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SCPW-21-0000483

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

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

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ORIGINAL PROCEEDING

CONCURRENCE AND DISSENT TO ORDER GRANTING IN PART AND DENYING IN  
PART PETITION FOR EXTRAORDINARY WRIT PURSUANT TO HRS §§ 602-4,  
602-5(5), AND 602-5(6) AND/OR FOR WRIT OF MANDAMUS

(By: Wilson, J.)

## **I. Introduction**

In March 2020, the State of Hawai‘i (the “State”), including its incarcerated people, faced an emergency declared by the Governor.<sup>1</sup> The emergency constituted the Governor’s recognition that extraordinary emergency powers were necessary to protect the population from the lethal threat of COVID-19. The severity of the threat of COVID-19 infection to Hawai‘i’s

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<sup>1</sup> See COVID-19 Emergency Proclamation, Off. of Governor of Haw. (Mar. 4, 2020), [https://governor.hawaii.gov/wp-content/uploads/2020/03/2003020-GOV-Emergency-Proclamation\\_COVID-19.pdf](https://governor.hawaii.gov/wp-content/uploads/2020/03/2003020-GOV-Emergency-Proclamation_COVID-19.pdf) (last visited Oct. 6, 2021).

incarcerated people and the failure of the Department of Public Safety ("DPS") to meet its legal duty to protect them necessitated intervention by this court on their behalf.<sup>2</sup> At the time of this court's emergency intervention in April 2020, no incarcerated person had died of or been infected with COVID-19.<sup>3</sup> Nevertheless, we intervened. We recognized that "[t]he COVID-19 pandemic ha[d] caused a public health emergency that [wa]s impacting Hawai'i's community correctional centers and facilities" and posited that there was "a significant interest in reducing inmate populations to protect those who work at or are incarcerated in these overcrowded facilities."<sup>4</sup> Thus, despite DPS' assurances that it was taking "reasonable steps" to "abate the risk" of COVID-19,<sup>5</sup> we appointed a special master and

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<sup>2</sup> See Order of Consolidation and for Appointment of Special Master at 3, Off. of Pub. Def. v. Ige, SCPW-20-0000213, docket #22, filed Apr. 2, 2020; Interim Order at 2-6, Off. of Pub. Def. v. Ige, SCPW-20-0000213, docket #88, filed Apr. 15, 2020.

<sup>3</sup> It would be four months before the DPS reported its first positive case of COVID-19. DPS reported its "first confirmed inmate case within the [DPS]" on August 7, 2020 at O'ahu Community Correctional Center ("OCCC"). Press Release, DPS, Dep't of Pub. Safety Confirms First COVID-19 Positive Inmate (Aug. 7, 2020), <https://dps.hawaii.gov/wp-content/uploads/2020/03/RELEASE-PSD-confirms-COVID-19-OCCC-inmate-and-3-ACOs-8.7.20.pdf>. DPS reported that three correctional officers at Halawa Correctional Facility ("HCF") and Waiawa Correctional Facility ("WCF") had been confirmed positive for COVID-19 several days earlier on August 4 and August 6. Id.

<sup>4</sup> Order of Consolidation and for Appointment of Special Master at 3, Off. of Pub. Def. v. Ige, SCPW-20-0000213, docket #22, filed Apr. 2, 2020.

<sup>5</sup> Resp'ts Answer at 10, Off. of Pub. Def. v. Ige, SCPW-20-0000213, docket #7, filed Mar. 31, 2020.

instituted procedures to facilitate the expedited release of certain categories of incarcerated people.<sup>6</sup>

In the nearly eighteen months since we first intervened, the consequences from the pandemic have significantly worsened. Severe overcrowding has persisted:<sup>7</sup> six of nine DPS facilities are over design capacity, and DPS' current population is nearly as high as it was when this court first intervened in April 2020, with more people being detained pretrial now than in April 2020.<sup>8</sup> This overcrowding has exacerbated the unsafe and unsanitary conditions within DPS facilities. Incarcerated persons are forced to eat and sleep shoulder-to-shoulder, in some cases, with so many people in one cell that one person must sleep with his head directly next to

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<sup>6</sup> Order of Consolidation and for Appointment of Special Master at 4, Off. of Pub. Def. v. Ige, SCPW-20-0000213, docket #22, filed Apr. 2, 2020; Interim Order at 2-6, Off. of Pub. Def. v. Ige, SCPW-20-0000213, docket #88, filed Apr. 15, 2020.

<sup>7</sup> I concur with part I of Justice McKenna's concurring and dissenting opinion, which concludes that the State suffers from an "over-incarceration epidemic." Concurring and Dissenting Opinion of Justice Sabrina McKenna at 6, In re Individuals in Custody of Hawai'i, SCPW-21-0000483, docket #45, filed October 12, 2021 [hereinafter "McKenna Concurrence & Dissent"].

<sup>8</sup> On March 31, 2020, DPS reported a total population of 3393 and 901 people held pretrial in its Hawai'i facilities. Dep't of Pub. Safety, Department of Public Safety Weekly Population Report (Mar. 31, 2020), <https://dps.hawaii.gov/wp-content/uploads/2020/04/Pop-Reports-EOM-2020-03-31.pdf>. On September 30, 2021, DPS reported a total population of 2951 and 909 people held pretrial. Dep't of Pub. Safety, Department of Public Safety Weekly Population Report (Sept. 30, 2021), <https://dps.hawaii.gov/wp-content/uploads/2021/10/Pop-Reports-EOM-2021-09-30.pdf>.

the toilet.<sup>9</sup> At HCCC, detainees are frequently kept in areas without toilets or running water, forcing some to urinate on themselves, on the walls, or in their drinking cups.<sup>10</sup> The tension among incarcerated persons from being held in such conditions has led to violence, with at least one detainee beaten to death at OCCC in a module that was being used as a quarantine area for COVID-positive detainees.<sup>11</sup>

As of October 4, 2021: 2863 people in DPS custody and 389 members of DPS staff have contracted COVID-19;<sup>12</sup> of those incarcerated persons infected with COVID-19, 32 required hospitalization;<sup>13</sup> and of those 32 persons hospitalized, 7 passed

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<sup>9</sup> See Sept. 23, 2020 Decl. of Pablo Stewart, M.D. ¶ 27, *In re Individuals in Custody of Hawai'i*, SCPW-20-0000509, docket #94, filed Oct. 27, 2020 [hereinafter "Sept. 2020 Stewart Decl."]; Apr. 7, 2021 Decl. of George Cordero ¶ 8-9, *In re Individuals in Custody of Hawai'i*, SCPW-20-0000509, docket #162, filed Apr. 8, 2021 [hereinafter "Cordero Decl."]; Decl. of Lisa O. Jobes ¶ 6-8, *Chatman v. Otani*, No. CV 21-00268 JAO-KJM, docket #6-4, filed June 9, 2021; Decl. of Ryan Tabar ¶ 7, *Chatman v. Otani*, No. CV 21-00268 JAO-KJM, docket #6-6, filed June 9, 2021 [hereinafter "Tabar Decl."].

<sup>10</sup> Tabar Decl. ¶ 7-8, *Chatman v. Otani*, No. CV 21-00268 JAO-KJM, docket #6-6, filed June 9, 2021; Decl. of Erin Loreda ¶ 12-13, 15-16, *Chatman v. Otani*, No. CV 21-00268 JAO-KJM, docket #6-8, filed June 9, 2021.

<sup>11</sup> See Kevin Dayton, *2 Inmates Killed in 2 Weeks In Hawaii Correctional System*, Honolulu Civil Beat (Sept. 1, 2020), <https://www.civilbeat.org/2020/09/2-inmates-killed-in-2-weeks-in-hawaii-correctional-system/>; Cordero Decl. ¶ 10.

<sup>12</sup> See Dep't of Pub. Safety, *COVID-19 Information* (updated 10/4/21), <https://dps.hawaii.gov/blog/2020/03/17/coronavirus-covid-19-information-and-resources/>. There are currently 35 active positive cases among incarcerated persons and 17 among staff. *Id.*

<sup>13</sup> This number was reported to the court by Deputy Attorney General Craig Y. Iha during oral argument in this proceeding on September 22, 2021.

away,<sup>14</sup> According to a recent report from Prison Policy Initiative, when comparing Hawai'i's incarcerated mortality rate (0.22%) to that of the general population (0.04%), incarcerated persons are 5.5 times more likely to die of COVID-19, making Hawai'i the most disproportionate state in the country.<sup>15</sup> And according to Justice McKenna's calculations, with respect to HCF specifically, "approximately 1 person out of every 107 people incarcerated has died[,]” leading to a death rate in HCF that is more than 15 times greater than that of the general population in Hawai'i.<sup>16</sup> Moreover, we know very little about the 7 incarcerated men who died of COVID-19. We do not know their names or backgrounds, or where, how, and under what circumstances they passed away.<sup>17</sup> The lack of disclosure on the

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<sup>14</sup> See Dep't of Pub. Safety, COVID-19 Information (updated 9/23/21), <https://dps.hawaii.gov/blog/2020/03/17/coronavirus-covid-19-information-and-resources/>. The 7 incarcerated persons who died were all being detained at HCF. This number does not include the 2 incarcerated persons who died while being held at Saguaro Correctional Center, which is operated by a DPS contractor in Arizona.

<sup>15</sup> See Tiana Herring & Maana Sharma, Prison Policy Initiative, States of emergency: The failure of prison system responses to COVID-19 (Sept. 1, 2021), [https://www.prisonpolicy.org/reports/states\\_of\\_emergency.html](https://www.prisonpolicy.org/reports/states_of_emergency.html); see also Nicole Pasia, Hawaii's incarcerated population 5.5 times more likely to die of COVID-19, report finds, State of Reform (Sept. 10, 2021), <https://stateofreform.com/news/hawaii/2021/09/hawaiis-incarcerated-population-5-5-times-more-likely-to-die-of-covid-19-report-finds/>.

<sup>16</sup> McKenna Concurrence & Dissent at 23-25.

<sup>17</sup> On February 3, 2021, DPS announced that the death of a male "between 50 to 60-years old" was being classified as a "COVID-19-related death." DPS, Third Hawaii Inmate Death Classified as COVID-19 Related (Feb. 3, 2021), <https://dps.hawaii.gov/wp-content/uploads/2020/03/RELEASE-HCF-COVID19-Inmate-Death-2.3.21.pdf>. DPS made similar announcements on February 5, 2021 for five incarcerated males "all above the age of 65" who died in

part of DPS is an alarming signal that inmates may be dying due to inadequate medical care.<sup>18</sup>

For pretrial detainees, compliance with HRS § 353-6.2 (2019) requires DPS to apprise the court, the prosecuting attorney, and defense counsel every ninety days of any “new information or a change in circumstances”--for example, updates

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January, DPS, Five Hawaii Inmate Deaths Classified as COVID-19 Related (Feb. 5, 2021), <https://dps.hawaii.gov/wp-content/uploads/2020/03/RELEASE-HCF-COVID19-Inmate-Death-2.5.21.pdf>, and on February 22, 2021 for a male “between 60 to 70 years old” who died in early February, DPS, Hawaii Inmate Death Classified as COVID-19 Related (Feb. 22, 2021), <https://dps.hawaii.gov/wp-content/uploads/2020/03/RELEASE-HCF-7th-COVID-related-death-2.22.21.pdf>. In all three death announcements, DPS stated that “[n]o additional information is being provided to protect individual medical privacy.” This comprises the totality of the information DPS has released about these seven deaths.

For example, we know, based solely on Deputy Attorney General Iha’s representations at oral argument, that all 7 men were hospitalized before they died. We do not know, however, where they were hospitalized, for how long, or what kind of care they required while hospitalized. We do not know when they were diagnosed with COVID-19 and what kind of care they received prior to being hospitalized.

<sup>18</sup> DPS officials claim they are prohibited by the federal Health Insurance Portability and Accountability Act from publicly releasing information about the deaths of incarcerated persons. See Kevin Dayton, Death Behind Bars: In Hawaii, The Death Of A Prisoner Is Often A Closely Held Secret, Civil Beat (Mar. 3, 2021), <https://www.civilbeat.org/2021/03/death-behind-bars-in-hawaii-the-death-of-a-prisoner-is-often-a-closely-held-secret/>. Under current law, the director of DPS is required to submit a death report to the governor, who must, in turn, submit the report to the state legislature. HRS § 353C-8.5 (Supp. 2019). However, the director retains discretion to “withhold disclosure of the decedent’s name or any information protected from disclosure by state or federal laws[,]” HRS § 353C-8.5(d), and in practice, when reports are released by state lawmakers to the media, they are commonly heavily redacted. See Dayton, Death Behind Bars.

Newly proposed legislation would amend HRS § 353C-8.5 to require that reports include the decedent’s race, cite state or federal authority that supports withholding information about the decedent from the public, and are made publicly available, first to the decedent’s family, and then to the press. H.B. 796, 31st Leg., Reg. Sess. (Haw. 2021). Unsurprisingly, DPS “strongly opposes” H.B. 796. Testimony on H.B. 796 Before the H. Comm. on Judiciary & Haw. Affs., 31st Leg., Reg. Sess. (Haw. 2021) (statement of Max Otani, Dir. of DPS); Testimony on H.B. 796 Before the H. Comm. on Corr., Mil., & Veterans, 31st Leg., Reg. Sess. (Haw. 2021) (statement of Max Otani, Dir. of DPS).

about a pretrial detainee's health status or an outbreak of COVID-19 in their facility of confinement--that would warrant a release from custody and help prevent their future infection or death.<sup>19</sup> However, there is no indication that DPS has been complying with its statutory duty to conduct ninety-day reviews of pretrial detainees or transmit such reviews to the appropriate parties. There is nothing more serious than the deaths of those held under the care and control of the State to underscore the severity of the COVID-19 emergency and the urgency with which we must now act. And the lack of disclosure by DPS provides no assurance to this court that more people in DPS custody will not die of COVID-19.<sup>20</sup>

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<sup>19</sup> HRS § 353-6.2 requires DPS, "on a periodic basis but no less frequently than every three months," to "conduct reviews of 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). DPS is required to transmit "its findings and recommendations" for each review "to the appropriate court, prosecuting attorney, and defense counsel." HRS § 353-6.2(b). Based on DPS' recommendation, defense counsel may then bring a motion to modify bail, and a hearing will be scheduled at which the court shall consider the motion. HRS § 353-6.2(c).

<sup>20</sup> On September 10, 2021, Hawaii News Now reported that DPS had initiated a "death investigation" after "a 30-year-old inmate sick with COVID was found unresponsive in his cell at [HCF] on [September 9]." Allyson Blair, Death investigation underway after Hawaii inmate with COVID found unconscious in cell (Sept. 10, 2021, 3:28 PM), <https://www.hawaiinewsnow.com/2021/09/11/death-investigation-underway-after-hawaii-inmate-with-covid-found-unconscious-cell/>. According to Hawaii News Now, DPS officials would not confirm if the man had been diagnosed with COVID-19 prior to his death, *id.*; there has been no official death announcement from DPS and Deputy Attorney General Iha disputed during oral argument that a recent COVID-19-related death had occurred. If DPS rules this a COVID-19-related death, the number of people who have died of COVID-19 in DPS custody would increase to 10.

## II. This Court has a Duty to Protect Incarcerated Persons from Cruel and/or Unusual Punishment in DPS Facilities

The Majority's attempts to justify this court's inaction in this proceeding run counter to five important truths: (1) DPS has failed to implement its Pandemic Response Plan ("PRP"), which was designed to protect incarcerated people from COVID-19; (2) DPS facilities are overcrowded at levels significantly over both design capacity and the Infectious Disease Emergency Capacities set by the Hawai'i Correctional System Oversight Commission ("HCSOC" or "Oversight Commission");<sup>21</sup> (3) pretrial detainees and convicted persons in DPS custody during the COVID-19 pandemic are being unconstitutionally subjected to cruel or unusual punishment;<sup>22</sup> (4) the United States District Court for the District of Hawai'i found "a strong likelihood" that DPS is violating the Eighth and Fourteenth Amendment rights of incarcerated people in Hawai'i;<sup>23</sup>

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<sup>21</sup> HCSOC, Hawai'i Correctional Facilities - Infectious Disease Emergency Capacities (Sept. 2020), <https://ag.hawaii.gov/wp-content/uploads/2020/09/FINAL-REPORT-091120.pdf>.

<sup>22</sup> See Dissent to Amended Order Re: Felony Defendants (filed August 18, 2020); Order Re: Petty Misdemeanor, Misdemeanor, and Felony Defendants at Maui Community Correctional Center, Hawai'i Community Correctional Center, and Kaua'i Community Correctional Center (filed August 24, 2020); Order Re: Petty Misdemeanor, Misdemeanor, and Felony Defendants (filed August 27, 2020); and Order Denying Petitioner's "Motion to Compel Compliance with This Court's Orders" (filed September 1, 2020) at 12-20, In re: Individuals in Custody of the State of Hawai'i, SCPW-20-0000509, docket #110, filed Feb. 18, 2021 [hereinafter "Omnibus Dissent"].

<sup>23</sup> Chatman v. Otani, No. CV 21-00268 JAO-KJM, 2021 WL 2941990 (D. Haw. July 13, 2021) (Order (1) Granting Plaintiffs' Motion for Provisional Class Certification and (2) Granting in Part and Denying in Part Plaintiffs'



and most critically, (5) incarcerated persons are at risk of being infected with, and potentially, dying of, COVID-19 so long as they are subjected to a present risk of infection in DPS facilities that far surpasses the dangerous conditions that caused court intervention in April 2020.<sup>24</sup>

Notwithstanding the Majority's rejection of the request by the Office of the Public Defender ("OPD") to protect Hawai'i's incarcerated people, the emergency created by the COVID-19 pandemic is not over.<sup>25</sup> The various measures previously taken by this court, and DPS have proven insufficient to prevent the spread of COVID-19 in Hawai'i's jails and prisons. These measures have failed, in large part, because meaningful and sustained population reduction in DPS facilities has not been achieved. Therefore, while I concur with the Majority's decision to order DPS to comply with the requirements of HRS § 353-6.2<sup>26</sup>--requirements imposed by the legislature and that apply even without this court's order--greater relief is

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Motion for Preliminary Injunction and Temporary Restraining Order) at \*15-17 [hereinafter "Otake Order"].

<sup>24</sup> See Interim Order, Off. of Pub. Def. v. Ige, SCPW-20-0000213, docket #88, filed Apr. 15, 2020.

<sup>25</sup> See Emergency Proclamation Related to the COVID-19 Response, Off. of Governor of Haw. (Aug. 5, 2021), [https://governor.hawaii.gov/wp-content/uploads/2021/08/2108026-ATG\\_Emergency-Proc-for-COVID-19-Response-distribution-signed.pdf](https://governor.hawaii.gov/wp-content/uploads/2021/08/2108026-ATG_Emergency-Proc-for-COVID-19-Response-distribution-signed.pdf).

<sup>26</sup> Order at 10, In re Individuals in Custody of Hawai'i, SCPW-21-0000483, docket #45, filed October 12, 2021.

warranted. The incarcerated population must be reduced to at least design capacity or to the HCSOC's Infectious Disease Emergency Capacities. And it is the duty of this court to finally heed the repeated entreaty of the Office of Public Defender for appointment of a public health expert to visit DPS facilities, report on the conditions of confinement and recommend corrective measures to end the cruel and unusual treatment of Hawaii's incarcerated people.

This court previously recognized, approximately thirteen months ago, that COVID-19 created a "public health emergency" and that rising cases within DPS facilities warranted "urgent and immediate concern in reducing" the incarcerated population.<sup>27</sup> Within the last month, the Majority found the

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<sup>27</sup> Interim Order at 3, In re Individuals in Custody of Hawai'i, SCPW-20-0000509, docket #13, filed Aug. 14, 2020; see also Order of Consolidation and for Appointment of Special Master at 2, Off. of Pub. Def. v. Ige, SCPW-20-0000213, docket #22, filed Apr. 2, 2020.

I concur with the Majority that this court has constitutional and statutory authority to grant relief in this proceeding and as granted in previous orders in response to the petitions of the Office of Public Defender for protection of Hawaii's incarcerated people from the pandemic emergency Order, Part II, In re Individuals in Custody of Hawai'i, SCPW-21-0000483, docket #45, filed October 12, 2021 (citing this court's inherent powers vested by article VI, section 1 of the Hawai'i Constitution, its authority "[t]o make or issue any order or writ . . . in aid of its jurisdiction" under Hawai'i Revised Statutes ("HRS") § 602-5(a)(5) and "[t]o make and award such judgments, decrees, orders and mandates . . . 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" under HRS § 602-5(a)(6), and its supervisory powers under HRS § 602-4). For the reasons stated by the Majority refuting the contention that, as a matter of law, no record would ever justify emergency intervention by this court absent a finding of a constitutional violation, I join Part II of the Majority opinion.

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Justice Eddins does not dispute the authority of this court to intervene where Hawai'i's incarcerated people are subjected to cruel and/or unusual conditions of confinement in violation of the Eighth Amendment of the United States Constitution and article I, section 12 of the Hawai'i Constitution or where there is a violation of the due process rights of people incarcerated before a trial to be free from punishment in violation of the Fourteenth Amendment of the United States Constitution and article I, section 5 of the Hawai'i Constitution. He contends that the record upon which this court based its previous intervention to protect incarcerated people was inadequate to find such constitutional violations and order remedial action. Under this analysis, the record considered by the District Court for the District of Hawai'i in Chatman, was also insufficient to authorize its intervention. See supra note 23. Respectfully, this proposition is untenable. The record supporting the emergency measures taken by this court and the federal district court to protect Hawai'i's incarcerated people is exhaustive. Since the filing of Off. of Pub. Def. v. Ige, SCPW-20-0000213, over one year ago on March 26, 2020, this court has received un rebutted affidavits from medical expert Dr. Pablo Stewart testifying as to the cruel and unusual conditions at OCCC; reports by DPS chronicling the size of the pretrial and convicted incarcerated population for the last two years, with separate population counts for felony and misdemeanor offenders; affidavits from the American Civil Liberties Union of Hawai'i Foundation as amicus curiae relaying statements from incarcerated persons recounting the conditions of incarceration; and reports by the special master, who coordinated with the parties for two months on the status of the incarcerated population and the actions taken by the parties to comply with this court's orders identifying categories for consideration of release. The federal district court received sworn testimony and conducted a hearing and several status conferences before granting Plaintiffs' motion for a preliminary injunction. The record here has established that DPS and the Judiciary have failed to (1) reduce the incarcerated population, and (2) institute measures consistent with DPS' Pandemic Response Plan and Centers for Disease Control standards to protect incarcerated persons against contracting COVID-19. The consequences have also become part of the record. Thousands of incarcerated people have contracted COVID-19 and a disproportionate number of those people, in comparison to the general population, have died as a result. See infra note 17 and accompanying text. Based on this record, further delay should not be countenanced by this court before intervening to protect incarcerated people from the risk of infection and death posed by the unconstitutionally cruel and/or unusual conditions of incarceration. Time--during this emergency--cannot be viewed as though there is no emergency. It is untenable to await the filing of unspecified future legal claims in state or federal court either by individuals or a class and thereafter postpone action until the completion of discovery that would predictably occur, including depositions of parties and experts. The results of such a strategy to create a new and more extensive record are evident: more disease and more death. Respectfully, the unprecedented public health emergency declared by the Governor, the right to be free from cruel and unusual punishment under the United States Constitution and the right to be free from cruel or unusual punishment under the Hawai'i constitution preclude such a dangerously delayed approach.

Respectfully, Justice Eddins' position declaring an insufficient record to intervene to protect incarcerated people contradicts his decision to intervene to protect judges and court personnel from infection by inmates.

threat to judges and Judiciary personnel posed by incarcerated persons infected with COVID-19 within our correctional facilities to be so severe as to require the suspension of pretrial incarcerated people's right to appear in person for preliminary hearings and arraignments pursuant to HRPP Rules 5<sup>28</sup> and 10<sup>29</sup> of the Hawai'i Rules of Penal Procedure. Citing the

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The Majority's sua sponte emergency intervention suspending pretrial incarcerated people's right to appear in person for preliminary hearings and arraignments pursuant to Rules 5 and 10 of the Hawai'i Rules of Penal Procedure ("HRPP") was done with no hearing, no affidavits, and no on-the-record input by the OPD or the prosecutor's office.

<sup>28</sup> HRPP Rule 5(c) (3) provides:

The court shall conduct the preliminary hearing within 30 days of initial appearance if the defendant is not in custody; however, if the defendant is held in custody for a period of more than 2 days after initial appearance without commencement of a defendant's preliminary hearing, the court, on motion of the defendant, shall release the defendant to appear on the defendant's own recognizance, unless failure of such determination or commencement is caused by the request, action or condition of the defendant, or occurred with the defendant's consent, or is attributable to such compelling fact or circumstance which would preclude such determination or commencement within the prescribed period, or unless such compelling fact or circumstance would render such release to be against the interest of justice.

HRPP Rule 5(c) (3) .

<sup>29</sup> HRPP Rule 10 provides:

(a) A defendant who has been held by district court to answer in circuit court shall be arraigned in circuit court within 14 days after the district court's oral order of commitment following (i) arraignment and plea, where the defendant elected jury trial or did not waive the right to jury trial or (ii) initial appearance or preliminary hearing, whichever occurs last.

(b) Following service of grand jury warrant, a defendant arrested in the jurisdiction or returned to the jurisdiction shall be arraigned not later than 7 days following the arrest or return.

“continued need to protect the health and safety of court users and Judiciary personnel during” the “unprecedented” COVID-19 emergency, the Majority suspended HRPP Rules 5 and 10.<sup>30</sup> The Majority’s opinion that the severity of the COVID-19 emergency at Hawai‘i’s correctional institutions requires intervention of the court to protect the Judiciary, but does not require intervention of the court to protect the incarcerated population

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(c) Following service of an information charging warrant of arrest, a defendant arrested in the jurisdiction or returned to the jurisdiction shall be arraigned not later than 7 days following arrest or return.

HRPP Rule 10.

<sup>30</sup> See Second Extension of Order Re: Temporary Extension of the Time Requirements Under Hawai‘i Rules of Penal Procedure Rule 10(a), (b), and (c) (Circuit Court of the Third Circuit), In re Judiciary’s Response to the COVID-19 Outbreak, SCMF-20-0000152, docket #143, filed Sept. 30, 2021; Ninth Extension of Order Re: Temporary Extension of the Time Requirements Under Hawai‘i Rules of Penal Procedure Rule 10(a), (b), and (c), In re Judiciary’s Response to the COVID-19 Outbreak, SCMF-20-0000152, docket #141, filed Sept. 30, 2021; Order Re: Temporary Extension of the Time Requirements Under Hawai‘i Rules of Penal Procedure Rule 5(c)(3) (First Circuit), In re Judiciary’s Response to the COVID-19 Outbreak, SCMF-20-0000152, docket #133, filed Aug. 19, 2021; Order Re: Temporary Extension of the Time Requirements Under Hawai‘i Rules of Penal Procedure Rule 5(c)(3) (Third Circuit), In re Judiciary’s Response to the COVID-19 Outbreak, SCMF-20-0000152, docket #135, filed Aug. 19, 2021; see also Dissent Re: Order Regarding Temporary Extension of the Time Requirements Under Hawai‘i Rules of Penal Procedure Rule 10(a), (b), and (c) (Circuit Court of the Third Circuit), In re Judiciary’s Response to the COVID-19 Outbreak, SCMF-20-0000152, docket #115, filed June 1, 2021; Concurrence and Dissent Re: Order Re: Temporary Extension of the Time Requirements Under Hawai‘i Rules of Penal Procedure Rule 10(a), (b), and (c) at 1, In re Judiciary’s Response to the COVID-19 Outbreak, SCMF-20-0000152, docket #45, filed Aug. 20, 2020.

held in conditions that have caused infection and death constitutes an arbitrary inconsistency.<sup>31</sup>

Incarcerated persons in DPS custody are being subjected to cruel and/or unusual punishment in violation of the Eighth Amendment of the United States Constitution and article I, section 12 of the Hawai'i Constitution.<sup>32</sup> The prohibition of cruel and unusual punishment reflects a benchmark for civilization and human decency. Under the federal constitution, the Eighth Amendment "proscribes more than [just] physically barbarous punishment";<sup>33</sup> it "embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and

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<sup>31</sup> The suspension of HRPP Rules 5 and 10 also constitutes a violation of pretrial detainees' right to due process of law. See Omnibus Dissent at 27-37.

<sup>32</sup> See Haw. Const., art. I, § 12 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted."); U.S. Const., amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). An in-depth constitutional argument can be found in the dissent filed in the OPD's last proceeding. See Omnibus Dissent at 12-20.

The Hawai'i Constitution uses the disjunctive "or" in prohibiting "cruel or unusual punishment" while the United States Constitution uses the conjunctive "and" in prohibiting "cruel and unusual punishments[.]"

<sup>33</sup> Under the Eighth Amendment, a punishment that does not lead to death can still be deemed cruel and unusual. See id. at 104 (holding that "deliberate indifference to serious medical needs of prisoners constitutes" cruel and unusual punishment); Taylor v. Riojas, 141 S. Ct. 52, 53 (2020) (per curiam) (finding cruel and unusual conditions where a detainee was held in a cell flooded with human waste and raw sewage for six days); Helling v. McKinney, 509 U.S. 25, 35 (1993) (detainee stated a cause of action under the Eighth Amendment where he alleged exposure to levels of environmental tobacco smoke that "pose[d] an unreasonable risk of serious damage to his future health"); Hutto v. Finney, 437 U.S. 678, 681-82 (1978) (evidence sustained a finding of cruel and unusual punishment where it was practice to detain four to eleven people, some with hepatitis and venereal disease, for indeterminate periods of time in windowless 8'x10' "isolation cells" containing a single toilet and feeding them less than 1000 calories per day).

decency[.]’” Estelle v. Gamble, 429 U.S. 97, 102 (1976) (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)). The bounds of what constitutes cruel and/or unusual punishment is now being tested in Hawai‘i’s correctional facilities at both the federal and state levels.

The United States District Court for the District of Hawai‘i found there was a strong likelihood that DPS was acting with “deliberate indifference” as to the inhumane conditions in DPS facilities, in violation of the Eighth Amendment’s prohibition against cruel and unusual punishment for postconviction detainees and the Fourteenth Amendment’s prohibition against punishment for pretrial detainees.<sup>34</sup>

Considering a record consistent with that currently before us, the federal district court found a strong likelihood that DPS was subjecting incarcerated people to inadequate testing and quarantining procedures, inadequate social distancing and mask wearing policies, severe overcrowding, and unsanitary living conditions.<sup>35</sup> The federal district court found that DPS was not following its Pandemic Recovery Plan and “ha[d] not taken reasonable available measures to abate the risks caused by the

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<sup>34</sup> Otake Order at \*13-19 (citing Thomas v. Ponder, 611 F.3d 1144, 1150 (9th Cir. 2010))

<sup>35</sup> Otake Order at \*18.

[aforementioned] conditions, knowing full well--based on multiple prior outbreaks--that serious consequences and harm would result to the inmates."<sup>36</sup> Dissatisfied with DPS' contentions that it was complying with its PRP, the federal district court noted that "[p]olicies are meaningless if they are not followed" and found that DPS' actions and alleged failure to comply with their PRP constituted "more than simple lapses [in compliance]" and, at times, showed "complete disregard for the [PRP.]"<sup>37</sup> To protect the incarcerated population from cruel and unusual conditions, the court

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<sup>36</sup> Id. For example, the federal district court noted that the HCCC warden admitted that new detainees were not tested for COVID-19 or quarantined upon arrival and were instead placed with other new detainees in areas separated by chain-linked fences ("dog cages") before being moved to a room with forty to sixty other people (the "fishbowl"). Id. at \*15-16. The court noted Plaintiffs' claims that detainees eat in chow halls and sleep shoulder-to-shoulder, and lack access to bathrooms, running water, and cleaning supplies. Id. at \*16-17. The court also emphasized Plaintiffs and DPS employees' claims that DPS failed to identify and isolate older incarcerated persons or those with underlying medical conditions who were at higher risk of contracting COVID-19. Id. at \*17.

<sup>37</sup> Id. at \*18-19. As an example of DPS' "complete disregard" for its PRP, the federal district court cited DPS' decision to transport dozens of incarcerated people from HCCC to facilities on O'ahu, explaining:

[DPS] knowingly (1) transported symptomatic inmates from a facility with an active COVID-19 outbreak, (2) who told staff they were ill, (3) who were infected, (4) but whose infections were unconfirmed due to late or no testing, (5) on an airplane, (6) to a facility with no active COVID-19 cases that previously experienced an outbreak, and (7) then housed those inmates with COVID-negative inmates. There is almost no clearer an example of complete disregard for the [PRP] and abandonment of precautionary measures to prevent the spread of COVID-19 between DPS facilities and islands.

Id. at \*19.



partially granted a preliminary injunction that, in relevant part, ordered DPS to “fully comply” with its PRP and to “[p]rovide sanitary living conditions to all inmates in DPS custody[.]”<sup>38</sup>

DPS is also violating the right of incarcerated people to be free from cruel or unusual punishment under article I, section 12 of the Hawai‘i Constitution. DPS has failed to take “reasonable action to protect” incarcerated persons “against unreasonable risk of physical harm[,]” instead maintaining overcrowded facilities where COVID-19 has and will continue to infect, and possibly cause the death of, these persons.<sup>39</sup> Though this court has not had the opportunity to expound on what constitutes “cruel or unusual punishment” under the Hawai‘i Constitution, it is clear that confinement in unsanitary, overcrowded conditions under the constant threat of contracting an infectious and lethal disease is cruel or unusual.<sup>40</sup>

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<sup>38</sup> Id. at \*24.

<sup>39</sup> Haworth v. State, 60 Haw. 557, 563, 592 P.2d 820, 824 (1979); see Omnibus Dissent at 16-18.

<sup>40</sup> With an eye toward future claims of cruel or unusual punishment under article I, section 12 of the Hawai‘i Constitution, I concur with part III.A of Justice McKenna’s concurring and dissenting opinion, which concludes that the law concerning cruel or unusual punishment must be developed in conjunction with our Constitution’s mandate to act with “an understanding and compassionate heart toward all the peoples of the earth.” McKenna Concurrence & Dissent at 22.

DPS is also violating the right of pretrial detainees to be free from punishment under article I, section 5 of the Hawai'i Constitution. Those being held pretrial--909 individuals comprising approximately 30% of the total incarcerated population--have not been convicted of a crime and are presumed innocent, yet are subjected to the same overcrowded, unsanitary environment with the same elevated risk of infection with a deadly disease as those being held postconviction.<sup>41</sup> These pretrial detainees are not only being subject to cruel or unusual punishment in contravention of article I, section 12, but also to unconstitutional punishment under the Fourteenth Amendment of the United States Constitution and article I, section 5 of the Hawai'i Constitution.<sup>42</sup>

The Majority, considering the same alleged conditions as the federal district court, has determined that the conditions in which incarcerated people are being held in Hawai'i are neither inhumane nor cruel or unusual. The Majority does not find it to be cruel or unusual that thousands of

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<sup>41</sup> Dep't of Pub. Safety, Department of Public Safety Weekly Population Report (Sept. 20, 2021), <https://dps.hawaii.gov/wp-content/uploads/2021/09/Pop-Reports-Weekly-2021-09-20.pdf>.

<sup>42</sup> See Haw. Const., art. I, § 5 ("No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws . . ."). An in-depth constitutional argument related to pretrial detainees being subjected to unconstitutional punishment can be found in the dissent filed in the OPD's last proceeding. See Omnibus Dissent at 18-20.

incarcerated persons have contracted COVID-19, or that seven people have died, while in DPS custody. The Majority does not find it to be cruel or unusual that innocent persons are being detained pretrial in overcrowded facilities that consistently experience new infections and outbreaks of COVID-19.<sup>43</sup> The Majority, instead, contends “the record is insufficient to warrant [the] extraordinary relief” requested by the OPD. This contention, however, disregards the uncontroverted expert testimony this court received from Dr. Pablo Stewart, who not only described in detail the conditions within OCCC that would lead to unnecessary infection and death, but also correctly predicted as early as April 2020 that DPS’ inadequate pandemic response would lead to outbreaks within OCCC and other DPS

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<sup>43</sup> OCCC recently experienced an outbreak of COVID-19, peaking at 168 active positive cases on September 20, 2021. See DPS, Pub. Safety Dep’t COVID-19 Testing Data - Active and Recovered (as updated on Sept. 20, 2021), <https://dps.hawaii.gov/blog/2020/03/17/coronavirus-covid-19-information-and-resources/>. Since August 2020, there have been large outbreaks in OCCC (256 active positive cases at its peak on August 28, 2020), WCF (162 active positive cases at its peak on November 27, 2020), HCF (300 active positive cases at its peak on December 23, 2020), Maui Community Correctional Center (“MCCC”) (43 active positive cases at its peak on March 5, 2021), and Hawai‘i Community Correctional Center (“HCCC”) (136 active positive cases at its peak on June 5, 2021). See Press Release, DPS, Dep’t of Pub. Safety COVID-19 Update for 8/28/20 (Aug. 28, 2020), <https://dps.hawaii.gov/wp-content/uploads/2020/03/RELEASE-PSD-COVID19-Update-8.28.20.pdf>; Dep’t of Pub. Safety, Department of Public Safety COVID-19 Update for 11/27/20, <https://dps.hawaii.gov/wp-content/uploads/2020/03/DND-submission-11.27.20.pdf>; Dep’t of Pub. Safety, Department of Public Safety COVID-19 Update for 12/23/20, <https://dps.hawaii.gov/wp-content/uploads/2020/03/DND-submission-12.23.20.pdf>; Dep’t of Pub. Safety, Department of Public Safety COVID-19 Update for 3/5/21, <https://dps.hawaii.gov/wp-content/uploads/2020/03/DND-submission-3.5.21.pdf>; Dep’t of Pub. Safety, Department of Public Safety COVID-19 Update, <https://dps.hawaii.gov/wp-content/uploads/2020/03/RELEASE-UPDATED-mass-testing-HCCC-positive-cases-6.5.21.pdf>.

facilities,<sup>44</sup> and that such outbreaks would “overwhelm local hospitals” and strain the healthcare facilities also used by the general population.<sup>45</sup>

In lieu of ordering relief, the Majority cites availability of the vaccine and states that 66% of the incarcerated population is fully vaccinated. But the Majority fails to acknowledge that the vaccination rate in our jails, where the community is more susceptible to COVID-19 outbreaks due to a consistent inflow of new detainees, is significantly lower, only 54.75%, and at OCCC is a mere 49%, as of September 21, 2021.<sup>46</sup> The Majority cites no evidence that such a low

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<sup>44</sup> See Apr. 6, 2021 Decl. of Pablo Stewart, M.D. ¶ 6-32, In re Individuals in Custody of Hawai‘i, SCPW-20-0000509, docket #162, filed April 8, 2021 [hereinafter Apr. 2021 Stewart Decl.]; Sept. 2020 Stewart Decl. ¶ 8-35; Apr. 13, 2020 Decl. of Pablo Stewart, M.D. ¶ 12-30, Off. of Pub. Def. v. Ige, SCPW-20-0000213, docket #80, filed April 13, 2020 [hereinafter “Apr. 2020 Stewart Decl.”].

<sup>45</sup> Apr. 2020 Stewart Decl. ¶ 19. The Majority’s contention that the record is “insufficient” also conflicts with its conclusion that the infection of incarcerated people from COVID-19 constitutes a threat to the safety of judges and Judiciary personnel so extreme as to require emergency measures suspending HRPP Rules 5 and 10 to protect judges and Judiciary personnel from exposure to inmates. See Dissent Re: Order Regarding Temporary Extension of the Time Requirements Under Hawai‘i Rules of Penal Procedure Rule 10(a), (b), and (c) (Circuit Court of the Third Circuit), In re Judiciary’s Response to the COVID-19 Outbreak, SCMF-20-0000152, docket #115, filed June 1, 2021; Concurrence and Dissent Re: Order Re: Temporary Extension of the Time Requirements Under Hawai‘i Rules of Penal Procedure Rule 10(a), (b), and (c) at 1, In re Judiciary’s Response to the COVID-19 Outbreak, SCMF-20-0000152, docket #45, filed Aug. 20, 2020; see also Omnibus Dissent at 27-37. This sua sponte emergency intervention was ordered by the Majority with no hearing, no affidavits, and no on-the-record input by the OPD or the prosecutor’s office.

<sup>46</sup> See DPS, Dep’t of Pub. Safety COVID-19 Update (Sept. 21, 2021), <https://dps.hawaii.gov/wp-content/uploads/2020/03/PSD-COVID-19-Update-for-9.21.21.pdf> (reporting vaccination rates across DPS facilities and staff). Despite the Majority’s reliance on DPS’ contention that it has made vaccines

vaccination rate will actually prevent infections in DPS facilities; in fact, two major outbreaks have occurred, both in jails,<sup>47</sup> after April 2021, when virtually all persons in DPS custody became eligible for vaccination.<sup>48</sup> The Majority also

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“readily available” to the incarcerated population, we do not know what DPS’ vaccination procedures look like in practice; this is information that should be provided to a public health expert. Answer of Resp’ts Otani & Hyun at 2, In re Individuals in Custody of Hawai‘i, SCPW-21-0000483, docket #13, filed Sept. 7, 2021. Contrary to Respondents’ contentions in briefing and during oral argument that protection from COVID-19 via vaccination “is entirely within the control” of incarcerated people, id., it remains the State’s responsibility to keep the people in its custody safe.

The Majority concludes that a 66% vaccination rate is sufficient to protect the incarcerated population from the threat of COVID-19. However, as of September 22, 2021, 85% of Judiciary employees were partially or fully vaccinated, see Press Release, Haw. State Judiciary, Judiciary Announces COVID-19 Vaccination and Testing Program (Sept. 22, 2021), [https://www.courts.state.hi.us/news\\_and\\_reports/2021/09/judiciary-announces-covid-19-vaccination-and-testing-program](https://www.courts.state.hi.us/news_and_reports/2021/09/judiciary-announces-covid-19-vaccination-and-testing-program), and yet, the Majority found the “continued need to protect the health and safety of court users and Judiciary personnel” and extended the suspension of the rights of pretrial detainees to appear in person for arraignments and preliminary hearings under HRRP Rules 5 and 10. See Second Extension of Order Re: Temporary Extension of the Time Requirements Under Hawai‘i Rules of Penal Procedure Rule 10(a), (b), and (c) (Circuit Court of the Third Circuit), In re Judiciary’s Response to the COVID-19 Outbreak, SCMF-20-0000152, docket #143, filed Sept. 30, 2021; Ninth Extension of Order Re: Temporary Extension of the Time Requirements Under Hawai‘i Rules of Penal Procedure Rule 10(a), (b), and (c), In re Judiciary’s Response to the COVID-19 Outbreak, SCMF-20-0000152, docket #141, filed Sept. 30, 2021; Order Re: Temporary Extension of the Time Requirements Under Hawai‘i Rules of Penal Procedure Rule 5(c)(3) (First Circuit), In re Judiciary’s Response to the COVID-19 Outbreak, SCMF-20-0000152, docket #133, filed Aug. 19, 2021; Order Re: Temporary Extension of the Time Requirements Under Hawai‘i Rules of Penal Procedure Rule 5(c)(3) (Third Circuit), In re Judiciary’s Response to the COVID-19 Outbreak, SCMF-20-0000152, docket #135, filed Aug. 19, 2021.

<sup>47</sup> OCCC recently experienced an outbreak of COVID-19, peaking at 168 active positive cases on September 20, 2021. DPS, Pub. Safety Dep’t COVID-19 Testing Data - Active and Recovered (as updated on Sept. 20, 2021), <https://dps.hawaii.gov/blog/2020/03/17/coronavirus-covid-19-information-and-resources/>. HCCC experienced an outbreak in late May/early June, peaking at 136 active positive cases on June 5, 2021. Dep’t of Pub. Safety, Department of Public Safety COVID-19 Update, <https://dps.hawaii.gov/wp-content/uploads/2020/03/RELEASE-UPDATED-mass-testing-HCCC-positive-cases-6.5.21.pdf>.

<sup>48</sup> See Press Release, Dep’t of Health, Vaccine Eligibility Expands to Residents 16 and Older Statewide (Apr. 19, 2021),

fails to acknowledge the increased transmissibility of the Delta variant, which according to the Centers for Disease Control is twice as contagious as previous variants and is transmissible even to vaccinated individuals,<sup>49</sup> and currently accounts for 93% of new infections in Hawai‘i.<sup>50</sup> Relying solely on vaccination also discounts the possibility of new variants developing and spreading.<sup>51</sup> Other than the Majority’s speculation, there is no

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<https://health.hawaii.gov/news/newsroom/vaccine-eligibility-expands-to-residents-16-and-older-statewide/>. Under the State Department of Health’s updated COVID-19 vaccination plan published on January 8, 2021, incarcerated people were not listed as a priority group for vaccination. See Press Release, Dep’t of Health, Haw. Dep’t of Health Issues Updated COVID-19 Vaccination Plan, (Jan. 8, 2021), <https://health.hawaii.gov/news/newsroom/hawaii-department-of-health-issues-updated-covid-19-vaccination-plan/>; Dep’t of Health, Executive Summary, [https://hawaiiicovid19.com/wp-content/uploads/2021/01/Executive-Summary\\_Final1\\_010721.pdf](https://hawaiiicovid19.com/wp-content/uploads/2021/01/Executive-Summary_Final1_010721.pdf) (prioritizing health care personnel (Phase 1a), long-term care facility residents (Phase 1a), adults 75 years of age and older (Phase 1b), frontline essential workers (Phase 1b), adults aged 64-74 years (Phase 1c), persons aged 16-64 years with high-risk medical conditions (Phase 1c), and all other essential workers (Phase 1c)). Incarcerated people had previously fallen under Stage 2 (of 4 total stages) under the Department’s original COVID-19 vaccination plan published in October 2020. See Dep’t of Health, Draft COVID-19 Vaccination Plan (Oct. 16, 2020), [https://hawaiiicovid19.com/wp-content/uploads/2020/11/Hawaii-COVID-19-Vaccination-Plan\\_Initial-Draft\\_101620.pdf](https://hawaiiicovid19.com/wp-content/uploads/2020/11/Hawaii-COVID-19-Vaccination-Plan_Initial-Draft_101620.pdf).

<sup>49</sup> CDC, “Delta Variant: What We Know About the Science” (last updated Aug. 26, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html>.

<sup>50</sup> Dep’t of Health, “Hawaii sequencing and variants of SARS-Cov-2” (Aug. 18, 2021), [https://health.hawaii.gov/coronavirusdisease2019/files/2021/08/Variant\\_report\\_20210818.pdf](https://health.hawaii.gov/coronavirusdisease2019/files/2021/08/Variant_report_20210818.pdf). In Governor David Ige’s own words, “the delta variant changed everything”; the Governor’s office is no longer using a 70% vaccination rate to remove vaccination, testing, and social gathering restrictions. Dan Nakaso, Potential surge could bring tighter rules, Honolulu Star Advertiser, Sept. 28, 2021, at A6.

<sup>51</sup> New Variants of Coronavirus: What You Should Know, Johns Hopkins Medicine (updated July 23, 2021), <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/a-new-strain-of-coronavirus-what-you-should-know> (noting that “[a]s long as the coronavirus spreads through the population, mutations will continue to happen”).

evidence to counter the finding of the federal district court that despite the rate of vaccination of incarcerated persons, cruel and unusual conditions persist.

The Majority also contends that “much of the relief” requested by the OPD in this proceeding is “already being addressed” by the five-member Monitoring Panel established under the Settlement signed by the parties in Chatman v. Otani, No. CV 21-00268 JAO-KJM, 2021 WL 2941990 (D. Haw. July 13, 2021).

Respectfully, the Majority is incorrect. The Settlement states that the Panel is “advisory” and may provide only “non-binding” recommendations to DPS.<sup>52</sup> Three of the five Panel members are present or former DPS employees, and only one member is an independent public health and corrections expert.<sup>53</sup> Critically, the Settlement expressly precludes the Panel from addressing the overcrowding that exacerbates the COVID-19 threat and all other

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<sup>52</sup> Ex. A to Answer of Resp’ts Otani & Hyun ¶ 5, In re Individuals in Custody of Hawai’i, SCPW-21-0000483, docket #15, filed Sept. 7, 2021.

<sup>53</sup> The Monitoring Panel is comprised of: Tommy Johnson (DPS Deputy Director for Corrections), Gavin Takenaka (DPS Healthcare Administrator), Dr. Kim Thorburn (former Hawai’i corrections medical director), Dan Foley (retired Intermediate Court of Appeals Judge and former Special Master for this court), and Dr. Homer Venters (epidemiologist and former chief medical officer of the New York City Correctional Health Services). See Answer of Resp’ts Otani & Hyun at 11-12, In re Individuals in Custody of Hawai’i, SCPW-21-0000483, docket #13, filed Sept. 7, 2021; Kevin Dayton, Panel Will Oversee Efforts By Prisons And Jails To Manage Pandemic Threat, Civil Beat (Sept. 3, 2021), <https://www.civilbeat.org/2021/09/panel-will-oversee-efforts-by-prisons-and-jails-to-manage-pandemic-threat/>.

cruel and/or unusual conditions of confinement.<sup>54</sup> There is no indication that the Panel has convened, and the Panel will end in approximately ninety days, after January 31, 2022, along with “all jurisdiction of any court to enforce” the Settlement.<sup>55</sup> The Majority makes the unlikely assumption that the Panel will accomplish in less than ninety days by agreement of the five Panel members what the single master appointed by this court was unable to achieve: devise measures DPS should take to comply with its legal duty to protect incarcerated people through quarantine, sanitization, social distancing, testing, contact tracing, and vaccination procedures.<sup>56</sup> As noted, were the five-member Panel to act with extraordinary alacrity to achieve this objective, the Panel’s authority to provide guidance to DPS would only continue until January 31, 2022, the date the Settlement expires.<sup>57</sup> It is not likely, however, that the Panel will make constructive recommendations, that DPS adopts such recommendations, and that the conditions in DPS facilities actually improve before the Settlement’s expiration. Thus, this

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<sup>54</sup> See Ex. A to Answer of Resp’ts Otani & Hyun ¶ 5, In re Individuals in Custody of Hawai’i, SCPW-21-0000483, docket #15, filed Sept. 7, 2021.

<sup>55</sup> Id. ¶ 27-28.

<sup>56</sup> Id. ¶ 5.

<sup>57</sup> The Settlement may be extended to, at latest, March 31, 2022, and only by the mutual consent of the parties or the written agreement of the majority of the Monitoring Panel. Id. ¶ 27.



court cannot rely on the Monitoring Panel established in Chatman to eliminate the threat posed by COVID-19 in Hawai'i's correctional facilities.

While the boundaries set by the United States Constitution are being rigorously defended by the federal district court, this court refuses to do the same on behalf of the Hawai'i Constitution. In refusing to do so, the Majority relies on as yet unidentified relief in Chatman that cannot address the signature cause of the unconstitutional conditions: overcrowding. COVID-19 remains a public health emergency,<sup>58</sup> as evidenced by the 2863 incarcerated persons who have contracted COVID-19, as well as the 7 people who have died of COVID-19, while under DPS' care.<sup>59</sup> It is the duty of this court to independently uphold the rights of incarcerated people under both the United States and the Hawai'i Constitution where the proven consequences of this court's failure to do so is the death of people placed in custody by the State Judiciary.

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<sup>58</sup> See Emergency Proclamation Related to the COVID-19 Response, Off. of Governor of Haw. (Aug. 5, 2021), [https://governor.hawaii.gov/wp-content/uploads/2021/08/2108026-ATG\\_Emergency-Proc-for-COVID-19-Response-distribution-signed.pdf](https://governor.hawaii.gov/wp-content/uploads/2021/08/2108026-ATG_Emergency-Proc-for-COVID-19-Response-distribution-signed.pdf).

<sup>59</sup> See Dep't of Pub. Safety, COVID-19 Information (updated 10/4/21), <https://dps.hawaii.gov/blog/2020/03/17/coronavirus-covid-19-information-and-resources/>. This number does not include the 2 people who died of COVID-19 while incarcerated at Saguaro. See supra note 14.

**III. This Court Must Order the Reduction of the Incarcerated Population and Appoint a Public Health Expert**

The gravity of the current emergency and the magnitude of the constitutional violations in this case warrant significant relief. The relief now requested by the OPD is largely the same as that relief first requested by the OPD eighteen months ago, and then again, one year ago, based on the unrefuted expert opinion of Dr. Stewart describing the unsanitary, crowded, and dangerous conditions that have since worsened at OCCC.<sup>60</sup> Had the unrebutted oft-repeated expert opinion of Dr. Stewart been heeded, had the special master entered DPS facilities and ordered the conditions therein to be made constitutional, and had the recommendations of the Oversight Commission been implemented by this court to reduce the prison population to at or below design capacity, lives would have been saved and unconstitutional suffering ended. As it is now, men and women suffer fear and disease that has escalated into a new cycle of proven lethality: incarcerated individuals are dying under unknown circumstances and pretrial detainees are being held without bail in conditions that DPS

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<sup>60</sup> See Petition for Extraordinary Writ Pursuant to HRS §§ 602-4, 602-5(5), and 602-5(6) and/or for Writ of Mandamus at 17-19, In re Individuals in Custody of Hawai'i, SCPW-21-0000483, docket #1, filed August 27, 2021; Petition for Writ of Mandamus at 14-16, In re Individuals in Custody of Hawai'i, SCPW-20-0000509, docket #1, filed Aug. 12, 2020; Petition for Writ of Mandamus at 16-19, Off. of Pub. Def. v. Ige, SCPW-20-0000213, docket #1, filed Mar. 26, 2020.

fails to disclose in violation of the legislative mandate that their conditions be described every three months pursuant to HRS § 353-6.2. To comply with the basic standard of humanity and human decency that prohibits cruel and unusual punishment under the Eighth Amendment of the United States Constitution and prohibits cruel or unusual punishment under article I, section 12 of the Hawai‘i Constitution, this court must “[o]rder the Circuit, Family and District courts, DPS, and the [Hawai‘i Paroling Authority] to reduce the population of Hawai‘i’s correctional facilities . . . to their design capacity and/or Infectious Disease Emergency Capacity as recommended by the [HCSOC]” and “[a]ppoint a public health expert to enter into all of Hawai‘i’s correctional facilities and review protocols, the ability to social distance and make recommendations.”<sup>61</sup> The expert must be provided full disclosure by DPS of the identities and circumstances of the seven deaths at HCF to ensure that no more incarcerated people die of COVID-19 in DPS custody.

#### **IV. Conclusion**

For the foregoing reasons, I concur with part II of the Majority’s Order, which concludes that this court has authority under the Hawai‘i Constitution and state statutes to

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<sup>61</sup> Petition for Extraordinary Writ Pursuant to HRS §§ 602-4, 602-5(5), and 602-5(6) and/or for Writ of Mandamus at 18, In re Individuals in Custody of Hawai‘i, SCPW-21-0000483, docket #1, filed August 27, 2021.

grant relief in this proceeding, and the portion of the Order requiring DPS to comply with HRS § 353-6.2, and respectfully dissent from the Majority's denial of the OPD's "Petition for Extraordinary Writ Pursuant to HRS §§ 602-4, 602-5(5), and 602-5(6) and/or for Writ of Mandamus." I also concur with parts I and III.A of Justice McKenna's concurring and dissenting opinion.

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

/s/Michael D. Wilson

