SCAP No. 22-561

In the Supreme Court of the State of Hawai‘i

State of Hawai‘i Petitioner-Appellant-Plaintiff, vs. **Christopher L. Wilson** Respondent-Appellee-Defendant.	CAAP 22-561 2CPC-17-964 Appeal from Findings of Fact, Conclusions of Law, and Order Granting Defendant's Motion to Dismiss Counts 1 & 2. Hon. Judge Rhonda I. L. Loo Hon. Judge Blaine J. Kobayashi Hon. Judge Kirstin M. Hamman

Answering Brief

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Christopher L. Wilson faced eleven years of imprisonment for carrying a loaded pistol. When he asserted that he carried it to protect himself, the prosecution's only response was that he lacked standing to bring a constitutional challenge. The lower court dismissed the charges. Mr. Wilson had standing to challenge statutes he was accused of violating and the prosecution made no effort to rebut his constitutional claim. The dismissal must be affirmed.

Statement of the Case

Petitioner, State of Hawai'i, charged Mr. Wilson with unlawfully carrying or possessing a handgun and ammunition in violation of Hawai'i Revised Statutes (HRS) §§ 134-25 and 134-27. Record on Appeal (ICA Dkt. No. 10 at 4[1] & Cir. Ct. Dkt. No. 1 at 2-3). The charges arose from an incident in the West Maui Mountains on the night of December 6, 2017.

Duane Ting and his men spotted people hiking on a trail cutting through his property. ICA Dkt. No. 10 at 4; Cir. Ct. Dkt. No. 2 at 3-4. Mr. Ting, armed with an AR-15 assault rifle, and his men rounded up three men and brought them to the highway, where the police were waiting. Cir. Ct. Dkt. No. 2 at 3-4 and Cir. Ct. Dkt. No. 161 at 2. One of the men explained that they were hiking to look at the moon and Native Hawaiian plants. *Id.*

About ten minutes later, Mr. Ting went back onto the trail, found Mr. Wilson, and brought him to the police. *Id.* Mr. Wilson told the police he was armed. Cir. Ct. Dkt. No. 2 at 3. The police found a loaded pistol tucked in the waist band of his pants. *Id.*

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[1] The page numbers refer to the page numbers as they appear in pdf format.

On May 14, 2021, Mr. Wilson moved to dismiss the charges on the grounds that his conduct—carrying the firearm and ammunition—was protected by the Second Amendment to the United States Constitution and Article I, Section 17 of the Hawai‘i Constitution. ICA Dkt. No. 10 at 12; Cir. Ct. Dkt. No. 132. Relying on *Young v. Hawai‘i*, 992 F.3d 765 (9th Cir. 2021), the Circuit Court of the Second Circuit[2] denied the motion. ICA Dkt. No. 10 at 12; Cir. Ct. Dkt. No. 139.

After that, the Supreme Court of the United States issued its decision in *New York State Rifle & Pistol Assn., Inc. v. Bruen*, ___ U.S. ___, 142 S.Ct. 2111 (2022), and then it vacated *Young v. Hawai‘i. See id.*, 142 S.Ct. 2895 (2022). Mr. Wilson filed a second motion to dismiss. ICA Dkt. No. 10 at 13; Cir. Ct. Dkt. No. 161.

Mr. Wilson again asserted that he carried the pistol for self-defense purposes. *Id.* at 5. He argued that his conduct was protected by the Second Amendment and the prosecution could not meet its burden under *Bruen*. *Id.* The prosecution did not dispute Mr. Wilson's factual and legal claims. ICA Dkt. No. 10 at 13; Cir. Ct. Dkt. No. 163. Instead, it argued that Mr. Wilson did not have standing to bring the constitutional challenge because he did not apply for a license to carry the firearm. Cir. Ct. Dkt. No. 163 at 4.

The circuit court,[3] based on the pleadings and the arguments of counsel, granted the motion to dismiss. *See* Transcript of Proceedings on August 17, 2022 (ICA Dkt. No. 14) at 13-14. Both Mr. Wilson and the prosecution lodged proposed findings of fact and conclusions of law.

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[2] The Honorable Judge Blaine J. Kobayashi heard the first motion to dismiss and issued the order denying the motion.

[3] The Honorable Judge Kirstin M. Hamman presided over the second motion to dismiss and subsequent proceedings below.

ICA Dkt. No. 10 at 15; Cir. Ct. Dkt. No. 168 & 169. The prosecution incorporated Mr. Wilson's undisputed factual assertions. ICA Dkt. No. 10 at 15; Cir. Ct. Dkt. No. 169. The circuit court adopted Mr. Wilson's version. ICA Dkt. No. 10; Cir. Ct. Dkt. No. 179.

The prosecution filed a motion to reconsider the dismissal. ICA Dkt. No. 10 at 15; Cir. Ct. Dkt. No. 175. The prosecution did not challenge the evidentiary basis for the dismissal and did not attempt to justify the application of HRS §§ 134-25 and 134-27 under *Bruen*. It re-raised the standing argument that had been rejected by the circuit court. *Id.* That motion was denied. ICA Dkt. No. 17; Cir. Ct. Dkt. No. 204.

The prosecution timely appealed from the order dismissing counts 1 and 2.[4] ICA Dkt. No. 1. This Court accepted the case on December 21, 2022. Dkt. No. 11.

Standard of Review

Questions about standing are "reviewed *de novo* under the right/wrong standard." *Wells Fargo Bank, N.A. v. Behrendt*, 142 Hawai'i 37, 41, 414 P.3d 89, 93 (2018). Similarly, questions of constitutional law are also reviewed under the "right/wrong" standard. *State v. Jenkins*, 93 Hawai'i 87, 100, 997 P.2d 13, 26 (2000).

Argument

1. The prosecution's attempt to contest the evidentiary basis for the circuit court's ruling must fail because it was never raised below and has no merit.

The prosecution claims for the first time that there was an insufficient factual basis for the circuit court to conclude that Mr. Wilson's conduct—carrying a handgun on a mountain trail for self-defense purposes—was constitutionally protected. Dkt. No. 13 (Opening Brief) at 6-8. The claim has been waived and is meritless.

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[4] The prosecution did not appeal from the order denying the motion for reconsideration.

This Court adheres to the well-settled rule that **when "a party fails to raise any argument, evidentiary or otherwise, that argument is generally deemed waived."** *State v. Schnabel*, 127 Hawai'i 432, 459 n. 59, 279 P.3d 1237, 1264 n. 59 (2012) (quoting *State v. Moses*, 102 Hawai'i 449, 456, 77 P.3d 940, 947 (2003)). *See also State v. Kikuta*, 125 Hawai'i 78, 89, 253 P.3d 639, 650 (2011) ("the failure to properly raise an issue at the trial level precludes a party from raising that issue on appeal."). The rule applies with equal force against the prosecution. *See State v. Rodrigues*, 67 Haw. 496, 498, 692 P.2d 1156, 1158 (1985) (prosecution precluded from arguing other exceptions to warrant requirement on appeal when it raised only one issue before the trial court); *State v. Gonzalez*, 128 Hawai'i 314, 317, 288 P.3d 788, 791 (2012) (even when prosecution prevails below it still cannot raise new arguments for the first time on appeal); *State v. Apollonio*, 130 Hawai'i 353, 358 n. 7, 311 P.3d 676, 681 n. 7 (2013) (prosecution's argument not raised before lower court deemed waived).

The prosecution's only response to Mr. Wilson's motion to dismiss was that he lacked standing to bring the constitutional challenge. Cir. Ct. Dkt. No. 163. It did not dispute Mr. Wilson's assertion that he was carrying the pistol for self-defense purposes when he was confronted by Mr. Ting, his AR-15, and his men. ICA Dkt. No. 14 at 7-12.

After the circuit court granted the motion, the prosecution resorted to a motion for reconsideration. Cir. Ct. Dkt. No. 172. The prosecution still failed to challenge the evidentiary basis. *Id.* It even recognized in its proposed findings of fact, conclusions of law, and order that Mr. Wilson asserted "his actions were under a claim of self-defense." Cir. Ct. Dkt. No. 170 at 2.

The prosecution had many chances to raise this argument below and failed to do it every time. The prosecution cannot for the first time on appeal contest Mr. Wilson's assertion that he

carried the pistol for self-defense purposes. The argument is waived. *State v. Rodrigues*, 67 Haw. at 498, 692 P.2d at 1158 (the prosecution's "issues not raised at the trial level will not be considered on appeal").

The argument also lacks merit. According to the prosecution, the declaration of counsel attached to the motion to dismiss is insufficient. Opening Brief at 6-7. Not so. Motions requiring "the consideration of facts not appearing of record" must be accompanied by either an affidavit or declaration. Hawai'i Rules of Penal Procedure (HRPP) Rule 47(a). Declarations may serve in lieu of affidavits. HRPP Rule 47(d). *See also State v. Thompson*, 150 Hawai'i 262, 268, 500 P.3d 447, 453 (2021) ("the only HRPP Rule that describes how a declaration in lieu of an affidavit may be made is HRPP Rule 47(d).").

Here, the declaration of counsel attached to Mr. Wilson's motion asserted that factual assertions in the memorandum were true and correct based on counsel's knowledge and belief, and the materials and information provided in the discovery process. Cir. Ct. Dkt. No. 161 at 7. The declaration complies with HRPP Rule 47(d).

The prosecution does the same thing in its memorandum in opposition. Cir. Ct. Dkt. No. 163. In its memorandum in opposition, the prosecution made several factual assertions found nowhere in the record. The prosecution asserted that Mr. Wilson did not apply for a license to carry the firearm and did not "register the firearm in Hawaii as required by statute." *Id.* at 4. The prosecution made passing references to "records from the State of Florida" and a federal agency's "[f]urther investigation" without attaching exhibits. *Id.* These factual assertions were based on the prosecutor's declaration that they were "true and correct to the best of [her] belief[.]" *Id.* at 6.

Both declarations of counsel comport with the requirements in HRPP Rule 47(d). They formed the factual basis for the circuit court to make its ruling pursuant to HRPP Rule 47(a), reject the prosecution's standing argument, and issue the dismissal order. The prosecution's untimely challenge to the evidentiary basis below has been waived and lacks merit.[5]

2. Mr. Wilson had standing to challenge the constitutionality of the prosecution's application of HRS §§ 134-25 and 134-27 because he was accused of violating them and did not have to apply for a license under HRS § 134-9.

The prosecution charged Mr. Wilson with two place-to-keep offenses thereby exposing him to criminal convictions and eleven years of imprisonment. HRS §§ 134-25(b) & 134-27(b). Mr. Wilson was, therefore, free to challenge the constitutionality of these charges in a motion to dismiss. *See State v. Hanapi*, 89 Hawai'i 177, 184, 970 P.2d 485, 492 (1998) ("The preferred method for a defendant to raise a constitutional right in a criminal prosecution is by way of a motion to dismiss.").

Criminal defendants have standing to challenge the constitutionality of the penal statutes they are accused of violating. *State v. Grahovac*, 52 Haw. 527, 532, 480 P.3d 148, 152 (1971) (the "criminally accused has 'standing' to constitutionally challenge only the specific penal sanctions with which he is charged."). "Where restraints imposed act directly on an individual or entity and a claim of specific present objective harm is presented, standing to challenge the constitutionality of an ordinance or statute exists." *State v. Bloss*, 64 Haw. 148, 151, 637 P.2d 1117, 1121 (1981) (citations omitted).

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[5] If the Court overlooks the prosecution's failure to raise the challenge to undisputed factual assertions below and finds merit in its evidentiary challenge, Mr. Wilson respectfully requests that the dismissal order be vacated and remanded to the circuit court so it can conduct an evidentiary hearing on his constitutional claims.

In other words, "[o]ne who would challenge the constitutional validity of a statute must show that as applied to [that person,] the statute is invalid." *State v. Marley*, 54 Haw. 450, 457, 509 P.2d 1095, 1101 (1973) (citations omitted). On the other hand, "a criminal defendant cannot challenge the constitutionality of one subsection of a statute where [the defendant] was charged under a different subsection." *State v. Armitage*, 132 Hawai'i 36, 55, 319 P.3d 1044, 1064 (2014).

Armitage is instructive. The defendants there challenged the constitutionality of two administrative regulations about Kaho'olawe even though they were charged with violating just one. *Id.* at 41 & 55, 319 P.3d at 1049 & 1063. Accordingly, this Court limited review to the regulation they were accused of violating:

> **Because Petitioners were subject to penal liability pursuant to HAR § 13-261-10, they have a claim of specific present objective harm, and therefore have standing to challenge the constitutionality of that regulation. This much is clear.** On the other hand, Petitioners stipulated at trial that they did not make any written application to the commission for the authorization of entrance into and activity within the reserve. This stipulation establishes that Petitioners did not attempt to follow the procedures set forth in HAR § 13-261-11 to obtain lawful entry into the Reserve; Petitioners thus may not have standing to argue that HAR § 13-261-11 is unconstitutional.

Id. at 55, 319 P.3d at 1063 (citations and quotation marks omitted).

Here, Mr. Wilson challenged the constitutionality of HRS §§ 134-25 and 134-27, as it applied to his case. *See State v. Marley*, *supra*. The "present objective harm" was great and undeniable. *State v. Bloss*, *supra*. He faced a criminal conviction and more than a decade of imprisonment. HRS §§ 134-25(b) & 134-27(b). He had standing to challenge the constitutionality of the prosecution's application of the criminal statutes against him.

The prosecution nevertheless insists that because he did not apply for a license under HRS § 134-9, Mr. Wilson could not move to dismiss alleged violations of HRS §§ 134-25 and 134-27. Opening Brief at 16. This makes little sense. Mr. Wilson asserted that he carried the pistol for ordinary self-defense purposes—conduct protected by the Second Amendment to the United States Constitution—and that criminalizing his conduct is unconstitutional. *See infra.*

A license to carry a firearm under HRS § 134-9, however, requires applicants to claim more than ordinary self-defense. An applicant must show that carrying a concealed firearm is based on a "reason to fear injury" to the applicant's person or property as "an exceptional case[.]" HRS § 134-9(a). A license to carry a firearm in the open may only be granted when "the urgency or the need has been sufficiently indicated[.]" *Id.* Even then, licenses are subject to the discretion of the chief of police.[6]

It is unreasonable and unrealistic to require license applications under HRS § 134-9 before courts can hear constitutional challenges to HRS §§ 134-25 and 134-27. Mr. Wilson should not

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[6] The statute may be unconstitutional. Hawai'i was among the six states giving government officers discretion to deny a concealed-carry license discussed in *New York State Rifle & Pistol Assn., Inc. v. Bruen*, ___ U.S. ___, 142 S.Ct. 2111, 2124 (2022). Justice Kavanaugh pointed out that in light of *Bruen*, HRS § 134-9 may be infirm. *Id.* at 2162 (Kavanaugh, J. concurring). Moreover, in *Young v. Hawai'i*, 992 F.3d 765 (9th Cir. 2021), the plaintiff brought a Second Amendment challenge to HRS § 134-9 after his application to carry a firearm for self-defense purposes was denied by the chief of police. *Id.* at 778. The Ninth Circuit upheld the statute. *Id.* at 828. The Supreme Court, however, accepted certiorari, vacated the judgment, and sent the case back to the Ninth Circuit "for further consideration in light of" *Bruen*. *See Young v. Hawai'i*, 142 S.Ct. 2895 (2022). The Ninth Circuit, in turn, remanded to the United States District Court of Hawai'i without analysis. *See id.*, 45 F.4th 1087 (9th Cir. 2022).

The Hawai'i Attorney General has also recognized that police chiefs "should no longer enforce the requirement that an applicant in an exception case show reason to fear injury to the applicant's person or property to obtain a concealed carry license[.]" Attorney General's Opinion No. 22-02 (ag.hawaii.gov/wp-content/uplodas/2022/07/Attorney-General-Opinion-22-02.pdf) (last viewed February 28, 2023). Requiring defendants to apply for licenses pursuant a potentially unconstitutional statute as a prerequisite to challenging other statutes is unreasonable.

have to present an "urgency," "need," or "reason to fear injury" as an "exceptional case" to the chief of police as a prerequisite to filing his motion to dismiss counts 1 and 2.

Moreover, the prosecution's additional standing requirement is unprecedented. *See, e.g., State v. Mendoza*, 82 Hawai'i 143, 154, 920 P.3d 357, 368 (1996) (examining defendant's constitutional challenge to HRS § 134-4 without requiring compliance with licensing scheme); *State v. Kam*, 69 Haw. 483, 495-496, 748 P.2d 372, 379-380 (1988) (defendant had standing to challenge prosecution for sale of pornography without reference to licensing regulations if any); *State v. Hanapi*, 89 Hawai'i at 183, 970 P.3d at 491 (defendant had standing to assert Native Hawaiian rights in motion to dismiss criminal trespass prosecution). It must be rejected.

The prosecution cannot charge people with criminal offenses, expose them to years of imprisonment, and then expect courts to ignore their constitutional challenges. Standing requirements are not intended to deprive people from raising applicable constitutional claims:

> We have . . . stated on many occasions that **the "touchstone" of this court's notion of standing is the needs of justice, and that standing requirements should not be barriers to justice.** Rather . . . we have endorsed the view that one whose legitimate interest is in fact injured by illegal action . . . should have standing because justice requires that such a party should have a chance to show that the action that hurts [the party's] interest is illegal.

Sierra Club v. Dept. of Transp., 115 Hawai'i 299, 312, 167 P.3d 292, 319 (2007) (citations and quotation marks omitted).

The prosecution wants to reserve standing for the few people who were denied a license to carry and either have the financial means and perseverance to bring a civil action against the State or went ahead and carried a firearm anyway. This is wrong. "**Complexities about standing are barriers to justice; in removing the barriers the emphasis should be on the needs of**

justice." *Life of the Land v. Land Use Commission*, 63 Haw. 166, 174 n. 8, 623 P.2d 431, 439 n. 8 (1981) (quoting *E. Diamond Head Ass'n v. Zoning Bd. of Appeals*, 52 Haw. 518, 523 n. 5, 479 P.2d 796, 799 n. 5 (1971)). Asserting constitutional rights is not a luxury for the privileged few. The circuit court did not err in refusing to adopt the prosecution's radical departure from the law of standing in Hawai'i.

3. The circuit court correctly applied the *Bruen* test and dismissed counts 1 and 2 because the prosecution made no effort to show how its application of HRS §§ 134-25 and 134-27 in this case was consistent with the nation's tradition of firearms regulation.

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U. S. Const. Am. II; *see also* Haw. Const. Art. I, Sec. 17.

For more than a century, it was understood that the Second Amendment was "a limitation only upon the power of Congress and the National government[.]" *Presser v. Illionis*, 116 U.S. 252, 265 (1886). *See also State v. Mendoza*, 82 Hawai'i at 146, 920 P.2d at 360. It was also understood that the Second Amendment was not a personal right, but a guarantee that states could form militias to suppress insurrection and repel invasion.[7] *United States v. Miller*, 307 U.S. 174, 179 (1939).

These understandings started to change in 2008. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court of the United States struck down a regulation banning the possession of handguns within the home. *Id.* at 574-575 and 635. The Court held for the first time

[7] This Court has not determined if Article I, Section 17 of the Hawai'i Constitution confers an individual right to possess firearms or the collective right for the State to maintain a militia. *See State v. Mendoza*, 82 Hawai'i 143, 154, 920 P.2d 357, 367 (1996).

that the Second Amendment "guarantee[s] the **individual** right to possess and carry weapons in case of confrontation." *Id.* at 594. The Court explained that "the inherent right of self-defense has been central to the Second Amendment right." *Id.* at 628.

Two years later, the Court extended the "right to possess a handgun in the home for purposes of self-defense" to state regulations and statutes through the Fourteenth Amendment. *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010). In doing so, state regulations were now subject to the Supreme Court's new interpretation of the Second Amendment.[8]

The Court reiterated that carrying handguns for self-defense is at the core of the Second Amendment:

> Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller*, we held that **individual self-defense is "the *central component*" of the Second Amendment right.** Explaining that the need for defense of self, family, and property is most acute in the home, we found that this right applies to handguns because they are the most preferred firearm in the nation to keep and use for protection of one's home and family. Thus, we concluded, **citizens must be permitted to use handguns for the core lawful purpose of self-defense.**
>
> *Heller* makes it clear that this right is deeply rooted in this Nation's history and tradition. *Heller* explored the right's origins, noting that the 1689 English Bill of Rights explicitly protected a right to keep arms for self-defense.

Id. at 767-768 (brackets, citations, and quotation marks omitted).

Then came *New York State Rifle & Pistol Assn., Inc. v. Bruen*, ___ U.S. ___, 142 S.Ct. 2111 (2022). The Court clarified that the Second Amendment continues to protect "an individual's right to carry a handgun for self-defense **outside** the home." *Id.* at 2122. The Court reasoned that

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[8] The Hawai'i Constitution may have already adopted the Second Amendment along with the rest of the National Constitution. *See* Haw. Const. Preamble ("The Constitution of the United States of America is adopted on behalf of the people of the State of Hawai'i.").

"**the Second Amendment allows individuals to possess and carry weapons in case of confrontation, and confrontation can surely take place outside the home**." *Id.* at 2135 (citations omitted).

The Court also laid out the test courts must use to determine when state or federal regulations infringes upon a person's right to carry firearms:

> In keeping with *Heller*, we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command.

Id. at 2126. The *Bruen* test has impacted jurisdictions throughout the country.[9]

The prosecution nevertheless refuses to recognize that the *Bruen* test is the law of the land. In response to Mr. Wilson's second motion to dismiss, it did not contest his assertion that his conduct was constitutionally protected. ICA Dkt. No. 10 at 13; Cir. Ct. Dkt. No. 163. Even when the circuit court dismissed counts 1 and 2 and the prosecution filed a motion for reconsideration, it still refused to apply the *Bruen* test. ICA Dkt. No. 10 at 15; Cir. Ct. Dkt. No. 175. It still refuses. It does not even cited the test in its opening brief.

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[9] This Court has held that the rational basis test applies to constitutional challenges to state and local firearm regulations pursuant to Article I, Section 17 of the Hawai'i Constitution. *State v. Mendoza*, 82 Hawai'i at 154, 920 P.2d at 368. That test must yield to *Bruen*. Not only has the Hawai'i Constitution adopted the Second Amendment, *supra* at n. 8, but the Second Amendment is incorporated by the Fourteenth Amendment and is "fully binding on the States[.]" *McDonald v. City of Chicago*, 561 U.S. 742, 785 (2010).

According to the prosecution, the *Bruen* test applies to civil challenges to licensing schemes and goes no further. Opening Brief at 9. The prosecution is wrong. The *Bruen* test is "the constitutional standard" for assessing the constitutionality of government regulations. *See id*, 142 S.Ct. at 2134.

Courts in jurisdictions across the country have duly applied the *Bruen* test to statutes outside firearm licensing schemes. *United States v. Rahimi*, 2023 WL 1459240 (5th Cir. 2023) (applying *Bruen* to federal penal statutes); *Range v. Attorney General*, 53 F.4th 262, 269 n. 6 (3d Cir. 2022) (noting the several federal district courts that have applied *Bruen* to penal statutes); *United States v. Tilotta*, 2022 WL 3924282 (S.D. Calif. Slip Op. Aug. 30, 2022) (*Bruen* "laid out a new test to be applied in Second Amendment challenges."); *Fooks v. State*, 255 Md.App. 75, 278 A.3d 208, 223 (Md. App. 2022) (applying *Bruen* to criminal offenses); *State v. Philpotts*, 2023 WL 408984 (Ohio App.) (Slip. Op. Jan. 26, 2023) (recognizing *Bruen* "changed the burden of proof and standard of review when evaluating the constitutionality of a statute regulating firearms."); *Ex parte Isedore*, 2023 WL 142514 (Tex. Crim. App.) (Slip. Op. Jan. 10, 2023) (applying *Bruen* to penal statutes relating to firearms). The prosecution's invitation to ignore *Bruen* must be declined. The circuit court did not err in applying the *Bruen* test.

Mr. Wilson was accused of violating HRS §§ 134-25 and 134-27. These statutes criminalize the carrying and possession of a firearm and ammunition without the defendant's reasons for carrying them outside their business, residence, or sojourn:

> **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 and the following:
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> (1) A place of repair;
> (2) A targe 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.
>
> . . . .
>
> (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.**

HRS § 134-25.[10]

The conduct element in these offenses is "carrying or possessing" a firearm and ammunition. HRS § 134-25(b); *State v. Slavik*, 150 Hawai'i 343, 354, 501 P.3d 312, 323 (App. 2021) (conduct for place-to-keep ammunition offense is possession). The prosecution's charging document also averred that Mr. Wilson "carr[ied] or possess[ed]" the firearm and ammunition. ICA Dkt. No. 10 at 4; Cir. Ct. Dkt. No. 1 at 2-3.

Mr. Wilson asserted that he carried the pistol for self-defense purposes and to protect himself from people like Mr. Ting and his men. ICA Dkt. No. 10 at 13; Cir. Ct. Dkt. No. 161. HRS §§ 134-25 and 134-27 criminalizes conduct that the constitutional right to bear and carry arms is meant to protect. *Bruen*, 142 S.Ct. 2126 at 2134-2135. *See also District of Columbia v. Heller*, 554 U.S. at 599 (self-defense is "the central component of the right itself."); *McDonald v. City of Chicago*, 561 U.S. at 791. The "Second Amendment's plain text covers [Mr. Wilson's] conduct[.]" *Bruen*, 142 S.Ct. at 2126.

[10] HRS § 134-27(a) confines ammunition in the same way.

The prosecution did nothing to rebut Mr. Wilson's assertion. It failed to show how its application of HRS §§ 134-25 and 134-27 in this case was "consistent with this Nation's historical tradition of firearm regulation." *Id.* In other words, it did not meet its burden under the *Bruen* test. Accordingly, the circuit court could not "conclude that [Mr. Wilson's] conduct [fell] outside the Second Amendment's unqualified command." *Id.* The circuit court did not err in dismissing counts 1 and 2.

Conclusion

Mr. Wilson had standing to bring the motion to dismiss counts 1 and 2. His assertion that his conduct was constitutionally protected went unchallenged, and the prosecution did not meet its burden under *Bruen*. The circuit court did not err. The dismissal of counts 1 and 2 must be affirmed.[11]

Dated: Wailuku, Maui, Hawai'i: March 1, 2023

/s/ Benjamin Lowenthal .
Benjamin E. Lowenthal
Attorneys for Respondent
Christopher L. Wilson

[11] Mr. Wilson requests in the alternative that the case be remanded to the circuit court to conduct an evidentiary hearing that if evidence is needed to support his constitutional claims. *See supra* at note 5.