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IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

In the Matter of the Judiciary's Response
to the COVID-19 Outbreak

CONCURRENCE AND DISSENT RE: ORDER REGARDING
TEMPORARY EXTENSION OF THE TIME REQUIREMENTS UNDER
HAWAIʻI RULES OF PENAL PROCEDURE RULE 10(a), (b), and (c)
(By: Wilson, J.)

Arraignment is a critical stage of a criminal proceeding. Its purpose is "to identify the accused, inform him of the charge, and obtain his plea, the object of the plea being to make an issue to be tried." State v. Basnet, 131 Hawaiʻi 286, 297, 318 P.3d 126, 137 (2013) (citing Territory of Hawaiʻi v. W.H. Marshall, 13 Haw. 76, 83 (1900)).[1] Hawaii Rule of Penal Procedure (HRPP) Rule 10 provides specific time periods for

[1] Under federal law the arraignment is referred to as "*a sine qua non* to the trial itself—the preliminary stage where the accused is informed of the indictment and pleads to it, thereby formulating the issue to be tried." Hamilton v. State of Ala., 368 U.S. 52, 55, 82 S. Ct. 157, 159 (1961).

arraignment of a defendant.[2] Failure of the court to comply with the time limitations of Rule 10 requires dismissal of the charge without prejudice.[3]

The Majority now suspends the right to an arraignment under HRPP Rule 10 for citizens in the First Circuit Court for the State of Hawai‘i. The period of suspension is indefinite: "no longer than is reasonably necessary to protect public health and safety." Consequently all citizens in the first circuit who have been arrested and taken into custody for new offenses, lose for an indefinite period of time their constitutionally guaranteed rights to be informed of the charge against them, to

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[2] HRPP Rule 10 provides:

> (a) A defendant who has been held by district court to answer in circuit court shall be arraigned in circuit court within 14 days after the district court's oral order of commitment following (i) arraignment and plea, where the defendant elected jury trial or did not waive the right to jury trial or (ii) initial appearance or preliminary hearing, whichever occurs last.
> (b) Following service of grand jury warrant, a defendant arrested in the jurisdiction or returned to the jurisdiction shall be arraigned not later than 7 days following the arrest or return.
> (c) Following service of an information charging warrant of arrest, a defendant arrested in the jurisdiction or returned to the jurisdiction shall be arraigned not later than 7 days following arrest or return.

[3] We hold first, that respectfully, the Family Court of the First Circuit (the family circuit court) should have arraigned Petitioner/ Defendant-Appellant Sushil Basnet (Basnet) in accordance with Hawai‘i Rules of Penal Procedure (HRPP) Rule 10(a), but because it failed to do so, the case must be dismissed without prejudice. Basnet, 131 Hawai‘i at 287, 318 P.3d at 127.

plead not guilty and to demand their right to a speedy trial. Without their arraignment, they are also deprived of the opportunity to plead guilty, be sentenced, complete their sentence and regain their freedom. An incarcerated citizen at the Oʻahu Community Correctional Center (OCCC) whose right to arraignment is indefinitely suspended is indefinitely exposed to cruel and unusual conditions that become more severe as the threat of the COVID-19 infection exponentially increases.

The Majority's decision to suspend the arraignment rights of incarcerated citizens at OCCC is without support. It is based entirely on concerns applicable to out-of-custody defendants. No factual basis is offered to support the Majority's conclusion that the modern technology commonly employed at OCCC for incarcerated citizens arraigned by video conference poses a threat to public health and safety. The Majority order does not consider the current practice that counters the assumption that technology is unavailable to allow arraignment by video conferencing. At present, in-custody defendants are arraigned from OCCC with the judge and defense counsel participating by video conference in the courtroom. The conclusion that COVID-19 precludes incarcerated citizens from receiving a virtual arraignment is thus belied by the present practice. Moreover, no hearing has been conducted with the Department of Public Safety and the Office of the Public

Defender to determine whether the surrender of the right to arraignment is necessary. The public defender's office and the private defense bar have not been given an on-the-record opportunity to address whether their incarcerated clients' right to an arraignment, including the time limitations prescribed in HRPP Rule 10, should be suspended indefinitely.

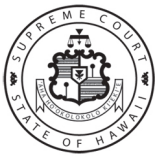
Notwithstanding the apparent, proven availability of less restrictive alternatives and the absence of on-the-record input from defense counsel representing incarcerated pretrial defendants, the Majority orders that incarcerated citizens no longer have the protection of arraignment afforded by HRPP Rule 10. Implicitly, the Majority finds that the present practice of video conferencing threatens public health and safety, or, for unstated reasons, can no longer be employed effectively in the first circuit.

Respectfully, the instant bare record does not support the Majority's conclusion that the exercise of the right to arraignment by incarcerated citizens poses a threat to public health and safety; nor does the record contain evidence to support the conclusion that protection of public health and safety cannot be accommodated by conducting video conference arraignments. And the Majority reaches its conclusion without providing incarcerated citizens the process they are due, including, at the very least, notice and an opportunity to be

heard before their right to an arraignment is suspended. Accordingly I dissent to the Majority's suspension of the right to an arraignment for incarcerated people of the First Circuit.

As for accused citizens who are not in custody at OCCC—and who do not suffer the fear of incarceration in the midst of a rampant, life-threatening COVID-19 epidemic—the Office of the Public Defender for the State of Hawai‘i has agreed to the suspension of HRPP Rule 10. As to this suspension, I concur.

Dated: Honolulu, Hawai‘i, August 20, 2020.

/s/ Michael D. Wilson

Associate Justice