SCPW-20-0000200 & SCPW-20-0000213

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

OFFICE OF THE PUBLIC DEFENDER,

Petitioner,

vs.

CLARE E. CONNORS, Attorney General of the State of Hawai‘i; DONALD S. GUZMAN, Prosecuting Attorney, Count of Maui; MITCHELL D. ROTH, Prosecuting Attorney, Count of Hawai‘i; JUSTIN F. KOLLAR, Prosecuting Attorney, County of Kaua‘i; DWIGHT K. NADAMOTO, Acting Prosecuting Attorney, City and County of Honolulu,

Respondents.

STATE OF HAWAI‘I OFFICE OF THE PUBLIC DEFENDER,

Petitioner,

vs.

DAVID Y. IGE, Governor, State of Hawai‘i; NOLAN P. ESPINDA, Director, State of Hawai‘i Department of Public Safety; EDMUND (FRED) K.B. HYUN, Chairperson, Hawai‘i Paroling Authority;

Respondents.

ORIGINAL PROCEEDING

OBJECTIONS AND COMMENTS TO SPECIAL MASTER'S INTERIM REPORT BY ACLU OF HAWAI‘I FOUNDATION AND LAWYERS FOR EQUAL JUSTICE

DECLARATION OF PABLO STEWART, M.D.

EXHIBIT A: "AN OPEN LETTER ON PROTECTING OUR INCARCERATED LOVED ONES FROM COVID19 PANDEMIC"

CERTIFICATE OF SERVICE

MATEO CABALLERO 10081
JONGWOOK "WOOKIE" KIM 11020
ACLU of Hawaii Foundation
P.O. Box 3410
Honolulu, Hawaii 96801
Telephone: (808) 522-5905
Facsimile: (808) 522-5909
E-mail: mcaballero@acluhawaii.org
wkim@acluhawaii.org

Attorneys for *Amicus Curiae*
ACLU of Hawaii Foundation

THOMAS A. HELPER 5676
Lawyers for Equal Justice
733 Bishop Street, Suite 1180
Honolulu, Hawaii 96813
Telephone: (808) 369-2507
E-mail: tom@lejhawaii.org

Attorney for *Amicus Curiae*
Lawyers for Equal Justice

OBJECTIONS AND COMMENTS TO SPECIAL MASTER'S INTERIM REPORT BY ACLU OF HAWAIʻI FOUNDATION AND LAWYERS FOR EQUAL JUSTICE

I. INTRODUCTION

Pursuant to this Court's April 10, 2020 Amended Interim Order, the American Civil Liberties Union of Hawaiʻi Foundation ("ACLU of Hawaiʻi") and Lawyers for Equal Justice ("LEJ") (together, "Nonprofit Amici") respectfully submit the following objections and comments to the Special Master's Initial Summary Report and Initial Recommendations ("Interim Report"): (A) in failing to include a timeline for action, the Interim Report does not account for the urgency of the pandemic, (B) the population reduction process needs a population reduction target, and that target should be design bed capacity for each DPS facility, (C) the process must include a presumption of release under least-restrictive conditions, (D) the Court should transform the Interim Report's recommendations into requirements, and set reasonable but expeditious deadlines for compliance, and (E) the Court should retain jurisdiction and consider more aggressive measures if the targets and deadlines are not met.

This Court's April 2, 2020 Order directed the 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." The Interim Report shows both the benefits and the limitations of that collaborative process. The Special Master effectively mediated discussions among the parties to the extent there was room for agreement. The Interim Report ably summarizes the process to date, identifies areas of agreement, and makes valuable recommendations about next steps in that process. But, as explained below, the Interim Report is fatally incomplete in key respects. For one, in not recommending any schedule for the release process, any deadlines, and any measurable goal or target for the population reduction process, it fails to account for the urgency of the pandemic. The Interim Report is also

substantively incomplete in that it does not address the constitutional claims raised by the Petitions. It does not recommend any shifting of burden, consideration of least restrictive alternatives, presumption of release, or guide or limit the discretion of the trial courts.

This Court should finish the work started by the Special Master by enforcing and supplementing his recommendations so that they reflect the urgency of this process, establish clear population reduction goals, impose firm deadlines and schedules, and provide clear guidance to the trial courts to ensure uniform and expedited handling of the release process. The Court should make explicit that the ultimate goal that all parties *must* achieve is the reduction of the population in Hawaii facilities to pandemic-safe levels—*i.e.*, levels that allow for social distancing and proper hygiene.[1] At a minimum, that means reaching 100% of *design* bed capacity within each DPS facility by a date certain.

The families of people in prison and jail are rightfully scared for their loved ones. *See* **Exhibit A:** ***An Open Letter on Protecting Our Incarcerated Loved Ones from COVID19 Pandemic*** (over 130 organizations and individuals endorsing a letter asking public officials to implement protections for incarcerated people). Unless this Court acts decisively, the release process will not keep pace with the COVID-19 threat. And Hawaii's correctional facilities will remain overcrowded, unclean, unsafe, and at extreme risk for an outbreak that would sicken and kill inmates and correctional officers, spread to the broader community, and strain the state's medical system to a breaking point.

[1] Indeed, this Court has already taken an important first step in the direction of turning the Interim Report's recommendations into requirements. The Interim Report recommends that DPS "provide sufficient information to the OPD about the inmates listed [by OPD in response to this Court's March 27 Order] so that OPD can clearly state each individual for whom they seek release." Interim Report at 39. This Court's Interim Order turned this recommendation into a directive, requiring DPS to provide inmate lists by April 14.

II. OBJECTIONS AND COMMENTS TO SPECIAL MASTER'S INTERIM REPORT

A. In Failing To Include A Timeline For Action, The Interim Report Does Not Account For The Urgency Of The Pandemic

One glaring omission from the Interim Report is that its recommendations do not reflect the urgency of the COVID-19 pandemic. Most notably, the recommendations include no timeline for action. Nonprofit Amici respectfully submit that any order entered by the Court must include a timeline requiring all stakeholders to move at a pace commensurate with the rapidly escalating nature of the pandemic, as well as corresponding deadlines.

It is simply a matter of time before COVID-19 breaches the walls of Hawaii's jails and prisons. While DPS claims that it has begun implementing its Pandemic Response Plan ("Plan") and that the Plan does enough to protect those in DPS custody from contracting COVID-19, the evidence reflects otherwise. Based on the testimony of Dr. Pablo Stewart—who is a health expert with three decades of correctional health care experience, who currently serves as a court-appointed monitor in a federal lawsuit concerning prison conditions, and who provides medical care at OCCC four days per week, including as recently as April 13, 2020—there is effectively no evidence that DPS has implemented at OCCC any meaningful changes to social distancing or hygiene protocols in light of the ongoing pandemic. *See* **Declaration of Pablo Stewart, M.D. ("Stewart Decl.") ¶¶** 14-18. Thus, even under the charitable interpretation that DPS has earnestly attempted to implement the Plan, such implementation is not enough. Indeed, until the number of people within each facility is decreased meaningfully and substantially—so that people are not packed two or three to a cell, *see* Stewart Decl. ¶ 16—*no plan* can work. And under these circumstances, it is simply a matter of time before DPS facilities statewide experience an outbreak—one that will in turn harm people detained in DPS facilities, DPS staff, and, eventually, the broader community. *See* Stewart Decl. ¶¶ 5, 19-20.

Compounding the problem is that the present and proposed processes move far too slowly, take too long, and leave far too much discretion to trial judges and prosecutors. Currently, the burden is entirely on the Office of the Public Defender ("OPD") to move for individual relief in each case, with prosecutors able to make blanket objections that further slow the process. And letting courts fully "maintain their judicial discretion" as if these were normal times effectively creates a strong presumption in favor of the *status quo*. *See* Stewart Decl. ¶ 22. Unless the Court imposes a timeline, change will not come fast enough to prevent disaster.

The Court need only look to correctional facilities in other jurisdictions to see how COVID-19 outbreaks can escalate in a matter of days, and why temporal urgency is needed here. In Washington, D.C., the local jail saw a seven-fold increase in confirmed cases of COVID-19 within a *one-week period*.[2] In Illinois, the Cook County Jail saw its third death yesterday, and over 500 detainees and correctional staff have contracted the virus to date.[3] These jurisdictions failed to act with urgency. *See* Stewart Decl. ¶ 5 ("time is truly of the essence"). Hawai'i can avoid a similar outcome, but only if it implements measures that require action along a timeline measured in days, not weeks or months. Such measures and deadlines are proposed below.

B. The Population Reduction Process Must Include A Population Reduction Target, And That Target Should Be Each Facility's Design Bed Capacity

Noticeably absent from the Interim Report is any kind of population reduction target for the relevant DPS facilities. Instead, the Interim Report gives the background to the establishment

[2] Natalie Delgadillo, *Coronavirus Cases At The D.C. Jail Have Grown Seven-Fold Since Last Week*, DCist (Apr. 8, 2020), https://dcist.com/story/20/04/08/coronavirus-cases-at-the-d-c-jail-have-grown-seven-fold-since-last-week.

[3] ABC 7 Chicago Digital Team, *Coronavirus Chicago: 3rd Cook County Jail Detainee Dies After Testing Positive For COVID-19*, ABC 7 Chicago (Apr. 12, 2020), https://abc7chicago.com/3rd-cook-county-jail-detainee-with-covid-19-dies/6098349.

of "operational capacities" for Hawaii's correctional facilities, recognizing that:

> [w]ith the threat of COVID-19 being introduced by incoming inmates or corrections staff that come in and out every day, these operational capacities are no longer valid….DPS's plans and efforts confirmed the Oversight Commission's belief that operational capacities must be set at lower levels as soon as possible….Therefore, it is my recommendation that the process of reconsidering, lowering, and monitoring the operational capacities of Hawai'i's correctional centers and facilities begin as requested by the Oversight Commission.

Report at 33-34. The Interim Report further recommends that DPS report on its plans and progress in seven specific areas relevant to establishing a pandemic-safe capacity. *Id.* at 32-33.

According to Dr. Stewart—who provided expert testimony in the landmark *Coleman/Plata* lawsuits concerning overcrowded California prisons, *see Brown v. Plata*, 563 U.S. 493 (2011)—"the failure to include a population reduction target will be fatal to any attempt to meaningfully achieve the larger goal of preventing a disastrous outbreak of COVID-19 within Hawaii jails and prisons." Stewart Decl. ¶ 21.

For this process to work—for it to meaningfully protect "public health *and* public safety"—a reasonable population reduction target must be mandated by the Court. Stewart Decl. ¶¶ 5, 21. Setting a target is necessary because, without one, "each actor in the system is drifting along without any sort of clear direction," and the status quo will be further entrenched. Stewart Decl. ¶ 22. As Dr. Stewart also notes, there is precedent for the judiciary to impose specific population reduction targets during crises. *See* Stewart Decl. ¶¶ 7, 23, 28; *Plata*, 563 U.S. at 501-02 (affirming three-judge federal court's order requiring California's prisons to reduce to "137.5% of design bed capacity," and stating that a "court-mandated population limit is necessary" to respond to severe overcrowding).

Based on Dr. Stewart's testimony, Nonprofit Amici also submit that the Court should impose 100% of *design* bed capacity as the mandatory initial target for each facility that system

stakeholders must achieve through the collaborative process. *See* Stewart Decl. ¶¶ 26-28. As Dr. Stewart observes, setting the target of reaching 100% of *operational* bed capacity is insufficient because that number reflects a facility's capacity only "on a good day with full staff"—and definitely not amid a pandemic. *See* Stewart Decl. ¶ 27. Moreover, some facilities (including OCCC) have already apparently reached under 100% of their operational capacities, yet still show no sign of effectively implementing adequate social distancing or hygiene measures. *Id*.

Assuming the Court imposes 100% of design capacity as an initial target, Nonprofit Amici also note that that may not be enough. As Dr. Stewart states, "[o]nce 100% of design capacity is reached within a given facility, the situation must be reevaluated to determine whether that population level allows for all the precautionary measures that the COVID-19 crisis calls for." *See* Stewart Decl. ¶ 29. More reductions may eventually be needed.[4]

For the time being—as a "first step," Stewart Decl. ¶¶ 26, 30—*some* target is necessary. And Nonprofit Amici respectfully submit that that target should be 100% of design capacity.

C. The Balancing of Constitutional Rights With Governmental Interests Justify A Presumption Of Release Under Least-Restrictive Conditions

The Interim Report recommends that the trial courts continue the process of requiring individual petitions from individual inmates, and making individual determinations in each case. The Interim Report does not recommend any limit on the discretion of the trial courts. *See* Interim Report at 39. The problems with this approach are evident now. The process is slow and

[4] After setting 100% of design capacity as an initial target, Nonprofit Amici suggest that this Court require DPS to consult with the Oversight Commission and medical professionals to establish capacities that would allow for the social distancing, hygiene, and other measures essential in the pandemic and as discussed in the seven areas identified in the Interim Report. DPS would then report a preliminary estimate of the pandemic-safe capacities and a description of the methodology used to reach these numbers by Monday, April 20, 2020. Obviously, the numbers may need to be adjusted as the situation changes.

inconsistent, and apparently gives little or no weight to the undisputed public health dangers or to the ultimate goal of reducing inmate populations to pandemic-safe levels.

Nonprofit Amici submit that, in determining the process for addressing the dangerous overcrowding in Hawaii's jails and prisons, this Court should balance the constitutionally protected rights of the people in jails and prisons to life and a safe detention environment, and the risk of irreparable harm posed by overcrowding during the pandemic, on the one hand, with the government's interest in maintaining public safety, on the other.[5] Where a person is (1) being held pretrial on unaffordable cash bail, (2) not incarcerated for a dangerous or violent offense, or (3) particularly susceptible to COVID-19, the public safety concerns are less compelling and the balance of equities and rights involved, as well as the need for urgent action, strongly favor, at a minimum, a presumption of release to be rebutted by the government.[6] Thus, for the people

[5] *See, e.g., Karr v. State*, No. A-13630, 2020 WL 1456469, at *3 (Alaska Ct. App. Mar. 24, 2020) (in holding that pretrial bail determinations should be reconsidered in light of COVID-19 pandemic, the Court of Appeals of Alaska found that "courts must now balance the public health safety risk posed by the continued incarceration of pre-trial defendants in crowded correctional facilities with any community safety risk posed by a defendant's release."); *Brown v. Plata*, 563 U.S. 493, 511-39, 131 S. Ct. 1910, 1929-44 (2011) (in balancing equities under Prison Litigation Reform Act, which applies in Federal Court but not here, and upholding an order from a three-judge panel requiring California to reduce its prison population to remedy unconstitutional conditions regarding mental health and medical care caused by overcrowding, the U.S. Supreme Court held that "[w]hen necessary to ensure compliance with a constitutional mandate, courts may enter orders placing limits on a prison's population" and that "[t]he court must also order the population reduction achieved in the shortest period of time reasonably consistent with public safety"); *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903 (1976) ("[T]he specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.").

[6] By suggesting that a presumption apply in this matter, Nonprofit Amici do not therefore concede that there is not a *right* to be released for a broader range of people, particularly in light of the rapidly evolving circumstances of the pandemic. Contrary to the State's contention, the

identified by this Court's April 10, 2020 Amended Interim Order—all of whom fall within the three groups identified above—Nonprofit Amici respectfully recommend the Court order that, until the threat to life and harm caused by the pandemic has passed, there should a presumption of temporary release that applies to their cases.

Specifically, after OPD has identified the people for potential release in accordance with the Amended Interim Order, this Court should order the appropriate district and circuit courts to issue orders to show cause why the person should not be released from incarceration or detention in light of the risks posed by the pandemic. For sentenced people, prosecutors would then be allowed an opportunity to rebut said presumption by clear and convincing evidence that the person poses imminent serious physical harm to a reasonably identifiable person or persons.[7] In

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government's failure to release more people in light of the significant risks posed by the pandemic *constitutes* deliberate indifference given the dire circumstances. *See* Stewart Decl. ¶¶ 11-20; *Helling v. McKinney*, 509 U.S. 25, 36, 113 S. Ct. 2475, 2482 (1993) (holding that a prisoner "states a cause of action . . . by alleging that [corrections officials] have, with deliberate indifference, exposed him to conditions that pose an unreasonable risk of serious damage to future health"); *Hare v. City of Corinth, Miss*., 74 F.3d 633, 644 (5th Cir. 1996) ("[E]ven where a State may not want to subject a detainee to inhumane conditions of confinement or abusive jail practices, its intent to do so is nevertheless presumed when it incarcerates the detainee in the face of such known conditions and practices."). As a trial court in New York recently held in releasing several people in special danger of contracting COVID-19 from Rikers Island Prison:

> Due process does not excuse prison officials who mean well, but have no effective way to protect inmates from potentially fatal epidemics. Again, prison officials are obliged to take "reasonable care" to mitigate the risk posed by Covid-19. That is so especially for prisoners who can fairly expect extremely serious consequences if they contract the disease. "Reasonable care" and "mitigation" obligations are not satisfied by tossing a bucket of water on a four-alarm house fire, or by placing a band-Aid on a compound bone fracture. Reasonable care to mitigate must include an effort to employ an effective ameliorative measure.

People ex rel. Stoughton v. Brann, 2020 NY Slip Op. 20081 (N.Y. Sup. Ct. April 6, 2020), *available at* http://nycourts.gov/reporter/3dseries/2020/2020_20081.htm.

[7] A "threat of serious physical harm" means a likelihood, established by individualized facts, of either (1) imminent serious bodily injury to a specifically identifiable person or persons in the community or (2) specific evidence of an imminent, credible threat of serious violence to

line with the Special Master's recommendation that said objections be "surgical," Interim Report at 39, generalized, vague, unsubstantiated, or blanket concerns about "public safety" should be deemed insufficient. This Court should provide guidance to this effect to the trial courts.

Since people are presumed innocent until proven guilty, pretrial detainees have additional claims for release. As explained in OPD's petition, the use of unaffordable cash bail to detain people is unconstitutional *with or without an ongoing pandemic*. Petition at 22-23 n.53. Posting cash bail bears no rational relationship to the mitigation of any public safety risk—except flight risk[8]—and the use of cash bail to *de facto* detain people unconstitutionally circumvents the process for denial of bail laid out in Section 804-3 of the Hawai'i Revised Statutes, thereby violating due process,[9] and unconstitutionally discriminates against indigent defendants, thereby

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unknown but reasonably identifiable persons, such as through credible threats of acts of terrorism.

[8] In Hawai'i, the amount posted as bail is returned even if the person reoffends so long as the person shows up to court. Haw. Rev. Stat. §§ 804-14, 804-41. Additionally, there is a meaningful distinction between risk of willful flight or so-called "flight risk"—which, in Hawai'i as an island state, is minimal—with failure to appear, which might be higher for a number of reasons beyond the person's control. *See* Ethan Corey et al., *The 'Failure to Appear' Fallacy*, The Appeal (Jan. 9, 2019), https://theappeal.org/the-failure-to-appear-fallacy.

[9] *See, e.g., United States v. Leathers*, 412 F.2d 169, 171 (D.C. Cir. 1969) (per curiam) ("Conditions [of pretrial release] which are impossible to meet are not to be permitted to serve as devices to thwart the plain purposes of [the Bail Reform Act], nor are they to serve as a thinly veiled cloak for preventive detention."); *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."); *Brangan v. Commonwealth*, 80 N.E.3d 949, 963 (Mass. 2017) ("But where a judge sets bail in an amount so far beyond a defendant's ability to pay that it is likely to result in long-term pretrial detention, it is the functional equivalent of an order for pretrial detention, and the judge's decision must be evaluated in light of the same due process requirements applicable to such a deprivation of liberty."); *State v. Brown*, 338 P.3d 1276, 1292 (N.M. 2014) ("Intentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether."); *In re Humphrey*, 228 Cal. Rptr. 3d 513, 528-29 (Cal. Ct. App. 2018) ("Money bail, however, has no logical connection to protection of the public, as bail is not forfeited upon commission of

violating equal protection.[10] Accordingly, after district and circuit courts issue orders to show cause for pretrial detainees, it would be incumbent upon prosecutors to file motions for detention under Section 804-3 in the appropriate cases.

Finally, in reviewing cases for release, Nonprofit Amici recommend this Court order district and circuit courts to impose only conditions of release that are narrowly tailored, the least restrictive, and reasonable in light of the pandemic and the specific threat to be mitigated. *See United States v. Scott*, 450 F.3d 863, 874 (9th Cir. 2006) (holding that drug testing could not be imposed as a condition of release for a pretrial detainee absent individualized probable cause). Conditions, such as verified housing and COVID-19 testing, that would not result in prompt release of a person are simply non-starters. Interim Report at 40; *supra* note 9. For pretrial detainees, courts may not impose any liberty-restricting conditions[11] unless there is specific evidence that the person poses a threat of serious physical harm to a reasonably identifiable

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additional crimes . . . . Accordingly, when the court's concern is protection of the public rather than flight, imposition of money bail in an amount exceeding the defendant's ability to pay unjustifiably relieves the court of the obligation to inquire whether less restrictive alternatives to detention could adequately protect public or victim safety and, if necessary, explain the reasons detention is required.").

[10] *See, e.g., Bearden v. Georgia*, 461 U.S. 660, 671, 103 S. Ct. 2064, 2071 (1983) ("Given the significant interest of the individual in remaining on probation, . . . the State cannot justify incarcerating a probationer who has demonstrated sufficient bona fide efforts to repay his debt to society, solely by lumping him together with other poor persons and thereby classifying him as dangerous. This would be little more than punishing a person for his poverty."); *ODonnell v. Harris Cty.*, 892 F.3d 147, 162 (5th Cir. 2018) (holding that disparate treatment of indigent arrestees in setting bail amounts violated equal protection as well as due process); *Buffin v. City and Cty. of San Francisco*, 2019 WL 1017537, at *16 (N.D. Cal. Mar. 4, 2019) (applying strict scrutiny and finding constitutional violation where arrestees who could afford bail released 12.8 hours faster on average than those who could not).

[11] "Liberty restricting conditions" are conditions of release that will cause moderate to serious hardship in an individual's ability to engage in their regular life activities (such as work, child care, or other responsibilities). Restrictions on travel, no-contact orders, orders imposing house arrest, a third-party custodian, a curfew, drug or alcohol monitoring, or GPS monitoring should all be considered "liberty-restricting conditions," though this is an exhaustive list.

person or persons. *See Scott*, 450 F.3d at 874. And any conditions set must be determined to be the least restrictive necessary to mitigate a specific identified threat. *See* Haw. Rev. Stat. 804-7.1 (requiring that pretrial conditions be "least restrictive"). Such determinations must be individualized and no blanket conditions of release should be used. Guidance to district and circuit courts to this effect should also be included in this Court's order.

In summary, Nonprofit Amici suggest that, for the individuals identified by OPD, this Court should direct the relevant trial courts to adopt the following procedure:

1. The relevant court shall issue an order to the prosecuting attorney to show cause why the inmate should not be released. The order will require the prosecutor to show by clear and convincing evidence that the individual poses imminent serious harm to a reasonably identified person or persons. The prosecuting attorney shall have 2 days to respond to the order.

2. If the prosecuting attorney does not respond to the order, or if the court determines on the pleadings that the response is insufficient, the court shall issue an order within 2 days requiring DPS to release the inmate.

3. If the prosecutor makes an adequate showing, the matter shall be set for hearing within 2 days.

4. The court will rule on the motion for release within 2 days after the hearing.

5. Either party may take an immediate appeal to this Court.

This procedure would allow trial courts to continue exercising discretion, as the Interim Report recommends, while ensuring the appropriate level of urgency in light of the pandemic.

D. The Court Should Transform Other Interim Report Recommendations Into Requirements, And Set Reasonable Deadlines For Compliance

Nonprofit Amici also submit that other recommendations be made into requirements.

1. *More frequent reporting of progress*

The Interim Report recommends that "DPS produce twice monthly population reports so that all interested stakeholders are kept abreast of the changes in population." Interim Report at

37. Nonprofit Amici agree that regular reporting should occur, but ask that such reporting be more frequent—ideally daily—and by more stakeholders. That DPS already issues nearly daily press releases shows that DPS can run daily population reports. These DPS reports must also include all facilities under its jurisdiction (not just jails) to ensure that no facility is dangerously overcrowded.[12] And other actors should provide regular reporting, too. For example, the chief judge of each circuit court should periodically report the number of cases considered and decided, and what proportion of those decisions granted release, broken down by judge, so that the Court can track progress.

2. *No cash bail*

The Interim Report finds:

> In order to reduce the pretrial population at correctional centers, I recommend that the practice of no cash bail, including unsecured bond, release on own recognizance, or supervised released, be regularly employed. Pretrial detainees who are a threat to public safety or a flight risk should not be released pending trial, but pretrial detainees who are poor and not a risk to public safety should not be held simply because they do not have the means to post bail.

Interim Report at 40. As already noted, reliance on cash bail is irrational here, and cannot be used to *de facto* detain people. Nonprofit Amici concur with this recommendation, and ask that this Court make it mandatory for the trial courts.

3. *Release not contingent on verification of residence*

The Interim Report states that "Verified Residence Should Not Be Required for Release."

[12] For example, while DPS has trumpeted recent "jail population" reductions, its near daily reports omit prison numbers. Based on the two most recent end-of-month population reports (*i.e.*, ending February 29 and March 31, 2020), it appears that prisons have seen a nearly three-digit increase in that month. *Compare* https://dps.hawaii.gov/wp-content/uploads/2020/03/Pop-Reports-EOM-2020-02-29.pdf (noting 840 people in Halawa and 194 people in Waiawa correctional facilities), *with* https://dps.hawaii.gov/wp-content/uploads/2020/04/Pop-Reports-EOM-2020-03-31.pdf (noting 882 people in Halawa and 243 people in Waiawa correctional facilities).

Interim Report at 40-41. Nonprofit Amici concur with this recommendation, and ask that this Court direct the trial courts not to impose such a condition.

4. *Expeditious release of people held for technical parole violations*

The Interim Report recognizes that Hawai‘i facilities hold 628 inmates for parole violations. “Presumably, many are there for technical parole violations.” Interim Report at 41-42; *see also* Hawai‘i Paroling Authority (“HPA”), *2019 Annual Statistical Report*, Table V (out of 363 parole revocations all 363 were for technical violations of parole). The Interim Report encourages the HPA to continue its efforts to release inmates in several categories, and predicts that “the results of the HPA’s initiative will begin to be seen by the end of the month.” Nonprofit Amici respectfully suggest that the Court direct HPA to expedite the review of everyone being held for technical parole violations and report back to this Court by Monday, April 20, 2020.

5. *Expeditious review of people held for technical probation violations*

The Interim Report recommends “a process of review” for “the nearly 410 men … and 63 women” held for probation violations. Interim Report at 43-44. Nonprofit Amici understand that the OPD has filed over 100 release motions, and that the Court set a hearing schedule for those motions that would extend for months. The Court should assign additional judges to review and decide said motions so that they can all be decided by no later than the end of this month.

E. The Court Should Retain Jurisdiction and Consider More Aggressive Measures If Targets and Deadlines Are Not Met

This Court should retain jurisdiction over this matter because of the unprecedented and evolving challenges presented by the coronavirus pandemic. As the Special Master has noted,

responding to the pandemic is an "ongoing collaborative effort" and "a work in progress."[13] As conditions evolve and new issues arise, existing orders may have to be modified on short notice and new orders issued. This is particularly true with respect to establishing revised capacity limits for correctional centers and facilities. *See* Stewart Decl. ¶¶ 28-30. Indeed, the population of each facility will have to be closely monitored. *See* Stewart Decl. ¶ 29. And more aggressive measures may need to be adopted if population targets are not met, or deadlines are missed.

At the same time, the Special Master should be retained to oversee the release process. The Special Master should, among other things, monitor and report on progress in reducing inmate populations, ensure that proper procedures are being followed, resolve disputes, answer questions, and make recommendations to this Court as necessary.

III. CONCLUSION

Nonprofit Amici respectfully request that the Court consider these objections and comments to the Interim Report. Nonprofit Amici also respectfully submit that the Court impose a population reduction target of 100% of design bed capacity for each DPS facility, establish a mandatory schedule for this process, and implement other substantive measures, including a presumption of release under least-restrictive conditions. This will ensure that the judicial system protects public health *and* public safety by reducing the chance of a devastating COVID-19 outbreak in jails and prisons.

[13] Interim Report at 44; John Burnett, *Inmate release is "a work in progress,"* Hawai'i Tribune Herald (Apr. 10, 2020), https://www.hawaiitribune-herald.com/2020/04/10/hawaii-news/inmate-release-is-a-work-in-progress.

DATED: Honolulu, Hawai‘i, April 13, 2020.

Respectfully submitted,

/s/ Mateo Caballero
MATEO CABALLERO

/s/ Jongwook “Wookie” Kim
JONGWOOK “WOOKIE” KIM

ACLU OF HAWAI‘I FOUNDATION
Attorneys for *Amicus Curiae*

/s/ Thomas A. Helper
Thomas A. Helper

LAWYERS FOR EQUAL JUSTICE
Attorney for *Amicus Curiae*