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IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

STATE OF HAWAII, Plaintiff-Appellant vs CHRISTOPHER L. WILSON, Defendant-Appellee	)	CASE ID. 2CPC-17-964(1) APPEAL FROM ORDER GRANTING DEFENDANT'S MOTION TO DISMISS COUNTS 1 & 2 FILED AUGUST 30, 2022 CIRCUIT COURT OF THE SECOND CIRCUIT, STATE OF HAWAI`I HONORABLE KIRSTIN M. HAMMAN JUDGE

STATE OF HAWAII'S OPENING BRIEF

APPENDICES "A" - "B"

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STATE OF HAWAIʻI'S OPENING BRIEF

COMES NOW, Plaintiff-Appellant STATE OF HAWAIʻI ("State") hereby submits the following opening brief, pursuant to Rule 28 of the Hawaiʻi Rules of Appellate Procedure.

I. STATEMENT OF THE CASE.

A. THE CHARGES AGAINST WILSON.

On December 8, 2017, the Plaintiff-Appellant State of Hawaii ("State") filed a felony information and non-felony complaint against Defendant-Appellee Christopher L. Wilson ("Wilson") in the Circuit Court of the Second Circuit. (Dkt. 10, Record on Appeal, PDF at 4, JIMS No. 1). The Felony Information and Non-Felony Complaint alleged four counts, as follows:

> Count One: Place to Keep Pistol or Revolver, in violation of Section 134-25(a) of the Hawaii Revised Statutes.
>
> Count Two: Place to Keep Ammunition, in violation of Section 134-27(a) of the Hawaii Revised Statutes.

> Count Three: Permit to Acquire Ownership of a Firearm, in violation of Section 134-17(c) of the Hawaii Revised Statutes.
>
> Count Four: Criminal Trespass in the First Degree, in violation of Section 708-813(1)(b) of the Hawaii Revised Statutes.

(Id.).

The incident underlying these charges took place on December 7, 2017. (Id.). At around 11:00 p.m. on December 6, 2017, Duane Ting was altered by a security system that trespassers had entered a property he owned and used for a zipline business. (Dkt. 10, PDF at 14, JIMS No. 163, PDF at 2). He contacted the Maui Police Department, then went to the property to look for the trespassers. (Id.). Ting located and detained several trespassers on his property, including Wilson. (Id.). When officers of MPD arrived, Wilson admitted he had a handgun tucked in the waistband of his pants. (Id., JIMS No. 163, PDF at 3). The officers recovered a loaded .22 caliber handgun from Wilson. (Id.). A records check conducted by MPD determined that Wilson had not obtained, or even applied for, a permit to acquire the firearm or a license to carry it. (Id.).

B. WILSON'S MOTIONS TO DISMISS.

Wilson filed a first Motion to Dismiss count 1 and count 2 on May 14, 2021. (Dkt. 10, PDF at 12, JIMS No. 132). The basis for this motion was the contention that prosecuting Wilson for Count One and Count Two (the two place to keep offenses) violated of Wilson's right to bear arms. (Id., PDF at 4-5). The State opposed the motion. (Dkt. 10, PDF at 12, JIMS

No. 134). The Circuit Court denied the Motion to Dismiss. (Dkt. 10, ROA, PDF at 12, JIMS No. 139).

Wilson then filed another motion to dismiss count 1 and count 2 on July 29, 2022. (Dkt. 10, PDF at 14, JIMS No. 161). As with Wilson's first motion to dismiss, this second motion also contended charging Wilson for carrying a loaded pistol without a carry license (i.e., the place to keep violations charged in Count One and Count Two) violated Wilson's constitutional right bear arms. This time, Wilson relied on the then-recently decided New York State Rifle & Pistol Ass'n v. Bruen, 142 S.Ct. 2111 (2022).

The State again opposed the motion. (Dkt. 10, PDF at 14, JIMS No. 163). The circuit court granted the motion at the hearing on August 17, 2022 (Dkt. 14) and entered Findings of Fact, Conclusions of Law, and an Order granting the Motion to Dismiss on August 30, 2022. (Dkt. 10, PDF at 15, JIMS No. 179).

The circuit court concluded that HRS §§ 134-25 and 134-27 violated Wilson's constitutional rights as applied. According to the circuit court, the State had failed to meet its burden under Bruen to justify the place to keep statutes. (Id., PDF at 3).

The State moved for reconsideration. (Dkt. 10, PDF at 15, JIMS No. 172). The attorney general's office sought and was granted permission to file an *amicus* brief in support of the State's motion. (Dkt. 10, PDF at 15-16, JIMS No. 175, 193). The

circuit court denied reconsideration of its ruling. (Dkt. 10, PDF at 17, JIMS No. 204).

C. THE STATE'S APPEAL.

The State then filed a notice of appeal (Dkt. 10, PDF at 17, JIMS No. 198) and moved to stay the remaining charges while the appeal is pending. The motion to stay was granted. (Id., PDF at 18, JIMS No. 215).

After filing the notice of appeal, the State requested this matter be transferred to this Court. (Dkt. 1). That request was granted on December 21, 2022. (Dkt. 11).

II. STATEMENT OF POINTS OF ERROR.

The Circuit Court erred when it granted Defendant-Appellee Christopher L. Wilson's "Motion to Dismiss Counts 1 & 2" (Dkt. 10, PDF at 14, JIMS No. 161), and entered its "Order Granting Defendant's Motion to Dismiss Counts 1 & 2" on August 30, 2022. (Dkt. 10, PDF at 15, JIMS No. 179).

As to the Circuit Court's findings of fact and conclusions of law, Finding of Fact ¶ 3 was clearly erroneous and Conclusions of Law ¶¶ 1, 3, 4, 5, 6, and 7 were incorrect.

The State objected to these errors when it: (a) opposed the motion to dismiss (Dkt. 10, PDF at 14, JIMS No. 163), (b) argued against the motion at the hearing thereon (Dkt. 14), (c) moved for reconsideration of the Circuit Court's decision to grant the motion (Dkt. 10, PDF at 15, JIMS No. 172), and (d)

submitted its own proposed findings of fact and conclusions of law (Dkt. 10, PDF at 15, JIMS No. 170).

III. STANDARD OF REVIEW.

A. MOTION TO DISMISS.

"A [trial] court's ruling on a motion to dismiss [a charge] is reviewed for an abuse of discretion." State v. Thompson, 150 Hawai`i 262, 266, 500 P.3d 447, 451 (2021), *quoting* State v. Akau, 118 Hawai'i 44, 51, 185 P.3d 229, 236 (2008) (brackets in Thompson).

> The trial court abuses its discretion when it clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant. The burden of establishing abuse of discretion is on appellant, and a strong showing is required to establish it.

Thompson, 150 Hawai`i at 266, 500 P.3d at 451, *quoting* State v. Wong, 97 Hawai'i 512, 517, 40 P.3d 914, 919 (2002). A "trial court abuses its discretion if it bases its ruling on an erroneous view of the law[.]" Maui Tomorrow v. BLNR, 110 Hawai'i 234, 242, 131 P.3d 517, 525 (2006).

B. FINDINGS OF FACT AND CONCLUSIONS OF LAW.

> Appellate review of factual determinations made by the trial court deciding pretrial motions in a criminal case is governed by the clearly erroneous standard. A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made.

State v. Wilson, 92 Hawai`i 45, 48, 987 P.2d 268, 271 (1999) (citation omitted).

The trial courts conclusions of law are reviewed under the right/wrong standard. Id.

IV. ARGUMENT.

A. THE CIRCUIT COURT'S FINDING THAT WILSON WAS CARRYING HIS UNPERMITTED, UNLICENSED FIREARM FOR "SELF-DEFENSE PURPOSES" WAS CLEARLY ERRONEOUS.

In its finding of fact ¶ 3 and conclusion of law ¶ 3, the Circuit Court found that, during the incident in question, Wilson was carrying the firearm for "self-defense purposes." (Dkt. 10, PDF at 15, JIMS No. 179). This finding is clearly erroneous, because "the record lacks substantial evidence to support the finding[.]" Wilson, 92 Hawai`i at 48, 987 P.2d at 271.[1] Indeed, the record does not merely lack "substantial evidence" for this finding; it lacks ***any*** supporting evidence whatsoever.

Wilson did not submit a declaration or testify regarding his alleged purpose for carrying the firearm, nor did he submit any exhibits with his motion, leaving the record bereft of any evidence on his supposed reasons. The Circuit Court's finding of fact ¶ 1 states in a footnote that the factual findings are based on Wilson's *counsel's* declaration. (Dkt. 10, PDF at 15, JIMS No. 179). That declaration, however, contains no facts. It is merely a blanket claim that all facts alleged in

[1] This Court has ". . . defined 'substantial evidence' as credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." In re Grievance Arbitration Between State Org. of Police Officers, 135 Hawai`i 456, 462, 353 P.3d 998, 1004 (2015) (internal quotation marks and citation omitted).

the motion are based on "materials and information obtained in the discovery process." (Dkt. 10, PDF at 14, JIMS No. 161, PDF at 7). What "materials and information" Wilson's counsel was relying upon for the specific claim that Wilson was carrying the pistol for self-defense was never specified. More importantly, though, the alleged "materials and information" were not made part of the record. The record, accordingly, is completely devoid of any information to support the circuit court's factual finding.

The circuit court's clearly erroneous factual finding, moreover, was not harmless. The primary case upon which the circuit court based its decision that the relevant provisions of Chapter 134 are unconstitutional as applied to Wilson was Bruen, *supra*. (See, Dkt. 10, PDF at 15, JIMS No. 179, PDF at 2-3, citing Bruen). Bruen, in turn, held ". . . the Second and Fourteenth Amendments protect an individual's right to carry a handgun ***for self-defense outside the home***." Bruen, 142 S.Ct. at 2122 (emphasis added). The circuit court apparently recognized the limitations of the firearm carry right created by Bruen, by stating in its conclusion of law ¶ 3 that Wilson ". . . was carrying the firearm on the trail for self-defense purposes - conduct protected by the Second Amendment." (Dkt. 10, PDF at 15, JIMS No. 179, PDF at 3). But as demonstrated *supra*, this factual finding had no basis in the record. Thus, the circuit court's conclusion that Wilson was engaging in "conduct protected by the Second Amendment" similarly lacked any basis. Moreover, while

Bruen holds that the Second Amendment "protect[s] the right of an ordinary, law abiding citizen . . . to carry handguns publicly for self-defense," Bruen, 142 S.Ct. at 2122, Wilson was not acting as a "law abiding citizen" at the time of this incident. Rather, he was illegally trespassing. Nothing in Bruen - or any other case - can be interpreted as providing a right to carry a handgun while committing a crime. See, People v. Gonzalez, 291 Cal. Rptr. 3d 127, 130 (Cal. App. 2022) ("We are aware of no court decision holding that the United States Constitution protects a right to carry a gun while simultaneously engaging in criminal conduct. . . ."); United States v. Perez-Garcia, No. 22-CR-1581-GPC, 2022 WL 17477918, at *3 (S.D. Cal. Dec. 6, 2022) ("a reasonable interpretation of Bruen is that it does not obfuscate the requirement that, as a threshold matter, to receive Second Amendment protection, one must first and foremost be law-abiding[.]")

These errors, standing alone, warrant vacatur of circuit court's order. There are several other ways in which the circuit court erred, however, which will be discussed *infra*.

B. THE CIRCUIT COURT'S APPLICATION OF *BRUEN* WAS ERRONEOUS.

The circuit court erred in its application of Bruen, *supra,* in several ways. Thus, a discussion of what Bruen held - and did not hold - is necessary.

In Bruen, the plaintiffs challenged a New York state law which ". . . conditions issuance of a license to carry [a firearm] on a citizen's showing of some additional special need."

Bruen, 142 S.Ct. at 2122. The Supreme Court explained New York's system as follows:

> A license applicant who wants to possess a firearm at home (or in his place of business) must convince a "licensing officer"—usually a judge or law enforcement officer—that, among other things, he is of good moral character, has no history of crime or mental illness, and that "no good cause exists for the denial of the license." §§ 400.00(1)(a)-(n) (West Cum. Supp. 2022). If he wants to carry a firearm outside his home or place of business for self-defense, the applicant must obtain an unrestricted license to "have and carry" a concealed "pistol or revolver." § 400.00(2)(f). To secure that license, the applicant must prove that "proper cause exists" to issue it.

Id., at 2122-23. The Court struck down the "proper cause" requirement to obtain a carry license, finding that ". . . New York's proper-cause requirement violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms." Id., at 2156.

Of particular importance to this case, Bruen did not hold that a State may not condition carrying of a firearm on obtaining a carry license. Indeed, the United States Supreme Court readily acknowledged the government's ability to impose reasonable restrictions on the persons, places, types, purposes, and manner in which firearms can be carried. As Justice Kavanaugh's concurrence in Bruen provides: "the Court's decision [in Bruen] does not prohibit States from imposing licensing requirements for carrying a handgun for self-defense." Id. at 2162 (Kavanaugh, J., concurring); See also Id. (Kavanaugh, J., concurring). ("Properly interpreted, the Second Amendment allows

a 'variety' of gun regulations.") The Bruen majority likewise noted that many states have licensing regimes which are unaffected by Bruen because they do not impose a "proper cause" condition on receiving a carry permit. Id., at 2124. Further, the Bruen court explicitly stated that the right to bear commonly used arms in public is "subject to certain reasonable, well-defined restrictions." Id., at 2156. See, also, Haw. Atty Gen., Op. No. 22-02, 2022 WL 2920096, at *1 (Hawaii A.G. July 7, 2022) ("Following Bruen, the language in Hawai‘i Revised Statutes ("HRS") § 134-9 requiring that an applicant '[i]n an exceptional case . . . show[] reason to fear injury to the applicant's person or property" in order to obtain a concealed carry license should no longer be enforced. ***All other statutory requirements for obtaining a concealed carry license are unaffected by Bruen, and . . . remain in full force and effect.***") (Emphasis added.).

Consistent with this principle, the cases preceding Bruen have acknowledged that reasonable regulations on firearms are within the ambit of the Second Amendment. As the Court stated in District of Columbia v. Heller:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose . . . For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues . . . Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on

> the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

128 S.Ct. 2783, 2816-17 (2008). Two years later, the Supreme Court reaffirmed the government's ability to regulate firearms in McDonald v. City of Chicago, Ill., when it restated Heller's recognition of constitutionally valid regulations under the Second Amendment. 130 S.Ct. 3020, 3047 (2010) (plurality opinion) ("We repeat [the assurances regarding the validity of government regulations discussed in Heller] here. Despite municipal respondents' doomsday proclamations, incorporation [of the Second Amendment to the States] does not imperil every law regulating firearms.")

Put simply, the Supreme Court has ***never*** found a right to carry a firearm without a duly issued carry license, nor has it found a right to carry a firearm that was obtained without a proper permit. With this background in mind, the circuit court's erroneous application of Bruen is discussed *infra*.

C. THE CIRCUIT COURT ERRED BY FINDING HRS §§ 134-25 AND 134-27 DO NOT MAKE ANY EXCEPTIONS FOR CARRYING FIREARMS OUTSIDE THE HOME.

In its conclusion of law ¶ 6, the Circuit Court found that HRS §§ 134-25 and 134-27 contain ". . . no exception for carrying firearms outside the home for self defense purposes." (Dkt. 10, PDF at PDF at 15, JIMS No. 179, PDF at 3). This conclusion was both plainly wrong and a clear abuse of discretion. Both section 134-25 and section 134-27 begin the

same way, prohibiting the carrying of pistols and ammunition, respectively, "[e]xcept as provided in sections 134-5 and 134-9[.]" HRS § 134-9 permits the carrying of firearms outside the home with a duly issued license.[2] Thus, it was clearly incorrect for the circuit court to conclude there are "no exceptions" to the place to keep laws.[3]

The circuit court's erroneous conclusion on this point was invited by the misleading way Wilson's motion to dismiss quoted HRS § 134-25, removing the HRS § 134-9 exception quoted above: "'[A]ll firearms shall be confined to the possessor's place of business, residence, or sojourn[.]'" Dkt, 10, PDF at 14, JIMS No. 161, PDF at 5 (brackets in original). Thus, both Wilson and the circuit court proceeded as if the carry license exception did not exist. This error led directly to the circuit court's incorrect application of Bruen.

As detailed *supra*, Bruen plainly allows States to condition firearm carry on obtaining a license to do so. It merely determined that New York's requirements to obtain such a license were too strict. Bruen, 142 S.Ct. at 2156. Bruen, accordingly, is only relevant with regard to determining what

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[2] HRS § 134-5 contains exceptions related to carrying firearms for target shooting and hunting.

[3] For this same reason, the circuit court's conclusion of law ¶ 5 was incorrect, insofar as it lists the places a person may take a handgun or ammunition under HRS §§ 134-25 and 134-27, implying the list is exclusive while ignoring the existence of the carry license exception. (Dkt. 10, PDF at 15, JIMS No. 179, PDF at 3).

requirements a State may impose on obtaining a carry license; it does not overturn Hawaii's place to keep statutes. See, People v. Williams, 2022 WL 3440484 at *1 (N.Y. Sup. Ct. Aug. 5, 2022) ("[T]he Bruen decision has no bearing on the constitutionality of the statutes criminalizing possession of a firearm because, as expressly stated in Bruen, states maintain the right under the Federal Constitution to require gun licenses for lawful possession.")[4]

In any case, the circuit court's finding that sections 134-25 and 134-27 were unconstitutional as applied to Wilson was based on an obviously faulty premise; i.e., that the place to keep statutes have no exceptions. As such exceptions exist (i.e., HRS § 134-9), the next question that one could conceivably ask is whether the exceptions run afoul of Bruen. As will be discussed *infra*, however, Wilson failed to raise such a challenge below, and would lack standing to do so regardless, due to his failure to even apply for a permit.

D. WILSON DID NOT ACTUALLY CHALLENGE THE REQUIREMENTS OF HRS § 134-9 UNDER *BRUEN*.

As noted *supra*, Wilson based his motion to dismiss on the patently false premise that there are ***no*** exceptions to

[4] For this reason, the circuit court's attempt to apply Bruen as set forth in conclusion of law ¶ 4 was error; it is apparently based on the erroneous assumption that Wilson's unlicensed carrying an unregistered firearm (while ilegally trespassing) was "constitutionally protected conduct" under Bruen. (Dkt. 10, PDF at 15, JIMS No. 179, PDF at 3). Bruen simply does not provide a right to carry a firearm without first registering that firearm and obtaining the appropriate license to carry it. Wilson's conduct was, accordingly, not protected.

Hawaii's place to keep statutes. As a result of this erroneous approach, Wilson's motion did not raise any argument for dismissal based on the interplay between Bruen and HRS § 134-9. Wilson, in fact, failed to even mention HRS § 134-9 in either his motion or reply memorandum. (Dkt. 10, PDF at 14-15, JIMS No. 161 and 165).

Given that: a) Bruen stands only for the proposition that States may not make carry licensure too onerous, and b) Wilson failed to claim that the applicable carry licensure statute - HRS § 134-9 - imposes requirements that violate Bruen, there was no basis for the circuit court to find that HRS §§ 134-25 and 134-27 are unconstitutional under Bruen. Accordingly, the circuit court's conclusion of law ¶ 7, ruling that the State had "not met its burden under the Bruen test" was a clear misapplication of Bruen.

Compounding the circuit court's error on this point is that HRS § 134-9 contains a number of requirements that are completely permissible under Bruen. Under HRS § 134-9(b), the requirements to receive a carry license are that the applicant:

> (1) Be qualified to use the firearm in a safe manner;
>
> (2) Appear to be a suitable person to be so licensed;
>
> (3) Not be prohibited under section 134-7 from the ownership or possession of a firearm; and
>
> (4) Not have been adjudged insane or not appear to be mentally deranged.

Id.[5]

As noted *supra*, the Supreme Court has held repeatedly that restrictions on felons and the mentally ill possessing firearms are constitutional. See, Heller, 128 S.Ct. at 2816-17; Bruen, 142 S.Ct. at 2162 (Kavanaugh, J., concurring); McDonald, 130 S.Ct. at 3047.

While Wilson may claim that the "appear to be a suitable person" requirement under subsection (2) runs afoul of Bruen, the issue is that, due to his failure to apply for a permit, Wilson did not demonstrate that he met all the other plainly constitutional requirements to obtain a carry license. He did not demonstrate that he was qualified to handle a firearm, that he was not a felon or fugitive, and that he was not insane or mentally deranged. *Cf.*, Somlo v. C. A. B., 367 F.2d 791, 793 (7th Cir. 1966) ("[A] pilot may not be permitted to disregard licensing requirements designed to insure technical skill and which have a substantial and close relationship to public safety. Therefore, even if the petitioner had been fully qualified for a license in December 1962, and there is no way of knowing that he was qualified, he was not justified in ignoring the legal requirements for a license."); Id. (a person may not "disregard . . . license requirements" since he "may not become a law unto himself[.]")

[5] HRS § 134-7 prohibits, *inter alia*, fugitives, felons, persons convicted of a crime of violence, certain mentally ill persons, and persons subject to certain protective orders from owning, possessing, or controlling firearms.

The State must be permitted to enforce these requirements in order to keep firearms out of the hands of dangerous individuals; Wilson's decision not to even seek a permit should not allow him to escape the consequences of bypassing these important, constitutionally-permissible statutory requirements. See, e.g., People v. Caldwell, 173 N.Y.S.3d 918, 920 (N.Y. Sup. Ct. 2022) ("[S]ince the issuance of Bruen, several courts of coordinate jurisdiction have denied motions to dismiss, finding that Bruen does not preclude the prosecution of unlawful possession of a firearm, where, as here, a defendant did not previously apply for, and was denied, a license.") (citations omitted).

E. WILSON LACKS STANDING TO CHALLENGE HRS § 134-9.

Even if Wilson had brought a challenge to HRS § 134-9 and Hawaii's carry licensing system under Bruen, he would have lacked standing to do so for one simple reason: he never applied for a carry permit.[6]

Wilson's lack of standing is made clear by State v. Armitage, 132 Hawai`i 36, 319 P.3d 1044 (2014). Wilson cited Armitage in his reply memorandum below as supporting his claim that he had standing (Dkt. 10, PDF at 15, JIMS No. 165), but

[6] The circuit court's conclusion of law ¶ 1 was erroneous, insofar as it found Wilson had standing to challenge HRS §§ 134-25 and 134-27; his standing to challenge those provisions was not the issue. As detailed *supra*, Wilson could only mount a challenge under Bruen by attacking HRS § 134-9. He failed to do so.

Armitage actually shows that Wilson lacks standing to challenge the carry license system.

In Armitage, the defendants were charged with entry in the Kaho`olawe reserve without authorization. Id., at 41, 319 P.3d at 1049. The Court, *sua sponte*, analyzed whether the defendants had standing to challenge the constitutionality of the controlling regulations. Id., at 55-56, 319 P.3d at 1063-64. The Court concluded that the defendants did have standing to challenge the regulation which barred entry to the reserve without authorization, but explained they did *not* have standing to challenge HAR § 13-261-11, the regulation which controlled the process for obtaining an entry permit:

> To the extent that Petitioners challenge HAR § 13-261-11 as unconstitutional, Petitioners would lack standing to do so, inasmuch as they never followed the prescribed procedures, and thus were not subject to HAR § 13-216-11. Since they never attempted to use the application procedure, they cannot claim that the specifics of the application procedures under HAR § 13-216-11, including review by a "cultural practitioner, HAR § 13-216-11(f), are unconstitutional as applied to them . . . ***Had Petitioners attempted to follow the application process, then they would have had standing to challenge the constitutionality of HAR § 13-261-11. However, those are not the facts presented by this case.***

Id., at 55-56, 319 P.3d at 1063-64 (emphasis added).

Here, Wilson has never claimed he applied for a carry license under HRS § 134-9. Just as the Armitage, where the defendants lacked standing to challenge the permitting regulation they never applied under, Wilson lacks standing to challenge HRS § 134-9.

Other jurisdictions, applying Bruen under similar circumstances, have found defendants who failed to apply for a carry license lack standing to challenge the relevant licensing regime. In People v. Rodriguez, 171 N.Y.S.3d 802 (N.Y. Sup. Ct. 2022), the defendant was indicted for, *inter alia*, criminal possession of a weapon. Id., at 804. He moved to dismiss, based on Bruen having struck down New York's carry license system. Id. The court rejected that challenge due to the defendant's failure to seek a license:

> Defendant does not claim to have a license. He does not claim to have sought a license. He does not claim to have been denied a license, either fairly or unfairly, whether because of a failure to establish a special need or for some other reason (see e.g. Penal Law § 400.00[1][c]-[e] [establishing ineligibility for firearm license if, for example, applicant has been convicted anywhere of a felony or serious offense; is a fugitive from justice; or is an unlawful user of or addicted to any controlled substance]). On that basis alone, defendant's challenge must fail.

Id. As the court in Rodriguez explained, ". . . ***having failed to seek a license, [the defendant] lacks standing to bring any challenge to the licensing regime.***" Id., at 805 (emphasis added). The same is true of Wilson. He never sought a license to carry, and therefore lacks standing to challenge HRS § 134-9.

Another recent New York case reached the same result. In People v. Brown, 2022 WL 2821817 (Ny.Sup. July 15, 2022), the court explained why Bruen did not mandate dismissal of the weapon charges against the defendant:

> Here, defendant's continued prosecution for publicly carrying a concealed semi-automatic unlicensed handgun does not violate the Second Amendment. First, unlike

> the petitioners in Bruen, he has not demonstrated, let alone even alleged, that he ever applied for any type of handgun license, let alone a concealed public carry permit. As the People correctly point out, the Supreme Court did not invalidate all of New York's carry-permit licensing requirements. Indeed, the Court recognized that New York's requirements that even an applicant for a permit to possess a weapon in their home or place of business must demonstrate that they are "of good moral character," that they have "no history of mental illness" (a "red flag" law), and that they have no criminal history, conditions that raise no constitutional concerns. . . . ***Having "failed to apply for a gun license in New York, [defendant therefore] lacks standing" to challenge his prosecution based on the limited finding in Bruen that part of the licensing law that existed at the time of his arrest is unconstitutional.***

Id., at *3 (emphasis added, brackets in original, some citations omitted). Defendant Wilson is in exactly the same position as Brown; he failed to apply for a carry license and there is no indication he even obtained a permit to acquire the firearm he was carrying.

People v. Williams, *supra*, dealt with another defendant who failed to even apply for a carry license. Following the example of Brown and Rodriguez in rejecting the defendant's attempt to have the charges dismissed, the court ruled:

> ***This Court joins the chorus of other judges in holding that the Bruen decision does not preclude the prosecution for unlawful possession of a firearm of a defendant who did not previously apply for, and was denied, a license*** (People v. Brown, Sup Ct Bronx County, July 15, 2022, Fabrizio, J., Ind. No. 71673/22, 2022 WL 2821817); People v. Rodriguez, Sup. Ct. New York County, 2022, --- N.Y.3d ----, 171 N.Y.S.3d 802, --- N.E.3d ----; People v Monroe, Sup Ct Bronx County, July 14, 2022, Clancy, J., Ind. No. 232/2021).

Williams, 2022 WL 3440484 at *1 (emphasis added).

The California Court of Appeals very recently reached a similar conclusion in People v. Velez, 85 Cal.App.5th 957, 302 Cal.Rptr.3d 88 (Cal.App. 5th Dist. 2022), *as modified* (Dec. 14, 2022). In Velez, the defendant was charged with, *inter alia*, carrying a loaded firearm in public as an active participant in a criminal street gang under Cal. Pen. Code § 25850. Id., 302 Cal.Rptr.3d at 91. He argued that ". . . Bruen rendered unconstitutional California's licensing scheme . . . and — by extension — section 25850, which criminalizes carrying a loaded firearm in public[.]" Id.

The court in Velez rejected this challenge, explaining that:

> [U]nlike the petitioners in Bruen, the record does not show, nor does [defendant] claim, that he applied for and was denied a license to possess the gun in question. (See U.S. v. Decastro (2d Cir. 2012) 682 F.3d 160, 164 [" 'As a general matter, to establish standing to challenge an allegedly unconstitutional policy, a plaintiff must submit to the challenged policy.' "].) Thus, he lacks standing to challenge the constitutionality of California's licensing scheme.

Id., 302 Cal.Rptr.3d at 106 (footnote omitted).

The results in these cases are in complete harmony with this Court's decision in Armitage; all hold that failure to apply for a permit results in the defendant lacking standing to challenge the permitting statute. *Compare*, Armitage, 132 Hawai`i at 55-56, 319 P.3d at 1063-64; Rodriguez, 171 N.Y.S.3d at 804-05; Williams, 2022 WL 3440484 at *1; Velez, 302 Cal.Rptr.3d at 106.

It also bears mentioning that Bruen does not compel a different result than Armitage, Rodriguez, Brown, Williams, and

Velez because the plaintiffs in Bruen, Nash and Koch, both actually applied for carry licenses:

> In 2014, Nash applied for an unrestricted license to carry a handgun in public. Nash did not claim any unique danger to his personal safety; he simply wanted to carry a handgun for self-defense. In early 2015, the State denied Nash's application for an unrestricted license but granted him a restricted license for hunting and target shooting only. In late 2016, Nash asked a licensing officer to remove the restrictions, citing a string of recent robberies in his neighborhood. After an informal hearing, the licensing officer denied the request. The officer reiterated that Nash's existing license permitted him "to carry concealed for purposes of off road back country, outdoor activities similar to hunting," such as "fishing, hiking & camping etc." App. 41. But, at the same time, the officer emphasized that the restrictions were "intended to prohibit [Nash] from carrying concealed in ANY LOCATION typically open to and frequented by the general public." Ibid.
>
> Between 2008 and 2017, Koch was in the same position as Nash: He faced no special dangers, wanted a handgun for general self-defense, and had only a restricted license permitting him to carry a handgun outside the home for hunting and target shooting. In late 2017, Koch applied to a licensing officer to remove the restrictions on his license, citing his extensive experience in safely handling firearms. Like Nash's application, Koch's was denied, except that the officer permitted Koch to "carry to and from work."

Bruen, 142 S.Ct. at 2125.

Unlike Wilson, the Bruen plaintiffs did not simply flout the law and carry firearms without a license to do so. Instead, they attempted to obtain carry licenses. Then, after being denied licenses, they filed suit and put the matter before the courts to determine whether New York's licensing scheme was constitutional. This is the proper approach; what Wilson did here is not.

Indeed, the circuit court's decision on this point amounts to an endorsement of self-help. Such an approach should not be condoned in light of the serious risk to public safety posed by firearms. This principle is illustrated by People v. Harty, 173 Cal.App.3d 493, 500, 219 Cal. Rptr. 85, 88 (Cal.App. 1985). There, the court concluded ". . . that if a previously convicted felon desires to obtain a firearm, he should first challenge the validity of the prior conviction by a motion to vacate the conviction in the court that entered the judgment . . . But he may not resort to self help by first obtaining and possessing the firearm, and thereafter try to assert the invalidity of the prior conviction as a defense to a prosecution." Id. While the instant case involves obtaining a carry license as opposed to having a conviction set aside, the principle is the same: individuals should not be encouraged to obtain firearms in violation of law as a means of self help. Just as the defendant in Harty should have attempted to have his conviction set aside before obtaining a gun, so too should have Wilson applied for a carry license before simply deciding to carry an unregistered firearm whenever and wherever he pleased. He did not do so, and the State should accordingly be able to enforce the place to keep statutes against him. See, Brown, 2022 WL 2821817, at *4 ("The petitioners in Bruen did the right thing; they challenged the law, but never violated the Penal Law. The public policy and public safety consequences of dismissing this and perhaps all cases en masse where defendants have been charged

with illegal possession of an unlicensed gun in public places is unwarranted, under any legal or historical analysis.").

V. RELEVANT STATUTES AND RULES.

See Appendix "B".

VI. CONCLUSION.

The circuit court erred when it granted Wilson's motion to dismiss. Bruen does not render Hawaii's place to keep statutes unconstitutional, and Wilson's did not actually challenge Hawaii's carry licensing system. Moreover, Wilson's failure to even apply for a carry license deprives him of standing to challenge HRS § 134-9. Accordingly, the State respectfully requests that the judgment below be reversed.

DATED: Wailuku, Hawaii, January 11, 2023.

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

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

VII. STATEMENT OF RELATED CASES.

The following case is related to this matter, insofar as it involves application of the Bruen decision to HRS § 134-25: *State v. Michael Elefante*, 2CPC-22-0000261. Therein, the circuit court of the second circuit recently dismissed a charge under HRS § 134-25 brought by the State, and the State anticipates it will appeal.

APPENDIX "A"

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In the Circuit Court of the Second Circuit

State of Hawai'i

State of Hawai'i vs. **Christopher L. Wilson**	2CPC-17-964(1) Order Granting Defendant's Motion to Dismiss Counts 1 & 2 Hon. Judge Kirstin M. Hamman

Order Granting Defendant's Motion to Dismiss Counts 1 & 2

The Court, having considered Defendant's Motion to Dismiss Counts 1 & 2 (Dkt. No. 161) and the relevant pleadings, the record in this case, and the arguments of counsel at the hearing held on August 17, 2022, enters the following:

Findings of Fact

1. On December 8, 2017, the State of Hawai'i filed the Felony Information in this case. In Count 1, the prosecution charged Defendant with the offense of "place to keep a pistol or revolver" in violation of Hawai'i Revised Statutes (HRS) § 134-25(a). In Count 2 Defendant was charged with the offense of "place to keep" ammunition in violation of HRS § 134-27(a). Count 3 averred unlawful permit to acquire and Count 4 avers criminal trespass in the first degree.

I do hereby certify that the foregoing is a full, true and correct copy of the official court record of the Courts of the State of Hawai`i.
Dated at: Wailuku, Hawai`i 11-JAN-2023, /s/ Sandy S. Kozaki, Clerk of the Second Judicial Circuit, State of Hawai`i

2. In support of the Felony Information, Officer Manuel Sorcy declared that on the night of December 6, 2017, Duane Ting located Defendant and other people on his property in the mountains near Maalaea, Hawai'i. They were hiking and gazing at the moon. When the police arrested Defendant, he told them he a weapon in his front waist band. Police retrieved a Phoenix Arms .22 LR caliber pistol with ammunition.

3. On July 29, 2022, Defendant moved to dismiss Counts 1 and 2. Defendant asserted[1] that he was hiking on the mountain trail looking at the moon and Native Hawaiian plants. He was carrying the pistol for self-defense purposes. He also asserted that Ting was armed with an AR-15 assault rifle when he was rounded up with the other hikers.

Conclusions of Law

1. Counts 1 and 2 aver violations of the place-to-keep statutes in HRS §§ 134-25(a) and 134-27(a). Defendant has standing to challenge the constitutionality of the application of these statutes. *State v. Armitage*, 132 Hawai'i 36, 55, 319 P.3d 1044, 1063 (2014).

2. A person's right to carry and bear firearms for self-defense purposes is an individual right protected by the Hawai'i and United States Constitutions. U.S. Am. II; Haw. Const. Art. I, Sec. 17. *District of Columbia v. Heller*, 554 U.S. 570, 595, 628 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010). This right extends outside the home. *New York State Rifle & Pistol Assn., Inc. v. Bruen*, __ U.S. ___, 142 S.Ct. 2111, 2199 (2022).

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[1] Defendant's factual assertions are based on the declaration of counsel, which relies on materials and information obtained from the prosecution in the discovery process.

3. Defendant was carrying the firearm on the trail for self-defense purposes—conduct protected by the Second Amendment. *Id. See also District of Columbia v. Heller*, 554 U.S. at 629-630.

4. When statutes infringe upon constitutionally protected conduct, the prosecution must show that the statute "is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command." *Bruen*, 142 S.Ct. at 2126.

5. HRS §§ 134-25(a) and 134-27(a) mandate that handguns and ammunition "shall be confined to the possessor's place of business, residence, or sojourn[.]" A person may only transport unloaded firearms and ammunition locked in a case to a place of repair, a target range, a licensed dealer's place of business, firearms show or exhibit, a formal hunter or firearm use training or instruction, or police station. *Id.*

6. The statute makes no exceptions for carrying firearms outside the home for self-defense purposes. *Id.*

7. The prosecution has not met its burden under the *Bruen* test. The application of HRS §§ 134-25(a) and 134-27(a) in this case infringes on Defendant's constitutional right to bear and carry a firearm for self-defense purposes.

Order

It is hereby ordered, adjudged, and decreed that Defendant's Motion to Dismiss Counts 1 and 2 is granted. Counts 1 and 2 are dismissed with prejudice.

Dated: Wailuku, Maui, Hawai'i AUGUST 30, 2022.

Judge in the Above-Entitled Case

CIRCUIT COURT SECOND CIRCUIT SEAL STATE OF HAWAII

Approved as to Form:

Sally A. Tobin, Esq.
Deputy Prosecuting Attorney

APPENDIX "B"

APPENDIX "B"

RELEVANT STATUTES

HAWAI`I REVISED STATUTES

§ 134-9. Licenses to carry

(a) In an exceptional case, when an applicant shows reason to fear injury to the applicant's person or property, the chief of police of the appropriate county may grant a license to an applicant who is a citizen of the United States of the age of twenty-one years or more or to a duly accredited official representative of a foreign nation of the age of twenty-one years or more to carry a pistol or revolver and ammunition therefor concealed on the person within the county where the license is granted. Where the urgency or the need has been sufficiently indicated, the respective chief of police may grant to an applicant of good moral character who is a citizen of the United States of the age of twenty-one years or more, is engaged in the protection of life and property, and is not prohibited under section 134-7 from the ownership or possession of a firearm, a license to carry a pistol or revolver and ammunition therefor unconcealed on the person within the county where the license is granted. The chief of police of the appropriate county, or the chief's designated representative, shall perform an inquiry on an applicant by using the National Instant Criminal Background Check System, to include a check of the Immigration and Customs Enforcement databases where the applicant is not a citizen of the United States, before any determination to grant a license is made. Unless renewed, the license shall expire one year from the date of issue.

(b) The chief of police of each county shall adopt procedures to require that any person granted a license to carry a concealed weapon on the person shall:

(1) Be qualified to use the firearm in a safe manner;
(2) Appear to be a suitable person to be so licensed;
(3) Not be prohibited under section 134-7 from the ownership or possession of a firearm; and
(4) Not have been adjudged insane or not appear to be mentally deranged.

(c) No person shall carry concealed or unconcealed on the person a pistol or revolver without being licensed to do so under this section or in compliance with sections 134-5(c) or 134-25.

(d) A fee of $10 shall be charged for each license and shall be deposited in the treasury of the county in which the license is granted.

§ 134-25. Place to keep pistol or revolver; penalty

(a) Except as provided in sections 134-5 and 134-9, all firearms shall be confined to the possessor's place of business, residence, or sojourn; provided that it shall be lawful to carry unloaded firearms in an enclosed container from the place of purchase to the purchaser's place of business, residence, or sojourn, or between these places upon change of place of business, residence, or sojourn, or between these places and the following:

(1) A place of repair;
(2) A target range;
(3) A licensed dealer's place of business;
(4) An organized, scheduled firearms show or exhibit;
(5) A place of formal hunter or firearm use training or instruction; or
(6) A police station.

“Enclosed container” means a rigidly constructed receptacle, or a commercially manufactured gun case, or the equivalent thereof that completely encloses the firearm.

(b) Any person violating this section by carrying or possessing a loaded or unloaded pistol or revolver shall be guilty of a class B felony.

[§ 134-27]. Place to keep ammunition; penalty

(a) Except as provided in sections 134-5 and 134-9, all ammunition shall be confined to the possessor's place of business, residence, or sojourn; provided that it shall be lawful to carry ammunition in an enclosed container from the place of purchase to the purchaser's place of business, residence, or sojourn, or between these places upon change of

place of business, residence, or sojourn, or between these places and the following:

(1) A place of repair;

(2) A target range;

(3) A licensed dealer's place of business;

(4) An organized, scheduled firearms show or exhibit;

(5) A place of formal hunter or firearm use training or instruction; or

(6) A police station.

“Enclosed container” means a rigidly constructed receptacle, or a commercially manufactured gun case, or the equivalent thereof that completely encloses the ammunition.

(b) Any person violating this section shall be guilty of a misdemeanor.