

The instant Petition raises the same issues previously brought before this Court under the same title in Case No. SCPW-20-0000509, *i.e.*, the risk posed by COVID-19 to persons being held in the State's prisons and jails.¹ Respondent recognizes the serious risk posed by COVID-19 to all residents of the State, whether in custody or not. That said, Respondent submits that the health of persons in custody and public safety must both be protected. The Petition, however, fails to give proper consideration to public safety in the relief it requests. Some of the relief requested by the Petition parallels the prior order of this Court in Case No. SCPW-20-0000509 (See, SCPW-20-0000509, JIMS Nos. 17 and 29). In some important respects, however, the Petition's proposed remedies fail to address important public safety concerns.

As an initial matter, Respondent observes that the Petition relies on outdated data which makes the situation at Maui Community Correctional Center ("MCCC") appear more dire than it actually is. The Petition cites statistics from August 23, 2021, which state there were 68 active cases at MCCC. (Dkt. 1, PDF at 14). However, the situation has significantly improved since then. According to more current data from DPS, as of

¹ The Petition raises a number of allegations regarding the Department of Public Safety's policies related to minimizing the spread of COVID-19 and the Department's adherence thereto, which are outside of Respondent's personal knowledge and control. Respondent accordingly defers to DPS regarding such issues.

September 3, 2021, MCCC has only 18 active cases of COVID-19.² While any COVID-19 cases are cause for concern, the significant reduction in cases over the past ten days clearly demonstrates the situation is trending in the right direction.

In any case, Respondent's objections to the Petition are outlined below.

I. DISCUSSION.

A. Petitioner Can Already File Motions Seeking The Release Of Any Inmate It Represents.

When this Court concluded the prior proceeding over this same issue, it was clear to note that "... OPD or defense counsel may file individual motions seeking the release of any inmate." (SCPW-20-0000509, Dkt. 164, PDF at 2). Thus, while the current situation has been developing, Petitioner has been free to continue requesting that inmates be released to mitigate COVID-19 related issues. Petitioner does not address why continuing to do so is not adequate to manage the situation. The trial courts are well-suited to considering the risks of COVID-19 and balancing them against any threat to public safety or flight risk represented by any individual detainee. This Court's prior order authorized them to do exactly that.

For example, as noted above, the situation at MCCC improved markedly from August 23 to September 3, going from 68 active cases to 18. These types of rapid developments can be

² The Department of Public Safety provides updated counts of COVID-19 cases on its website daily. See, <https://dps.hawaii.gov/blog/2020/03/17/coronavirus-covid-19-information-and-resources/>

brought to a trial court's attention as individual motions for release are considered, so a decision can be made based on the most current information. If a particular facility successfully eliminates all or most COVID-19 cases, that should be a relevant factor to consider, just as it should be considered if a facility has increasing cases.

Likewise, the situation may vary dramatically from county to county. One county's correctional facilities may have many cases, while at the same time others have few. Given the importance of carefully balancing public safety against the risk of COVID-19, the situation should be analyzed by the trial courts on a case-by-case basis in light of the conditions where each particular inmate is detained, rather than attempting to create a one-size-fits-all remedy.

Thus, as the Court has already provided an effective remedy to address the situation by explicitly authorizing motions to release individual inmates, the extraordinary remedy of mandamus is not necessary.³ This is especially true given that Petitioner has failed to explain why the *existing* remedy provided by the Court is inadequate to address the issues raised in the Petition.

³ "A writ of mandamus and/or prohibition is an extraordinary remedy that will not issue unless the petitioner demonstrates a clear and indisputable right to the relief requested *and a lack of other means to redress adequately the alleged wrong or to obtain the requested action.*" State v. Tui, 138 Hawai'i 462, 467, 382 P.3d 274, 279 (2016), quoting Kema v. Gaddis, 91 Hawai'i 200, 204-05, 982 P.2d 334, 338-39 (1999) (emphasis added, internal quotation marks omitted).

B. Petitioner's Proposal For Release Of Pretrial Detainees Insufficiently Protects Public Safety.

The Petition requests that all pretrial detainees, outside of certain specified categories, be presumptively entitled to be released. (Dkt. 1, PDF at 17-18). One such excluded category is persons being held for felonies under HRS Chapter 707. (Id.). This proposal inadequately protects public safety, as demonstrated by this Court's amendment of its original order in Case No. SCPW-20-0000509. There, the "excluded offenses" (i.e., the offenses for which release was not presumed) were amended to include *all* offenses under Chapter 707, not merely felonies. (SCPW-20-0000509, Dkt. 122, PDF at 2).⁴

This amendment by the Court was prudent. Chapter 707 includes many offenses against the person which can seriously endanger the public even if they do not raise to the level of a felony.⁵ Persons who committed such offenses pose a threat to public safety, and should not be entitled to a presumption of release prior to serving their sentence. Accordingly, Respondent requests that, if the relief Petitioner seeks is granted, all offenses under Chapter 707 be deemed excluded offenses.

⁴ This amendment was made in response to a motion filed by the City & County of Honolulu requesting the change. (SCPW-20-0000509, Dkt. 112).

⁵ For example, Reckless Endangering in the Second Degree under HRS § 707-714 is a misdemeanor, but entails "conduct that recklessly places another person in danger of death or serious bodily injury[.]" Other Chapter 707 offenses, such as Unlawful Imprisonment in the Second Degree under HRS § 707-722 and Assault in the Third Degree under HRS § 707-712, similarly pose clear threats to public safety.

Moreover, in Case No. SCPW-20-0000509, this Court ruled that, as to individuals charged with an "excluded offense" (including any violation of Chapter 707), "the trial judges retain discretion to set bail and conditions of release." (SCPW-20-0000509, Dkt. 122, PDF at 2). The trial courts should continue to have the power to determine the appropriate conditions for pre-trial release for persons charged with potentially violent offenses, giving due consideration to the specifics of the case and the risks associated with COVID-19. Imposing the presumption of release sought by Petitioner simply tips the balance too far against protecting public safety.

In addition, there are many other dangerous felonies outside the list of excluded offenses proposed by Petitioner. For example, Arson in the First Degree is a class A felony, which can entail a defendant knowingly placing "another person in danger of death or bodily injury[.]" HRS § 708-8251(1)(a). This is obviously a very serious crime, which can involve significant danger to the public. Similarly, possession of a firearm with intent to facilitate the commission of a felony drug offense under HRS § 134-22 is a class A felony which involves clear potential for violence. Yet, under Petitioner's proposal, the presumption of release would still apply to a person accused of such crimes.

This illustrates the issue with imposing a presumption of release as to all offenses outside a select list of exclusions. At a minimum, Respondent submits that no such presumption should apply to any offense which involves a risk of

causing bodily injury or death to a member of public. The trial courts are well positioned to make that determination, and should retain the discretion to do so.

C. All Individuals Serving A Sentence For A Violation Of HRS Chapter 707 Should Be Excluded From Release.

As with pretrial detainees, the Petition requests that individuals serving a sentence as a condition of deferral or probation be eligible for release, with certain specified exceptions. (Dkt. 1, PDF at 18, ¶1.a). One proposed exception is for individuals imprisoned for any *felony* under HRS Chapter 707. (Id.). Petitioner also requests all persons serving a sentence for a misdemeanor be eligible for release, with certain exceptions not including offenses under Chapter 707 (Id., PDF at 18, ¶1.b). As detailed above, this conflicts with the rationale behind the Court's amendment of its original order in Case No. SCPW-20-0000509 to exclude all Chapter 707 offenses from the presumption of release.

As noted *supra*, there is a very strong basis to deny release to pretrial detainees being held for violent crimes. There is obviously an even stronger basis to deny those *convicted* of a violent crime under Chapter 707 from being released. Respondent, accordingly, requests that if the Court imposes standards relating to temporary release of convicted persons, it exclude anyone convicted of any offense under Chapter 707, not merely felonies.

D. The Petition Does Not Contemplate Pre-Release Testing And Safeguards.

In the prior action over this issue, the Court imposed various requirements to reduce the risk of releasing COVID-19 positive detainees into the community, particularly requiring a negative test for COVID-19 as a prerequisite for being released. (See, SCPW-20-0000509, Dkt. 17, PDF at 3). The Petition, however, does not discuss any such requirements as part of its requested relief.⁶ Respondent requests that, at a minimum, the Court impose pre-release safeguards similar to those ordered in Case No. SCPW-20-0000509. Otherwise, there is a risk that COVID-19 positive individuals will be released and cause further community spread of the virus.

E. Petitioner's Request That The State Be Ordered To Reduce The Population Of Correctional Facilities To Design Capacity Ignores Public Safety.

Petitioner requests an order that the State and the lower courts take "immediate steps" to reduce the population of correctional facilities to design capacity or the "Infectious Disease Emergency Capacity" recommended by the Hawaii Correction System Oversight Commission. (Dkt. 1, PDF at 19, ¶ 2). The vague nature of this request makes it difficult to respond to, insofar as Respondent cannot address the request for an order mandating "immediate steps" without having any clear indication of what those steps would be. Nevertheless, the most obvious problem with the Petitioner's request on this point is that it does

⁶ The petition does request that the Court order COVID-19 testing for all incarcerated person and staff at the State's correctional facilities, but does not tie the requested releases to a negative test result.

not take into account public safety and the necessity of keeping certain potentially dangerous individuals in custody.

According to the information provided to Respondent by the Warden of the Maui Community Correctional Center, including pre-trial custodies and persons being held for probation or parole violations, MCCC is currently holding 79 persons charged with a crime under HRS Chapter 707, 23 charged with abuse of a family or household member under HRS § 709-906, 14 charged with burglary, 10 charged with robbery, one charged with unauthorized entry into a dwelling in the first degrees under § 708-812.55, and nine charged with possession of a firearm with intent to facilitate the commission of a felony drug offense under HRS § 134-22. See, Declaration of Andrew Martin, ¶ 3. The Department of the Prosecuting Attorney has also identified another 15 detainees who fall into the above listed categories, due to the fact that the information provided by MCCC lists only one charge per person. Id., ¶ 4.⁷ This totals 151 persons being held pre-trial or for probation/parole violations who are charged with serious and potentially violent offenses.

In addition, MCCC is holding 36 person serving sentences for felonies, and 42 serving sentences as a condition of felony probation. Id., ¶ 6. This totals 78 persons serving a sentence due to a felony conviction. Adding the 151 detainees

⁷ Of these 15 persons, 3 are charged with misdemeanors under Chapter 707, 4 are charged with violations of a protective order, 3 are charged with abuse of a family or household member, 3 are charged with burglary, one is charged with unauthorized entry into a dwelling in the first degree, and one is charged with possession of a firearm with intent to facilitate the commission of a felony drug offense. See, Declaration of Andrew Martin, ¶ 4.

and the 78 serving sentences together, MCCC is holding 229 persons who are either being detained due a dangerous/violent crime, or who are serving time related to a felony conviction. This is, unfortunately, already over MCCC's design capacity of 209 (although below MCCC's operation capacity of 301). Accordingly, it is currently not feasible to reduce MCCC's population to design capacity without releasing persons who pose a threat to public safety.

The petition also does not address what is to be done if/when MCCC reaches capacity with only violent or dangerous persons being detained pre-trial or serving sentences. If the population is capped at design capacity, what can Respondent do if the Maui Police Department arrests someone charged with, for example, murder? There must be consideration given to protecting the public and keeping individuals who pose serious threats to public safety in custody. The petition, however, ignores this extremely serious question, and apparently requests an inflexible order capping capacity.⁸

There are also a number of pre-trial detainees at MCCC who have been denied bail. While some of these detainees fall into the violent categories outlined above, not all do. When a person is denied bail, the trial court has already made a determination pursuant to HRS § 804-3 that "... no condition or

⁸ As Exhibit A to the Petition demonstrates, DPS has a very robust plan to prevent the spread of COVID-19 in its facilities. Petitioner does not argue there are any specific failings with the plan itself; instead Petitioner takes issue with DPS's implementation of the plan. DPS will presumably comply with its own plan, as it has been ordered to do by a federal court. (Dkt. 1, Exhibit B).

combination of conditions will reasonably assure the appearance of the person when required or the safety of any other person or community[.]” Such a determination should not be easily cast aside, particularly without evaluating each person denied bail on an individual basis. Accordingly, detainees already denied bail should not be entitled to the presumption of release requested by Petitioner.⁹

Respondent, again, recognizes the serious issues posed by COVID-19, but has a responsibility to protect the public in the County of Maui. Granting the relief sought by the Petition without significant limitations and safeguards will seriously endanger the public.

II. CONCLUSION.

As outlined *supra*, the Petition does not give sufficient consideration to public safety. While Respondent of course wishes to minimize the risk of COVID-19 to incarcerated persons, that concern must be carefully balanced with protecting the public.

In any case, the Court has already held the Petitioner (and private defense counsel) may file motions seeking the release of detained persons. This procedure can be employed to obtain the release of appropriate, non-dangerous persons from custody. Accordingly, Respondent requests that, to the extent the Court takes action in this matter, any additional relief be

⁹ Such inmates may, of course, still file individual motions for release as already authorized by this Court’s closing order in Case No. SCPW-20-0000509.

narrowly tailored as outlined herein, with special attention given to minimizing the risk to the public.

DATED: Wailuku, Hawai`i, September 7, 2021.

Respectfully submitted,

DEPARTMENT OF THE PROSECUTING ATTORNEY
ANDREW H. MARTIN, PROSECUTING ATTORNEY

By /s/ Richard B. Rost
RICHARD B. ROST
Deputy Prosecuting Attorney
County of Maui
Attorney for Respondent

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

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

DECLARATION OF ANDREW H. MARTIN

I, ANDREW H. MARTIN, do hereby declare as follows:

1. Declarant is a the Prosecuting Attorney for the County of Maui, State of Hawai`i, and has been designated as a Respondent in this matter;

2. After reviewing the Petition filed in this case, Declarant contacted the Warden of Maui Community Correctional Center ("MCCC"), Deborah Taylor, and requested information regarding the number of persons being held therein, and the reasons for each person's detention.

3. Pursuant to the information provided by Warden Taylor, including pre-trial custodies and persons being held for probation or parole violations, as of September 2, 2021, MCCC is currently holding:

a) 79 persons charged with a crime under HRS Chapter 707;

b) 23 persons charged with abuse of a family or household member under HRS § 709-906;

- c) 14 persons charged with burglary;
- d) 10 persons charged with robbery;
- e) one person charged with unauthorized entry into a dwelling in the first degrees under § 708-812.55;
- f) 9 persons charged with possession of a firearm with intent to facilitate the commission of a felony drug offense under HRS § 134-22.

4. Moreover, because the information provided by MCCC only lists a single charge for each incarcerated individual, a review of the files of the Department of the Prosecuting Attorney has identified 15 additional persons currently being detained for one of the offenses outlined in paragraph 3. Of these 15 persons, 3 are charged with misdemeanors under Chapter 707, 4 are charged with violations of a protective order, 3 are charged with Abuse of a Family or Household Member, 3 are charged with Burglary, one is charged with Unauthorized Entry into a Dwelling in the First Degree, and one is charged with Possession of a Firearm with Intent to Facilitate the Commission of a Felony Drug offense.

5. This totals 151 persons being held pre-trial or for probation/parole violations who are charged with serious and potentially violent offenses.

6. In addition, MCCC is currently holding 36 persons serving sentences for felonies and 42 persons serving sentences as a condition of felony probation.

7. There are accordingly a total of 229 persons being detained at MCCC who are charged with a violent crime and are

either being held pre-trial or for probation/parole violations, or are who have been sentenced as a result of a felony conviction. This number exceeds the "design capacity" of MCCC, which is 209. This indicates MCCC's population cannot currently be reduced to "design capacity" without releasing persons who likely pose a threat to public safety.

I DECLARE UNDER PENALTY OF LAW THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

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

/s/ Andrew H. Martin
ANDREW H. MARTIN
Prosecuting Attorney
County of Maui
Attorney for Respondent

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

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

CERTIFICATE OF SERVICE

I hereby certify that the forgoing document was served on September 7, 2021 via JEFS electronic filing to the following:

- Kelden Braun Akoni Waltjen (kbw96720@yahoo.com)
- Justin F. Kollar (jkollar@kauai.gov)
- Rebecca Vogt Like (rlike@kauai.gov)
- Steven S. Alm (honpros00@honolulu.gov)
- Clare Connors (clare.e.connors@hawaii.gov)
- Lee S. Hayakawa (lee.s.hayakawa@hawaii.gov)
- James S. Tabe (james.s.tabe@hawaii.gov)
- Jon Neil Ikenaga (jon.n.ikenaga@hawaii.gov)

DATED: Wailuku, Hawai`i, September 7, 2021.

/s/ Richard B. Rost
RICHARD B. ROST
Deputy Prosecuting Attorney
County of Maui
Attorney for Respondent