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**Electronically Filed
Supreme Court
SCPW-21-0000483
07-SEP-2021
04:21 PM
Dkt. 13 RPET**

No. SCPW-21-0000483

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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

ORIGINAL PROCEEDING

Hon. Mark E. Recktenwald
Chief Justice
Hon. Paula A. Nakayama
Hon. Sabrina S. McKenna
Hon. Michael D. Wilson
Honorable Todd W. Eddins
Associate Justices

ANSWER OF RESPONDENTS MAX N. OTANI, Director, State of Hawai'i Department of
Public Safety and EDMUND (FRED) K.B. HYUN, Chairperson of the Hawai'i Paroling
Authority TO PETITION FOR EXTRAORDINARY WRIT PURSUANT TO
HRS §§ 602-4, 602-5(5), AND 602-5(6) AND/OR WRIT OF MANDAMUS

DECLARATION OF TOMMY JOHNSON

DECLARATION OF GAVIN K. TAKENAKA
DECLARATION OF EDMUND (FRED) K.B. HYUN
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ANSWER OF RESPONDENTS MAX N. OTANI, Director, State of Hawai‘i Department of Public Safety and EDMUND (FRED) K.B. HYUN, Chairperson of the Hawai‘i Paroling Authority¹ TO PETITION FOR EXTRAORDINARY WRIT PURSUANT TO HRS §§ 602-4, 602-5(5), AND 602-5(6) AND/OR WRIT OF MANDAMUS

I. Introduction

For the past 18 months, the nation and entire world have been under a public health emergency due to the COVID-19 pandemic.² Governor Ige declared a state of emergency on March 4, 2020 and issued the first of many proclamations to support the State’s response to the threat of COVID-19.³ Since then, government agencies, public officials, and thousands of public service employees have worked tirelessly to protect, support and lead their communities through the evolving COVID-19 pandemic. This commitment has but one common purpose: to protect the health, safety, and well-being of the people of Hawai‘i – including inmates in State correctional facilities. Against the backdrop of this collective undertaking, the Office of the Public Defender (“OPD”) for the third time⁴ petitions this Court for a blanket release of prison and jail inmates, among other relief. OPD’s petition must fail for five reasons.

First, State Respondents have not ceased responding to the health and safety challenges COVID-19 presents to inmates and staff at all State facilities. This includes prioritizing inmates

¹ Collectively, “State Respondents.”

² The United States Secretary of Health and Human Services identified COVID-19 as a public health emergency on January 31, 2020. <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx>, (last visited Sept. 7, 2021).

³ https://governor.hawaii.gov/wp-content/uploads/2020/03/2003020-GOV-Emergency-Proclamation_COVID-19.pdf (last visited Sept. 7, 2021).

⁴ See SCPW-20-0000213, *State of Hawai‘i, Office of the Public Defender v. David Y. Ige, et. al.* filed on March 26, 2020, and SCPW-20-0000509, *In the Matter of Individuals in Custody of the State of Hawai‘i* filed on August 12, 2020.

for vaccinations over most of the general public, ensuring vaccines are readily available to every inmate and all staff, implementing and updating the Department of Public Safety's ("DPS") Pandemic Response Plan ("PRP")⁵, releasing inmates early when possible and expediting requests for early parole consideration. State Respondents challenge OPD's reliance on the Federal District Court's July 13, 2021 injunction order in *Chatman v. Otani*, Civil No. 21-cv-00268-JAO-KJM (D. Haw.), as the court in that case never held an evidentiary hearing, never made findings of fact, and never tested the credibility or accuracy of the inmate declarations – some of which were introduced as exhibits to reply pleadings such that DPS had no opportunity to respond properly. The factual record notwithstanding, Director Otani agreed to work with counsel for the inmates in that case and it has since settled.

Second, the most effective way to protect the vast majority of inmates from moderate to severe illness without compromising public health and safety ***is entirely within the control of OPD's own clients***: they must simply ***agree to the vaccines DPS has made readily available to them***. The Pfizer/BioNTech, Moderna, and Johnson & Johnson vaccines are overwhelmingly safe and effective. Although DPS has been able to encourage more inmates to get vaccinated through education and outreach, large numbers of inmates have refused, placing both themselves and their fellow inmates at unnecessary risk of contracting COVID-19. To the extent OPD's petition seeks early release as the primary measure to combat COVID-19, it dangerously discounts the personal responsibility that all persons – including inmates – now have to mitigate this disease. It also ignores that being fully vaccinated will give inmates real protection against

⁵ See DPS PRP (May 28, 2021 Revision) <https://dps.hawaii.gov/wp-content/uploads/2020/03/PSD-Pandemic-Response-Plan-Revised-May-2021.pdf> (last visited Sept. 7, 2021).

moderate to severe illness and death resulting from COVID-19. While this is a more difficult measure to implement, it is the most significant mitigation measure available.

Third, the federal case cited by OPD as a basis for its petition – *Chatman v. Otani* – precludes most of the relief OPD seeks. The plaintiffs in that case made similar allegations regarding DPS’s response to the COVID-19 pandemic. The federal court certified an interim class consisting of, among others, present and future inmates of State correctional facilities. But, as noted above, on September 2, 2021, Director Otani and class counsel entered into a settlement agreement⁶ to resolve the plaintiffs’ claims, which both parties agree is “fair, adequate, and reasonable.”⁷ Notably, the settlement established a five-member panel of experts to assist DPS in implementing its PRP. One panel member, the Honorable Daniel Foley, is intimately familiar with the issues presented by OPD’s petition, as he served as this Court’s special master last year. Action by this Court is therefore inappropriate and unnecessary because: (1) the members of the class in *Chatman* are the same inmates that OPD claims to represent in this action; (2) OPD makes the same claims raised in *Chatman* – *i.e.*, alleged unconstitutional conditions of confinement due to the risks posed by COVID-19; and (3) the five-member monitoring panel already addresses OPD’s requests for relief numbers 3, 4, 8 and 9.

Fourth, consistent with the previous litigation brought by OPD, the evidence makes it clear that State Respondents have not acted with deliberate indifference towards inmates’ constitutional rights. Outbreaks of COVID-19 within correctional facilities, especially those that

⁶ A true and correct copy of the Settlement Agreement and General Release in *Chatman v. Otani*, Civil No. 21-00268 JAO-KJM is attached as Exhibit “A”. The parties have already filed joint motions to for approval of the settlement under Fed. R. P. 23(e).

⁷ A copy of the September 3, 2021 joint press release by the Department of the Attorney General and attorney for the inmate class is attached as Exhibit “B”.

reflect spikes in community disease, do not equal deliberate indifference. As shown in the attached declarations, DPS continues to use its PRP and health guidance.

Fifth, the extreme measure of blanket inmate releases remains problematic, as it puts at risk the health and safety of the general public. Although in its third petition OPD now concedes that public health and safety are important considerations,⁸ the blanket presumption in favor of releases requested by OPD continues to present risks. Prior to any releases, the Court must consider the adverse impact each release would have on public safety – not only to victims, victim’s family members, witnesses and the community, but also the hospitals and community health systems, as well as emergency and social services that are over-stressed by COVID-19. At a minimum, every released inmate must be: (1) fully vaccinated, unless exempted for medical or religious reasons; (2) have a safe place to live; (3) be evaluated for the risk they pose to the community – including the probability that they will re-offend; and (4) be subject to reasonable monitoring so they do not commit additional crimes.

II. State Respondents Continue to Take Measures to Ensure the Safety of Inmates and Staff.

A. DPS Continues to Use its Pandemic Response Plan.

DPS’s COVID-19 response began well before any inmate or staff tested positive. On March 23, 2020, DPS adopted a comprehensive, department-wide Pandemic Response Plan (“PRP”) consistent with Center for Disease Control and Prevention’s (“CDC”) COVID-19 guidelines but which set a high bar to prevent, contain, and control the spread of COVID-19 at the State’s facilities. Declaration of Tommy Johnson (Johnson Decl.) at ¶ 5; Gavin K. Takenaka (Takenaka Decl.) at ¶ 8. The first identified positive case occurred at Oahu Community

⁸ See Petition at pg. 14, 17.

Correctional Center on August 7, 2020, more than five months *after* the national and state emergencies were declared. Takenaka Decl. at ¶ 24. The PRP is constantly reviewed and has been updated on several occasions as CDC guidelines and information have evolved. Johnson Decl. at ¶ 8; Takenaka Decl. at ¶ 8. In addition to DPS's department-wide PRP, each of DPS's eight facilities⁹ has a pandemic response plan that is tailored to the individual space and unique challenges of each facility, and the needs of the population and staff. Johnson Decl. at ¶ 6.

DPS continues to implement the PRP according to the unique conditions at each facility, taking into account facility space and layout, staffing needs, and inmate population levels. Each facility continues to implement appropriate screening, quarantine and isolation, medical care, personal protective equipment supply and cleaning, vaccination, testing, and other strategies. These have been described in prior submissions to this Court¹⁰ and are detailed in the attached declarations of DPS Deputy Director for Corrections Tommy Johnson and DPS Healthcare Administrator Gavin K. Takenaka.

OPD points to the federal court's injunction order in *Chatman* as *prima facie* evidence that DPS has failed to act in accordance with its PRP or follow applicable CDC guidance. But this is simply not so. In rendering its decision, the federal court considered and relied upon numerous hearsay declarations by inmates and certain staff members. The court also relied on declarations submitted by the plaintiffs as part of their reply brief, which the State did not have

⁹ DPS has 8 State facilities: Hawai'i Community Correctional Center (HCCC); Halawa Correctional Facility (HCF); Kauai Community Correctional Center (KCCC); Kulani Correctional Facility (KCF); Maui Community Correctional Center (MCCC); OCCC; Women's Community Correctional Center (WCCC); and Waiawa Correctional Facility (WCF). Johnson Decl., at ¶ 4; Takenaka Decl. at ¶ 3.

¹⁰ See also <https://dps.hawaii.gov/blog/2020/03/17/coronavirus-covid-19-information-and-resources/> (last visited Sept. 7, 2021), DPS's COVID-19 resources and information.

the opportunity to rebut or explain, and it did not hold an evidentiary hearing. Instead, for purposes of declaring injunctive relief, the court assumed the plaintiffs' witness declarations were reliable and credible because class counsel did not assert a claim for damages in the complaint. The court determined this meant the inmates had no motive to make untruthful or inaccurate statements. *See* Petition Exhibit B at pg. 39. But the court did not consider another possible motive – the inmates' desire to be free from confinement, which OPD now seeks to achieve by relying upon the *Chatman* injunction order.

State Respondents highlight and discuss below the following three components of their pandemic response that are particularly germane to OPD's allegations: education, information and outreach efforts; decompression strategies and vaccines.

1. Education, Information, and Outreach

At intake, inmates are required to watch a ten-minute COVID-19 educational video that includes instruction on infection prevention measures, detailed handwashing procedures, and vaccinations. Johnson Decl. at ¶ 13; Takenaka Decl. at ¶ 11. CDC educational posters have been posted throughout the facilities. *Id.* Inmate education regarding COVID-19 and vaccinations is also reinforced during every inmate encounter with medical staff. Takenaka Decl. at ¶ 11, 36. DPS offers vaccinations to new intakes and existing inmates who request vaccinations. *Id.* at ¶ 34. Sign-up sheets are posted in each housing unit. *Id.*

2. Consideration of Decompression Strategies

DPS considered and continues to consider decompression strategies, *i.e.* the release of inmates from correctional facilities, but has limited authority to release inmates. Johnson Decl. at ¶ 26. The authority to release inmates and commit inmates to DPS's custody lies with the courts and Hawai'i Paroling Authority (HPA). DPS continues to work with the courts, HPA, and

the State Council of Governments to explore decompression strategies, reduce new intake admissions, facilitate medical releases and early parole considerations, plan for current and future operations, and coordinate inmate transports and remote hearings. *Id.* In addition, DPS and HPA are working collaboratively to consider inmates participating in the extended furlough program for release on early parole. Johnson Decl. at ¶ 28; Declaration of Edmund Hyun (Hyun Decl.) at ¶ 10.

Contrary to OPD's claims, DPS regularly conducts periodic reviews 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 under Hawai'i Revised Statutes § 353-6.2. Johnson Decl. at ¶ 27. And just as OPD has taken to filing these petitions on behalf of all inmates, it too has an obligation to follow up on any new information from its clients and file the appropriate motions for release, if warranted. OPD fails to explain what steps it has taken to utilize such information to zealously advocate on behalf of individual inmates.

B. The Hawaii Paroling Authority Continues to Expedite Requests for Early Parole Consideration

HPA has also played an important role in State Respondents' pandemic response. In the initial consolidated petitions regarding COVID-19,¹¹ this Court ordered the HPA to expeditiously address requests for early parole consideration, including conducting hearings using remote technology. This Court also recommended that HPA consider early releases for specific categories of prisoners.¹² HPA continues to conduct an individualized review of

¹¹ SCPW-20-0000200 and SCPW-20-0000213.

¹² These categories included inmates: (1) who are most vulnerable to the virus; which included inmates who are 65 years old and older, have underlying conditions, who are pregnant; and (2) being held on technical parole violations (i.e. curfew violations, failure to report as directed, etc.) or who have been granted community or minimum security classifications and are

requests for early parole consideration, including prisoners within the Court's recommended categories. *See* Hyun Decl. at ¶ 6. Since March 2020, HPA has conducted a total of 3,948 consideration hearings, where 1,193 inmates were granted parole; 1,279 inmates had established released dates, continued, rescheduled or deferred; are 1,569 were denied parole. *Id.* at ¶ 7. HPA also continues to conduct hearings remotely, when necessary. *Id.* at ¶ 8. An order granting OPD's request vis-à-vis HPA is therefore unnecessary. HPA has continued, and will continue, to implement the parole priorities previously identified by this Court.

III. COVID-19 Vaccines Are Overwhelmingly Safe and Effective – Inmates Need to Act Responsibly by Obtaining Vaccines Offered by DPS

One component of DPS' COVID-19 response relies on the three overwhelmingly safe and effective vaccines currently authorized by the U.S. Food and Drug Administration (FDA) for use in the United States. The first is made by Pfizer/BioNTech, the second by Moderna, and the third by Johnson & Johnson. *See generally*, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines.html> (updated Sept. 1, 2021) (last visited Sept. 7, 2021). On August 23, 2021, the FDA granted full approval to the Pfizer/BioNTech vaccine for those aged 16 years or over. *See* <https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine> (last visited Sept. 7, 2021). The Moderna and Johnson & Johnson vaccines remain under an Emergency Use Authorization from the FDA.

All three vaccines are safe and highly effective at preventing COVID-19 infection, moderate to severe illness, and death. Multiple studies have shown the real-world effectiveness of the vaccines against COVID-19 infection, as well as the reduced likelihood of serious illness

near the end of their sentences. For category (1), the HPA expanded the age from 65 to 55 years old and older. *See* Hyun Decl. at ¶ 5.

and death when breakthrough infections do occur. See <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/fully-vaccinated-people.html> (last visited Sept. 7, 2021).

For example, the Pfizer and Moderna vaccines were shown to be between 86% and 99% effective against infection and symptomatic disease in the United States. *Id.* The Johnson & Johnson vaccine was found to be 77% effective at preventing infection. See <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/fully-vaccinated-people.html> (updated July 27, 2021) (last visited Sept. 7, 2021).

The vaccines also offer significant protection even against the Delta Variant. For example, the Pfizer vaccine was found to have been 79% effective at reducing confirmed infection, and 88% effective at reducing symptomatic infection with the Delta Variant in studies from England and Scotland. See <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/fully-vaccinated-people.html> (updated July 27, 2021) (last visited Sept. 7, 2021). Further, vaccinated people who do suffer breakthrough infections – largely from the Delta Variant – are infectious for less time than infected unvaccinated people. *Id.* Numerous clinical trials and investigations have found that COVID-19 vaccines are both “safe and effective” as “[m]illions of people in the United States have received COVID-19 vaccines under the most intense safety monitoring in U.S. history.” See CDC, Selected Adverse Events Reported after COVID-19 Vaccination, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/adverse-events.html> (updated Sept. 2, 2021) (last visited Sept. 7, 2021).

In collaboration with DOH, DPS continues its vaccination efforts in earnest. Takenaka Decl. at ¶ 35. Vaccinations are offered upon intake and remain readily available to all inmates. Vaccination clinics are scheduled based on sign-ups and vaccine supply. *Id.* Importantly, just as inmates were prioritized by the State for receipt of the vaccines, ***there is no shortage of vaccine***

supply at any facility. *Id.* Vaccines are offered solely to protect inmates from harm, and they allow them to decrease their risks while residing within a congregate setting.

Since January 2021, more than 2,800 inmates have received either a single dose vaccine or the second dose of a two-dose series vaccine.¹³ *Id.* at ¶ 35. On June 21, 2021, the Health Care Division conducted a point-in-time study of the current vaccination status among inmates at correctional facilities statewide. The total population count was 2,929. The study showed 1,588 inmates were fully vaccinated, 210 inmates were in the process of becoming fully vaccinated, 1,126 inmates refused to be vaccinated, and 5 inmates could not receive the vaccine due to medical contraindications.¹⁴ *Id.* at ¶ 35. The fact a number of inmates made the personal decision to refuse the COVID-19 vaccine should not somehow create a basis for mandating blanket releases at the expense of public safety.

IV. The Settlement in *Chatman v. Otani* Precludes the Relief OPD Seeks

As OPD described in its petition, the plaintiffs in *Chatman v. Otani* made the same allegations regarding DPS' response to the COVID-19 pandemic. This included allegations that DPS failed to take adequate measures under its PRP and in accordance with CDC guidance, and otherwise acted with deliberate indifference to inmates' constitutional rights. *See* Petition at pgs.

¹³ The total amount does not reflect the number of inmates who are vaccinated and currently in DPS's custody. Due to inmate movements and population changes that inevitably occur in the correctional system, the cumulative total vaccinated represents DPS's efforts to provide vaccinations since vaccines became available. *Id.*

¹⁴ Pursuant to the Governor's emergency orders, DPS also recently implemented mandatory vaccinations for staff. As of September 6, 2021, 77.1% of DPS staff are fully vaccinated. DPS's entire workforce totals 2,748 employees. The 77.1% figure includes employees who did not provide vaccination information due to being out on leave. This group represents roughly 10% of DPS's workforce. In addition, 185 employees are confirmed to be partially vaccinated as they have taken the first of the two-shot regimen, which equals 6% of DPS's work force. DPS hopes that staff vaccination rates will continue to increase. Johnson Decl. at ¶ 29.

8-9, 20-25. On July 13, 2021, the federal court granted plaintiffs’ motion for a preliminary injunction, after which the parties held several status conferences before Magistrate Judge Kenneth Mansfield.¹⁵ As a result of sincere discussions about what would be best for all parties, on September 2, 2021, DPS and class counsel executed a settlement agreement that the parties agree is “fair, adequate, and reasonable.” *See* Exhibits “A” and “B”.

As part of the settlement, DPS agreed, among other conditions, to:

- screen and quarantine people newly admitted to a correctional facility as provided in its PRP, and subject to any conditions, modifications and/or exceptions set forth therein;
- immediately isolate those who exhibit COVID-19 symptoms and those who test positive for COVID-19 infection as medically appropriate and in accordance with the PRP, taking into account available space, structural limitations, and staffing and other resources within each facility;
- provide reasonably sufficient cleaning supplies to allow all inmates in its custody in correctional facilities to wipe down phones before they use them;
- provide a minimum of two cloth or other appropriate face masks per person, as provided in the PRP; and
- require staff to wear appropriate face masks where necessary within the correctional facilities as provided for in the PRP.

Exhibit “A” at pgs. 8-11.

Importantly, the settlement requires the establishment of a five-member panel of experts to provide advice and recommendations to assist DPS in its pandemic response.¹⁶ Two members

¹⁵ The State appealed the preliminary injunction order and also moved for an emergency stay before the Ninth Circuit. While the State was confident it would prevail on appeal because the order was both impermissibly broad, it determined settlement was in the best interests of all parties. A copy of the State’s motion for emergency stay, without the exhibits, is attached as Exhibit “C”.

¹⁶ *See* Exhibits “A” and “B”. *See also* <https://www.hawaiinewsnow.com/2021/09/06/settlement-reached-class-action-suit-between-hawaii-inmates-state-public-safety-department/> (last visited Sept. 7, 2021).

were appointed by the class representatives – Dr. Homer Venters and Dr. Kim Thorburn. Two members of the panel were appointed by DPS – Deputy Director for Corrections Tommy Johnson and Healthcare Administrator Gavin Takenaka. The parties jointly appointed the fifth panel member – retired Intermediate Court of Appeals Judge Dan Foley. Judge Foley has longstanding knowledge of the Hawai‘i criminal justice and corrections systems, and intimate familiarity with the issues raised by OPD’s petition through his work as this Court’s special master last year. DPS will be required to provide the Monitoring Panel with regular COVID-19 test results, as well as full and complete access to all State facilities. The parties also agreed that the Court would retain jurisdiction to enforce compliance with the settlement.

Any further action by this Court is not appropriate or necessary because: (1) the members of the class in *Chatman* are the same individuals the OPD purportedly represents in this action; and (2) the claims raised in *Chatman* are the same claims asserted by the OPD - the unconstitutional conditions of confinement due to the risks posed by COVID-19; and (3) the establishment of the Monitoring Panel renders OPD’s requests for relief numbers 3, 4, 8 and 9 moot.

V. OPD Fails to Establish Any Constitutional Violation

A. A Violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 5 and 12 of the Hawaii Constitution Requires Proof of Deliberate Indifference.

The Eighth Amendment’s protection against “cruel and unusual punishments” applies to convicted offenders serving their sentences in prison. *See Ingraham v. Wright*, 430 U.S. 651, 668 (1977). The Amendment requires prison officials to “provide humane conditions of confinement.” *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). Prison officials have a duty to provide prisoners the basic necessities of life, including adequate shelter, food, clothing,

sanitation, medical care, and personal safety. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994).

An inmate making such claims must meet a two-part test: (1) the objective requirement, requiring that a prison official's acts or omissions caused deprivation of "the minimal civilized measure of life's necessities"; and (2) the subjective requirement, requiring "deliberate indifference" on the part of the defendant. *Lopez v. Smith*, 203 F.3d 1122, 1132–33 (9th Cir. 2000). These "life's necessities" include adequate shelter, food, clothing, sanitation, medical care, and personal safety. *See Farmer*, 511 U.S. at 832. "Deliberate indifference" requires that a prison official know of and disregard an excessive risk to the inmate. *Id.* at 837; *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). The official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists and he must also draw the inference. *Farmer*, 511 U.S. at 837. Essentially, the official must be "recklessly disregarding" a substantial risk of harm. *Id.* at 836. A plaintiff must also show that "failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.'" *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1991), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997) (en banc).

"Deliberate indifference is a high legal standard." *Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004). The requisite state of mind is one of subjective recklessness, which entails more than ordinary lack of due care. *Snow v. McDaniel*, 681 F.3d 978, 985 (9th Cir. 2012), *overruled in part on other grounds, Peralta v. Dillard*, 744 F.3d 1076, 1082-83 (9th Cir. 2014).

While the Eighth Amendment applies to convicted offenders, the Due Process Clause of the Fourteenth Amendment protects a pretrial detainee from punishment prior to an adjudication of guilt. *See Bell v. Wolfish*, 441 U.S. 520, 534-35 (1979). A pretrial detainee's conditions of confinement violate the Fourteenth Amendment if they amount to "punishment" in that the

conditions are not reasonably related to a legitimate governmental objective or are excessive in relation to the legitimate governmental objective. *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473-74 (2015). This Court has adopted the federal standard with respect to claims under Article I, Section 5 of the Hawai‘i Constitution. *See Maesaka-Hirata*, 143 Hawai‘i at 358, 431 P.3d at 731 (adopting *Bell* standard).

A pretrial detainee must show “objective deliberate indifference” for a Fourteenth Amendment violation. *Gordon v. County of Orange*, 888 F.3d 1118, 1125 (9th Cir. 2018) (citing *Castro v. County of Los Angeles*, 833 F.3d 1060, 1070 (9th Cir. 2016)). Under that standard, an official must fail to “take reasonable available measures to abate [a substantial] risk [of serious harm], even though a reasonable official in the circumstances would have appreciated the high degree of risk involved.” *Id.* A plaintiff must “prove more than negligence but less than subjective intent—something akin to reckless disregard.” *Id.* The “mere lack of due care by a state official” is not enough. *Id.* In applying this test, “a court must take account of the legitimate interests in managing a jail, acknowledging as part of the objective reasonableness analysis that deference to policies and practices needed to maintain order and institutional security is appropriate.” *Kingsley*, 135 U.S. at 2474.

In *Gordon v. Maesaka-Hirata*, 143 Hawai‘i 335, 358, 431 P.3d 708, 731 (2018), this Court expressly adopted the federal Due Process standard in addressing the conditions under which a pretrial detainee is held (in that particular case, it was solitary confinement):

We hereby adopt the *Bell [v. Wolfish*, 441 U.S. 520 (1979), federal] standard for determining whether an Article I, Section 5 due process violation has occurred under the circumstances of this case.

Maesaka-Hirata, 143 Hawai‘i at 358, 431 P.3d at 731.

Similarly, with respect to post-conviction prison inmates, there is no reason for this Court

to vary from the federal standard in applying the cruel or unusual punishment clause in Article I, Section 12 of the Hawai‘i Constitution. There do not appear to be any Hawai‘i cases specifically addressing claims that post-conviction prison conditions constitute cruel or unusual punishment under the Hawai‘i Constitution. Hawai‘i courts applying the cruel or unusual punishment clause in cases involving sentencing, however, vary little from their federal counterparts. This Court historically treated the Hawai‘i cruel or unusual punishment standard the same as the federal standard. *See, e.g., State v. Davia*, 87 Hawai‘i 249, 953 P.2d 1347 (1998); *State v. Kumukau*, 71 Haw. 218, 226-27, 787 P.2d 682, 687 (1990); *State v. Freitas*, 61 Haw. 262, 268 602 P.2d 914, 920 (1979). This Court has also declined to depart from federal standards in other cases. *See State v. Texeira*, 50 Haw. 138, 143-45, 433 P.2d 593, 587-98 (1967) (declining to expand unreasonable search and seizure protections beyond U.S. Constitution); *State v. Viglielmo*, 105 Hawai‘i 197, 211-12, 95 P.3d 952, 966-67 (2004) (same with respect to free speech protections); *see also State v. Kido*, 3 Haw. App. 516, 518, 654 P.2d 1351, 1353 (App. 1982) (“When the Hawai‘i provision was originally adopted, the delegates to the 1950 constitutional convention used the eighth amendment to the United States Constitution as a model and intended federal precedent to be followed in construing the state’s ‘cruel or unusual punishment’ clause.” (citing Committee of the Whole Report No. 20, *reprinted in I Proceedings of the Constitutional Convention of Hawaii of 1950* 303 and 164 (1960); Hawaii Constitutional Convention Studies, Introduction & Article Summaries 25, Legislative Reference Bureau (April 1978))).

There is now a slight difference between Hawai‘i and federal rights against cruel or unusual punishment, in that the Eighth Amendment no longer contains a proportionality element in sentencing cases. *See State v. Guidry*, 105 Hawai‘i 222, 237, 96 P.3d 242, 257 (2004). This difference, however, is due to the U.S. Supreme Court reversing itself in *Harmelin v. Michigan*,

501 U.S. 957, 978 (1991), rather than any change by this Court in applying Hawai‘i law. And as noted above, this Court has already adopted the federal standard for challenges to prison conditions involving pretrial detainees. *See Maesaka-Hirata*, 143 Hawai‘i at 358, 431 P.3d at 731. The same approach should be taken for convicted prisoners.

B. Federal and State Courts Throughout the Country have Rejected COVID-19 Related Claims for Mass Inmate Releases and Other Relief Based on Eighth and Fourteenth Amendment Challenges.

The vast majority of federal and state cases have rejected attempts to release inmates or impose orders with respect to criminal defendants based on Eighth or Fourteenth Amendment grounds. Several federal Courts of Appeals have imposed stays or reversed preliminary injunctions based on plaintiffs’ failure to demonstrate deliberate indifference by prison officials. *See Wilson v. Williams*, 961 F.3d 829, 841 (6th Cir. 2020) (“while the harm imposed by COVID-19 on inmates at Elkton ultimately [is] not averted, the [Bureau of Prisons] has responded reasonably to the risk and therefore has not been deliberately indifferent to the inmates’ Eighth Amendment rights.”); *Cameron v. Bouchard*, No. 20-3547, 2020 WL 3100187, at *2 (6th Cir. June 11, 2020) (defendants took similar preventative measures as in *Wilson* and were likely not deliberately indifferent); *Valentine v. Collier*, 956 F.3d 797, 802-03 (5th Cir. 2020) (plaintiffs lacked evidence of the defendants’ “subjective deliberate indifference” and noting “[t]o the contrary, the evidence shows that [Texas Department of Criminal Justice] has taken and continues to take measures—informed by guidance from the CDC and medical professionals—to abate and control the spread of the virus”); *Marlowe v. LeBlanc*, 810 F. App’x 302, 305 (5th Cir. 2020) (relying on *Valentine* and noting that “Defendants point to a plethora of measures they are taking to abate the risks posed by COVID-19, from providing prisoners with disinfectant spray and two cloth masks to limiting the number of prisoners in the infirmary lobby and painting

markers on walkways to promote social distancing.”); *Swain v. Junior*, 958 F.3d 1081, 1089 (11th Cir. 2020) (“Accepting, as the district court did, that the defendants adopted extensive safety measures such as increasing screening, providing protective equipment, adopting social distancing when possible, quarantining symptomatic inmates, and enhancing cleaning procedures, the defendants’ actions likely do not amount to deliberate indifference.”).¹⁷

C. Respondents Are Not Guilty of Deliberate Indifference in their Response to the COVID-19 Pandemic.

Respondents are not guilty of deliberate indifference, either subjectively or objectively, with respect to the COVID-19 pandemic. As discussed above, DPS has established, implemented and updated pandemic response plans for each of its facilities based on CDC guidelines, and has responded reasonably to address the spread of COVID-19 in State facilities. The PRP provides for numerous measures to protect inmates from the threat of COVID-19,

¹⁷ Even more federal District Courts have refused to find deliberate indifference in COVID-19 cases. See *Evans v. Whitmer*, Case No. 2:20-cv-61, 2020 WL 3786173, at *2-*8 (W.D. Mich. July 7, 2020); *Fernandez-Rodriguez v. Licon-Vitale*, 20 Civ. 3315 (ER), 2020 WL 3618941, at *22-*24 (S.D.N.Y. July 2, 2020); *Perry v. Washington*, Case No. 1:20-cv-530, at *2-*8 (W.D. Mich. June 30, 2020); *Gonzalez v. Ahern*, Case No. 19-cv-07423-JSC, 2020 WL 3470089, at *5-*7 (N.D. Cal. June 25, 2020); *McMurry v. Brown*, Case No. 2:20-cv-58, 2020 WL 3118567, at *3-*10 (W.D. Mich. June 12, 2020); *Maney v. Brown*, Case No. 6:20-cv-00570-SB, 2020 WL 2839423, at *13-*18 (D. Or. June 1, 2020); *Baez v. Moniz*, Civil No. 20-10753-LTS, 2020 WL 2527865, at *7-*9 (D. Mass. May 18, 2020); *Grinis v. Spaulding*, Civil Action No. 20-107838-GAO, 2020 WL 2300313, at *2-*3 (D. Mass. May 8, 2020); *Plata v. Newsom*, Case No. 01-cv-01351-JST, at *3-*9 (N.D. Cal. April 17, 2020); *Money v. Pritzker*, Case Nos. 20-cv-2093 & 20-cv-2094, 2020 WL 1820660, at *17-*18 (N.D. Ill. April 10, 2020).

Several state courts have also rejected deliberate indifference arguments relating to COVID-19. See *James Hilton (Inmate #189355) v. Commissioner of Correction*, TSRCV164008417S, 2020 WL 4333571, at *2 (Conn. Super. Ct. June 23, 2020); *State v. Bednash*, ID No. 1002013141, 2020 WL 2917305, at *1 (Del. Super. Ct. May 15, 2020); *Foster v. Commissioner of Correction*, 146 N.E.3d 372, 390-96 (Mass. 2020); *Commonwealth v. Garcia*, 147 N.E.3d 1127, at *1-*2 (Mass. App. Ct. June 29, 2020); *Disability Rights Montana v. Montana Judicial Districts 1-22*, OP 20-0189, 2020 WL 1867123, at *5 (Mont. April 14, 2020); *People ex rel. Carroll v. Keyser*, 125 N.Y.S.3d 484, 487-89 (N.Y. App. Div. 2020); *Colvin v. Inslee*, No. 98317-8, 2020 WL 4211571, at *8-*9 (Wash. July 23, 2020).

including screening and testing, education, sanitation, providing inmates and staff with PPE, and making vaccines available. PSD also marshalled personnel and directed resources to quell outbreaks when they have occurred.

The fact that positive COVID-19 cases were present in State facilities, or experienced outbreaks, does not demonstrate deliberate indifference. “[P]rison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, *even if the harm ultimately was not averted.*” *Farmer*, 511 U.S. at 844 (emphasis added). For example, in *Wilson*, 961 F.3d at 840, the court rejected a deliberate indifference argument even though 59 inmates and 46 staff members had tested positive for COVID-19 and 6 inmates had died. In *Lucero-Gonzalez v. Kline*, No. CV-20-00901-PHX-DJH (DMF), 2020 WL 2987002, at *3 (D. Ariz. June 2, 2020), the court rejected a deliberate indifference argument even though 26 detainees tested positive and none had died.

The fact prison officials do not adopt every policy or practice that might be available to combat the virus is also not proof of deliberate indifference. *See Wilson*, 961 F.3d at 844 (Even if the Bureau of Prisons did “not [make] full use of the tools available to remove inmates from Elkton, such as temporary release, furlough, or home confinement,” prison officials are not required to “take every possible step to address a serious risk of harm.”); *Hallinan v. Scarantino*, No. 5:20-HC-2088-FL, 2020 WL 3105094, at *16 (E.D.N.C. June 11, 2020) (“The Eighth Amendment does not require [Federal Bureau of Prisons] officials to take all conceivable steps to prevent the spread of COVID-19, provided their response to the virus remains reasonable.”); *Duvall v. Hogan*, Civil Action No. ELH-94-2541, 2020 WL 3402301, at *13 (D. Md. June 19, 2020) (“[T]he law does not require correctional officers to utilize every tool in the toolkit when addressing a serious risk of harm.”).

Further, CDC guidance on correctional and detention facilities does not mandate physical distancing when security would be compromised. *See CDC Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> (last updated Jun 9, 2021) (last visited Sept. 7, 2021). The CDC guidance contains the following express warning: “The guidance may need to be adapted based on individual facilities’ physical space, staffing, population, operations, and other resources and conditions.” The guidance further states:

Implement social distancing strategies to increase the physical space between incarcerated/detained persons (*ideally* 6 feet between all individuals, regardless of symptoms), and to minimize mixing of individuals from different housing units. ***Strategies will need to be tailored to the individual space in the facility and the needs of the population and staff. Not all strategies will be feasible in all facilities.***

Id. (section entitled “Prevention Practices for Incarcerated/Detained Individuals”) (emphases added). Courts have therefore held that:

[T]here is no basis in the record to conclude that planning for anything less than six-foot distancing between all prisoners (and staff) at all times constitutes deliberate indifference. Such a requirement would likely require changes not just in dormitory housing but also, for example, in any cells housing more than one inmate It might prove impossible to implement given the need for inmate-staff interactions and in light of security concerns. Perhaps most significantly, although CDC guidance notes that social distancing strategies would “ideally” provide “6 feet between all individuals,” the same guidance recognizes that “[s]trategies will need to be tailored to the individual space in the facility and the needs of the population and staff. *Not all strategies will be feasible in all facilities.*”

Plata, 2020 WL 1908776, at *6 (emphasis in original). *See also Duvall*, 2020 WL 3402301, at *14 (“Plaintiffs focus, *inter alia*, on the distance between bunk beds, which are spaced less than six feet apart, thereby precluding the ability of inmates to accomplish social distancing.

However, the inability of detainees to practice social distancing at all times does not, without

more, demonstrate that defendants have deliberately disregarded these risks.”). In *Duvall*, the court noted that “where prison officials took other steps[,]” such as “educating detainees on the importance of the practice [of social distancing], instructing detainees to sleep head-to-foot, suspending programming, providing masks to detainees, and removing vulnerable detainees from the general population[,]” deliberate indifference is not shown. *Id.*

And the fact there may be anecdotal evidence of lapses by individuals in implementing COVID-19 policies is not proof of deliberate indifference. *Chunn v. Edge*, 20-cv-1590 (RPK) (RLM), 2020 WL 3055669, at *23-*28 (E.D.N.Y. June 9, 2020) (“Shortfalls in the immediate implementation of guidelines this complex and resource-intensive do not suggest knowing disregard of a substantial risk of harm, rather than negligent error.”); *Lucero-Gonzalez v. Kline*, No. CV-20-00901-PHX-DJH (DMF), 2020 WL 2987002, at *10 (D. Ariz. June 2, 2020) (“Although there may be instances in which Defendants’ policies have not been *followed* — such as lack of cleaning supplies or inconsistent cleaning, or where the detainees themselves do not practice social distancing or wear their masks — this does not reflect that the policies *themselves* are objectively insufficient.”); *Swain*, 958 F.3d at 1089 (holding that even if social-distancing policies are “not uniformly enforced,” there was “no finding that the defendants are ignoring or approving the alleged lapses in enforcement of social-distancing policies, so these lapses in enforcement do little to establish that the defendants were deliberately indifferent.”).

The fact the Delta variant is present in State facilities, or outbreaks occurred at multiple facilities or might occur in the future, does not constitute deliberate indifference. What matters is that the State has taken reasonable measures to address COVID-19, not whether an outbreak was “ultimately . . . averted.” *Farmer*, 511 U.S. at 844. DPS’s actions demonstrate that it understands the risk of harm that COVID-19 continues to present and that it has responded

reasonably to that risk, even when COVID-19 spiked within the general community, entered State facilities and outbreaks occurred.

VI. If the Court Does Order Releases, the Health and Safety of the General Public and Inmates Must be Considered

In addition to ensuring the health and safety of the general public, State Respondents remain committed to taking appropriate steps consistent with public safety to mitigate the risks of COVID-19 within State facilities and to ensure the health and safety of inmates and staff. Consistently during the prior litigations, State Respondents did *not* oppose reasonable measures designed to reduce the number of inmates in DPS's facilities; they only sought to ensure such measures were carried out responsibly and as necessary to address the COVID-19 emergency.

The State Respondents respectfully ask the Court to consider the adverse impact a release order would have on public safety – not only the risks to victims, victim's family members, witnesses and community, but also to hospitals,¹⁸ community health systems¹⁹, emergency facilities,²⁰ and social services,²¹ all of which are completely over-stressed by COVID-19. To

¹⁸ No ICU beds available at Queen's medical facilities as COVID cases surge in Hawai'i <https://www.staradvertiser.com/2021/08/17/hawaii-news/no-icu-beds-available-at-queens-medical-facilities-as-covid-cases-surge-in-hawaii/> (last visited Sept. 7, 2021).

¹⁹ Hawai'i hospitals run out of ICU beds, scramble to bring in extra oxygen. <https://www.staradvertiser.com/2021/09/04/hawaii-news/hawaii-hospitals-run-out-of-icu-beds-scramble-to-bring-in-extra-oxygen/> (last visited Sept. 7, 2021).

²⁰ Honolulu Emergency Services crews struggle to keep pace with COVID-19 calls. <https://www.staradvertiser.com/2021/09/05/hawaii-news/ems-crews-struggle-to-keep-pace-with-covid-19-calls/> (last visited Sept. 7, 2021).

²¹ Number of homeless in Hawaii shelters fewest in 10 years. <https://www.staradvertiser.com/2021/06/21/hawaii-news/homeless-in-shelters-fewest-in-10-years/> (dated June 21, 2021) (last visited Sept. 7, 2021).

ensure the public's health and safety are not compromised, State Respondents ask that the following measures be implemented for every inmate released.

First, all inmates must be fully vaccinated, unless exempted for religious or medical reasons, prior to release. This measure will mitigate the risk to the general public, law enforcement, courts, community health systems, emergency and social services, and DPS, if returned to custody. Vaccinations will not only reduce the spread of COVID-19 but also reduce the harmful toll on our health care systems.²² The CDC recommends COVID-19 vaccinations for everyone 12 years and older because vaccinations are “the best way to protect yourself, your family, and your community.”²³ They are an important tool in the response to the COVID-19 pandemic, and will “help us get back to normal.”²⁴

Given that the majority of inmates released under prior blanket orders reoffended, requiring all released inmates to be vaccinated will further decrease the chances that new

²² Unvaccinated COVID patients are taking resources away from others. 90% of the people hospitalized statewide with COVID-19 are unvaccinated. <https://www.hawaiitribune-herald.com/2021/08/21/hawaii-news/green-unvaccinated-covid-patients-are-taking-away-resources-from-others/> (last visited Sept. 7, 2021).

²³ See <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html> (updated August 26, 2021) (last visited Sept. 7, 2021). “The best way to slow the spread of COVID-19 and to prevent infection by Delta or other variants is to get vaccinated.” <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/effectiveness/why-measure-effectiveness/breakthrough-cases.html> (updated August 23, 2021) (last visited Sept. 7, 2021).

²⁴ CDC Key Things to Know About COVID-19 Vaccine, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html> (updated Aug. 19, 2021) (last visited Sept. 7, 2021) “COVID-19 vaccines are effective at helping protect against severe disease and death from variants of the virus that causes COVID-19 currently circulating, including the Delta variant.” “COVID-19 vaccines are effective at protecting you from COVID-19, especially severe illness and death. COVID-19 vaccines reduce the risk of people spreading the virus that causes COVID-19.”

infections will be introduced into State facilities if and when they are placed back in confinement.

Second, all inmates must have a safe place to live. It is imperative that individuals released into the community have safe places to live so they do not become homeless, which also puts one at risk of COVID-19 infection.²⁵ In addition, because available beds at homeless shelters are full and have decreased due to social distancing measures,²⁶ a safe place to live is even more important.

Third, inmates must be assessed on an individualized basis for the risk they pose to the safety of the community. Rather than mandate a blanket presumption of release for a multitude of offenders, the trial courts must conduct an individualized assessment to determine whether detention, bail or bail conditions are necessary to ensure the safety of the victims, the community, and the offender. If not, offenders may continue to commit more crimes and jeopardize the public safety, which is already at high risk. The Criminal Justice Research Institute reported that 58% of inmates released under the Court's prior release order had reoffended at least once since their release. *See*

<https://www.hawaiinewsnow.com/2021/01/15/new-study-reveals-more-than-half-hawaii-inmates-released-under-last-years-emergency-orders-reoffended/> (last visited Sept. 7, 2021).

For example, a 37-year old male continued to commit multiple sexual assaults after being repeatedly released pursuant to the OPD writ.

²⁵ Homeless man nowhere to quarantine after testing positive for COVID-19. <https://www.kitv.com/story/44561046/oahu-man-has-nowhere-to-quarantine-after-testing-positive-for-covid19> (last visited Sept. 7, 2021).

²⁶ The depopulation of congregate shelters during COVID for social distancing are likely the reasons why shelter space is decreasing. <https://www.staradvertiser.com/2021/06/21/hawaii-news/homeless-in-shelters-fewest-in-10-years/> (last visited Sept. 7, 2021).

<https://www.hawaiinewsnow.com/2021/03/18/exception-rule-judge-orders-suspect-sex-assault-spree-ordered-held-without-bail/> (last visited Sept. 7, 2021).

VII. Conclusion

For the foregoing reasons, this Court should deny OPD's petition.

DATED: Honolulu, Hawai'i, September 7, 2021.

CLARE E. CONNORS
Attorney General

/s/Michelle L. Agsalda
KIMBERLY T. GUIDRY
ROBERT T. NAKATSUJI
CRAIG Y. IHA
MICHELLE L. AGSALDA

Attorneys for Respondents
Max N. Otani, Director, State of Hawai'i
Department of Public Safety; and
Edmund (Fred) K.B. Hyun, Chairperson,
Hawai'i Paroling Authority

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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

ORIGINAL PROCEEDING

DECLARATION OF TOMMY JOHNSON

DECLARATION OF TOMMY JOHNSON

I, Tommy Johnson, hereby declare, under penalty of law, that the following is true and correct:

1. I am the Deputy Director for the Corrections Division of the Department of Public Safety, State of Hawai'i (DPS). I have had that position since November 16, 2020. I also served as the Deputy Director for the Corrections Division from June 2007 to December 2010. Except during the time I served as Deputy Director, I was the Paroles and Pardons Administrator for the Hawai'i Paroling Authority from September 2001 to November 15, 2020.

2. I am authorized and competent to testify to the matters herein and, unless otherwise indicated, I make this declaration based on personal and professional knowledge.

3. As the Deputy Director, I am responsible for overseeing the management and operations at DPS' correctional facilities. This includes oversight of both security and healthcare operations at the facilities.

4. DPS has eight State facilities, including: Hawaii Community Correctional Center (HCCC), Halawa Correctional Facility (HCF), Kauai Correctional Community Center (KCCC), Kulani Correctional Facility (KCF), Maui Community Correctional Center (MCCC), Oahu

Correctional Community Center (OCCC), Women's Correctional Community Center (WCCC), and Waiawa Correctional Facility (WCF).

5. In March 2020, DPS developed and adopted a comprehensive system-wide plan, based upon guidance from the Centers for Disease Control and Prevention (CDC) to prevent, contain, and control the spread of COVID-19. *See* DPS Pandemic Response Plan (May 28, 2021 Revision) <https://dps.hawaii.gov/wp-content/uploads/2020/03/PSD-Pandemic-Response-Plan-Revised-May-2021.pdf>.

6. In addition to DPS' department-wide pandemic response plan, DPS' eight individual facilities each have a pandemic response plan that is tailored to the individual space and unique challenges of each facility, and the needs of the population and staff.

7. Implementation of CDC guidance at each of DPS' facilities must be carried out in accordance with the security concerns that are unique to each facility. For example, community correctional centers function as jails which hold pretrial detainees and convicted offenders sentenced to shorter terms of incarceration. Correctional facilities, on the other hand, function as prisons which house convicted offenders who have been sentenced to longer terms of incarceration. Correctional facilities also house inmates of different security classifications; HCF houses medium and high security inmates, while WCF houses minimum security inmates. Other factors affecting a location's ability to fully implement CDC guidance include staffing levels, physical space and infrastructure limitations, and the volume of new inmates ordered to the facility by the courts.

8. DPS constantly reviews and adapts its pandemic response plans as circumstances and guidelines evolve.

9. Each facility has formed a leadership team responsible for the review and implementation of the pandemic response plan for that facility.

10. All new inmates are screened by medical staff before entering a facility, which involves no-touch temperature checks and health screening.

11. New intakes are also screened by medical staff for signs and symptoms of infection and risk factors for COVID-19, such as travel history, recent medical history, history of exposure to COVID-19, and observing the individual for any signs of infection.

12. DPS has utilized the strategy of routine intake quarantine for new arrivals and detainees returning from outside transport to minimize the risk of infection that these inmates may bring into the facility. Intake quarantine strategies may be adjusted for each facility depending on the facility's space and security concerns as allowed under CDC guidance. This intake strategy was developed according to CDC guidance and with input from and in coordination with the State's Department of Health ("DOH").

13. All inmates are educated about the COVID-19 virus and view an educational video during intake at each facility, which includes instruction on infection prevention measures, detailed handwashing procedures and vaccinations. CDC educational and information posters have been posted throughout the facilities. Education is also reinforced during every inmate encounter with medical staff.

14. Two cloth masks are provided to all inmates upon intake and two masks have been issued to each staff member. Inmates can keep one mask while the other can be laundered during daily free laundry service provided. Staff and inmates can request to switch out damaged and/or unusable masks at any time and staff are provided N-95 level masks for certain tasks, assignments, etc.

15. Staff are required to wear masks at all times unless excused for medical reasons, on the grounds of religion, or operational requirements of their jobs. Staff are reminded to

always wear their masks, and if necessary, those that refuse to do so without valid reasons can be written up and face appropriate disciplinary action.

16. Staff are authorized to wear their own personal masks.

17. Inmates are also provided with soap and towels in restrooms and cells. Resupply of soap is made upon request of the inmate and towels are washed twice daily. Morning washes for those that are scheduled to shower in the afternoon, and afternoon washes for those scheduled to shower in the morning. Damaged and/or unusable towels can be replaced upon request.

18. Masks, disinfectant/sanitizer, and other personal protective equipment (PPE) are separately furnished as required for certain tasks, such as entering quarantine or isolation units, transport and/or transfer of inmates, and when encountering an individual with suspected or confirmed COVID-19.

19. Staff are educated and screened prior to entry into a facility. Staff attended mandatory training on the COVID-19 virus that included information on proper disinfecting techniques, hand washing, proper wearing of PPE, and at that time, staff were also fitted for the N-95 masks, which are readily available in the facility. In addition, facility training personnel update staff members on the facility's pandemic plan and provide information and guidance as needed.

20. Social distancing strategies currently used by facilities include using no-contact barrier, minimizing inmate movements and transports, suspending certain programs, suspending in-person visits, restructuring recreation and meals, arrange bunks so inmates sleep head to foot, utilization of blue tape on sidewalks to maintain social distancing, posting of educational material, utilization of telehealth for virtual clinics, staggering pill lines, administering medication at modules, suspending work furlough, and spaced seating in common areas.

21. Decisions to test inmates are based on clinical decisions made by DPS' medical professionals and are based on criteria developed and provided to DPS by the DOH. DOH's criteria were developed from the guidelines published by the CDC. Testing is also expanded to other areas, such as at intake, or mass testing where necessary.

22. Inmates who are close contacts of a suspected or confirmed COVID-19 case are placed in 14-day quarantine. Inmates who are confirmed or suspected COVID-19 infection are placed in medical isolation pursuant to the facilities' pandemic plan, which was developed based on information provided by the DOH and guidance published by the CDC.

23. All facilities have identified units designated for quarantine and medical isolation. Medical staff conducts health assessments of inmates in quarantine and medical isolation at least twice daily.

24. CDC recommends restricting quarantined individuals from leaving during quarantine period unless released from custody or a transfer is necessary for medical care, infection control, lack of quarantine space, or extenuating security concerns. The guidelines are implemented based on the facilities pandemic plan along with the assistance and guidance the DOH. Because of the nature and lack of space in jail and prison settings, and infrastructure limitations, there are always exceptions as outlined by the DOH and CDC.

25. Discharge from medical isolation is ordered by a medical provider.

26. DPS considered and continues to consider decompression strategies to reduce crowding (ex. diverting new intakes to other facilities with available capacity and encouraging alternatives to incarceration). For instance, DPS has and continues to work with the Courts, Hawai'i Paroling Authority ("HPA"), and State Council of Governments to explore alternatives to incarceration, reduce new inmates, reduce the number of pretrial detainees, minimize the number of HPA warrants, plan for current and future operations, coordinate inmate transports to

other facilities, and conduct remote hearings. DPS continues to review pre-trial cases, and offenders identified as having met the criteria for supervision will have their cases referred to the court for decision.

27. DPS regularly conducts periodic reviews 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 under Hawai'i Revised Statutes § 353-6.2.

28. Another decompression strategy is extended furlough program. In 2021, DPS started an extended furlough pilot program at Maui Community Correctional Center. Inmates who are released on extended furlough are monitored and reside at a verified address in the community. If an inmate performs well on extended furlough for 3 months, DPS refers the inmate to HPA for consideration of early parole. Supervision includes weekly meetings with facility case management staff, which includes drug testing at the facility, and weekly community-based COVID-19 testing as well. So far, 11 inmates initially participated in this program, 2 were returned for various violation, and 9 remain in good standing. During October 2021, it is anticipated that DPS will recommend to the HPA to consider granting parole consideration hearings to participants. DPS plans to expand this initiative statewide with the next facility to participate being the Oahu Community Correctional Center (OCCC) within the next 30 days and have already began reviewing inmate cases to determine how many will qualify.

29. Pursuant to the Governor's emergency orders, DPS recently implemented mandatory vaccinations for staff. As of September 6, 2021, 77.1% of DPS staff are fully vaccinated. DPS's entire workforce totals 2,748 employees. The 77.1% figure includes employees who did not provide vaccination information due to being out on leave. This group

represents roughly 10% of DPS's workforce. In addition, approximately, 185 employees are confirmed to be partially vaccinated as they have taken at least the first of the two-shot regimen, which equals 6% of DPS's work force. DPS hopes that staff vaccination rates will continue to increase.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Honolulu, Hawaii, September 7, 2021.



TOMMY JOHNSON

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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

ORIGINAL PROCEEDING

**DECLARATION OF GAVIN K.
TAKENAKA**

DECLARATION OF GAVIN K. TAKENAKA

I, Gavin K. Takenaka, hereby declare, under penalty of law, that the following is true and correct:

1. I am the Corrections Health Care Administrator for Department of Public Safety, State of Hawai'i (DPS). I have had that position since January 2, 2019. Prior to that, I was the Mental Health Branch Administrator from July 2017 to June 2019, the Mental Health Section Administrator at Halawa Correctional Facility (HCF) from December 2011 to July 2017, and a Clinical Psychologist at HCF from November 2006 to July 2017. I have been employed by DPS for approximately 15 years.

2. I am authorized and competent to testify to the matters herein and, unless otherwise indicated, I make this declaration based on personal and professional knowledge.

3. As Corrections Health Care Administrator, I provide administrative management, coordination and oversight of health care to the inmate population at DPS State correctional facilities. Health Care Division administers the delivery of medical, mental health, dental and other specialty services at all State correctional facilities. These facilities include: Hawai'i Community Correctional Center (HCCC); Halawa Correctional Facility (HCF); Kauai

Community Correctional Center (KCCC); Kulani Correctional Facility (KCF); Maui Community Correctional Center (MCCC); Oahu Community Correctional Center (OCCC); Women's Community Correctional Center (WCCC); and Waiawa Correctional Facility (WCF).

4. The HCD has three branches: Medical, Clinical Services, and Mental Health. The Medical Branch provides medical and psychiatric diagnostic services, medication management and treatment through a staff of physicians, psychiatrists, and advanced practice registered nurses. Clinical Services provides a range of clinically required nursing, dental, and specialty care through professional registered nurses, licensed practical nurses, para-medical assistants, dentists, dental hygienists, dental assistants, and health information personnel. The Mental Health Branch provides a variety of mental health services for individuals with serious mental health needs in outpatient, residential, and acute care settings through clinical psychologists, a registered nurse with a psychiatric specialty, social workers, human services professionals, corrections recreational therapists, and para-medical assistants. DPS also utilizes local community providers, clinics and hospitals to meet the specialized and emergent needs of the inmate population.

5. I am involved on a daily basis in the planning and implementation of health care protocols and measures to address COVID-19 among inmates within the custody of the department. As part of my official duties, I am familiar with the health care measures used for the inmate population in order to prevent, contain, and control the spread of COVID-19 .

I. HEALTH CARE RESPONSE TO ADDRESS COVID-19

6. After becoming first aware of COVID-19 cases in the United States, DPS quickly took action to address COVID-19.

7. On March 9, 2020, HCD distributed an Instruction Bulletin on how to

respond to the coronavirus and an Infectious Disease Clinical Care Guide, which included a coronavirus response checklist, a COVID-19 risk assessment and management algorithm of suspected cases in correctional facilities, a quarantine implementation overview, and facility infection control measures during an outbreak.

8. On March 23, 2020, DPS adopted a comprehensive department-wide Pandemic Response Plan consistent with Centers for Disease Control and Prevention (CDC) recommendations to combat the spread of COVID-19 in individual facilities. Because clinical information and guidelines of COVID-19 continually evolves, DPS has updated its pandemic response plan on several occasions. *See* DPS Pandemic Response Plan (May 28, 2021 Revision) <https://dps.hawaii.gov/wp-content/uploads/2020/03/PSD-Pandemic-Response-Plan-Revised-May-2021.pdf>.

9. In March 2020, HCD staff started COVID-19 response training. Among other things, training provided clinical information and guidance for: inmate screening for COVID-19; quarantine and medical isolation procedures; donning, doffing, and disposal of personal protective equipment (PPE); social distancing measures; medication administration procedures; COVID-19 testing; new admission screening procedures; and medical and nursing clinical procedures for COVID-19 patients. As CDC guidance has become available, additional training has been provided.

10. DPS takes the COVID-19 pandemic seriously and has implemented measures to proactively prevent, contain and control the spread of COVID-19 in its facilities, including providing education to staff and inmates regarding COVID-19; conducting screening of all individuals prior to entry into a DPS correctional facility; implementing COVID-19 testing of inmates; utilizing quarantine and medical isolation strategies for inmates who have tested

positive for COVID-19; and administering vaccinations and providing ongoing education and information to inmates regarding the COVID-19 vaccines in order to increase vaccination levels within the facilities.

A. Education

11. During the intake process at correctional facilities, inmates are educated about COVID-19 and view a ten-minute educational video which includes instruction on infection prevention measures, detailed handwashing procedures and vaccinations. CDC educational and information signage have been posted throughout the facilities in areas visible to inmates that provide information regarding COVID-19 as well as the benefits of vaccination. Education is also reinforced during inmate encounters with health care staff.

12. Before CDC educational and information posters were available, DPS distributed the following information and posters to all State facilities: (a) informational poster on how to help prevent the spread of respiratory diseases on February 28, 2020; (b) COVID-19 Information Bulletin and Clinical Guide were issued on March 9, 2020; (c) Contact precaution, airborne precaution, and droplet precautions signs were distributed on March 10, 2020.

B. Screening

13. CDC has not recommended that COVID-19 testing must be administered before an individual (inmate, staff or visitor) is allowed entry into the facility. Instead, CDC recommends “verbal screening and temperature checks for incarcerated/detained persons, staff, volunteers, and visitors who enter correctional and detention facilities...” *See CDC Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities; Guidance for Correctional and Detention Facilities (Updated June 9,*

2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>.

14. Since March 2020, all State facilities have implemented screening procedures for inmates, staff and visitors consistent with CDC guidance.

15. Staff, visitors, vendors and volunteers are screened for COVID-19 symptoms, using a screening survey and no-touch temperature check prior to entry into the facility.

Screening questions include exposure history and a checklist of COVID-19 symptoms:

fever/chills, cough, shortness of breath or difficulty breathing, fatigue, muscle or body aches, headache, new loss of taste or smell, sore throat, congestion or running nose, nausea or vomiting, diarrhea or loose stool.

16. All new admission inmates are screened for COVID-19 symptoms before entering a facility, which involves no-touch temperature check and health screening. Medical and mental health staff conduct medical and mental health assessments. In addition, new intakes are evaluated and screened for signs and symptoms of infection, recent medical history, history of exposure to COVID-19, and observed for any signs of illness. If an individual presents with signs or symptoms of COVID-19, the individual is placed in medical isolation. Facilities have also implemented routine intake quarantine of new admissions for 14 days with SARS-CoV-2 testing before being housed with the existing population, if possible. This initial intervention ensures the existing inmate population is not exposed to newly admitted inmates until they are screened and cleared by the medical providers.

17. The existing inmate population is also assessed and tested for SARS-CoV-2 by medical staff at all facilities. First, inmates who self-report COVID-19 symptoms are assessed and receive SARS-CoV-2 diagnostic testing. All inmates are encouraged to self-monitor and

report symptoms of illness to staff either orally or utilize the sick-call requests. On April 17, 2020, DPS suspended the \$3.00 co-payment for medical evaluations for possible COVID-19 infections so inmates would more readily report symptoms of COVID-19 or seek medical care. An inmate with possible COVID-19 symptoms may also be referred by any staff, inmate, visitor, vendor, volunteer, or family member for a medical assessment. Second, medical staff performs temperature testing and symptom screening in every quarantine unit at least once a day. If an inmate in quarantine becomes symptomatic, the inmate is admitted to medical isolation. Inmates in quarantine receive diagnostic testing for SARS-CoV-2 every 3-7 days and on day 14 prior to release from quarantine status. Third, if any transport out of the facility is needed, an inmate is screened upon exit and return.

18. Within 14 days of admission, medical staff conducts medical assessments, which includes the identification of older adults and inmates with certain medical conditions that may place an individual at increased risk for severe illness from COVID-19. These include: cancer; chronic kidney disease; chronic lung diseases; dementia or other neurological conditions; diabetes; down syndrome; health conditions; HIV infection; immunocompromised state; liver disease; overweight and obesity; pregnancy; sickle cell disease or thalassemia; smoking (current or former); solid organ or blood stem cell transplant; stroke or cerebrovascular disease; and substance abuse disorders. *See CDC People with Certain Medical Conditions* (Updated August 20, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>. CDC notes, “[h]aving a substance use disorder (such as alcohol, opioid, or cocaine use disorder) can make you more likely to get severely ill from COVID-19.” *Id.* at 5-7. Because a large percentage of the inmate population have a substance use disorder, it is not possible to separate inmates with substance use disorders and other medical conditions

identified by the CDC from the rest of the inmate population. Instead, medical staff identifies, reviews and monitors inmates who are at increased risk for severe illness from COVID-19.

C. Testing

19. CDC describes two scenarios when testing of inmates and staff may be considered in a correctional setting:

a. Diagnostic tests are intended to identify current infection in individuals and is performed when a person has signs or symptoms consistent with COVID-19, or when a person is asymptomatic but has recent known or suspected exposure to SARS-CoV-2; and

b. Screening tests are intended to identify infected people who are asymptomatic and do not have known, suspected, or reported exposure to SARS-CoV-2.

See CDC Interim Considerations for SARS-CoV-2 Testing in Correctional and Detention Facilities (Updated June 7, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/testing.html>.

20. DPS has implemented testing in the above categories, and has expanded non-exposure asymptomatic screening testing to seven areas: (a) broad-based testing; (b) new admission testing and day-14 Routine Intake Quarantine testing; (c) pre-medical procedure testing for inmates transported outside the facility for essential medical procedures that require testing; (d) pre-release testing for inmates entering community programs; (e) pre-transfer testing for inmates scheduled to be transferred to a congregate facility; (f) pre-flight testing for inmates transferred to another correctional facility; and (g) surveillance testing of randomly selected inmates.

21. DPS's testing efforts are consistent with CDC recommendations. SARS-CoV-2 testing has been incorporated as part of a comprehensive approach to reducing transmission of the virus within correctional facilities.

22. In collaboration with the State of Hawai'i, Department of Health (DOH), and the Hawai'i National Guard, broad-based testing was first used to address the cluster of cases at OCCC on August 10, 2020.

23. Beginning September 14, 2020, with the assistance of DOH, Hawai'i National Guard and community partners, DPS expanded broad-based testing of inmates and staff at all facilities.

24. The first identified positive case in any DPS correctional facility was at OCCC on August 7, 2020.

25. Testing is continuously being conducted at all facilities. As of September 3, 2021, a total of 23,785 tests were administered to inmates at all eight facilities, of which 2,053 test results were positive, of which 1,884 inmates recovered. *See* DPS's COVID-19 Resources and Information, <https://dps.hawaii.gov/blog/2020/03/17/coronavirus-covid-19-information-and-resources/>. Each positive case was reported to DOH and appropriate response measures were taken to provide the necessary health care services to these inmates.

26. DPS regularly communicates, consults and coordinates with DOH in its efforts to combat the spread of COVID-19 in its facilities. DPS has also been working with DOH in responding to clusters of COVID-19 cases at its facilities.

D. Quarantine and Medical Isolation Strategies

27. DPS utilizes medical isolation and quarantine strategies to contain and control the spread of COVID-19.

28. “Quarantine” refers to the practice of separating individuals who have had close contact with a COVID-19 case to determine whether they develop symptoms of the disease.

29. “Cohorting” refers to the practice of isolating multiple individuals with laboratory-confirmed COVID-19 together or quarantining close contacts of an infected person together as a group due to limited number of individual cells.

30. Quarantine for COVID-19 should last for a period of 14 days. If cohorting during quarantine is necessary, steps are taken to avoid adding new inmates to an existing quarantine cohort after the 14-day quarantine clock has started, if possible. If an entire housing unit is under quarantine, due to contact with a case from the same housing unit, the entire housing unit may need to be treated as a cohort and quarantined in place. If an inmate develops symptoms during the 14-day period, the symptomatic inmate is placed on medical isolation. If quarantined inmates do not develop symptoms and do not test positive for COVID-19, the inmates may be released from quarantine at the end of the 14-day period. If additional inmates present with symptoms during the 14-day period, these symptomatic inmates are medically isolated, and the 14-day quarantine period restarts.

31. “Medical Isolation” refers to separation of individuals with confirmed or suspected COVID-19 infection to prevent their contact with others and reduce the risk of transmission. The CDC notes that confirmed COVID-19 cases may be medically isolated as a cohort. If cohorting suspected cases of COVID-19 is unavoidable, steps are taken to make accommodations to reduce exposure for the individuals with increased risk of severe illness. Medical isolation ends when the inmate meets clinical symptom-based criteria for release from medical isolation, as determined by a medical provider.

32. Medical and security staff conduct their own assessments regarding housing inmates in quarantine and medical isolation. The following procedures are implemented at all facilities: (a) medical staff notifies security of inmates who require quarantine and medical isolation based on CDC guidance; (b) security staff conducts its own housing assessment based on security concerns; (c) security staff approves and moves an inmate to a quarantine or medical isolation area, taking into consideration medical and security housing needs; (d) upon completion of the inmate's movement, medical staff distributes an updated housing designation form to notify security and civilian staff of designated quarantine and medical isolation housing areas; the information is updated when changes occur; (e) signage is posted to notify all staff of medical isolation or quarantine status, and the appropriate personal protective equipment required in the area.

33. All inmates in quarantine and medical isolation have access to medical staff and mental health services. Medical staff conducts health assessments for inmates in quarantine at least once daily, and twice daily for inmates in medical isolation. Inmates are assessed at greater frequency, as clinically indicated, and upon referral or request. Mental health staff also monitors inmates to provide ongoing clinical consultation and assessments.

E. Vaccinations

34. Vaccinations are offered to all inmates. In January 2021, older inmates were initially provided opportunities for vaccination. By March 2021, vaccine pods were implemented at all correctional facilities for all inmates to access a COVID-19 vaccine. Vaccination efforts are ongoing. All newly admitted inmates are offered vaccinations upon admission. Inmates are continuously educated about vaccinations. Vaccination informational and educational posters have been distributed and posted in all facilities. Sign-up sheets are posted in each housing unit.

Vaccination clinics are scheduled based on sign-ups and vaccine supply. Presently, there is no shortage of vaccine supply at all facilities. Vaccines are readily available to all inmates.

35. Since January 2021, more than 2,800 inmates have received either the single dose vaccine or the second dose of the two-dose series vaccine. Due to inmate movements and population changes that inevitably occur in the correctional system, the cumulative total vaccinated represents DPS’s efforts to provide vaccinations since vaccines became available. On June 21, 2021, the Health Care Division conducted a point-in-time study of the current vaccination status among inmates at correctional facilities statewide. The total population count was 2,929. The study showed 1,588 inmates were fully vaccinated, 210 inmates were in the process of becoming fully vaccinated (i.e., awaiting the second shot of a two-dose series, awaiting the two-week post-vaccination period, or awaiting scheduled vaccination), 1,126 inmates refused, and 5 inmates could not receive the vaccine due to medical contraindications. The table below provides the June 21, 2021 point-in-time data by facility.

Facility	Total Population	Fully Vaccinated	Full Vaccination in Process	Refused	Medically Contraindicated
OCCC	882	358	127	397	0
HCF	755	538	0	215	2
WCCC	208	106	1	101	0
WCF	200	163	0	36	1
MCCC	312	147	16	149	0
HCCC	284	66	66	151	1
KCCC	149	86	0	63	0
KCF	139	124	0	14	1
Total	2929	1588	210	1126	5

36. Inmates are encouraged and educated about vaccinations through informational fliers, posters, and individual counseling with nursing staff. Medical and mental health staff are also available to address any questions and concerns.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Honolulu, Hawaii, September 7, 2021.



GAVIN K. TAKENAKA

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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

ORIGINAL PROCEEDING

**DECLARATION OF EDMUND (FRED)
K.B. HYUN**

DECLARATION OF EDMUND (FRED) K.B. HYUN

I, Edmund (Fred) K.B. Hyun, hereby declare, under penalty of law, that the following is true and correct:

1. I am currently employed by the State of Hawai'i as the Chair of the Hawai'i Paroling Authority ("HPA"). I have had that position since August 2016.
2. As the HPA Chair, I am responsible for the administration of HPA statewide including overseeing parole release hearings, parole revocation hearings, and considerations for early releases.
3. In the initial consolidated petitions (SCPW-20-0000200 and SCPW-20-0000213), the Court ordered HPA to expeditiously address requests for early parole consideration, including conducting hearings using remote technology.
4. This Court also recommended that HPA consider early releases for specific categories of prisoners.
5. These categories included inmates: 1) who are most vulnerable to the virus; which

included inmates who are 65 years old and older, have underlying conditions, who are pregnant; and 2) being held on technical parole violations (i.e. curfew violations, failure to report as directed, etc.) or who have been granted community or minimum security classifications and are near the end of their sentences. For category (1), the HPA expanded the age from 65 to 55 years old and older.

6. HPA has continued to conduct an individualized review of requests for early parole considerations, including prisoners within the Court's recommended categories.

7. Since March 2020, HPA has conducted a total of 3948 consideration hearings, where 1193 inmates were granted parole; 1279 inmates had established release dates; and were continued, rescheduled or deferred; and 1569 inmates were denied parole.

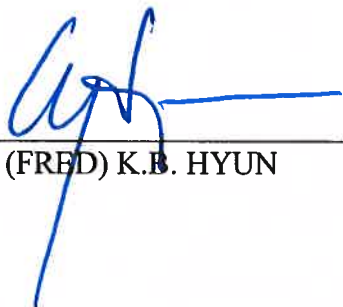
8. HPA continues to conduct hearings remotely, when necessary.

9. HPA works in collaboration with the Department of Public Safety (DPS) to schedule and conduct remote hearings, and for extended furlough, medical considerations and early parole considerations.

10. In collaboration with DPS, inmates participating in the extended furlough program will be considered for early parole by HPA, if referred by DPS.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Honolulu, Hawaii, September 7, 2021.


EDMUND (FRED) K.B. HYUN