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NO. SCPW-21-0000483

IN THE SUPREME COURT OF THE STATE OF HAWAII

IN THE MATTER OF INDIVIDUALS) ORIGINAL PROCEEDINGS
IN CUSTODY OF THE STATE OF)
HAWAII) HONORABLE MARK E.
) RECKTENWALD,
) Chief Justice
) HONORABLE PAULA A. NAKAYAMA
) HONORABLE SABRINA S. MCKENNA
) HONORABLE MICHAEL D. WILSON
) HONORABLE TODD W. EDDINS
) Associate Justices
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RESPONDENT STEVEN S. ALM'S ANSWER
TO PETITION FOR EXTRAORDINARY WRIT PURSUANT TO
HRS §§ 602-4, 602-5(5), AND 602-5(6) AND/OR FOR WRIT OF MANDAMUS

and

CERTIFICATE OF SERVICE

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Respondent

**RESPONDENT STEVEN S. ALM'S ANSWER
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HRS §§ 602-4, 602-5(5), AND 602-5(6) AND/OR FOR WRIT OF MANDAMUS**

Respondent, Steven S. Alm, Prosecuting Attorney, City and County of Honolulu, State of Hawai'i (Respondent), in accordance with the order issued by this Honorable Court on August 31, 2021, submits this Answer to the Petition for Extraordinary Writ Pursuant to HRS §§ 602-4, 602-5(5), and 602-5(6) and/or for Writ of Mandamus (Petition).

While Respondent shares the concern over the ongoing pandemic and its known and potential effects, Respondent objects to a return to the procedures put in place by this Court's orders issued in the prior proceeding because they do not adequately protect the safety of the public and were issued at a time of different circumstances at OCCC.¹ The majority of Petitioner's requests simply reiterate what was in place last year up until the conclusion of those proceedings by this Court on April 16, 2021. As a result of the Court's orders, trial court judges lacked the discretion accorded to them by statute to determine an individual's custody status based on circumstances unique to each offender. Sentences were terminated or suspended well in advance of completion dates. As a result, inmates were released en masse in order to comply with this Court's order to reduce the number of inmates in custody. Rather than impose the same release orders with constraints

¹ See SCPW-20-0000509, *In the Matter of Individuals in Custody of State*.

on the trial court judges, health and government officials should continue to address the contagion without interference.²

The availability of vaccines has altered the landscape. Data from the Department of Public Safety shows that as of September 3, 2021 more than half of Hawaii inmates have received the COVID-19 vaccine.³ On August 23, 2021, the Federal Drug Administration gave full approval to the Pfizer-BioNTech COVID-19 Vaccine.⁴ In addition, on August 5, 2021, Governor Ige's Emergency Proclamation Related to the COVID-19 Response contains a vaccination mandate for all state and county employees.⁵ As of August 16, 2021, 87.6% of the state's approximately 14,000 employees are fully vaccinated as are 77.1% of employees with the Department of Public Safety.⁶

In the prior proceeding, the Department of the Attorney General noted in its March 24, 2021 filing that the inmate population had been reduced significantly and a vaccination program was being administered to all willing inmates at all correctional facilities. See, SCPW-20-0000509, Dkt. 118. According to the Attorney

² The Hawaii Correctional Systems Oversight Commission.

<https://ag.hawaii.gov/hawaii-correctional-systems-oversight-commission/>

³ On September 1, 2021, the Department of Public Safety issued a COVID-19 UPDATE in which, effective September 2, 2021, the Hawaii Paroling Authority will require eligible inmates to be fully vaccinated prior to their release on parole.

<https://www.hawaiinewsnow.com/2021/09/02/under-new-mandate-hawaii-inmates-will-have-be-vaccinated-before-being-released-parole/>

⁴ <https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine>

⁵ <https://governor.hawaii.gov/wp-content/uploads/2021/08/2108026-ATG-Emergency-Proc-for-COVID-19-Response-distribution-signed.pdf>

⁶ <https://governor.hawaii.gov/newsroom/office-of-the-governor-news-release-state-sees-87-6-fully-vaccinated-rate-98-6-compliance-rate-among-employees/>

General, when vaccines became available, inmates were prioritized for vaccination ahead of the general public. Dkt. 118 at page 6.

Since March of 2020, Respondent, its law enforcement partners, the Department of the Attorney General, the Department of Public Safety and the Hawaii Paroling Authority have undertaken diligent efforts to ameliorate the spread of COVID-19 in correctional facilities and jails. See, SCPW-20-0000200, 20-0000213 & 20-0000509. The Department of Public Safety's effort to expedite release of inmates was well underway before the State and County "shutdowns" in March 2020 in accordance with its Pandemic Response Plan. Both the Department of Public Safety, county prosecutors, and law enforcement moved expeditiously to comply with this Court's orders in the prior proceeding, SCPW-20-0000509.

Government and health officials continue to address and resolve issues as it relates to the community spread of COVID-19. Now there is the Delta variant, which Petitioner makes the focus of its Petition and calls for this Court to resume oversight. Petitioner is once again relying on a doomsday scenario, contending, "Today the situation that faces the State is exponentially more dire than that which prompted this Court's swift action in August 2020. The necessity for this Court to once again intervene is urgent." Petition, Dkt. 1 at 3. Respondent disagrees. While it is true the State has reported increasing numbers of COVID-19, this was to be expected given travel slowly resumed and businesses reopened. Petitioner puts an emphasis on the Delta variant but also notes the possibility of other variants.

Variants are to be expected within the populace even with a vaccine.⁷ And while the CDC has reported that the Delta variant of COVID-19 is more transmissible, the science is clear that the vaccine works, both to reduce transmission and drastically reduce the chances of serious illness.⁸ Given the availability of vaccines to all inmates, any inmate who chooses not to get vaccinated should not be released pursuant to Petitioner's requests. Such an outcome will have a perversely negative impact on public safety.

Petitioner has ten requests for relief. Requests Nos. 1, 2, 5, 6 are directed to the Circuit, Family and District Courts. Petitioner asks this Court to reinstate previous orders relating to release of inmates wherein (1) release shall be presumed, (2) the courts shall consider design capacity as opposed to operational capacity, and, (3) the courts shall consider the health risk posed. Petition, Dkt. 1 at 17. Petitioner lists the categories of offenses it is willing to exempt although notably has omitted petty misdemeanor and misdemeanor sexual assault offenses and other misdemeanor offenses in HRS Chapter 707 such as assault in the third degree and terroristic threatening in the second degree. Under the prior orders, the trial courts were unable to set bail for sexual assault offenses designated misdemeanors or petty misdemeanors. That issue manifested in at least one case that garnered media and public attention with an individual who was arrested multiple times but

⁷ <https://www.cdc.gov/coronavirus/2019-ncov/variants/variant.html>
<https://covid.cdc.gov/covid-data-tracker/#variant-proportions>

⁸ <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html>

who continued to be released by the trial courts due to this Court's August 27, 2020 Order mandating the release of misdemeanants and petty misdemeanants.⁹

Respondent disagrees with Petitioner's request to reinstate constraints on the trial court judges who are in the best position to decide who should be released and on what status. Petitioner also requests that this Court order the trial courts, in addition to the Department of Public Safety and the Hawaii Paroling Authority to take immediate steps to reduce the inmate population. Dkt. 1 at 18, ¶ 2.

Petitioner ignores the diligent efforts various state agencies have taken since early 2020 to reduce the inmate population. Moreover, Respondent reads Petitioner's request for immediate release of inmates to be problematic because due to COVID-19 concerns, the Judiciary is not fully operational and thus there is limited capacity to supervise probationers (e.g. face-to-face meetings and routine drug testing).

Finally as it relates to the trial courts, Petitioner asks this Court to suspend the custodial portions of all sentences, not allow cash bail, or any bail in most cases unless there is a flight risk or risk to the safety of the public. Once again, Petitioner advocates that the trial court judges lose the authority and discretion accorded to them by state law. Trial court judges are in the best position to assess the individual characteristics of offenders whether pre-trial or otherwise.

⁹ In the case of one offender, he had been arrested seven times and five of those cases involved charges of sexual assault in the fourth degree against five different women. See, <https://www.kitv.com/story/43508806/prosecuting-attorney-warns-of-37-year-old-man-on-sex-assault-spree-in-honolulu>

As to Petitioner's request involving the release of already sentenced felons, this Court has limited authority to release such inmates on COVID-19 grounds. Petitioner fails to support such a request and recent numbers released by the Department of Public Safety do not justify such extraordinary relief assuming it is even within this Court's jurisdiction.

As to Petitioner's requests in paragraph numbers 3, 4, 7-10, Respondent would defer to the Department of Attorney General as Petitioner's requests for relief relate specifically to the duties and responsibilities of the Department of Public Safety and the Hawaii Paroling Authority. Those agencies have expended significant efforts and steps to prevent and minimize the spread of COVID-19 within correctional facilities since the inception of the pandemic. They undertook proactive measures to process early releases of inmates well before this Court's involvement. Other agencies, to include Respondent, have taken steps to reduce jail populations. In addition, this Court has repeatedly denied petitions for release filed by individual inmates that simply invoke the COVID-19 pandemic and make general accusations of prison overcrowding and unsafe conditions.

The Department of Public Safety created a comprehensive pandemic response plan to keep inmates safe. There is vigorous testing at facilities. The COVID-19 vaccine has been, and continues to be, available and administered to the State's inmate population thus ameliorating the need for the measures taken in the prior proceedings.

Respondent has every reason to believe the Department of Public Safety will follow its pandemic response plan, the primary reason being that the Department is currently under federal court oversight. On July 13, 2021, United States District Court Judge Jill A. Otake issued an Order (1) Granting Plaintiffs’ Motion for Provisional Class Certification and (2) Granting in Part and Denying in Part Plaintiffs’ Motion for Preliminary Injunction and Temporary Restraining Order. See, *Chatman v. Otani*, Civil No. 21-00268 JAO-KJM, 2021 WL 2941990 (D. Haw. July 13, 2021). In the order, Judge Otake declined Plaintiffs’ request to appoint a special master. *Id.* at 23. Judge Otake ordered Defendant to fully comply with the State of Hawaii Department of Public Safety Pandemic Response Plan COVID-19 (May 28, 2021 Revision), a plan that Judge Otake agreed, “is a rather comprehensive plan that addresses the proper management of COVID-19 at DPS facilities.” *Id.* at 24, FN 27. Judge Otake referred oversight to USDC Magistrate Judge Mansfield. *Id.* at 24. Then, on September 3, 2021, under a proposed settlement filed in federal court, state correctional officials have agreed to permit a five-member panel to inspect and assess efforts to prevent the spread of the coronavirus and to make recommendations or raise concerns about the pandemic response.¹⁰ Given this unprecedented level of COVID-19 oversight, which will

¹⁰ The panel will include Dr. Homer Venters, Dr. Kim Thorburn, retired Intermediate Court of Appeals Judge Daniel Foley, DPS Corrections Health Care Administrator Gavin Takenaka and Deputy Director for Corrections Tommy Johnson. <https://www.civilbeat.org/2021/09/panel-will-oversee-efforts-by-prisons-and-jails-to-manage-pandemic-threat/>

protect inmates without jeopardizing public safety, Respondent believes that this Court need not intervene.

Respondent, unlike Petitioner, has the responsibility to ensure the safety of the greater public at large and would request that this Court not return to the position the criminal justice system was in for much of 2020 until the conclusion of the proceedings approximately five months ago. Trial court judges need to retain their discretion and ability to detain, order bail and impose conditions of bail when the circumstances present themselves. Under previous orders, the trial courts did not have that authority.

Government officials, Respondents and the private sector have been working diligently and expeditiously to address the COVID-19 outbreak. While Hawaii has seen an increase in COVID-19 numbers, there are three vaccines and large numbers of the population have been vaccinated with one of the three approved vaccines. Releasing inmates en masse, along with restricting the ability of trial court judges to tailor release based on the crimes and characteristics of the offender, is not warranted. Variants of the virus exist, but that should not be a reason to impose restraints on the trial courts and order even more inmates released given the availability of vaccines and treatment options.

CONCLUSION

Based on the argument presented, Respondent respectfully requests this Honorable Court reject the Petition. Respondent believes a release of inmates will senselessly exacerbate the considerable anxiety the community is experiencing and

offend the notion of shared sacrifices and burdens the entire state must all carry during this pandemic.

Assuming *arguendo* that *mandamus* relief is granted once again, it is crucial that adequate measures are taken prior to the large scale release of inmates to not only prevent further spread of COVID-19 in the community but also the very likelihood of an increase in crime due to the release of inmates who have already shown their inability to comply with the laws and regulations of this State.

Dated at Honolulu, Hawai'i: September 7, 2021.

Respectfully submitted,

By /s/ STEVEN S. ALM
Prosecuting Attorney
City and County of Honolulu
Respondent

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CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2021, a copy of **Respondent Steven S. Alm's Answer**, was served by electronic notification through JEFIS to the following:

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