesaka-Hirata, 143 Hawai'i 335, 358, 431 P.3d 708, 731 (2018) (citing Bell v. Wolfish, 441 U.S. 520, 535, 538-39 (1979)). At minimum, under both federal and state constitutional standards, courts may infer that conditions of confinement are prohibited punishment of a pretrial detainee if they are the result of an expressed intent to punish, if they are not rationally related to a legitimate alternative purpose, or if they are excessive in relation to that legitimate alternative purpose. Id. But this court has also recognized that people incarcerated before trial can have greater rights under the due process clause of article I, section 5 of the Hawai'i constitution than under the federal constitution. Id.

I believe that under the Hawai'i due process clause, all pretrial "punishment" must be prohibited. The question then is what constitutes pretrial "punishment" prohibited by the Hawai'i constitution's due process clause. I believe that incarcerating people before an adjudication of guilt can constitute "punishment" prohibited by the Hawai'i constitution, especially in light of our "excessive bail" provision discussed below. I also believe that pretrial incarceration constitutes unconstitutional "punishment" if a person is neither a flight

risk nor a danger to the community.⁸ And even for those for whom pretrial incarceration might otherwise survive constitutional muster, the COVID-19 pandemic has created circumstances that could cause pretrial incarceration to become unconstitutional “punishment.”

Compared to unincarcerated people, who can choose to take measures to avoid contact with others, an incarcerated person has no real control over their exposure to SARS-CoV-2, the virus that causes COVID-19, except for getting vaccinated and consistently wearing a mask. Although DPS reports issuing two cloth masks to each incarcerated person, it is unrealistic to expect that an incarcerated person would be able to enforce consistent and proper mask-wearing by others. And due to over-incarceration and resultant overcrowding, recommended social distancing measures cannot be enforced within cells designed for

⁸ In Huihui v. Shimoda, 64 Haw. 527, 644 P.2d 968 (1982), this court acknowledged that as “there is no evidence in history that bail was ever intended as a deterrent against the commission of crimes between indictment and trial and in view of the difficulty in accurately estimating one’s dangerous propensities, [some] courts generally maintain that bail may not constitutionally be denied solely on an estimated likelihood of danger to the community or interference with the judicial process.” Huihui, 64 Haw. at 542, 644 at 978. This court then ruled, however, that “this state has a legitimate interest in protecting its communities from those who threaten their welfare, and that this interest may be taken into account in the setting of pretrial bail. But the manner in which the legislature allows this and other legitimate, recognized state concerns to be reflected in the bail decision, should it choose to do so by statute, must also be reasonable and satisfy the minimal demands of procedural due process as necessitated by the fact that pretrial detention denies an accused his liberty without a formal adjudication of guilt.” Id.

one person but occupied by two or three people or in barracks-style pretrial facilities, and probably also cannot be enforced in other areas.

Thus, in my opinion, if a fully-vaccinated person incarcerated before trial consistently wears a mask while incarcerated but contracts symptomatic COVID-19 due to exposure to the SARS-CoV-2 virus while incarcerated, this would clearly constitute unconstitutional "punishment" in violation of the due process clause of the Hawai'i constitution.⁹

In order to avoid unconstitutional pretrial punishment, provisions within article 1, section 12 of the Constitution of the State of Hawai'i must be effectuated and enforced. That section provides in part that "[e]xcessive bail shall not be required" and that a "court may dispense with bail if reasonably satisfied that the defendant . . . will appear when directed, except for a defendant charged with an offense punishable by life imprisonment." Haw. Const. art. 1, § 12.

In my opinion, bail set in an amount higher than a person can afford can be "excessive."¹⁰ Even without COVID-19

⁹ In my opinion, this would also be true for a person who is unable to receive a vaccination due to underlying physical conditions or due to a religious objection.

¹⁰ I believe we should revisit this court's per curiam opinion in Sakamoto v. Chang, 56 Haw. 447, 451, 539 P.2d 1197, 1200 (1975), which stated that "bail is not excessive merely because defendant is unable to pay it." It cited to only to one federal case, Hodgdon v. United States, 365 F.2d 679

intermittently spreading in our various CCFs, as discussed earlier, I believe incarcerating a person before trial without reasons permitted by the constitution would constitute unconstitutional “punishment” inflicted before an adjudication of guilt.¹¹ But due to the pandemic, I believe that even for those people for whom pretrial incarceration might otherwise be constitutionally permissible, judges should consider pretrial release or release with conditions, such as home confinement with monitoring pending trial.

Thus, the prohibitions on pretrial punishment and excessive bail must be effectuated and enforced by our courts. For those currently in custody, various procedural mechanisms exist. Despite the abolishment of the writ of habeas corpus in the post-conviction context by Hawai‘i Rules of Penal Procedure Rule 40(a) (2006), the writ is still available in the pre-conviction context. See HRS § 660-3 (2016) (“The supreme court . . . and the circuit courts may issue writs of habeas corpus in cases in which persons are unlawfully restrained of their liberty[.]”). Habeas petitions requiring evidentiary hearings, however, must be filed in the circuit courts. See Oili v. Chang, 57 Haw. 411, 412, 557 P.2d 787, 788 (1976). Hence, individuals incarcerated

(8th Cir. 1966), and I believe this statement is an incorrect interpretation of the Hawai‘i constitution.

¹¹ See supra note 8.

pretrial may file petitions for writs of habeas corpus in our circuit courts or motions for pretrial release in the appropriate courts. After completion of evidentiary hearings in trial courts, writs of habeas corpus are also available in this court for pretrial bail matters. See, e.g., Sakamoto, 56 Haw. at 447, 539 P.2d at 1197.

For those that may be charged with crimes in the future, our trial courts must also uphold the constitutional prohibitions on pretrial punishment and excessive bail when addressing bail for newly-filed charges.

III. The Hawai‘i constitution prohibits cruel or unusual punishment for those convicted of crimes

A. “Cruel or unusual punishment”

Article 1, section 12 of the Constitution of the State of Hawai‘i also prohibits the infliction of “cruel or unusual punishment” for those convicted of crimes. In comparison, the Eighth Amendment to the United States Constitution prohibits the infliction of “cruel and unusual punishments.”¹² (Emphasis added.)

¹² Our recent caselaw appears to have missed the distinction. See also State v. Davia, 87 Hawai‘i 249, 252 n.3, 953 P.2d 1347, 1350 n.3 (1998) (“Article I, section 12 of the Hawai‘i Constitution provides in relevant part that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.”) (emphasis added.)

Our case law has been applying a “proportionality” test not available under the Eighth Amendment’s “cruel and unusual” punishment prohibition, but has been doing so on the basis that the federal and state constitutions contain identical language. For example, in State v. Guidry, this court stated:

[T]he standard by which punishment is to be judged under the “cruel and unusual” punishment provision of the Hawai‘i Constitution is whether, in the light of developing concepts of decency and fairness, the prescribed punishment is so disproportionate to the conduct proscribed and is of such duration as to shock the conscience of reasonable persons or to outrage the moral sense of the community.”

105 Hawai‘i 222, 237, 96 P.3d 242, 257 (2004) (cleaned up).¹³

The fifty states’ constitutions differ in terms of whether their respective constitutions mirror the federal constitution’s “cruel and unusual” language. Specifically, twenty states use the conjunctive language,¹⁴ twenty states use the disjunctive language,¹⁵ two states use both the conjunctive and disjunctive

¹³ Even if our language was identical to the federal Constitution, we are able to provide greater protection under the Hawai‘i constitution. State v. Lopez, 78 Hawai‘i 433, 445, 896 P.2d 889, 901 (1995) (“[A]s long as we afford defendants the minimum protection required by the federal constitution, we are free to provide broader protection under our state constitution.”).

¹⁴ Alaska Const. art. I, § 12; Ariz. Const. art. II, § 15; Colo. Const. art. II, § 20; Fla. Const. art. I, § 17; Ga. Const. art. I, § 1, ¶ 17; Idaho Const. art. 1, § 6; Ind. Const. art. I, § 16; Iowa Const. art. I, § 17; Md. Declaration of Rights art. 16 (prohibiting “cruel and unusual pains”); Mo. Const. art. I, § 21; Mont. Const. art. II, § 22; Neb. Const. art. I, § 9; N.J. Const. art. I, ¶ 12; N.M. Const. art. II, § 13; N.Y. Const. art. I, § 5; Ohio Const. art. I, § 9; Or. Const. art. I, § 16; Tenn. Const. art. I, § 16; Utah Const. art. I, § 9; Va. Const. art. I, § 9; W. Va. Const. art. III, § 5; Wis. Const. art. I, § 6.

¹⁵ Ala. Const. art. I, § 15; Ark. Const. art. II, § 9; Cal. Const. art. I, § 17; Haw. Const. art. I, § 12; Kan. Const. Bill of Rights § 9; La. Const. art. I, § 20 (prohibiting “cruel, excessive, or unusual punishment”); Me.

forms,¹⁶ six states ban only cruel punishments,¹⁷ and three states do not reference any of these terms.¹⁸

Article 1, section 17 of the Constitution of the State of California provides, "Cruel or unusual punishment may not be inflicted or excessive fines imposed." In 1972, the Supreme Court of California analyzed the death penalty against the disjunctive requirements of its state constitution in People v. Anderson, 493 P.2d 880 (Cal. 1972). Although Anderson was later superseded by legislation and constitutional amendment ratifying the death penalty, the court's construction of the disjunctive language is noteworthy. This case was the first time the California court acknowledged the significance of "cruel or unusual" versus "cruel and unusual." Id. at 888 ("Although we have often considered challenges to the constitutionality of capital punishment, we have heretofore approached the question in the Eighth Amendment context of 'cruel And unusual'")

Const. art. I, § 9 (prohibiting neither "cruel nor unusual punishments"); Mass. Const. pt. 1, art. XXVI; Mich. Const. art. I, § 16; Minn. Const. art. 1, § 5; Miss. Const. art. III, § 28; Nev. Const. art. I, § 6; N.H. Const. pt. 1, art. XXXIII; N.C. Const. art. I, § 27; N.D. Const. art. I, § 11; Okla. Const. art. II, § 9; S.C. Const. art. I, § 15 (prohibiting neither "cruel, nor corporal, nor unusual punishment"); Tex. Const. art. I, § 13; Wyo. Const. art. I, § 14.

¹⁶ Fla. Const. art. I, § 17; Md. Declaration of Rights arts. 16, 25; Del. Const. art. I, § 11; Ky. Bill of Rights § 17; Pa. Const. art. I, § 13; R.I. Const. art. I, § 8; S.D. Const. art. VI, § 23; Wash. Const. art. I, § 14.

¹⁷ Fla. Const. art. I, § 17; Md. Declaration of Rights arts. 16, 25.

¹⁸ Conn. Const.; Ill. Const.; Vt. Const.

punishment, using that term interchangeably with the 'cruel Or unusual' language of article 1, section 6, of the California Constitution, and have never independently tested the death penalty against the disjunctive requirements of the latter.").

The Anderson court first reviewed the constitutional history of the provision and noted that the initial proposal at the Constitutional Convention of 1849 actually used the term "cruel and unusual punishment." Id. at 883-84. When the House of Delegates finally adopted the section, however, the language had changed to "cruel or unusual" punishments. Id. at 884. The court concluded that this change was intentional in light of the debates over other state constitution models that did not use the conjunctive form:

Although the delegates to the convention were limited in their access to models upon which to base the proposed California Constitution at the commencement of their deliberations, by the end of the convention they had access to the constitutions of every state. At least 20 state constitutions were mentioned by delegates during the debates. The majority of those which included declarations of rights or equivalent provisions differed from the New York, Iowa, and United States Constitutions and did not proscribe cruel And unusual punishments. Rather, they prohibited 'cruel punishments, or 'cruel or unusual punishments.' Several had provisions requiring that punishment be proportioned to the offense and some had dual provisions prohibiting cruel and/or unusual punishments and disproportionate punishments.

The fact that the majority of constitutional models to which the delegates had access prohibited cruel or unusual punishment, and that many of these models reflected a concern on the part of their drafters not only that cruel punishments be prohibited, but that disproportionate and unusual punishments also be independently proscribed, persuades us that the delegates modified the California provision before adoption to substitute the disjunctive 'or' for the conjunctive 'and' in order to establish their intent that both cruel punishments and unusual punishments be outlawed in

this state. In reaching this conclusion we are mindful also of the well established rules governing judicial construction of constitutional provisions. We may not presume, as respondent would have us do, that the framers of the California Constitution chose the disjunctive form 'haphazardly,' nor may we assume that they intended that it be accorded any but its ordinary meaning.

Id. at 884-85 (cleaned up).

The court next examined past case law and admitted that it previously used the conjunctive and disjunctive forms interchangeably. It reasoned that its past disregard for whether a punishment could be unconstitutionally "cruel" was understandable because, at the time, capital punishment was "not considered so cruel" and "was a widely accepted, customary punishment," so cases were decided with more focus on whether the penalty was "unusual." Id. at 888-89. The court determined that it could no longer continue assuming that capital punishment comported with "contemporary standards of decency" and thus had to reexamine whether it was cruel, unusual, or both according to then-present standards. Id. at 891.

Discussing cruelty, the Anderson court concluded that California's framers "used the term cruel in its ordinary meaning -- causing physical pain or mental anguish of an inhumane or tortuous nature." Id. at 892. Whether a punishment was unconstitutionally cruel depended on "whether the punishment affront[ed] contemporary standards of decency." Id. at 893. The court considered several factors, including public

acceptance of the punishment; the frequency of its actual application; the pain and dehumanizing effects, including the "brutalizing psychological effects," of the punishment; and whether the continued practice of the punishment demeaned the "dignity of man, the individual and the society as a whole." Id. at 893-95. Additionally, while the court did not decide the permissibility of "necessary" cruelty, it held that the death penalty, at least, was not necessary to any state interest. Id. at 895-97.¹⁹

Article 1, section 16 of the Michigan Constitution of 1963 provides, "Excessive bail shall not be required; excessive fines shall not be imposed; cruel or unusual punishment shall not be inflicted; nor shall witnesses be unreasonably detained." The Supreme Court of Michigan acknowledged this textual difference from the federal Constitution and concluded that the divergence

¹⁹ It is unclear to me whether California's test for cruel or unusual punishment has since evolved. In People v. Cage, 362 P.3d 376, 405 (Cal. 2015) (cleaned up), the California Supreme Court stated:

To determine whether a sentence is cruel or unusual as applied to a particular defendant, a reviewing court must examine the circumstances of the offense, including its motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must also consider the personal characteristics of the defendant, including age, prior criminality, and mental capabilities. If the court concludes that the penalty imposed is grossly disproportionate to the defendant's individual culpability, or, stated another way, that the punishment shocks the conscience and offends fundamental notions of human dignity, the court must invalidate the sentence as unconstitutional.

was intentional and also a compelling reason for broader state constitutional protection:

[T]he Michigan provision prohibits "cruel or unusual" punishments, while the Eighth Amendment bars only punishments that are both "cruel and unusual." This textual difference does not appear to be accidental or inadvertent.[n.11]

. . . .

[n.11] While the historical record is not sufficiently complete to inform us of the precise rationale behind the original adoption of the present language by the Constitutional Convention of 1850, it seems self-evident that any adjectival phrase in the form "A or B" necessarily encompasses a broader sweep than a phrase in the form "A and B." The set of punishments which are either "cruel" or "unusual" would seem necessarily broader than the set of punishments which are both "cruel" and "unusual."

People v. Bullock, 485 N.W.2d 866, 872 (Mich. 1992).

Today, Michigan courts employ a three-part test to determine whether a punishment is "proportional" and therefore escapes the constitutional ban on "cruel or unusual punishment":

"The Michigan Constitution prohibits cruel or unusual punishment, Const. 1963, art. 1, § 16, whereas the United States Constitution prohibits cruel and unusual punishment, U.S. Const., Am. VIII." People v. Benton, 294 Mich. App. 191, 204, 817 N.W.2d 599 (2011). "If a punishment passes muster under the state constitution, then it necessarily passes muster under the federal constitution." Id. (cleaned up). "[U]nder the Michigan Constitution, the prohibition against cruel or unusual punishment include[s] a prohibition on grossly disproportionate sentences." Id.

This Court employs the following three-part test in determining whether a punishment is cruel or unusual: "(1) the severity of the sentence imposed and the gravity of the offense, (2) a comparison of the penalty to penalties for other crimes under Michigan law, and (3) a comparison between Michigan's penalty and penalties imposed for the same offense in other states." Id.

People v. Burkett, No. 351882, 2021 WL 2483568, at *2 (Mich. Ct. App. June 17, 2021).

With respect to Massachusetts, part 1, article XXVI of the Constitution or Form of Government for the Commonwealth of Massachusetts provides, in relevant part, "No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments."

The Supreme Judicial Court of Massachusetts reads the disjunctive language²⁰ in its constitution as being "at least as broad as the Eighth Amendment to the Federal Constitution." Good v. Comm'r of Correction, 629 N.E.2d 1321, 1325 (Mass. 1994) (citing Michaud v. Sheriff of Essex Cnty., 458 N.E.2d 702 (Mass. 1983)) (emphasis added). Earlier Massachusetts case law echoed California's initial threshold of "contemporary standards of decency which mark the progress of society." Id. The test thereafter evolved into one of proportionality:

"The touchstone of art. 26's proscription against cruel or unusual punishment ... [is] proportionality." Commonwealth v. Perez, 477 Mass. 677, 683, 80 N.E.3d 967 (2017). "The essence of proportionality is that 'punishment for crime should be graduated and proportioned to both the offender and the offense.'" Id., quoting Miller, 567 U.S. at 469, 132 S.Ct. 2455.

"To reach the level of cruel [or] unusual, the punishment must be so disproportionate to the crime that it shocks the conscience and offends fundamental notions of human dignity" (quotation and citation omitted). Commonwealth v. LaPlante, 482 Mass. 399, 403, 123 N.E.3d 759 (2019). To determine whether a sentence is disproportionate requires (1) an "inquiry into the nature of the offense and the offender in light of the degree of harm to society," (2) "a comparison

²⁰ Past Massachusetts case law, however, appears to have misquoted the state's constitution and its actual use of "or" rather than "and." More recent case law seems to correct this error by simply replacing the "and" with "[or]" when quoting past precedent.

between the sentence imposed here and punishments prescribed for the commission of more serious crimes in the Commonwealth," and (3) "a comparison of the challenged penalty with the penalties prescribed for the same offense in other jurisdictions" (quotation and citation omitted). Cepulonis v. Commonwealth, 384 Mass. 495, 497-498, 427 N.E.2d 17 (1981). "The burden is on a defendant to prove such disproportion...." Id. at 497, 427 N.E.2d 17.

Commonwealth v. Concepcion, 164 N.E.3d 842, 855 (Mass. 2021).

Like Michigan, Massachusetts has not defined the words "cruel" or "unusual" separately but has construed the disjunctive phrase together as providing broader protection.

Washington is one of the six states that bans only "cruel" punishment. Article 1, section 14 of the Constitution of the State of Washington provides, "Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." The Supreme Court of Washington found the state's departure from the federal Constitution to be intentional:

Especially where the language of our constitution is different from the analogous federal provision, we are not bound to assume the framers intended an identical interpretation. The historical evidence reveals that the framers of Const. art. 1, § 14 were of the view that the word "cruel" sufficiently expressed their intent, and refused to adopt an amendment inserting the word "unusual". The Journal of the Washington State Constitutional Convention: 1889 501-02 (B. Rosenow ed. 1962).

State v. Fain, 617 P.2d 720, 723 (Wash. 1980). The court has also repeatedly held that Washington's cruel punishment clause offers greater protection than the federal cruel and unusual punishment amendment. See, e.g., State v. Manussier, 921 P.2d 473 (Wash. 1996); State v. Bartholomew, 683 P.2d 1079 (Wash. 1984); State v. Fain, 617 P.2d 720 (Wash. 1980); State v. Morin,

995 P.2d 113 (Wash. App. 2000); State v. Ames, 950 P.2d 514 (Wash. App. 1998); State v. Roberts, 14 P.3d 713 (Wash. App. 2000); State v. Ramos, 387 P.3d 650 (Wash. 2017); State v. Gregory, 427 P.3d 621, 631 (Wash. 2018).

Washington applies a proportionality test for assessing whether a sentence is “cruel.” The Washington factors for proportionality are nearly identical to both the Michigan and Massachusetts tests: the nature of the offense, the legislative purpose behind the criminal statute, the punishment the defendant would have received in other jurisdictions for the same offense, and the punishment imposed for other offenses in the same jurisdiction. Fain, 617 P.2d at 720.

The Washington Supreme Court is currently considering an inmate’s constitutional challenge to the conditions of his confinement due to the COVID-19 pandemic. Matter of Williams, 476 P.3d 1064, 1078 (Wash. App. 2021), review granted, 484 P.3d 445 (Wash. 2021). In Matter of Williams, petitioner Robert Williams was a 78-year-old Black man diagnosed with diabetes and hypertension who was also largely immobilized after suffering a stroke. Williams, 476 P.3d at 1070. He had been sentenced to 270 months of confinement for first-degree burglary, first-degree robbery, and attempted second-degree murder and entered prison at age 67. Id. Following the outbreak of COVID-19 in his prison and his deteriorating health post-infection, Williams

argued that, given his age, race, and disabilities, the conditions of his confinement became a “cruel punishment” in violation of Washington’s constitution and he should be released. Id. In February 2021, the Supreme Court of Washington determined that the continuous evolution of “grim facts” surrounding the case warranted review. Matter of Williams, 484 P.3d 445, 447 (Wash. 2021).

The constitutional history of our “cruel or unusual punishment” clause does not appear to explain why our constitution uses the disjunctive “or.” Cases from other states can provide some guidance but are not binding on us. Importantly, however, the state high court decisions discussed above all agree on the importance of interpreting state constitutions to provide greater rights than under the federal constitution.

In this regard, the Hawai‘i constitution is unique and must be interpreted according to its own principles. But we must effectuate the plain language of the self-executing provision of our constitution that prohibits “cruel” or “unusual” punishment. I believe our law in this area must be developed. In doing so, I believe we should consider the preamble to our state constitution, which provides:

We, the people of Hawaii, grateful for Divine Guidance, and mindful of our Hawaiian heritage and uniqueness as an island State, dedicate our efforts to fulfill the philosophy

decreed by the Hawaii State motto, "Ua mau ke ea o ka aina i ka pono."

We reserve the right to control our destiny, to nurture the integrity of our people and culture, and to preserve the quality of life that we desire.

We reaffirm our belief in a government of the people, by the people and for the people, and with an understanding and compassionate heart toward all the peoples of the earth, do hereby ordain and establish this constitution for the State of Hawaii.

No other constitution in the world requires that those it governs dedicate their efforts to fulfilling the philosophy of "Ua mau ke ea o ka 'āina i ka pono." I am also not aware of any other constitution that expresses "an understanding and compassionate heart toward all the peoples of the earth."

Thus, the preamble of our constitution encourages all of us, including our courts, to act in a manner that is pono and with an understanding and compassionate heart. We should interpret and give life to our constitutional prohibition against "cruel or unusual punishment" in this light.

B. Cruel or unusual punishment is occurring due to the over-incarceration epidemic overlaid with the COVID-19 pandemic

In whatever manner we interpret our constitutional prohibition against cruel or unusual punishment, the over-incarceration epidemic overlaid with the COVID-19 pandemic may now be causing conditions of confinement that are unconstitutionally "cruel" or "unusual." For example, at the September 22, 2021 hearing on this petition, the State reported

that seven people incarcerated at Halawa Correctional Facility had died from COVID-19 as of that date. If the count of 748 people incarcerated there as of September 20, 2021 is used, this would mean that approximately one person out of every 107 people incarcerated there has died of COVID-19.

In contrast, as of September 22, 2021, the State of Hawai'i Department of Health reported 726 cumulative deaths statewide. Subtracting the seven Halawa deaths left 719 deaths statewide as of that date. Hawaii COVID-19 Data, State of Hawai'i - Department of Health: Disease Outbreak Control Division | COVID-19, <https://health.hawaii.gov/coronavirusdisease2019/current-situation-in-hawaii/>, also available at <https://perma.cc/2MC5-NN3N> (last visited Sept. 22, 2021). It appears that almost all COVID-19 deaths in Hawai'i occurred in people over the age of 18, id., and all those incarcerated at Halawa are presumably over 18. Of Hawai'i's estimated 1.46 million population, about 76.4%, or 1,111,188 people, are over 18 years old. Latest Population Estimate Data for the State of Hawai'i, DEP'T OF BUS. ECON. DEV. & TOURISM, <https://census.hawaii.gov/home/population-estimate/>, also available at <https://perma.cc/YU62-EJU8> (follow "DBEDT Data Warehouse" hyperlink; select the "Population (Census): Total Resident (Census)" and the "Population by Age: 18 years and

over” indicators; select “State of Hawaii” as the Area and “Annual” for the Frequency for 2020; then select “Get Data”).

Thus, for the general population in Hawai‘i over the age of eighteen, it appears COVID-19 has caused one death per 1,612 people as of September 22, 2021. This means that people incarcerated in Halawa had a COVID-19 death rate more than fifteen times greater than that of the general population. Granted, I do not know whether people incarcerated at Halawa have higher rates of underlying conditions than the general. In light of this death rate, however, the number of people incarcerated at Halawa needs to be reduced to prevent further transmission of COVID-19.

I also note that according to DPS, two of our people incarcerated at the Saguaro Correctional Center in Arizona have died of COVID-19. PSD CORONAVIRUS (COVID-19) INFORMATION AND RESOURCES, STATE OF HAWAII: DEPARTMENT OF PUBLIC SAFETY (Mar. 17, 2020), <https://dps.hawaii.gov/blog/2020/03/17/coronavirus-covid-19-information-and-resources/>, also available at <https://perma.cc/PPA5-PCXU>. Kī‘aha also points out that the disproportionately disparate treatment of Native Hawaiians in our criminal justice system has resulted in a disproportionate percentage of Native Hawaiians being transferred to Saguaro.²¹

²¹ Kī‘aha, supra note 2, explains:

Even before COVID-19, I had concerns regarding whether the long-term transfer of Native Hawaiians to the continental United States implicates article XII, section 7 of the Hawai'i constitution, which states:

Section 7. The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited

A number of social and historical factors play into this disparity, including contact with Western civilization and the on-going effects of colonization.

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According to the Office of Hawaiian Affairs' 2010 Report on *The Disparate Treatment of Native Hawaiians in the Criminal Justice System*, Native Hawaiians make up only 24% of Hawai'i's general population, while comprising 39% of the state's prison population. This number includes both the male and female population, both of which are disproportionately overrepresented in Hawai'i's prisons. Some advocates in the field of criminal justice reform argue that, today, the number of Native Hawaiians that make up the incarcerated population is closer to 60%. For Native Hawaiian women, the percentage is at an alarming 44%, while Native Hawaiian youth are arrested more frequently than any other ethnic group for nearly every offense. Moreover, research done by the National Council on Crime and Delinquency found that children of incarcerated parents are five to six times more likely to become incarcerated than their peers.

Native Hawaiians are more likely to receive a prison sentence following a determination of guilt. This is due in part to the discretionary nature of sentencing. Pa'ahao also have the highest recidivism rate due to limited access to reentry services that would assist them in returning to society. As a result, pa'ahao are denied parole because they are unable to complete the necessary programs[] Additionally, OHA's report reflects that 41% of Hawai'i's prisoners sent to out-of-state facilities are Native Hawaiian. Perhaps the most detrimental disproportion is that Native Hawaiians go to prison more often for drug offenses than any other ethnic group.

Id.

the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

As explained in Native Hawaiian Law: A Treatise:²²

In essence, indigenous cultural property includes everything with which indigenous peoples have a relationship and to which they have a responsibility. As [former U.S. Human Rights] Special Rapporteur [Erica-Irene] Daes explains, "Possessing a song, story or medicinal knowledge carries with it certain responsibilities to show respect to and maintain a reciprocal relationship with the human beings, animals, plants and places with which the song story or medicine is connected." Therefore, indigenous peoples' cultural property can be conceived as "a bundle of relationships, rather than a bundle of economic rights."

Thus, it appears to me that article XII, section 7 of the Hawai'i constitution encompasses "human relationships" within its protections. The reality is that, even before the COVID-19 pandemic, Native Hawaiians transferred to Saguaro were largely cut off from familial and other cultural human relationships. The COVID-19 pandemic has seriously exacerbated this disconnect. Thus, distinct cultural rights of Native Hawaiians protected by the Hawai'i constitution may also inform what constitutes "cruel or unusual punishment" with respect to Native Hawaiians.²³

Turning back to "cruel or unusual punishment" in general, as of September 20, 2021, 359 people were incarcerated by DPS

²² Melody Kapilialoha MacKenzie et al., Native Hawaiian Law: A Treatise 1020 (2015).

²³ In Lono v. Ariyoshi, 63 Haw. 138, 621 P.2d 976 (1981), this court held that a prisoner's transfer to a mainland penal institution did not violate the due process clauses of the United States and Hawai'i constitutions as well as applicable administrative law. The rights of Native Hawaiians under article XII, section 7 of the Hawai'i constitution were not raised or discussed.

based on alleged probation violations and 658 people were incarcerated based on alleged parole violations. This totals 1,017 people, or about 25% of the 4,077 people incarcerated in DPS custody. In my opinion, especially if the alleged probation or parole violations are of a “technical” nature, such as missed check-ins with probation or parole officers, contraction of symptomatic COVID-19 by a mask-wearing fully-vaccinated person²⁴ in these categories would clearly constitute cruel or unusual punishment prohibited by the Hawai‘i constitution. In my opinion, this would also be true with respect to the fully-vaccinated²⁵ elderly, pregnant people, or those with underlying health conditions, who are especially vulnerable to COVID-19.

IV. Conclusion

As stated at the outset, we are dealing with an epidemic of over-incarceration now overlaid with the COVID-19 pandemic. We must remember that incarcerated people are people from our communities and families who, with very few exceptions for those sentenced to life imprisonment without the possibility of parole, are entitled to return to our communities and families without suffering long-term complications or death from COVID-19. In addition, we must address our over-incarceration

²⁴ To repeat, in my opinion, this would also be true for a person who is unable to receive a vaccination due to underlying physical conditions or due to a religious objection.

²⁵ See supra note 26.

epidemic. To address the actual and potentially unconstitutional conditions described above, I would therefore mandate as follows.

In 2019, the Hawai'i State Legislature created the Hawai'i Correctional Oversight Commission ("Oversight Commission"), tasked in part to "[e]stablish maximum inmate population limits for each correctional facility and formulate policies and procedures to prevent the inmate population from exceeding the capacity of each correctional facility[.]" See HRS § 353L-3(b)(2) (2019). In September 2020, the Oversight Commission issued its "Infectious Disease Emergency Capacities" report for Hawai'i Correctional Facilities. See HAWAII CORR. OVERSIGHT COMM'N, HAWAI'I CORRECTIONAL FACILITIES INFECTIOUS DISEASE EMERGENCY CAPACITIES (Sept. 2020), <https://ag.hawaii.gov/wp-content/uploads/2020/09/FINAL-REPORT-091120.pdf>, also available at <https://perma.cc/4YJN-JVQJ>.

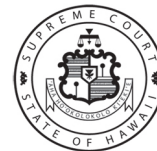
It is unclear to me whether the Oversight Commission stands by these capacity numbers for each facility now as this report was issued well before vaccinations became available. However, I also do not believe there were any deaths in Hawai'i correctional facilities as of September 2020. I would in any event request an update from the Oversight Commission as to the capacity numbers it currently believes are appropriate for each

CCF. I would also ask the DPS Corrections Division to post its Corrections Populations Reports weekly.

I would then encourage our trial courts to effectuate the constitutional principles discussed above when they address bail for newly-filed charges. I would also encourage defense counsel to file individualized writs of habeas corpus or motions for release, as appropriate. Finally, I would encourage all those within our criminal justice system, including respondents and our trial courts, to continuously exercise their best efforts to apply measures within their legal authority and discretion to achieve capacity numbers for CCFs indicated by the Oversight Commission, whether during or after the COVID-19 pandemic.

DATED: Honolulu, Hawai'i, October 12, 2021.

/s/ Sabrina S. McKenna



I hereby join in the concurrence and dissent of Justice McKenna as to Sections I and III.A. only.

/s/ Michael D. Wilson