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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

IN THE MATTER OF INDIVIDUALS)	ORIGINAL PROCEEDING
IN CUSTODY OF THE)	
STATE OF HAWAI'I)	HONORABLE MARK E.
)	RECKTENWALD
)	Chief Justice
)	HONORABLE PAULA K. NAKAYAMA
)	HONORABLE SABRINA S. MCKENNA
)	HONORABLE MICHAEL D. WILSON
)	HONORABLE TODD W. EDDINS
)	Associate Justices
)	

RESPONDENT JUSTIN F. KOLLAR'S RESPONSE TO
AUGUST 31, 2021 ORDER

CERTIFICATE OF SERVICE

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RESPONDENT

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AUGUST 31, 2021 ORDER

Pursuant to the Order issued by this Honorable Court on August 31, 2021, Respondent JUSTIN F. KOLLAR, Prosecuting Attorney, County of Kaua‘i, State of Hawai‘i, hereby submits this Response to the August 27, 2021, Petition for Extraordinary Writ (“August 27, 2021, Petition for Writ”).

Respondent Kollar acknowledges that the presence of the Delta variant of COVID-19 in Hawai‘i in recent months is somewhat a “game changer.” In recent weeks, COVID-19 infection and death rates in Hawai‘i¹ and on Kaua‘i² are higher than they have ever been. As such, Respondent Kollar acknowledges that there is a compelling need to reduce Hawaii’s correctional

¹ See <https://www.staradvertiser.com/2021/08/23/hawaii-news/tougher-hawaii-travel-restrictions-possible-as-covid-19-surge-continues/>

² See <https://www.thegardenisland.com/2021/08/28/hawaii-news/kdho-49-new-cases-of-covid-19-saturday/>

facilities' populations to design capacity. Therefore, Respondent Kollar takes the following positions, concerning Petitioner's ten (10) types of requested relief:

1. Respondent Kollar does not oppose Petitioner's request that this Honorable Court order the Circuit, Family, and District courts, when adjudicating motions for release, (a) release shall be presumed unless the court finds that the release of the individual would pose a significant risk to the safety of the individual or the public; (b) design capacity of the correctional facility shall be taken into consideration; and (c) the health risk posed by the COVID-19 pandemic, within the Fifth Circuit specifically (as opposed to the State of Hawai'i as a whole), should be taken into consideration.

Respondent Kollar does not oppose the requested items 1a through 1d, requested by Petitioner (creating categories of detainees/incarcerated people), but requests the inclusion of the following offenses/offense-types exceptions, in addition to those offenses designated by Petitioner:

a. For those serving a sentence (not to exceed 18 months) as a condition of felony deferral or probation, except for individuals serving a term of imprisonment for Possession Prohibited (HRS §134-7), or Carrying or Use of Firearm in the Commission of a Separate Felony (HRS §134-21).

b. For those serving sentences for misdemeanor or petty misdemeanor convictions, except those serving a term of imprisonment for Assault in the Third Degree (HRS §707-712), Assault Against a Law Enforcement Officer in the Second Degree (HRS §707-712.6), or for quarantine rules/proclamations violations.

c. For pretrial detainees charged with a misdemeanor or petty misdemeanor offense, except those charged with Assault in the Third Degree (HRS §707-712), Assault Against a Law Enforcement Officer in the Second Degree (HRS §707-712.6), or with violating quarantine rules/proclamations.

d. For pretrial detainees charged with a felony, except those charged with Possession Prohibited (HRS §134-7), or Carrying or Use of Firearm in the Commission of a Separate Felony (HRS §134-21).

2. Respondent Kollar does not oppose this Honorable Court ordering the Circuit, Family and District courts, DPS, and the HPA to reduce the population of the Kaua'i Community Correctional Center to its design capacity.

3. Respondent Kollar joins in Petitioner's request for the appointment of a public health expert to enter into all of Hawai'i's correctional facilities and to review protocols, the ability to social distance; and to make recommendations to this court.

4. Respondent Kollar takes no position regarding Petitioner's request for testing of all incarcerated persons and staff at Hawai'i's correctional facilities but suggests that it might be more practical to require testing weekly or twice each week, rather than daily.³

5. Respondent Kollar opposes this Honorable Court ordering the Circuit, Family, and District courts to suspend custodial portions of a sentence until the conclusion of the COVID-19 pandemic or until deemed satisfied for

³ In footnote 64, Petitioner suggests that he is requesting daily testing. See August 27, 2021, Petition for Writ.

individuals serving intermittent sentences. Respondent Kollar believes the COVID-19 pandemic could last another two years, and possibly longer.⁴ This lengthy, uncertain timeframe is simply unrealistic, in terms of suspending sentences. Respondent Kollar requests that individuals in this category should be released on a case-by-case basis.

6. Respondent Kollar does not oppose a moratorium on the collection of cash bail, where pretrial arrestees/defendants are not a risk to public safety or a flight risk. Respondent Kollar supports increased use of supervised release, or weekly check-in, remote court hearings.

7. Respondent Kollar does not oppose this Honorable Court ordering the HPA to expeditiously address requests for early parole consideration, including conducting hearings using remote technology. Respondent Kollar strongly requests that hearings are set with enough advance notice that victims may be notified in advance of the hearing; and that the State has sufficient time to present written objections.

Respondent Kollar also does not oppose an order that HPA consider release of incarcerated persons who are most vulnerable to the virus, which includes individuals who are 65 years or older, have underlying health conditions, who are pregnant, and those individuals being held on technical parole violations (i.e., curfew violations, failure to report as directed, etc.) or who have been designated as having “minimum” or “community” security

⁴ <https://www.businessinsider.com/when-will-covid-pandemic-end-maybe-2023-2021-8>

classifications and are near the maximum term of their sentences. Respondent Kollar does not oppose having the HPA provide periodic progress reports to the parties of their efforts and progress in the aforementioned areas. The reports should include a list of the names of individuals who have been granted release, the names of the individuals who are under consideration for release, and the names of individuals who were considered for release but for whom release was denied.

8. Respondent Kollar supports ordering DPS to adhere to the CDC's Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities in all Hawai'i correctional facilities.

9. Respondent Kollar supports ordering DPS to adhere to its Pandemic Response Plan – COVID-19 (May 28, 2021 rev.).

10. Respondent Kollar supports ordering DPS to comply with the requirements of HRS §353-6.2 and to conduct periodic reviews to determine whether pretrial detainees should remain in custody or whether new information or a change in circumstances warrants reconsideration of a detainee's pretrial release or supervision.

Mandated use of remote hearings

Respondent Kollar respectfully requests that this Honorable Court order DPS and the Family, Circuit, and District courts to allow phone and web hearings, effective immediately, for incarcerated persons, when in-person court hearings are prohibited. Further, as a condition of release, the courts should schedule a weekly Zoom or telephonic hearing for released individuals to

appear remotely to make sure they are in compliance with release conditions. (The only exception for access to remote hearings by prisoners should be for those who are COVID-19 positive.)

Increased attention to vaccines and vaccine education

Respondent Kollar notes that vaccinations remain a powerful weapon against the spread of COVID-19, including the Delta variant. Unvaccinated persons are 29 times more likely to be hospitalized for COVID-19, compared with vaccinated persons; unvaccinated persons are five (5) times as likely to get infected with the Delta variant, as compared to vaccinated persons; vaccinated people appear to be infected for a shorter period, compared with unvaccinated people; and asymptomatic, vaccinated people who become infected are very unlikely to infect others, suggesting overall that vaccinated people are less likely than unvaccinated people, to infect others.⁵

Respondent Kollar asserts that it is crucial in the fight against COVID-19 in Hawai'i's correctional facilities that DPS develop and maintain a robust vaccination program, including vaccine education for incarcerated people and DPS staff.⁶

⁵ <https://www.nytimes.com/article/breakthrough-infections-covid-19-coronavirus.html>

⁶ DPS's Pandemic Response Plan includes the education of incarcerated people about COVID-19 vaccines. See numbered pages 22-23, Pandemic Response Plan (rev. May 28, 2021), attached to August 27, 2021, Petition for Writ, as e-pages 49-50.

Respondent Kollar also notes that Petitioner seems to downplay (unintentionally, we are certain) the role of vaccines in preventing COVID-19 outbreaks in prisons.⁷

Respondent Kollar notes that in the DPS's response plan, DPS is required to offer vaccines to all incarcerated people.⁸ The plan does not specify that a mRNA vaccine shall be offered to incarcerated people. Given the superior efficacy of the mRNA vaccines, as compared to others, such as the Johnson and Johnson vaccine⁹, this court should mandate that DPS offer at least one type of mRNA vaccine to incarcerated people.

Respondent Kollar requests that this Honorable Court order DPS to publish data weekly on its rates of COVID-19 vaccination among incarcerated people and DPS staff.

Respondent Kollar also suggests that this Honorable Court order DPS to contract with an advertising agency based in Hawai'i to create video and print

⁷ Petitioner asserts, "*Even fully vaccinated people with Delta variant breakthrough infections can spread the virus to others.*" He also writes, "*Moreover, fully vaccinated people with the Delta variant carry just as high a viral load in the first five to six days of infection as unvaccinated people.*" See numbered page 6, August 27, 2021 Petition for Writ. Today, a New York Times article refers to this "*viral load talking point*" as "*problematic*," and "*both true and misleading.*" The author explains, "*Even when the viral loads are similar, the virus behaves differently in the noses and throats of the vaccinated and the unvaccinated.*" See <https://www.nytimes.com/2021/09/07/briefing/risk-breakthrough-infections-delta.html>.

⁸ See item f. at numbered page 22 (e-page 49), Exhibit A to August 27, 2021 Petition for Writ.

⁹ <https://www.aamc.org/news-insights/so-you-got-jj-vaccine-here-s-what-you-should-know-about-delta-variant-boosters-and-more>

ads encouraging correctional facility staff and incarcerated people in Hawai'i to get vaccinated against COVID-19. In other words, the ads should have as their target audiences correctional facilities' staff and incarcerated people located in Hawai'i. This Court should also order DPS to show the ads to its entire staff and its incarcerated population; and to display the written ads within all of its correctional facilities, to the extent practicable.

II. Conclusion

Respondent Kollar fully acknowledges the serious public health emergency presented by COVID-19 outbreaks in Hawai'i's correctional facilities; and asserts that this public health emergency requires increased flexibility among all agencies involved in the Hawai'i criminal justice system – the police departments, the Judiciary and the courts, the Department of Public Safety, prosecutors' offices, public defenders' offices, probation departments, the Hawaii Paroling Authority, the Sheriff's department, etc.

DATED: Lihu'e, Kaua'i, Hawai'i, September 7, 2021.

/s/ Justin F. Kollar
JUSTIN F. KOLLAR
Prosecuting Attorney
County of Kaua'i
State of Hawai'i
RESPONDENT

IN THE SUPREME COURT OF THE STATE OF HAWAII

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I hereby anticipate that upon e-filing of the foregoing document in the JEFS system, all named parties will be immediately electronically served.

DATED: Lihu'e, Kaua'i, Hawai'i, September 7, 2021.

/s/ Justin F. Kollar
Prosecuting Attorney
County of Kaua'i
State of Hawai'i