SCPW-21-0000483

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

IN THE MATTER OF INDIVIDUALS IN CUSTODY
OF THE STATE OF HAWAIʻI

ORIGINAL PROCEEDING

CONCURRENCE AND DISSENT OF EDDINS, J.

I concur with the outcomes of the court's order. But I cannot endorse the order's premise.

The fundamental reason Petitioner must be denied so much of the relief it wants is not that Petitioner has failed to show its entitlement to a writ (though I agree that is the case here). It is, rather, that this court does not have the authority to grant the Office of the Public Defender (OPD) the relief it seeks. To the extent the OPD asks us to rewrite bail statutes, commute sentences, or micromanage the Hawaiʻi Paroling Authority, it is asking us to exercise legislative and executive power. This court has broad powers to both control the litigation before it and administer justice. But our power is judicial. We cannot do what Petitioner asks of us. Not even in

times of emergency. See Haw. Insurers Council v. Lingle, 120 Hawai‘i 51, 70, 201 P.3d 564, 583 (2008).[1]

After explaining why this court lacks the authority to grant Petitioner much of the relief sought, I supplement my concurrence with the court's order in two respects.

First, leaving aside my jurisdictional concerns, I elaborate on why – with one exception - Petitioner has failed to show it is entitled to a writ of mandamus or an extraordinary writ.

Second, I clarify my concurrence with the court's disposition of Petitioner's constitutional claims. After stating my belief that convicted inmates bringing conditions-of-confinement claims under article I, section 12 would not need to show subjective deliberate indifference, I ultimately agree with the court's decision to refrain from analyzing the constitutional claims OPD gestures towards in its petition: no matter how generous article I, section 12's protections may be, the underdeveloped record in this case cannot support a finding that the Department of Public Safety (DPS) violated inmates' constitutional rights.

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[1] In Hawaii Insurers Council, the court explained that under the separation of powers doctrine, no branch of government may "exercise powers not so constitutionally granted, which from their essential nature, do not fall within its division of governmental functions, unless such powers are properly incidental to the performance by it of its own appropriate functions." 120 Hawai‘i at 70, 201 P.3d at 583 (cleaned up).

I. THIS COURT LACKS THE AUTHORITY TO GRANT PETITIONER THE RELIEF IT SEEKS

A. None of the statutes Petitioner cites authorize us to grant the relief Petitioner seeks

Citing the need to mitigate the risks posed by the ongoing COVID-19 pandemic, the OPD asks us to order trial courts deciding certain inmates' release motions to presume release in the absence of a finding that it would pose a significant risk to the safety of the inmate or the public.[2] This request

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[2] OPD's first request is that we:

> Order the Circuit, Family and District courts that when adjudicating motions for release: (a) release shall be presumed unless the court finds that the release of the individual would pose a significant risk to the safety of the individual or the public; (b) design capacity (as opposed to operational capacity) of the correctional facility shall be taken into consideration; (c) the health risk posed by the COVID-19 pandemic should be taken into consideration. Motions for release based on the foregoing are for the following categories of incarcerated persons:
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> a. Individuals serving a sentence (not to exceed eighteen months) as a condition of felony deferral or probation, except for: (i) individuals serving a term of imprisonment for a sexual assault conviction or an attempted sexual assault conviction; or (ii) individuals serving a term of imprisonment for any felony offense set forth in HRS Chapter 707, burglary in the first 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) and (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) and (2), including attempt to commit those specific offenses (HRS §§ 705-500, 705-501).
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> b. Individuals 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).

encompasses motions for release brought by certain individuals serving a term of imprisonment as a condition of felony or misdemeanor probation or deferral. It also encompasses motions for release brought by many pretrial detainees. The OPD also asks us to order trial courts to suspend the custodial portion of intermittent sentences.[3] And to tell the Department of Public Safety how to best mitigate COVID-19 risks in Hawai‘i prisons.[4]

> 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).
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> d. All pretrial detainees charged with a felony, except those charged with a sexual assault or an attempted sexual assault, any felony offense set forth in HRS Chapter 707, burglary in the first 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) and (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), including attempt to commit those specific offenses (HRS §§ 705-500, 705-501)[)].

[3] OPD asks us to "[o]rder the Circuit, Family and District courts to suspend the custodial portions of such sentence until the conclusion of the COVID-19 pandemic or until deemed satisfied for individuals serving intermittent sentences."

[4] OPD asks us to:

> Order the Circuit, Family and District courts, DPS, and the HPA to reduce the population of Hawai‘i's 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] those facilities to their design capacity and/or Infectious Disease Emergency Capacity as recommended by the Hawai‘i Correctional System Oversight Commission.

OPD also wants us to (among other things) order the Hawai‘i Paroling Authority to use "remote technology" when conducting parole hearings, consider releasing some classes of individuals, and prepare periodic progress reports.[5]

The OPD's petition cites an array of statutory and constitutional provisions that it says empower the court to grant this relief. None of them do.

Article VI, sections 1 and 7 of the Hawai‘i Constitution concern the State's judicial power and the supreme court's role in making rules and regulations governing courts' exercise of judicial power:

It also requests that we "[a]ppoint a public health expert to enter into all of Hawai‘i correctional facilities and review protocols, the ability to social distance and make recommendations" and "[o]rder testing for COVID-19 for all incarcerated persons and staff at Hawai‘i correctional facilities . . . ." OPD further asks that we Order DPS to adhere to: (1) the CDC's Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities; and (2) "its Pandemic Response Plan – COVID-19 (May 28, 2021 rev.)."

[5] OPD asks us to:

> Order the HPA to expeditiously address requests for early parole consideration, including conducting hearings using remote technology. The HPA should also consider release of incarcerated persons who are most vulnerable to the virus, which includes individuals who are 65 years old and older, have underlying health conditions, who are pregnant, and those individuals being held on technical parole violations (i.e. curfew violations, failure to report as directed, etc.) or who have been designated as having "minimum" or "community" security classifications and are near the maximum term of their sentences. The HPA shall prepare and provide periodic progress reports to the parties of their efforts and progress in the aforementioned areas. The reports should include a list of the names of individuals who have been granted release, the names of the individuals who are under consideration for release, and the names of the individuals who were considered for release but for whom release was denied.

> The judicial power of the State shall be vested in one supreme court, one intermediate appellate court, circuit courts, district courts and in such other courts as the legislature may from time to time establish. The several courts shall have original and appellate jurisdiction as provided by law and shall establish time limits for disposition of cases in accordance with their rules.

Haw. Const. art. VI, § 1.

> The supreme court shall have power to promulgate rules and regulations in all civil and criminal cases for all courts relating to process, practice, procedure and appeals, which shall have the force and effect of law.

Id. at § 7.

The orders the OPD requests are neither "rules and regulations" in civil or criminal cases nor related to court processes, practices, procedures, or appeals. Article VI, section 7 authorizes the supreme court to promulgate, for example, the Hawai‘i Rules of Appellate Procedure, the Hawai‘i Rules of Professional Conduct, and the Hawai‘i Rules of Civil Procedure. But it does not authorize us to dictate what precautions the Department of Public Safety should take in its correctional facilities. Nor does it authorize us to curate a list of crimes from the Hawai‘i Penal Code and order that a "presumption of release" applies to motions for release brought by those accused or convicted of crimes on our list. This is pure policy work and it is the domain of others. Not this court.

Any doubt on this point is settled by Hawai‘i Revised Statutes (HRS) § 602-11 (2016). The first sentence of that

statute is substantively identical to article VI, section 7 of the constitution: "The supreme court shall have power to promulgate rules in all civil and criminal cases for all courts relating to process, practices, procedure and appeals, which shall have the force and effect of law." HRS § 602-11. Its second sentence, however, dictates that rules promulgated by the court may not effect litigants' substantive rights or expand the court's jurisdiction: "Such rules shall not abridge, enlarge, or modify the substantive rights of any litigant, nor the jurisdiction of any of the courts, nor affect any statute of limitations." Id. (emphasis added).

The relief the OPD seeks is directly related to inmates' substantive rights. It is therefore not something the court can appropriately grant through the exercise of its Article VI, section 7 power to promulgate "rules" relating to "process, practices, procedure and appeals." See id.

Petitioner also cites HRS § 602-4 (2016) as authorizing this court to grant the requested relief. That statute gives the supreme court "general superintendence of all courts of inferior jurisdiction to prevent and correct errors and abuses therein where no other remedy is expressly provided by law." This is a broad grant of power within our domain: when it comes to the courts and what happens in courts, we are supreme and may intervene to forestall or fix errors and abuses as we see fit.

See, e.g., State v. David, 141 Hawai‘i 315, 327, 409 P.3d 719, 731 (2017) (exercising supervisory powers under HRS § 602-4 to address an important question of law presented by appellant even though its resolution was not essential to the case's disposition); State by Off. of Consumer Prot. v. Joshua, 141 Hawai‘i 91, 93, 405 P.3d 527, 529 (2017) ("Pursuant to our supervisory powers under [HRS § 602-4], we reinforce our advisement . . . that when circuit courts intend their rulings to be final and appealable, they must enter appealable final judgments."). But nothing in the text of HRS § 602-4 or our historical invocations of it suggests we are authorized to enact novel presumptions of law, control correctional facilities, or curb trial courts' statutory discretion in adjudicating motions for release.

HRS § 602-5(a)(5) (2016) also provides no basis for the relief OPD seeks. That statute gives the supreme court the power to "make or issue any order or writ necessary or appropriate in aid of its jurisdiction, and in such case, any justice may issue a writ or an order to show cause returnable before the supreme court . . . ." HRS § 602-5(a)(5) (emphasis added). The court's authority to issue writs under HRS § 602-5(a)(5) is expressly limited: it may issue only those writs necessary or appropriate "in aid of its jurisdiction." This language reflects the fact that though writs are one procedural

tool the court may use when exercising power, they are not an independent source of jurisdictional power. Likewise, HRS § 602-5(a)(3)[6] grants the supreme court the jurisdiction to decide writs of mandamus and exercise "such other original jurisdiction as may be expressly conferred by law . . . ." This is a codification of the court's power to address questions properly arising under writs. Not an authorization to exercise legislative or executive power.

Petitioner's strongest argument that this court has the authority to grant the requested relief is found under HRS § 602-5(a)(6). That statute grants the supreme court the jurisdiction to:

> make and award such judgments, decrees, orders and mandates, issue such executions and other processes, and do such other acts and take such other steps as may be necessary to carry into full effect the powers which are or shall be given to it by law or for the promotion of justice in matters pending before it.

That last clause – "or for the promotion of justice in matters pending before [the court]" – is conceptually capacious.

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[6] HRS § 602-5(a)(3) provides that the supreme court has the jurisdiction and power to:

> exercise original jurisdiction in all questions arising under writs directed to courts of inferior jurisdiction and returnable before the supreme court, or if the supreme court consents to receive the case arising under writs of mandamus directed to public officers to compel them to fulfill the duties of their offices; and such other original jurisdiction as may be expressly conferred by law . . . .

Petitioner takes up the invitation offered by HRS § 602-5(a)(6)'s expansive language. The OPD suggests a reading of the statute that renders this court effectively omnipotent. Under Petitioner's reading[7] of HRS § 602-5(a)(6), this court may make any order or mandate so long as two conditions are met. First, the order or judgment has some connection, however tenuous, to the subject matter of a case pending before the court. And second, the court thinks its order would promote justice. That's it.

HRS § 602-5(a)(6) gives us broad powers to promote justice "in matters pending before [the court]." But Petitioner reads the statute as authorizing us to promote justice in any domain *related to* matters pending before the court. This reading both skirts the separation of powers doctrine and, arguably, renders the statute facially unconstitutional. To provide but one illustration, the legislature has delegated responsibility for administering correctional facilities to the Department of Public Safety. See HRS § 26-14.6(b) (2009 & Supp. 2015). Any reading of HRS § 602-5(a)(6) that authorizes this court to order DPS to, when possible, use liquid or foam soap, instead of bar

[7] The OPD's petition does not explain how HRS § 602-5(a)(6) authorizes the court to grant the OPD the relief it seeks. But its catholic requests coupled with its assertion that this court may grant those requests pursuant to HRS § 602-5(a)(6), implies this reading.

soap, in correctional facilities[8] would unconstitutionally infringe on the executive's power.[9]

Absent a showing that DPS is violating inmates' constitutional rights or neglecting a nondiscretionary ministerial duty - or that an injunction is necessary to *prevent* a constitutional violation - this court has no authority to tell DPS how to run Hawai'i's correctional facilities.

B. Nothing in SCPW-20-0000509 justifies the relief Petitioner seeks

Petitioner provides one final explanation of this court's jurisdiction to grant the requested relief: this court's orders in connection with OPD's previous petitions. Petitioner's argument is, effectively, that what the court has done before, it may lawfully do again.

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[8] Petitioner asks us to "Order DPS to adhere to the CDC's Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities in all Hawai'i correctional facilities." The CDC guidance Petitioner references includes this soap-related recommendation: "Liquid or foam soap when possible. If bar soap must be used, ensure that it does not irritate the skin and thereby discourage frequent hand washing. Ensure a sufficient supply of soap for each individual." See Center for Disease Control and Prevention, Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities, https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html [https://perma.cc/98UZ-2WHH].

[9] It is not just executive power the OPD asks us to infringe upon. The laws governing sentencing and bail are codified largely in HRS Chapters 706 and 804. The supreme court has the final say on the *interpretation* of these laws. But it cannot - even in the midst of a global pandemic - use its power to issue writs of mandamus and other extraordinary writs to rewrite them by, for example, establishing a presumption in favor of granting motions for release brought by certain individuals serving a term of imprisonment as a condition of felony or misdemeanor probation or deferral.

Several of the actions the court took in response to the March and August 2020 petitions were not just lawful, they were prudent. For example, in April 2020, the court appointed the Honorable Daniel R. Foley (ret.) as a special master. See Order of Consolidation and for Appointment of Special Master, Office of the Public Defender v. Connors, SCPW-20-0000200 at 6 (April 2, 2020). Judge Foley worked with the interested parties to address the issues raised in the March 2020 petitions and submitted detailed reports to the court. Judge Foley's appointment was an appropriate exercise of the court's inherent powers.[10]

But the fact that some of the actions the court took in response to the OPD's prior petitions were lawful does not mean that *all* of them were. Portions of our August 17, 2020 "Amended Order Re: Petty Misdemeanor and Misdemeanor Defendants" (the August 17 Order) and our August 27, 2020 "Order Re: Petty

[10] Another example of a lawful exercise of the court's inherent powers in response to the COVID-19 pandemic comes from the court's August 18, 2020 "Amended Order Re: Felony Defendants." In that order, the court established an "expedited process . . . to address the issues related to release and temporary suspension of incarceration" for a large number of convicted felons and pretrial detainees charged with a felony. In re Individuals in Custody of State of Hawai'i, No. SCPW-20-0000509, 2020 WL 4816344, at *1 (Haw. Aug. 18, 2020), clarified on denial of reconsideration, No. SCPW-20-0000509, 2020 WL 5036224 (Haw. Aug. 26, 2020). The court said that "motions for release and temporary suspension of incarceration will be presumed to have been filed" by these inmates. Id. at *2. It also provided guidance about how trial courts should decide these motions (on a non-hearing basis except in extraordinary circumstances) and set a deadline (August 24, 2020) by which the lower courts had to enter their orders on the motions. Id. at *2-*3. These are procedural, logistical, and scheduling directions and it is within this court's power to issue them.

Misdemeanor, Misdemeanor, and Felony Defendants" (collectively the August 2020 Orders) were unjustified, supported by neither the statutes they cited nor by the court's "inherent powers."

In the August 17 Order, the court temporarily suspended *en masse* court orders incarcerating certain pretrial detainees. See In re Individuals in Custody of State of Hawai'i, No. SCPW-20-0000509, 2020 WL 4873285 (Haw. Aug. 17, 2020), clarified on denial of reconsideration, No. SCPW-20-0000509, 2020 WL 5036224 (Haw. Aug. 26, 2020). [11]

The court's August 27 "Order Re: Petty Misdemeanor, Misdemeanor, and Felony Defendants" (the August 27 Order) went further and *prospectively* prohibited trial courts from setting bail for certain arrestees. The court commanded:

> With regard to individuals who are arrested and detained solely on petty misdemeanor or misdemeanor offenses after the filing date of this order that are not "excluded offenses," the respective trial court shall not set bail but shall release such individuals on their own recognizance or supervised release, and may impose

[11] The court ordered that, subject to certain conditions:

> With regard to pretrial detainees charged with a petty misdemeanor or a misdemeanor offense, the respective court orders for detaining the individuals are temporarily suspended and, by Wednesday, August 19, 2020, the Department of Public Safety ("DPS") shall release from OCCC such pretrial detainees, 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)). . . .

In re Individuals in Custody of the State of Hawai'i, 2020 WL 4873285, at *1 (footnote omitted).

conditions of release under HRS § 804-7.1.

In re Individuals in Custody of State of Hawai‘i, No. SCPW-20-0000509, 2020 WL 5057630, at *2 (Haw. Aug. 27, 2020) (emphasis added), amended, No. SCPW-20-0000509, 2021 WL 1236964 (Haw. Mar. 31, 2021).

HRS § 804-9 (Supp. 2019) vests trial courts with discretion to set bail amounts and enumerates factors courts should consider in determining how much bail to impose: "The amount of bail rests in the discretion of the justice or judge . . . and shall be set in a reasonable amount based upon all available information, including the offense alleged, the possible punishment upon conviction, and the defendant's financial ability to afford bail."

The August 27 Order effectively nullified HRS § 804-9 and trial courts' discretion under it. While the August 27 Order was in effect, trial courts could not both exercise their discretion under HRS § 804-9 *and* comply with the supreme court's edict. There is nothing procedural about the determination that trial courts should be stripped of their statutory discretion to set bail under HRS § 804-9.

The legislative nature of the court's August 27, 2020, order is exemplified by its "excluded offenses" list.

This list – formulated by the court and included in the order – delineates the bounds of the order's applicability. If

a person is arrested for an "excluded offense," then the court's new "no bail" rule would not apply to them. The trial court would retain its authority to set their bail pursuant to HRS § 804-9.

The court's curation of an "excluded offenses" list was pure policymaking. The court decided – understandably - that violation of a restraining order or injunction (HRS § 604-10.5 (2016)) would be an "excluded offense." Yet also that harassment by stalking (HRS § 711-1106.5 (2014)) and sexual assault in the fourth degree (HRS § 707-733 (Supp. 2017)) would not be. It picked "violation of interstate or intrastate travel quarantine requirements, as ordered pursuant to HRS ch. 127A" for inclusion on its list. And it left promoting minor-produced sexual images in the first degree (HRS § 712-1215.5 (2014))

off.[12] The court was not *providing process* when it made these decisions, it was legislating.[13]

In her concurrence and dissent to the August 27 Order, Justice McKenna disagreed with the court's decision to put quarantine violation on the "excluded offenses" list. She argued that incarcerating "quarantine violators" might make it harder to "reduce and eventually eliminate COVID-19" in Hawai'i's correctional centers. In re Individuals in Custody of the State of Hawai'i, 2020 WL 5057630, at *3 (McKenna, J., concurring and dissenting). This is a cogent argument. But it underscores the ways in which the court's curation of an "excluded offenses"

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[12] The court's "no bail" rule applied only to those arrested for petty misdemeanors and misdemeanors that were not on the "excluded offenses" list. But the court's order (and "excluded offenses" list) also contemplated felony arrests and offenses. Certain felony offenses – like those in Chapter 707 – were "excluded." Others, like sex trafficking (HRS § 712-1202 (Supp. 2016)) were not. The court's order "encouraged" the trial courts - when dealing with those arrested of non-excluded felony offenses - to "regularly employ the practice of releasing defendants without imposing bail." In re Individuals in Custody of the State of Hawai'i, 2020 WL 5057630, at *2. This "encouragement" was appropriate. And it did not infringe on trial courts' statutory discretion. But the decision to encourage the trial courts to take this approach when dealing with those arrested of *certain felonies* (like sex trafficking (HRS § 712-1202)), *but not others* (like labor trafficking in the second degree (HRS § 707-782 (2014))) is a policy-fraught judgment call of the sort typically left to the legislature.

[13] The August 27, 2020 Order also effectively negated trial courts' sentencing discretion under HRS §§ 706-621, 706-624(2), and 706-625 by commanding that:

> To the extent there are individuals serving intermittent sentences, the custodial portion of such defendants' intermittent sentence shall be suspended while Governor Ige's Emergency Proclamations remain in effect, or alternatively the sentences may be deemed satisfied at the discretion of the sentencing judge.

In re Individuals in Custody of the State of Hawai'i, 2020 WL 5057630, at *2.

list implicates questions of public health and criminal justice policy, not the provisioning of procedures, the administration of justice, or the exercise of the court's inherent powers.

The August 27 Order cited several statutes that it said justified its rewriting of bail and sentencing laws. The order said it was made "pursuant to this court's authority under Hawai‘i Revised Statutes ("HRS") §§ 602-5(3) & (6) [sic] and § 706-625, Governor David Y. Ige's Emergency Proclamations, and HRS § 601-1.5." In re Individuals in Custody of the State of Hawai‘i, 2020 WL 5057630, at *1.

As discussed above, the first two statutes cited by the August 2020 Orders – HRS §§ 602-5(a)(3) & (6) – do not authorize the court to extinguish trial courts' discretion under bail or sentencing laws.

It is unclear which portion of HRS § 706-625 (2014) the August 2020 Orders relied on. But that's just a statute concerning the trial court's discretion to revoke and modify probation. It doesn't authorize the supreme court to suspend the custodial portions of intermittent sentences imposed pursuant to HRS § 706-605 (2014 & Supp. 2018).

And HRS § 601-1.5 (2016) merely concerns the chief justice's authority over court deadlines and filing requirements.

The court's inherent powers also do not fully justify the August 2020 Orders.

This court's inherent powers, as codified in HRS § 602-4 and 602-5 are comprehensive, flexible, and far-reaching. There is nothing "narrow" about them. But our inherent powers - versatile and broad though they may be - do not free the court of all constitutional constraints on its actions. We may "provide process where none exists." See State v. Moriwake, 65 Haw. 47, 55, 647 P.2d 705, 712 (1982) (cleaned up). But we may not supplant the substance of already-existing laws.

Historically, we have invoked our inherent powers in situations involving the interpretation of laws or litigation logistics, fees, and fines. We have relied on these powers to, for example:[14]

- Provide guidance when the lowers courts have differed in their interpretations of a statute. See State v. Moniz, 69 Haw. 370, 742 P.2d 373 (1987).

[14] Another apparent example of our inherent authority to provide process in ways that promote justice is found in this court's March 24, 2020 order in SCPW-20-0000200. There, the court said that it had reviewed a letter received from the Office of the Public Defender and would deem the letter – which asked the court to consider an order "designed to commute or suspend" jail sentences being served by certain inmates in Hawai'i correctional facilities – "as a petition for writ of mandamus pursuant to HRAP Rule 21." See Order, Office of the Public Defender v. Connors, SCPW-20-0000200 at 1 (Mar. 24, 2020).

- Clarify when preliminary hearings may be closed to the public. See Gannett Pac. Corp. v. Richardson, 59 Haw. 224, 227, 580 P.2d 49, 53 (1978).
- Reduce the fines imposed on a litigant for civil contempt. See Haw. Pub. Emp't Rels. Bd. v. Haw. State Tchrs. Ass'n, 55 Haw. 386, 520 P.2d 422 (1974).
- Award attorneys' fees to a party without a statutory entitlement to them. See CARL Corp. v. State, Dep't of Educ., 85 Hawai'i 431, 460, 946 P.2d 1, 30 (1997).
- Allow an individual defendant to seek an amendment of the lifetime revocation of his driver's license – even though such a challenge was not contemplated by the relevant statute – because justice so required. See Farmer v. Admin. Dir. of Ct., State of Haw., 94 Hawai'i 232, 11 P.3d 457 (2000).

None of our prior invocations of our inherent powers suggest that the August 2020 Orders - to the extent they temporarily frustrated trial courts' ability to carry out their duties under HRS sections 706-624(2) (Supp. 2017), 706-625, and 804-9 - were lawful. Yes, a trial court has the authority to dismiss a manslaughter charge after two mistrials. Cf. Moriwake, 65 Haw. 47, 647 P.2d 705. But it doesn't follow that

this court can gut trial courts' statutory discretion under the bail and sentencing laws.

The August 2020 Orders, while assuredly well-intentioned, were an anomaly. In other states, the acceleration of inmate release was accomplished through executive action, not judicial fiat.[15] And some state courts, when faced with petitions seeking relief similar to that sought here, have declined to grant it citing separation of powers concerns. For example, in Matter of Request to Modify Prison Sentences, 231 A.3d 667, 672-73 (N.J. 2020), the New Jersey Supreme Court rejected the Office of the Public Defender and the American Civil Liberties Union of New Jersey's request to "order a framework for the early release of several groups" of inmates on the grounds that "whether to grant parole or to furlough an inmate rests largely with the Executive Branch." See also Colvin v. Inslee, 467 P.3d 953, 960-64 (Wash. 2020) (denying petition for writ of mandamus that sought to compel Washington's Governor and Department of Corrections Secretary to release certain offenders and lower prison

[15] For example, Illinois's Governor Jay Pritzker issued an executive order suspending statutory limitations on the permissible length of time and justifications for furloughs. See Ill. Exec. Order No. 2020-21 (Apr. 6, 2020), https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-21.aspx [https://perma.cc/C36N-3QU9]. In Colorado, Governor Jared Polis issued an executive order temporarily suspending various criminal statutes aimed to reduce the incarcerated population. See Co. Exec. Order No. D 2020 016 (Mar. 25, 2020), https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20016%20Suspending%20Certain%20Regulatory%20Statutes%20Concerning%20Criminal%20Justice_0.pdf [https://perma.cc/W2UM-YRLW].

populations in response to COVID-19 and proclaiming that the court would not "usurp" the executive's authority).

The Massachusetts Supreme Judicial Court took a different approach. That court, relying on its general supervisory power, did order the release of a limited group of pretrial detainees. See Comm. for Pub. Counsel Services v. Chief Justice of Trial C., 142 N.E.3d 525, 530, aff'd as modified, 143 N.E.3d 408 (Mass. 2020). But the court - citing separation of powers concerns - also declined to release anyone serving a term of incarceration post-conviction. Id. at 540-42. The Supreme Judicial Court said that (absent a constitutional violation) it could not revise or revoke sentences "in a manner that would usurp the authority of the executive branch." Id. at 530. It emphasized that "mechanisms to allow various forms of relief for sentenced inmates exist within the executive branch." Id. at 542.[16]

[16] The Massachusetts Supreme Court's action is distinguishable from that undertaken by the Washington Supreme Court in response to COVID-19. While the former released certain pretrial detainees, the latter merely provided guidance to its lower courts about the interpretation of a Washington law concerning the release of the accused. See In the Matter of Statewide Response By Washington State Courts to the COVID-19 Public Health Emergency, Amended Order No. 25700-B-607 (March 20, 2020), http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/Supreme%20Court%20Emergency%20Order%20re%20CV19%20031820.pdf [https://perma.cc/2HSB-FM2G]. Unlike the Massachusetts Supreme Court (and this court), the Washington Supreme Court did not directly order the release of any pretrial detainees.

The circumstances surrounding other cases where a state supreme court took action to release pretrial detainees are distinguishable from those of the August 2020 Orders.[17]

In our common law system, precedent is legitimizing: enough wrongs *can* make a right. The snowballing weight of precedent can add the patina of validity to even the puniest legal reasoning. OPD's rote reliance on the court's orders in SCPW-20-0000509 illustrates this point. This is why - though I support the court's denial-in-part of the writ - I do not join

[17] For example, in Kentucky, the Supreme Court issued an order releasing some pretrial detainees. See 2020-45 Amended Order, In Re: Kentucky Court of Justice Response to Covid-19 Emergency: Amended Emergency Release Schedule and Pretrial Drug Testing Standards (May 29, 2020), https://kycourts.gov/Courts/Supreme-Court/Supreme%20Court%20Orders/202045.pdf [https://perma.cc/4QCY-KJB4]. But Kentucky's Rules of the Supreme Court provide that: "The policy-making and administrative authority of the Court of Justice is vested in the Supreme Court and the Chief Justice. All fiscal management, personnel actions and policies, development and distribution of statistical information, and pretrial release services come within that authority." KY ST S CT Rule 1.010 (emphases added). There is no analogous rule in Hawai'i.

In Maryland, Chief Judge Mary Ellen Barbera issued an administrative order directing judges to "identify at-risk incarcerated persons for potential release," "expedite the handling of motions for review of bonds," and consider COVID-19-related factors in making release and sentencing decisions. But Chief Judge Barbera did not set forth specific categories of covered or excluded offenses. See Administrative Order Guiding the Response of the Trial Courts of Maryland to the Covid-19 Emergency as It Relates to Those Persons Who Are Incarcerated or Imprisoned (Apr. 14, 2020), https://mdcourts.gov/sites/default/files/admin-orders/20200414guidingresponseoftrialcourts.pdf [https://perma.cc/9BHD-LFGN].

Additionally, although the Supreme Court of South Carolina's Chief Justice Donald W. Beatty issued a "memorandum" directing magistrates and municipal judges to release certain pretrial detainees, the memorandum is silent on the chief justice's authority to do so. Memorandum, Re: Coronavirus (Mar. 16, 2020), https://www.sccourts.org/whatsnew/displayWhatsNew.cfm?indexId=2461 [https://perma.cc/CA6V-6ECH].

the court's order to the extent it implies the court could have even granted OPD much of the relief it seeks.

II. OPD IS NOT ENTITLED TO MOST OF THE RELIEF IT SEEKS BUT IS ENTITLED TO A WRIT OF MANDAMUS ORDERING DPS TO COMPLY WITH HRS § 353-6.2

Despite my conclusion that the court lacks jurisdiction to act in this case, I agree with the court's conclusion that the OPD has not shown an entitlement to mandamus relief.

As this court routinely explains, a writ of mandamus is an extraordinary remedy. And no writ of mandamus will issue absent an indisputable showing that the petitioner is entitled to the requested relief. Petitioners seeking an extraordinary writ must also show that there are no other means of addressing the alleged wrong or obtaining the action sought. And writs of mandamus should not arrogate the discretionary authority of lower courts or displace the normal appellate procedures.

Here, mandamus relief is largely inappropriate. There are other ways to address the alleged wrong. And granting the requested relief would intrude on lower courts' discretion. I do agree with the court though that OPD is entitled to a writ of mandamus ordering DPS to comply with its non-discretionary duties under HRS § 353-6.2 (Supp. 2019).

A. Article I, section 12 grants petitioners the relief they are seeking with respect to the regular employment of no cash bail

Petitioners ask us to:

> Order that the practice of no cash bail, including the release of individuals on their own recognizance, on signature bonds, or on supervised release, should be regularly employed, and pretrial detainees who are 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.

Petitioner doesn't need an order from the court commanding that pretrial detainees who pose no public safety or flight risk should not be imprisoned simply because they lack the means to post cash bail. Article I, section 12 already endorses this conclusion. This potent provision of our bill of rights forbids both excessive bail and the unreasonable or arbitrary denial of bail. See Huihui v. Shimoda, 64 Haw. 527, 539, 644 P.2d 968, 976 (1982). Indeed, article I, section 12's language codifies trial courts' discretion to release nearly all defendants without bail.

The provision's legislative history foregrounds the powerful role it plays in ensuring that cash bail is not used to imprison the poor just because they lack the funds to post bail. Speaking against a 1978 constitutional amendment that would remove this provision from our constitution, Delegate Adelaide Keanuenueokalaninuiamamao "Frenchy" DeSoto spoke passionately about the role its protections play in protecting the poor:

> This amendment [removing what is now article I, section 12 from the state constitution] prejudices the poor. . . . I am advocating that, in the event there is a charge brought against a poor person, that poor person has just as much right to be released as the rich . . . . I urge this Convention to vote down this amendment . . . I urge all of you to look at this amendment as a declaration against the poor . . . .

Debates in the Committee of the Whole on Bill of Rights Comm. Prop. No. 15, in 1 Proceedings of the Constitutional Convention of Hawai‘i of 1978, at 651 (1980).

HRS § 804-9 too supports the assertion that *no one* in our state should be incarcerated merely because they cannot pay bail. That statute requires that the "bail amount should be so determined as not to suffer the wealthy to escape by the payment of a pecuniary penalty, nor to render the privilege useless to the poor." For most indigent defendants *any* cash bail would render the privilege useless.

Petitioners do not need a writ from this court ordering that no pretrial detainee should be incarcerated "simply because they do not have the means to post cash bail." They have article I, section 12. Its protections are mighty. They preceded the COVID-19 pandemic. And they will outlast it.

B. Post-conviction inmates can bring individual motions for release

Post-conviction inmates also have alternative means for seeking relief available to them. They are free, for example, to file individual motions for release. This individualized approach to relief may demand more hustle of OPD lawyers and the private criminal defense bar than a blanket petition for an extraordinary writ. But it is not impossible. It's not even infeasible or impractical. It's doable. Our district, family,

and circuit courts have admirably stepped up and met the challenges posed by the ongoing pandemic; they have, and will continue to, expeditiously resolve individual release motions. Petitioner has thus failed to show it lacks alternative means to seek relief.

C. The requested relief would impermissibly infringe on trial courts' discretion

The requested mandamus relief is also unavailable because it would intrude on trial courts' discretion over bail and sentencing. See Kema v. Gaddis, 91 Hawai'i 200, 204-05, 982 P.2d 334, 338-39 (1999) ("Where a trial court has discretion to act, mandamus will not lie to interfere with or control the exercise of that discretion . . . .").

A writ of mandamus may issue where the trial court has committed a flagrant and manifest abuse of discretion. Petitioner has not argued that has happened, or will happen, here. Rather, petitioner is asking us to preemptively handicap trial courts' discretion in deciding motions for release, imposing custodial sentences, and employing cash bail. This imposition would be as inadvisable as it is legally unfounded.

Trial courts are the judiciary's boots on the ground (and a lot more). They are familiar with the specific matters before them. They are well positioned to determine what extent the COVID-19 pandemic impacts their bail or sentencing decisions in

a given case. And, unlike this court, they can reach an individualized decision that takes into account factors such as public safety, public health, flight risk, and a defendant's age and health status.

D. OPD is entitled to a writ requiring DPS to comply with HRS § 353-6.2

HRS § 353-6.2 requires community correctional centers to review, no less frequently than every three months, "pretrial detainees to reassess whether a detainee should remain in custody or whether new information or a change in circumstances warrants reconsideration of a detainee's pretrial release or supervision." HRS § 353-6.2(a). It also mandates that the centers transmit the findings and recommendations of their periodic reviews to the "appropriate court, prosecuting attorney, and defense counsel." HRS § 353-6.2(b).

The duties HRS § 353-6.2(a) imposes on DPS are clear and nondiscretionary. The community correctional centers must conduct a review of pretrial detainees no less frequently than every three months. DPS has discretion over *how* to conduct the review and *whether* to reconsider a given detainee's supervision. But it may not skip the reviews or do them less frequently than every three months. Similarly, HRS § 353-6.2(b) makes transmitting the review results a mandatory ministerial duty:

the results must be shared with the "appropriate court, prosecuting attorney, and defense counsel." HRS § 353-6.2(b).

Because HRS § 353-6.2 imposes clear and nondiscretionary duties on DPS, and because OPD has no other avenues for ensuring DPS's fulfillment of those duties, OPD is entitled to a writ of mandamus ordering DPS's compliance with HRS § 353-6.2.

III. ARTICLE I, SECTION 12 OF THE HAWAI'I CONSTITUTION PROVIDES MORE EXPANSIVE PROTECTIONS THAN THE EIGHTH AMENDMENT, BUT THE SCANT RECORD IN THIS CASE DOES NOT SHOW ANY CONSTITUTIONAL VIOLATIONS

Courts have a duty to "enforce the constitutional rights of all persons, including prisoners." Brown v. Plata, 563 U.S. 493, 511 (2011) (cleaned up). Where there is a showing that the conditions of confinement at a correctional facility violate inmates' Eighth Amendment or article I, section 12 rights, we are empowered, indeed obligated, to intervene and – if necessary to remedy the constitutional violation – impose specific requirements on prison administrators.[18] "Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration." Id.

The Eighth Amendment and article I, section 12 protect inmates against not only punishment that is "cruel or unusual"

[18] We may also intervene if there is a showing that injunctive relief is necessary to forestall a constitutional violation.

because it is inhumane, but also against conditions of confinement that pose a substantial risk of serious harm or deprive prisoners of "a single, identifiable human need such as food, warmth, or exercise". Wilson v. Seiter, 501 U.S. 294, 304 (1991).

To succeed with a conditions-of-confinement claim under the Eighth Amendment, a plaintiff must show subjective deliberate indifference to a "substantial risk of serious harm to a prisoner."[19] Farmer v. Brennan, 511 U.S. 825, 836 (1994). As the Supreme Court explained in Farmer:

> We hold instead that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [the official] must also draw the inference.

Id. at 837.

We have never addressed what a plaintiff bringing a conditions-of-confinement claim under article I, section 12 must show. But "[t]his court generously interprets the civil rights bestowed by the Hawai‘i Constitution." In re KAHEA, No. SCAP-20-0000110, 2021 WL 4271347, at *10 (Haw. Sept. 21, 2021). And, in

[19] This is a *lower* standard than that applied to Eighth Amendment excessive force claims where a plaintiff alleges a prison official of using excessive physical force. In such cases, the key question is "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." Hudson v. McMillian, 503 U.S. 1, 6 (1992) (cleaned up).

the context of conditions-of-confinement claims brought by convicted inmates,[20] I believe that article I, section 12 provides protections at least as expansive as those provided by the "objective deliberate indifference" standard.

In applying the "objective deliberate indifference" standard in the context of conditions-of-confinement claims brought by pretrial detainees[21] under the due process clause, the Second Circuit explained:

> [T]o establish a claim for deliberate indifference to conditions of confinement under the Due Process Clause of the Fourteenth Amendment, the pretrial detainee must prove that the defendant-official acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, or should have known, that the condition posed an excessive risk to health or safety. In other words, the "subjective prong" (or "*mens rea* prong") of a deliberate indifference claim is defined objectively.

Darnell v. Pineiro, 849 F.3d 17, 35 (2d Cir. 2017). See also Castro v. Cty. of Los Angeles, 833 F.3d 1060, 1071 (9th Cir.

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[20] Pretrial detainees asserting their article I, section 5 due process rights have been violated because the conditions of their confinement are punitive face a lower bar for establishing a due process violation. They do not need to show that the conditions at issue pose a "substantial risk of serious harm." They can succeed on a showing that: "(1) there is a showing of an expressed intent to punish on the part of detention facility officials; (2) the condition or restriction is not reasonably related to a legitimate goal; or (3) the condition or restriction is excessive in relation to the alternative purpose assigned to it." Gordon v. Maesaka-Hirata, 143 Hawai'i 335, 358, 431 P.3d 708, 731 (2018) (cleaned up).

[21] In Kingsley v. Hendrickson, 576 U.S. 389, 392 (2015), the Supreme Court held that a pretrial detainee may prove that their federal due process rights were violated by a jail officer's use of excessive force by showing that the force was *objectively* unreasonable. Our constitution's due process protections for pretrial detainees bringing excessive force claims are at least as great, if not greater, than those provided by the federal constitution.

2016) (observing that under "objective" standard, pretrial detainees asserting failure-to-protect due process claims must "prove more than negligence but less than subjective intent—something akin to reckless disregard").

We have yet to expound on the scope of article I, section 12's protections in the context of conditions-of-confinement claims. But given the gravity of the rights at stake in "cruel or unusual punishment" claims, any future treatment of this issue by the court must account for the analytical difference between excessive force, excessive sanction, and conditions-of-confinement claims. Concepts such as proportionality of punishment, which are fundamental to the protections our state constitution offers against excessive sanctions, are irrelevant in the context of conditions-of-confinement claims.

Though the extent of article I, section 12's protections remains an open question, the scant record before us forecloses our engagement with that question here.[22] The sad statistics in

[22] The OPD attaches the district court's preliminary injunction order in Chatman v. Otani, No. CV 21-00268 JAO-KJM (D. Haw. 2021), to its petition. Chatman is a putative class action initiated by several individuals incarcerated or detained in Hawai'i's correctional facilities. Chatman v. Otani, No. CV 21-00268 JAO-KJM, 2021 WL 2941990, at *1-*2 (D. Haw. July 13, 2021). The Chatman plaintiffs alleged that DPS violated their Eighth and Fourteenth Amendment rights by mishandling the pandemic and failing to implement DPS's Pandemic Response Plan. Id. at *1. Before the settlement agreement was entered, the district court granted plaintiffs' motion for provisional class certification and granted in part and denied in part plaintiffs' motion for preliminary injunction and temporary restraining order. Id. at *25. The court ordered DPS to fully comply with its Pandemic Response Plan; it also imposed additional conditions. Id. at *22-*24. On September 9, 2021, the district court granted the parties' joint motion for

the OPD's petition are a profound testament to the ravages of COVID-19. But they are no substitute for a factual record. And no matter how grave a plaintiff's allegations, the factual record must be established through the adversarial process. The making of declarations, factual stipulations, and judicial findings of fact need not take long. (Actions for injunctive relief, by their nature, should move quickly.) But given the record in this case, regardless of how liberal article I, section 12's protections may be, Petitioner will not be able to show a constitutional violation. For this reason, I concur with the court's decision to refrain from analyzing the constitutional issues raised in Petitioner's application.

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

/s/ Todd W. Eddins

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preliminary approval of the settlement agreement. Chatman v. Otani, No. CV 21-00268 JAO-KJM, ECF No. 97 (D. Haw. Sep. 9, 2021).

The OPD treats the district court's preliminary injunction order in Chatman as if it is a substitute for a fully developed factual record. But it isn't: the Chatman court did not hold an evidentiary hearing and its analysis is conclusory and based on an assortment of declarations. The contents of those declarations are not subject to judicial notice by this court. See Hawai'i Rules of Evidence Rule 201; Uyeda v. Schermer, 144 Hawai'i 163, 172, 439 P.3d 115, 124 (2019) ("Factual allegations, conclusions, and findings, whether authored by the court, by the parties or their attorneys, or by third persons, should not be noticed to prove the truth of the matters asserted even though the material happens to be contained in court records." (cleaned up)).