SCWC-23-376

IN THE SUPREME COURT STATE OF HAWAI‘I

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| STATE OF HAWAI‘I,<br>Respondent/Plaintiff-Appellee,<br><br>vs.<br><br>CHARLES ZUFFANTE,<br>Petitioner/Defendant-Appellant. | CIRCUIT CASE NO. 3CPC-22-315<br><br>RESPONSE TO AMICUS CURIAE BRIEF FILED BY THE ACLU OF HAWAI‘I AND AMERICAN CIVIL LIBERTIES UNION FOUNDATION |

# RESPONSE TO AMICUS CURIAE BRIEF FILED BY THE ACLU OF HAWAI‘I AND AMERICAN CIVIL LIBERTIES UNION FOUNDATION

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# RESPONSE TO AMICUS CURIAE BRIEF FILED BY THE ACLU OF HAWAIʻI AND AMERICAN CIVIL LIBERTIES UNION FOUNDATION

The State of Hawaiʻi, through the Office of the Prosecuting Attorney for the County of Hawaiʻi, submits its response to the Amicus Curiae brief filed by the Hawaiʻi ACLU of Hawaiʻi and American Civil Liberties Union Foundation (collectively "the ACLU").

The ACLU asks this Court to go from zero to sixty without providing any showing that the alleged harms they seek to prevent are harms that currently face the people of the State of Hawaiʻi. The Petitioner seeks to change the law with a legal question that was not properly preserved using a record that does not reflect the alleged harms sought to be prevented, and the ACLU of Hawaiʻi additionally asks this Court to bypass putting the issue before the legislature.

1. There is no Legal Basis for the Petitioners's Request Under Hawaiʻi Due Process Case Law

The ACLU asks: why wasn't the interrogation recorded? Well, that is a good question that the Petitioner fully had the ability to put before the trial judge and the jury but chose not to inquire into. If the Petitioner failed to cross-examine or even argue to the jury that the

Petitioner's statement to Officer Gaspar should not be believed because it was not recorded, what showing is there in this record that cross-examination and the current jury instructions are insufficient in providing a fair trial, and would therefore necessitate that *State v. Kekona*, 77 Hawai'i 403, 886 P.2d 740 (1994), be overturned? The record being so woefully undeveloped to support the Petitioner's argument underscores why overturning *Kekona* is unnecessary and would be a premature response.

The only legal requirement for the admission of the Petitioner's statement was to show that the Petitioner was informed of his rights to not make a statement, right to have an attorney present during any interrogation, and for the government to further show that the statement was voluntary and not the product of coercion, Hawai'i Revised Statutes ("HRS") § 621-26, and by Petitioner's own account, the statement, that the Petitioner said to derive a benefit but now does not want to be held responsible for saying, was the Petitioner's own idea. 1 Feb. 2023 Trial Transcript ("2/1/23 Transcript") p. 135 lines 1-16. Police were under no duty and had no obligation to record the statement. However, the Hawai'i County Police Department does regularly record statements, because there is an interview room equipped with audio and video recording. 17 Aug. 2022 Motion to Determine Voluntariness Transcript ("MTDV Transcript") p. 39 lines 14-25, p. 40 lines 1-3.

"[W]hether the failure of the police to create a record of the defendant's confession undermines its accuracy and detracts from the credibility of later testimony is an issue uniquely left to the sound discretion of the trier of fact." *State v. Kekona*, 77 Hawai'i at 409, 886 P.2d at 746 (*quoting State v. Kelekolio*, 74 Haw. 479, 516, 849 P.2d 58, 75 (1993) "[The] defendant [still] retains the right to put before the jury, as the trier of fact, all evidence, including the facts

and circumstances surrounding the making of his confession, 'relevant to weight or credibility.'")

At the Motion to Determine Voluntariness of Defendant's Statements ("MTDV"), the Respondents provided testimony that the machine that is used to record interrogations was not functioning at the time of the interrogation of the Petitioner. MTDV transcript p. 39 lines 14-25, p. 40 lines 1-3. Officers Caldwell-Kaai, Devon Manuel, and Justin Gaspar were available for cross-examination at the Motion to Determine Voluntariness on August 17, 2022. Officer Caldwell-Kaai was not cross-examined, MTDV Transcript p.17 Lines 18-20. Officer Manuel was very briefly cross-examined about the Hawai'i County Police Department's policy on the usage of body-worn camera but was not asked about whether he or any other Officers were available to be present during Officer Gaspar's interrogation, MTDV Transcript p.25 Lines 4-25 p. 26 Lines 1-19. Officer Gaspar was only asked whether there were any additional policy or procedures for audio/video recording of suspect statements, and when Petitioner was told the machine used to record interviews was broken at the time of the interrogation of Petitioner, Gaspar was only asked if the machine was broken when Kimberly Jackson was interviewed, Gaspar answered the machine was broken, and then Petitioner stated there were no further questions for Officer Gaspar. MTDV Transcript p. 50 Lines 23-25, p. 51 Lines 1-15.

At trial, Officers Caldwell-Kaai and Devon Manuel were available for cross-examination on January 31, 2023, and Officer Justin Gaspar was available for cross-examination the very next day on February 1, 2023. Officer Caldwell-Kaai was cross-examined about his body worn camera footage, but only as to the initial seizure of the Petitioner, he was not questioned about whether he, as in Caldwell-Kaai, or any other officers were available to record the interrogation of Petitioner by Officer Gaspar. 31 Jan. 2023 Trial Transcript ("1/31/23 Transcript") p. 24 Line

13 to p. 49 Line 14. Officer Manuel was equally only cross-examined about his body worn camera footage as to the initial seizure of the Petitioner, and was not questioned about whether he, as in Manuel, or any other officers were available to record the interrogation of Petitioner by Officer Gaspar. 1/31/23 Trial Transcript p. 43 Line 12 to p. 49 Line 14. Officer Gaspar was not cross-examined about a "failure" to record the interrogation, Gaspar was not asked if any Officers equipped with body worn camera were available to record, and was not asked if there were any other means to record the interrogation. 2/1/23 Trial Transcript p. 103 Line 9 to p. 136 Line 20.

Despite multiple jury instructions affirming the jury's role as being the exclusive judges of the facts, an instruction to consider a witnesses means and ability to obtain information, an instruction to consider the circumstances surrounding the taking of a defendant's statement, and a specific jury instruction that the jury had no obligation to believe Officer Gaspar's testimony as to any out-of-court statements made by the Petitioner, there was no argument made that the jury should take a critical look at Gaspar's account of Petitioner's statement, or that the lack of a recording should be used to determine Gaspar's account of Petitioner's statement should not be believed. The ACLU argues the current case law creates a situation where a trial or suppression hearing turns into a "credibility contest" between a Defendant and the government. But credibility contests are precisely what trial, and to the extent that suppression hearings are mixed questions of fact and law, are.

> Over the course of time, this court has lost sight of the distinction between the need for the trial court, as the judge of the law, to assess the manner in which a confession or inculpatory statement is extracted, for purposes of resolving the "purely legal question" of *admissibility* (*i.e.,* whether the confession or inculpatory statement was voluntarily given), and the prerogative of the jury, as the judge of the facts, to determine the *weight and effect* of the confession or inculpatory statement with regard to its *credibility and reliability* (*i.e.,* its

> worthiness of belief) within the context of "the ultimate factual issue of the defendant's guilt or innocence."

*Kelekolio*, 74 Haw. at 518, 849 P.2d at 76 (emphasis in original).

"[Q]uestions of credibility, whether of a witness or of a confession, are for the jury[.]" *Id*. 74 Haw. at 517, 849 P.2d at 75.

Under the guise of "updating" or "modernizing" the law, the Petitioner and fellow amici brief ironically seek to have this Court go backward and lose sight of that distinction yet again.

2. Police in *Kekona* Had the Ability to Record Interrogations, the Argument That Technological Advancements Necessitates Creating a New Rule is a Red Herring

The ACLU argues that the wide availability of recording devices necessitates a change in the law. It further argues that the availability of recording devices makes the facts of this case absurd. Considering the prevalence of body worn camera and the general public's knowledge that cell phones/mobile devices could record events and conversations, maybe the jury would have taken kindly to this argument as well, had the Petitioner raised it, and the Petitioner was more than able to tell the jury that Petitioner believed it was absurd that Officer Gaspar did not record the interview. Again, the record is silent because these are questions and arguments that were not pursued at trial or at the trial level, whether such questions and arguments are to be pursued is a tactical and/or strategic decision under the defense's discretion.

But more importantly, *Kekona* was not about the police's inability to record an interrogation. The case was about whether a trial would be fundamentally unfair without a recording of the interrogation. Turning to the Petitioner's case, the State's burden was to prove the case beyond a reasonable doubt, which was done. It is the role of defense to argue the existence of reasonable doubt, it is the role of defense to argue a lack of evidence, it is the role of defense to hold the State to its burden. The Petitioner was never prevented from throwing into

question the credibility of any of the police officers. Nor was the Petitioner prevented from arguing to the jury that they could use their common sense and reason to find it unbelievable or even ridiculous that Officer Gaspar did not record the interview. The Petitioner was not prevented from testifying in his defense and was not prevented from remaining silent.

The ACLU further argues that the failure to record the interrogation essentially forced a Hobson's choice on defendant as to the right to remain silent or right to testify, this is also inaccurate. Although a Defendant need not explain their decision whether to testify or not testify, without a motion or an objection having been made saying that the admission of Gaspar's account of the interrogation would compel a waiver of the right to remain silent, it is awfully convenient at this juncture to now raise an allegation that the failure to record the interrogation had forced the Petitioner to waive their right to remain silent. Before trial, through discovery, the Petitioner had Officer Gaspar's finalized narrative, and in fact used said report to refresh Officer Gaspar's memory, 2/1/23 Trial Transcript p. 114 Lines 7-18. Petitioner was aware that Officer Gaspar was expected to testify that Petitioner said "all the meth in the vehicle" was Petitioner's, Officer Gaspar's testimony was not a heat of trial "gotcha" moment that forced the Petitioner's hand at the last minute. The Petitioner was advised about the mutually exclusive right to remain silent and the right to testify multiple times pursuant to *Tachibana v. State*, 79 Hawai‘i 226, 900 P.2d 1293 (1995), and made a conscious, deliberate waiver of his right to remain silent not because he was coerced into giving a false confession and there was no means of proving otherwise, but because he did not agree with the specific wording of his allegedly false confession. 24 Jan. 2023 Trial Transcript pp. 6, 237, 2/1/23 Trial Transcript p. 125.

The trial Defense was that the Petitioner gave an allegedly false confession to protect his girlfriend and testimony to support that argument was available through the State's witnesses in

the State's case-in-chief. Officer Gaspar freely admitted that the Petitioner said that Petitioner did not want his girlfriend being charged with anything and upon further questioning Officer Gaspar admitted that he, as in Gaspar, does not take what is told during interrogation as fact. 2/1/23 Trial Transcript p. 115 Lines 2-16.

Further, this is not a case where the Petitioner's statement, given through Officer Gaspar, was the only evidence offered by the State proving Petitioner's guilt. A pat down search of the Petitioner during the arrest revealed a clear-pink zip packet, containing 3.5 grams of methamphetamine, enclosed in a gallon-sized zip back that was on the Petitioner's person. 1/31/23 Trial Transcript at p. 40 Line 20. A fanny pack was located in the back seat area of the vehicle, *Id*. at 176 Lines 11-14, inside that fanny packet were ten (10) clear-pink zip packets that matched the clear-pink zip packet found in the Petitioner's pocket, nine (9) bags of which contained approximately 3.5 grams of methamphetamine, one (1) bag containing approximately 2.5 grams. 2/1/23 Trial Transcript p. 62 Line 10 to p. 63 Line 4. Further drugs were located in a sunglasses case on the dashboard of the vehicle, right in front of where the Petitioner was seated.

Through HRS § 712-1251, the legislature has authorized a prima facie inference that all passengers in a vehicle have knowing possession of illicit drugs that are found in a non-commercial carrier vehicle if the items were 1) located in an area accessible to the passengers (and not in an area that is normally accessible only to the driver) and 2) the quantity of drugs found "are clearly greater than quantities which would be possessed merely for personal use." *See State v. Bumanglag*, 63 Haw. 596, 634 P.2d 80 (1981), *quoting State v. Brighter*, 61 Haw. 99, 595 P.2d 1072 (1972). For additional due process protection, the related pattern jury instruction Hawai‘i Jury Instruction Criminal 13.50, cautions the jury that the jury is not required to make said knowing inference. With well over fifty (50) grams of methamphetamine located in

the vehicle in Petitioner's situation, within areas accessible to Petitioner, it is not definitive that the failure to make a recording is the sole reason that the Petitioner testified.

3. Invoking the Court's Supervisory Power is an Extreme Remedy and is a Premature Response in Light of this Case's Record

"The supreme court shall have the general superintendence of all courts of inferior jurisdiction to prevent and correct errors and abuses therein where no other remedy is expressly provided by law." HRS § 602-4. Supervisory powers should be invoked sparingly and only in great necessity. In *State v. Pattioay*, 78 Hawai'i 455, 896 P.2d 911 n.28 (1995), the Court stated "the court's inherent powers 'must be exercised with restraint and discretion' and only in exceptional circumstances." As a threshold matter, there would need to be a showing that an error and abuse occurred. On this record, there is no showing of abuse or misconduct on the part of law enforcement, in fact, the Petitioner agreed that all but three to four words were an accurate recitation of the interrogation. There was never any claim that the Petitioner's statement was extracted by coercion or other misconduct, again, the making of the statement and the content of the statement were of the Petitioner's own volition. Nor was there any error as to the law being applied. As such, this case fails the necessary condition for the Court to exercise this extraordinary power. Further, there would need to be no other remedy expressly provided by law. Although there currently is no law mandating recording, as the ACLU concedes, legislatures have the ability to enact laws that can provide the relief they seek.

If the majority of states cited by this Court in *Kekona* have reversed course through legislation, there is a good chance such relief can similarly be authorized by the legislature, just as the legislature, within half a year, amended the procedure for initiating felony prosecutions in light of *State v. Obrero*, 151 Hawai'i 472, 517 P.3d 755 (2022).

Dated: Kailua Kona, Hawai‘i, April 11, 2025.

/s/ Frederick M. Macapinlac
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CERTIFICATE OF SERVICE

I hereby certify that an e-filed copy of the foregoing document was served upon:

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by:

☒ electronic mail through the Judiciary Electronic Filing and Service System
☐ facsimile transmission (fax no. ), confirmation attached
☐ e-mail ( )
☐ mailing via U.S. Postal Service
☐ certified mail, return receipt requested
☐ hand-delivery

on April 11, 2025.

/s/ Frederick M. Macapinlac
OFFICE OF THE PROSECUTING ATTORNEY