

Electronically Filed
Supreme Court
SCPW-20-0000509
12-AUG-2020
11:11 PM

SCPW-

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

IN THE MATTER OF
INDIVIDUALS IN CUSTODY OF
THE STATE OF HAWAI'I

ORIGINAL PROCEEDINGS

HON. MARK E. RECKTENWALD,
Chief Justice
HON. PAULA A. NAKAYAMA
HON. SABRINA S. MCKENNA
HON. MICHAEL D. WILSON
Associate Justices

**PETITION FOR EXTRAORDINARY WRIT
PURSUANT TO HRS §§ 602-4, 602-5(5), AND 602-5(6)
AND/OR FOR WRIT OF MANDAMUS**

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I.

STATEMENT OF FACTS

In late March, 2020, in the early days of the unprecedented COVID-19 health emergency gripping our state, nation and the world, the Office of the Public Defender (“OPD”) sought emergency action by this court to address the threat of the pandemic on inmates and staff in Hawai‘i’s correctional centers and facilities. At the time, the potential catastrophic impact of the pandemic on our State, the community, our citizens, and our correctional centers and facilities was not determinable. There were lockdowns across the nation, the death toll was rising, and numerous other states had taken steps towards releasing inmates from correctional facilities. In anticipation of the devastating consequences, the OPD petitioned this Court to take emergency action on release of prisoners to alleviate overcrowded conditions.

In response to the petitions for emergency action resulting from the pandemic, this Court declined to order a blanket release of certain categories of inmates and, instead, appointed a Special Master to work with the parties in a collaborative and expeditious manner to address the issues raised in the two petitions and to facilitate a resolution while protecting public health and public safety. As part of the process, this Court instituted procedures for expedited consideration by the courts of individual release motions, which included an opportunity for objection to the release based on public safety and other considerations. By early June, this Court noted that, although the pandemic continued, the rate of new infections in Hawai‘i remained at very low levels. This Court determined that much of the urgent relief requested in the two petitions had been addressed, concluded the consolidated proceedings, and recommended further issues regarding inmate populations at correctional facilities may be addressed through alternative means, specifically, the Hawai‘i Correctional Systems Oversight Commission.

Since the time of the last order, it appears that the Department of Public Safety (“DPS”) and the general public have become complacent. The OPD’s warning that the introduction of COVID-19 into Hawai‘i’s correctional facilities was “inevitable” was dismissed and ridiculed at a legislative hearing. Now case counts have soared and restrictions have been re-imposed. State of Hawai‘i, Department of Health (“DOH”) Director Bruce Anderson has described the situation in Hawai‘i as “endemic.” Hawai‘i COVID-19 counts as of August 12, 2020, showed a total of 202 new cases, with a total of 3,958 cases and 38 deaths reported since February 28, 2020.¹ Since the end of July, case counts have routinely been in the triple digits.² From cases of one to two per day for a period of almost five weeks, Hawai‘i is now experiencing cases in three figures on a daily and ongoing basis.³ Our death total which remained at 17 for weeks has now more than doubled to 38 as of August 12, 2020.⁴

It is the recent positive test results at multiple correctional facilities in Hawai‘i and the Arizona facility which houses Hawai‘i inmates that creates the urgency requiring immediate judicial relief. Unlike the situation in early March which dealt with *the threat* of this deadly pandemic being introduced into our correctional facilities, we are now faced with *the reality* of COVID-19 being confirmed in at least three facilities on Oahu. As of August 12, 2020, a total of sixteen inmates and seven adult correctional officers (“ACOs”) have tested positive at the Oahu

¹ Hawaii Data Collaborative, <https://www.hawaiidata.org/covid19> (last visited, August 12, 2020)

² Id.

³ Id.

⁴ Id.

Community Correctional Center (OCCC).⁵ As of August 11, 2020, 235 OCCC inmates had been tested and 295 OCCC inmates had been placed in quarantine and 20 more in medical isolation.⁶ Additionally, the DPS reported on August 7, 2020, that one ACO at the Halawa Medium Security Correctional Facility (“HMSF”) and two ACOs at the Waiawa Correctional Facility (“WCF”) had reported positive tests.⁷ In light of the growth of the outbreak in our larger community which has now reached into three facilities on Oahu, it is apparent that significant action is needed in our correctional centers but will not occur without the intervention of this Court.

In explaining that the DPS was acting quickly “to implement the [DPS’s] COVID-19 pandemic protocol for correctional facilities, in an effort to mitigate any potential spread of the virus,” the news release asserted, “Since the beginning of this pandemic, we have been working closely with the Department of Health (DOH) to ensure the DOH and [Centers of Disease Control] guidelines are followed in our facilities, so we can maintain the health and welfare of our staff and the incarcerated population.”⁸

That is unfortunately not the case. In a Honolulu Civil Beat article, staff members reported “apparent lapses in protocols that are supposed to keep the pandemic out, such as

⁵ Hawaii Department of Public Safety Facebook, (August 12, 2020 entry) *see* <https://www.facebook.com/HawaiiPSD>

⁶ “Coronavirus (COVID-19) Information and Resources,” State of Hawaii Department of Public Safety, <http://dps.hawaii.gov/blog/2020/03/17/coronavirus-covid-19-information-and-resources/?fbclid=IwAR3Z1nIBd2qpuQn1FqUv5hUR43zNN0WeAvYWD-rnN2FjfyXqIyaZu7CLYjQ> (last visited, August 12, 2020)

⁷ Hawaii Department of Public Safety Facebook, (August 7, 2020 entry) *see* <https://www.facebook.com/HawaiiPSD>

⁸ Id.

inmates who were released to the general [jail] population before their 14 days [quarantine period] were up and one occasion where work line inmates were seen strolling around the module without masks covering their faces.”⁹ Staff members are only issued two “flimsy” masks and the DPS is not providing hand sanitizer, face shields or eye protection.¹⁰ Three inmates are being held in two-person cells and inmates are being released before their 14-day quarantine period expires due to overcrowding in the holding module.¹¹ Aging furniture in the modules is not being regular sanitized.¹² In addition, inmates, their family members, and others have reported to their attorneys and advocates in the community the following information:

- ACOs at WCF may wear their mask when they enter into the facility, but they remove them while in the facility.
- Not every ACO at OCCC wears a mask.
- A number of inmates at OCCC, even though they receive masks, only wear them when they go to court or to the visiting module to meet with their attorney; they do not wear masks the rest of the time.
- While the initial response to the pandemic in the Spring was to clean and disinfect twice per day, cleaning and disinfecting has now been reduced to only once per day; showers and telephones are not cleaned or wiped down between use.
- Cleaning supplies are sometimes not available; while bleach is made available to the inmates for disinfecting, they are not provided gloves to wear while using the toxic material.

⁹ Dayton, K., “Hawai‘i Corrections Workers Fear Infection As COVID-19 Outbreak Grows.” Honolulu Civil Beat. See <https://www.civilbeat.org/2020/08/hawaii-corrections-workers-fear-infection-as-covid-19-outbreak-grows/>

¹⁰ Id.

¹¹ Id.

¹² Id.

- Although DPS has asserted that all inmates who leave their facilities are quarantined for a period of 14 days upon return it was reported that an inmate who was transported to the Family Court of the First Circuit at the Ronald T.Y. Moon Judiciary Complex, upon his return to HMSF, was not quarantined; instead, the inmate was returned to his module where he had regular close contact with other inmates.
- Approximately 60 inmates eat meals together at the same time without social distancing of six feet. Inmates are not spaced apart six feet while in line to receive meals.
- Inmates are continuing to be charged \$3.00 medical co-payment per visit to the medical unit.
- Inmates are informed that masks are limited and issued only when appropriate.
- Inmates are willing to risk punishment for crafting masks from t-shirts.

Inmates clearly have cause to be concerned about potential exposure to COVID-19 based on the foregoing anecdotal reports as well as the fact that individuals such as religious program volunteers were reportedly still entering into facilities, as well as staff and ACOs on a daily basis.

Hawai‘i inmates who are being housed in Arizona are equally in peril.¹³ The DPS has contracted with CoreCivic, a for-profit correctional corporation, to house the overflow of inmates from Hawai‘i correctional facilities. Currently, over 1,122 Hawai‘i inmates are housed at

¹³ To illustrate this point as to Arizona correctional facilities in general, on August 4, 2020, 517 inmates at the Arizona State Prison Complex Tucson Whetstone Unit tested positive for COVID-19 – this reflected a 72% jump in the Arizona Department of Corrections, Rehabilitation and Reentry’s identified COVID-19 cases. The department had previously reported 890 confirmed COVID-19 cases among inmates statewide, with 225 tests pending as of August 3, 2020, when 222 inmates in Tucson tested positive out of 690 inmates tested. This alarming jump in cases occurred despite the fact that inmates had been provided with fabric face coverings since July 2, 2020, and staff had been required to wear cloth face coverings since Jun 15, 2020. Alonzo, A, “Dozens of Nevada inmates housed at private Arizona facility test positive for COVID-19,” Reno Gazette Journal (published July 19, 2020, updated July 20, 2020; *see* <https://www.rgj.com/story/news/local/mason-valley/2020/07/19/coronavirus-nevada-covid-19-updates-arizona-prison-cases/5468224002/>).

Saguaro Correctional Facility in Eloy, Arizona.¹⁴ These inmates are at significant risk of contracting COVID-19. As of August 12, 2020, the State of Arizona has reported 189,443 confirmed cases of COVID-19 and 4,347 deaths from COVID-19.¹⁵ Saguaro Correctional Facility houses both Hawai‘i and Nevada inmates in a single facility. While the inmates are not housed together, the Hawai‘i and Nevada sections of the facility are only separated by security gates. More than two-thirds of the nearly 100 Nevada inmates at Saguaro have tested positive for COVID-19.¹⁶ Of the 99 Nevada inmates tested, 69 were positive for COVID-19.¹⁷ To date, the DPS has not reported any confirmed cases of COVID-19 in inmates in the Hawai‘i section of Saguaro Correctional Center. Nevertheless, the disturbing number of confirmed cases in the Nevada section of Saguaro Correctional Center verifies that the Hawai‘i inmates are in dire straits. As of August 12, 2020, 79% of Arizona Intensive Care Unit beds were in use.¹⁸ This creates the distinct possibility that Hawai‘i inmates who contract COVID-19 will not be able to receive appropriate and necessary medical care if they become infected. Further, unlike inmates housed in Hawai‘i correctional facilities, the release of inmates housed in Saguaro Correctional

¹⁴ *Data obtained from* Corrections Division, State of Hawai‘i Dep’t of Public Safety, “Bi-monthly Population Report - 08-03-2020,” available at <https://dps.hawaii.gov/wp-content/uploads/2020/08/Pop-Reports-Weekly-2020-08-03.pdf>

¹⁵ “Data Dashboard,” Arizona Department of Health Services, <https://www.azdhs.gov/preparedness/epidemiology-disease-control/infectious-disease-epidemiology/covid-19/dashboards/> (last visited, August 12, 2020).

¹⁶ Alonzo, A, “Dozens of Nevada inmates housed at private Arizona facility test positive for COVID-19,” *Reno Gazette Journal* (published July 19, 2020, updated July 20, 2020; *see* <https://www.rgj.com/story/news/local/mason-valley/2020/07/19/coronavirus-nevada-covid-19-updates-arizona-prison-cases/5468224002/>).

¹⁷ *Id.*

¹⁸ Data Dashboard,” Arizona Department of Health Services, <https://www.azdhs.gov/preparedness/epidemiology-disease-control/infectious-disease-epidemiology/covid-19/dashboards/> (last visited, August 12, 2020).

Center is substantially more time-consuming and involved. Generally, the DPS only transfers inmates between Hawai‘i correctional facilities and Saguaro Correctional Center on flights scheduled at specifically designated times. While additional flights could be scheduled this cannot be accomplished with the expediency necessary in this situation. As COVID-19 is already present within the Saguaro Correctional Facility and it appears that there is some contact between Nevada and Hawai‘i inmates and possibly cross-over between staff members, without any action it appears to be simply a matter of time before a Hawai‘i inmate is infected. As COVID-19 can spread rapidly and explosively there is a special urgency for immediate and decisive action in the case of inmates housed in Saguaro Correctional Facility.

Much like some communities in Hawai‘i and the U.S. mainland, as the numbers in Hawai‘i appeared to reflect a “flattening of the curve,” the DPS has become complacent and relaxed what procedures they had put in place pursuant to the court-ordered response to the growing health crisis. The number of inmates in jail population showed a steady decline from mid-March 2020 to mid-May 2020.¹⁹ However, there has been a steady increase in the population since mid-May 2020. In fact, the most recent DPS population statistics confirm that Hawai‘i correctional facilities are overcrowded beyond design capacity:²⁰

¹⁹ Data obtained from Corrections Division, State of Hawai‘i Dep’t of Public Safety, “Bi-monthly Population Report - 7-20-2020” and “Bi-monthly Population Report - 8-2-2020” from; available at <https://dps.hawaii.gov/wp-content/uploads/2020/07/Pop-Reports-Weekly-2020-07-20.pdf> and <https://dps.hawaii.gov/wp-content/uploads/2020/08/Pop-Reports-Weekly-2020-08-03.pdf>

²⁰ Data obtained from Corrections Division, State of Hawai‘i Dep’t of Public Safety, “Bi-monthly Population Report - 08-03-2020,” available at <https://dps.hawaii.gov/wp-content/uploads/2020/08/Pop-Reports-Weekly-2020-08-03.pdf>

Design bed capacity is defined as “the number of inmates that a correctional facility was originally designed to house, or currently has a capacity to house as a result of subsequent modifications” and “does not include extraordinary arrangements to accommodate overcrowded

Facility	Design Capacity	Operational Capacity	Inmate Head Count	Occupancy Rate (% of Capacity)
HCCC	206	226	356	157.5%
SNF	90	132	105	79.5%
HMSF	496	992	790	79.6%
KCCC	110	128	138	107.8%
KCF	200	200	178	89.0%
MCCC	209	301	315	104.7%
OCCC	628	954	938	98.3%
WCCC	258	260	222	85.4%
WCF	294	334	232	69.5%
Total	2,491	3,527	3,274	92.8%

Note: Operational Capacity changed to Corrections Population Management Commission capacities.

Indeed, far from trying to reach and/or maintain populations in line with the “design capacity” of each facility, the inmate head count as of August 3, 2020, exceeded the “design capacity” at six facilities, and even exceeded the “operational capacity” at three of the facilities. Proper social distancing and hygiene cannot be maintained at “operational capacity.”²¹

conditions.” See Corrections Division, State of Hawai‘i Dep’t of Public Safety, “End of Month Population Reports – 12-31-2004,” (Dec. 30, 2004).

²¹ In 2001, the Corrections Population Management Commission (“CPMC”) established the operational capacities of state correctional centers and correctional facilities. Relying on the standards developed by the American Correctional Association, the Commission justified increasing the capacity of the correctional facilities by placing multiple occupants in each cell:

Medium/minimum inmates may be placed in multiple occupancy rooms with at least 25 unencumbered square feet per inmate. “Unencumbered space” is space that is not encumbered by furnishings or fixtures. These conditions require the inmates spend no more than ten hours per day in their cells. If the inmate is to be housed for longer than ten hours per day, there must be 80 [square feet] of total space per occupant.

Corrections Population Management Commission, 2001 Annual Report, December 2001, pp. 6-7.

CPMC allowed for double occupancy because *it assumed that the inmates would be permitted to leave their cells for fourteen hours per day. However, because risk of COVID-19, the inmates are likely required to remain in their cells more than ten hours a day. And because they are in the cells more than ten hours a day, the operational capacity must be reduced to the equivalent of design capacity.* Therefore, under these circumstances, the establishment of the operational capacities established in 2001 is no longer applicable.

Equally troubling, the numbers of inmates either increased or remained essentially the same from July 20, 2020 to August 3, 2020, reflecting no effort to reduce numbers despite the rising COVID-19 cases in our state and across the mainland.²² At OCCC, where the largest outbreak of COVID-19 is presently occurring, the inmate head count is 98.3% of “operational capacity” which is 310 inmates beyond “design capacity.” HMSF has 294 inmates beyond “design capacity.”

As evidenced by the wild-fire spread of coronavirus in facilities on the Mainland, the introduction of COVID-19 into overcrowded conditions is a recipe for disaster. As the Centers of Disease Control (“CDC”) has stated, “Correctional and detention facilities face challenges in controlling the spread of infectious diseases because of crowded, shared environments and potential introductions by staff members and new intakes.”²³ As of the date of the report, among 37 jurisdictions reporting, 86% reported at least one confirmed COVID-19 case among incarcerated or detained persons or staff, across 420 correctional and detention facilities.²⁴ Similarly, the Marshall Project reported, “By August 4, at least 86,639 people in prison had tested positive for the illness, *a 10 percent increase from the week before.*”²⁵ (Emphasis added).

²² Data obtained from Corrections Division, State of Hawai‘i Dep’t of Public Safety, “Bi-monthly Population Reports” and “End of Monthly Population Reports” from March 31, 2020 to May 18, 2020; available at <https://dps.hawaii.gov/about/divisions/corrections/>

²³ “COVID-19 in Correctional and Detention Facilities – United States, February – April 2020”. Centers for Disease Control and Prevention, (May 15, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6919e1.htm>

²⁴ Id.

²⁵ The Marshall Project, “A State-by-State Look at Coronavirus in Prisons,” (updated August 6, 2020); see <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons#:~:text=Cases%20first%20peaked%20in%20late%20April%2C%20when%20states,symptoms%20in%20much%20greater%20numbers%20than%20previously%20known.>

It was noted that cases first peaked in late April, when states such as Michigan, Ohio, Tennessee and Texas began mass testing of prisoners, and those initiatives suggested that coronavirus had been circulating among people without symptoms in much greater numbers than previously known.²⁶ According to the New York Times, the top fourteen clusters of COVID in the United States are all in prisons and jails.²⁷

The DPS is not testing inmates unless they exhibit signs and symptoms,²⁸ completely ignoring that we now know that those suffering from COVID-19 may be asymptomatic but still expose others to the disease with whom they come in close enough contact, such as cells built for one person that house three people, or shared dormitories, showers and dining tables.

Also exacerbating the situation is the lack of widespread testing which is critical in the prison setting because it reveals asymptomatic carriers who can spread the disease. As the Ohio Department of Rehabilitation and Corrections shared on its website, “Because we are testing everyone—including those who are not showing symptoms—we are getting positive test results on individuals who otherwise would never have been tested.” Indeed, the CDC, in an analysis of correctional and detention facilities with strategies for containing transmission, acknowledging that COVID-19 can spread quickly in congregate settings, stated, “Although symptomatic screening is important, an investigation of a COVID-19 outbreak in a skilled nursing facility

²⁶ Id.

²⁷ “Coronavirus in the U.S.: Latest Map and Case Count,” The New York Times, (updated August 12, 2020); see <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html#clusters>

²⁸ State of Hawai‘i Dep’t of Public Safety, “Department of Public Safety - COVID-19 - Frequently Asked Questions (4/07/20), <https://dps.hawaii.gov/wp-content/uploads/2020/04/Department-of-Public-Safety-COVID-19-FAQ.pdf> (last visited, August 12, 2020).

found that approximately one half of cases identified through facility-wide testing were among asymptomatic and pre-symptomatic persons, who likely contributed to transmission. These data indicate that *symptom screening alone* is inadequate to promptly identify and isolate infected persons in congregate settings such as correctional and detention facilities.”²⁹ (Emphasis added).

However, in Hawai‘i the DPS’s own reporting shows that out of a reported inmate population in Hawai‘i of 3,274 as of August 3, 2020, DPS has tested a total of 308 inmates as of August 12, 2020, or, 10.63% of the inmate population.³⁰ That is woefully inadequate to determine the breadth of the outbreak, especially in light of the less than adequate measures regarding masks and social distancing presently in place.

Even the so-called quarantining of those who tested positive, those who have been exposed to someone who tested positive, and those who has just entered the facility is suspect as a means of controlling a possible outbreak. Hawai‘i’s facilities are old. Modules in these facilities often share the same air conditioning/ventilation ducts and have no access to fresh air from outside the facility. As programs in the facilities were cancelled from early March due to

²⁹ Crisp, L., “Nearly 2,000 inmates at Marion Correctional Institution test positive for COVID-19”, May 1, 2020. 10 WBNS; *see* <https://www.10tv.com/article/news/local/prison-covid-19-cases-puts-marion-county-more-confirmed-cases-any-other-ohio-county-2020-apr/530-43b3392d-44c7-472a-8589-97449dd89567#:~:text=The%20Ohio%20Department%20of%20Rehabilitation%20and%20Corrections%20sent,have%20never%20been%20tested%20because%20they%20were%20asymptomatic.%22>

³⁰ Corrections Division, State of Hawai‘i Dep’t of Public Safety, “Bi-monthly Population Report - 8-2-2020” <https://dps.hawaii.gov/wp-content/uploads/2020/08/Pop-Reports-Weekly-2020-08-03.pdf>, and “COVID-19 Information,” http://dps.hawaii.gov/blog/2020/03/17/coronavirus-covid-19-information-and-resources/?fbclid=IwAR3FzJapaD1iCDQE3dqMjj6BRdlaBYz7z1p_EQ3XOEJmzkw6bgZQoLr b3EE#gallery-2 (last visited August 12, 2020).

the pandemic, inmates have had longer periods to spend in close quarters, and as noted, in some instances, are in the presence of persons who are not even wearing masks.

The State of Hawai‘i has incarcerated these inmates in their correctional facilities. In many cases, these people have committed crimes resulting in their incarceration. In some cases, the person detained is behind bars simply because he or she cannot afford to post bail. Whatever the reason, the fact of incarceration has removed the inmate’s ability to take care of their own health. In so doing, the State of Hawai‘i bears the responsibility to care for their health. This principle is embedded within the United Nations Standards Minimum Rules for the Treatment of Prisoners, known as “The Nelson Mandela Rule”³¹ as well as the Hawai‘i and U.S. Constitutions. But the situation we are currently facing in our correctional facilities goes beyond care, i.e. treatment, for a disease already present. At this time, we must not only care for the health of those in our institutional charge but we must certainly not place them in greater peril by the manner in which we confine them by exposing them to a disease they do not already have.

II.

STATEMENT OF JURISDICTION

This Petition seeks extraordinary relief under extraordinary circumstances. While the U.S. and Hawai‘i Constitutions demand safe and sanitary conditions of confinement under normal circumstances, this Petition ask the Court to exercise directly its fundamental judicial power,³² its supervisory power over the judicial system,³³ and/or its mandamus power over

³¹ United Nations Office on Drugs and Crime. The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).
https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf

³² Haw. Const. Art. VI, § 1.

³³ Haw. Const. Art. VI, § 7; HRS § 602-4; HRS § 602-5(5); HRS § 602-5(6).

respondent judges and public officials,³⁴ to reduce the number of people who are now in Hawai‘i jails and prisons to prevent massive and unnecessary harm and loss of life during this once-in-a-lifetime COVID-19 pandemic.

This Court has jurisdiction to provide the relief sought in this Petition, which includes taking necessary steps to avoid or mitigate impending catastrophe. The Court has broad powers to supervise the judicial system, including the power to both “make or issue any order or writ necessary or appropriate in aid of its jurisdiction,” HRS § 602-5(5), and “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.” HRS § 602-5(6). Separately, the Court “shall have the general superintendence of all courts of inferior jurisdiction.” HRS § 602-4. This Court has stated that “public safety is always an important consideration for any judicial determination” that “invoke[s] our supervisory power.” State v. Moniz, 69 Haw. 370, 373, 742 P.2d 373, 376 (1987). As explained below, the ongoing public emergency warrants the Court’s direct intervention here.

Separately, the present case warrants exercise of the Court’s mandamus power over Respondent judges and public officials. Mandamus relief is proper where the petitioner demonstrates (1) a clear and indisputable right to relief; and (2) a lack of other means to adequately redress the alleged wrong or obtain the required action. Kema v. Gaddis, 91 Hawai‘i 200, 204, 982 P.2d 334, 338 (1999); Barnett v. Broderick, 84 Hawai‘i 109, 111, 929 P.2d 1359, 1361 (1996). No adequate means exists to redress the impending danger to public safety posed by the COVID-19 crisis. While some detainees and prisoners may have the ability to file

³⁴ HRS § 602-5(3).

individual motions seeking release, that would be inadequate here given the dramatic pace at which the crisis is unfolding—and the increased exposure that detainees and prisoners face with each passing day. Further, as explained below, both pretrial detainees and prisoners in Hawai‘i jails and prisons have an indisputable right to relief under both the U.S. and Hawai‘i Constitutions. Accordingly, the Court has power to—and should—issue an extraordinary writ, a writ of mandamus, or both, here.

III.

STATEMENT OF ISSUES PRESENTED AND RELIEF SOUGHT

This Petition presents the following issues:

Whether present detention and incarceration practices for people currently detained or incarcerated in Hawai‘i jails and prisons during the ongoing COVID-19 crisis raise serious due process concerns under the Eighth and Fourteenth Amendments to the U.S. Constitution, and article I, sections 5 and 12 of the Hawai‘i Constitution, justifying immediate extraordinary relief.

To mitigate the harm that the COVID-19 pandemic will inflict upon people incarcerated and detained in prison and jail, correctional staff, and the people of Hawai‘i, Petitioner respectfully requests, at minimum, the following relief:

1. Order the DPS to adhere to the CDC’s Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in all correctional centers and correctional facilities.
2. Order testing for COVID-19 for all inmates, staff and ACOs.
3. Appoint a public health expert to enter into all correctional centers and correctional facilities and review protocols, the ability to social distance, and make recommendations.
4. Order the Circuit, Family and District Courts, the Department of Public Safety, and the Hawai‘i Paroling Authority to reduce the population of its Correctional Centers and 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 its Correctional Centers and Correctional Facilities to their design capacity.

5. Order the Circuit, Family and District Courts that when adjudicating motions for release, (1) release shall be presumed unless the court finds that the release of the inmate would pose a significant risk to the safety of the inmate or the public; (2) design capacity (as opposed to operational capacity) of the correctional center or facility shall be taken into consideration; (3) and the health risk posed by the COVID-19 pandemic. Motions for release based on the foregoing are for the following categories of inmates:³⁵
- a. Inmates serving a sentence (not to exceed 18 months) as a condition of felony deferral or probation except for (I) inmates serving a term of imprisonment for a sexual assault conviction or an attempted sexual assault conviction; or (ii) inmates serving a term of imprisonment for any felony offense contained in HRS chapter 707, burglary in the first or second degree (HRS §§ 708-810, 708-811), robbery in the first or second degree (HRS §§ 708-840, 708-841), abuse of family or household members (HRS § 709- 906(7)&(8)), and unauthorized entry in a dwelling in the first degree and in the second degree as a class C felony (HRS §§ 708-812.55, 708-812.6(1) & (2)), including attempt to commit these specific offenses (HRS §§ 705-500, 705-501).
 - b. Inmates serving sentences for misdemeanor or petty misdemeanor convictions except those convicted of abuse of family or household members (HRS § 709-906), violation of a temporary restraining order (HRS § 586-4), violation of an order for protection (HRS § 586-11), or violation of a restraining order or injunction (HRS § 604-10.5).
 - c. All pretrial detainees charged with a petty misdemeanor or a misdemeanor offense, except those charged with abuse of family or household members (HRS § 709-906), violation of a temporary restraining order (HRS § 586- 4), violation of an order for protection (HRS § 586-11), or violation of a restraining order or injunction (HRS § 604- 10.5).
 - d. All pretrial detainees charged with a felony, except those charged with a sexual assault or an attempted sexual assault, any felony offense contained in HRS chapter 707, burglary in the first or second degree (HRS §§ 708-810, 708-811), robbery in the first or second degree (HRS §§ 708-840, 708-841), abuse of family or household members (HRS § 709-906(7)&(8)), and unauthorized entry in a dwelling in the

³⁵ Similar to the prior Supreme Court interim orders issued under SCPW-20-0000200 and SCPW-20-0000213, any inmate or party shall not be precluded from taking any steps as may be deemed appropriate to seek release of any inmate during this time of emergency, including inmates who do not fall within the enumerated category of inmates.

first degree and in the second degree as a class C felony (HRS §§ 708-812.55, 708-812.6(1) & (2)), including attempt to commit these specific offenses (HRS §§ 705-500, 705-501).

6. Order the Circuit, Family and District Courts to suspend the custodial portion of such sentence until the conclusion of the COVID-19 pandemic or deemed satisfied for individuals serving intermittent sentences.
7. Order that the practice of no cash bail, including the release of inmates on their own recognizance, on signature bonds, or on supervised release, should be regularly employed, and pretrial detainees who are poor and 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.
8. Order the Hawai'i Paroling Authority to move forward to expeditiously address requests for early parole consideration, including conducting hearings using remote technology. The Hawai'i Paroling Authority should also consider release of inmates who are most vulnerable to the virus, which includes inmates who are 65 years old and older, have underlying conditions, who are pregnant, and those inmates being held on technical parole violations (i.e. curfew violations, failure to report as directed, etc.) or who have been granted community or minimum security classifications and are near the end of their sentences. The Paroling Authority shall prepare and provide periodic progress reports to the parties of their efforts and progress in this respect. The list should include the names of the inmates who have been granted release, the names of the inmates who are under consideration for release, and the names of the inmates who were considered for release but for whom release was denied.
9. Order the DPS to cooperate and be responsive to the Hawai'i Correctional Systems Oversight Commission's requests with respect to reconsidering, lowering and monitoring the operational capacities of Hawaii correctional centers and facilities, and with respect to the conditions of confinement during the COVID-19 pandemic.

If the relief sought were to be granted, for inmates who were released pursuant to an expedited review process, the State would continue to have the option of filing individual motions seeking to modify the release status of any defendant for whom it was appropriate.

It should be explained that Petitioner is not seeking appointment of a Special Master or would not request that a Special Master be required to begin the requested release process. Put simply, time is of the essence to get the population numbers reduced with as much deliberate

speed as possible. When more inmates are exposed to the virus, already present in the largest facilities, OCCC and Halawa, it will be too late. Likewise, Petitioner is not seeking the filing and hearing of individual written motions for release, even on an expedited basis. There is not time to file and schedule such hearings before a number of judges in the Circuit, District and Family Courts. To the extent that this Court would require motions and hearings, Petitioner would request an expedited “form” motion to be heard before one designated judge in each of the Circuit, District and Family courts.

IV.

STATEMENT OF REASONS FOR ISSUING THE WRIT

A. PRESENT DETENTION AND INCARCERATION PRACTICES FOR INDIVIDUALS CURRENTLY DETAINED OR INCARCERATED IN HAWAI‘I JAILS AND PRISONS DURING THE ONGOING COVID-19 CRISIS RAISE SERIOUS DUE PROCESS CONCERNS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION, AND ARTICLE I, SECTIONS 5 AND 12 OF THE HAWAI‘I CONSTITUTION, JUSTIFYING IMMEDIATE EXTRAORDINARY RELIEF.

Both pretrial detainees and people sentenced to a term in prison have a right to a sanitary and safe detention environment. As noted above, the CDC guidelines regarding masks and social distancing are not being consistently followed at the correctional centers under the jurisdiction of the DPS. The policy on testing seems to be fixed on symptomatic screening rather than the broad-based screening that would also identify those who are positive but asymptomatic or presymptomatic, and, as a result, present the risk of exposure to everyone with whom they come in contact.

As previously noted, the eighth amendment to the U.S. Constitution and article I, section 12 of the Hawai‘i Constitution impose on the government an affirmative duty to provide conditions of reasonable health and safety to the people it holds in its custody:

[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment[.]

DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189, 199-200 (1989).

Conditions that pose an unreasonable risk of future harm violate the Eighth Amendment's prohibition against cruel and unusual punishment, even if that harm has not yet come to pass.

Thus, the government cannot “ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year.” Helling v.

McKinney, 509 U.S. 25, 33 (1993). For example, inmates cannot be commingled with others

having infectious maladies such as hepatitis and venereal disease. Hutto v. Finney, 437 U.S.

678, 682 (1978); Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974). An Eighth Amendment

violation is established even though the plaintiff cannot yet “prove that he is currently suffering serious medical problems caused by” the exposure. Helling, 509 U.S. at 32. Here, absent

dramatic action by this Court and the government, inmates are at high risk of contracting

COVID-19 in the event of an outbreak by being held in overcrowded conditions in violation of

their Eighth Amendment rights. *See* Wright v. Rushen, 642 F.2d 1129, 1133 (9th Cir. 1981)

(conditions of confinement must be analyzed in context, and courts must “consider the effect of each condition in the context of the prison environment, especially when the ill-effects of particular conditions are exacerbated by other related conditions”).

The Due Process Clause of the fourteenth amendment to the U.S. Constitution and article I, section 5 of the Hawai'i Constitution provide at least as much protection to the pretrial

detainees (which include people held pretrial for misdemeanors).³⁶ While the Eighth Amendment prohibits punishment that is “cruel and unusual,” the Fourteenth Amendment’s due process protections do not allow “punishment” at all. Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979) (“Due process requires that a pretrial detainee not be punished.”); Gordon v. Maesaka-Hirata, 143 Hawai‘i 335, 348 (2018). The due process rights of a pretrial detainee “are at least as great as the Eighth Amendment protections available to a convicted prisoner.” City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983).³⁷ If placing an inmate in a situation creating an elevated risk of potentially lethal infection constitutes “cruel and unusual punishment” in violation of the Eighth Amendment, as was found in Hutto and Gates, placing a pretrial detainee in a situation presenting a serious risk of lethal infection is certainly unconstitutional in violation of the Fourteenth Amendment.³⁸ Here, absent immediate action by this Court and the

³⁶ Id.

³⁷ Castro v. County of Los Angeles, 833 F.3d 1060, 1070-73 (9th Cir. 2016) (*en banc*) (holding that objective deliberate indifference standard applies to detainee’s failure-to-protect claim under Fourteenth Amendment) (citing Kingsley v. Hendrickson, 135 S.Ct. 2466 (2015) (suggesting that pretrial detainees need not satisfy deliberate indifference standard and holding that in excessive force claim brought by pretrial detainee, detainee need not prove deliberate indifference; objective evidence that governmental action was not rationally related to a legitimate governmental objective (or that it is excessive in relation to that objective) is sufficient)).

³⁸ In addition, a significant number of people in Hawai‘i are being detained on cash bail they cannot afford. An order requiring an unattainable financial condition of release is a de facto order of pretrial detention that violates procedural due process and improperly circumvents the procedures laid out in HRS § 804-3. *See* United States v. Leathers, 412 F.2d 169, 171 (D.C. Cir. 1969) (per curiam); United States v. Mantecon-Zayas, 949 F.2d 548, 550 (1st Cir. 1991) (per curiam) (“[O]nce a court finds itself in this situation—insisting on terms in a “release” order that will cause the defendant to be detained pending trial—it must satisfy the procedural requirements for a valid detention order”); ODonnell v. Harris County, 892 F.3d 147, 162 (5th Cir. 2018) (holding that Defendants’ practices result in the “absolute deprivation of [indigent misdemeanor arrestees’] most basic liberty interests—freedom from incarceration”); United States v. Leisure, 710 F.2d 422, 415 (8th Cir. 1983) (“[T]he amount of bail should not be used as an indirect, but effective, method of ensuring continued custody.”); Brangan v. Commonwealth, 80 N.E.3d 949, 963 (Mass. 2017); State v. Brown, 338 P.3d 1276, 1292 (N.M. 2014) (“Intentionally setting bail

government, pretrial detainees are also presently at high risk of contracting COVID-19 by being held in overcrowded conditions of confinement in violation of their due process rights.

Detention and imprisonment during the pandemic not only deprive individuals of their freedom, but also puts them at serious risk of loss of life or permanent injury. These significant risks, not accounted for in sentencing or determinations of pretrial detention, implicate substantive and procedural due process rights that demand coordinated, immediate, and comprehensive action by the government. Such action should be guided by both public safety and public health considerations,³⁹ including the correctional facilities' inability to adequately prepare, respond, and operate in the event of a COVID-19 outbreak due to limited resources and the overcrowded conditions in jails and prisons.⁴⁰ Given the stakes and the significant risks posed by COVID-19 to the 5,050 people held in jail and prison by the State of Hawai'i, it is clear

so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether.”). If such de facto wealth-based detention orders violate procedural due process and equal protection under “normal circumstances,” *de facto* wealth-based detention most certainly violates these same protections during a public health crisis where the individual interest at issue is not only liberty but also life and bodily integrity. *See, e.g., ODonnell*, 892 F.3d at 161 (holding unequal treatment of wealthy and poor in pretrial wealth-based detention is unconstitutional); *Brangan*, 80 N.E. 3d at 964-65 (finding that, when financial conditions of release will likely result in an individual’s pretrial detention, the judge must provide “findings of fact and a statement of reasons for the bail decision,” including consideration of the individual’s financial resources, “explain how the bail amount was calculated,” and state why “the defendant’s risk of flight is so great that no alternative, less restrictive financial or nonfinancial conditions will suffice to assure his or her presence at future court proceedings”); *In re Humphrey*, 228 Cal. Rptr. 3d 513, 535 (Cal. Ct. App. 2018).

³⁹ *See, e.g.,* Centers 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), available at <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>.

⁴⁰ ACLU of Hawai'i, [Complaint against the State of Hawai'i concerning unconstitutional prison conditions and overcrowding](https://acluHawai'i.files.wordpress.com/2017/01/acluhidojcomplaintprisonovercrowding.pdf) (Jan. 6. 2017), available at <https://acluHawai'i.files.wordpress.com/2017/01/acluhidojcomplaintprisonovercrowding.pdf>;

that significant action to prevent massive and unnecessary harm and loss of life is both necessary and appropriate.

Moreover, COVID-19 outbreaks within the overcrowded facilities or facilities in which appropriate physical distancing is not possible will not only place inmates at risk of death or serious illness, but will also endanger the lives and well-being of staff and service providers who work in the facilities, their families, and members of the community at large. And finally, outbreaks within these facilities will severely tax the limited resources of community health care providers, including hospital beds,⁴¹ ventilators, and personal protective equipment because of virulent spread within close quarters, and will also require the utilization of additional resources to provide constitutionally mandated medical care.

V.

CONCLUSION

Based on the foregoing arguments and authorities, Petitioner STATE OF HAWAI‘I OFFICE OF THE PUBLIC DEFENDER respectfully requests that this Court grant the instant Petition and immediately issue an Extraordinary Writ and/or Writ of Mandamus ordering the Circuit, Family and District Courts, the Department of Public Safety, and the Hawai‘i Paroling Authority to take immediate steps to significantly reduce the population of its Correctional

⁴¹ According to Lt. Governor Josh Green, hospitals can be overwhelmed within a month if the number of COVID-19 cases does not start to decrease, as hospitals are currently at 50% capacity. Boneza, Jenn, “Hospitals could be overwhelmed in a month if cases of COVID-19 continue to increase at the current rate,” KHON2, (August 12, 2020), <https://www.khon2.com/coronavirus/hospitals-could-be-overwhelmed-in-a-month-if-cases-of-covid-19-continue-to-increase-at-the-current-rate/> (last visited, August 12, 2020).

Centers and Correctional Facilities to prevent the massive loss of life and harm that the spread of COVID-19 would cause in such facilities.

DATED: Honolulu, Hawai‘i, August 12, 2020.

Respectfully submitted,

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