No. CAAP-21-0000576

IN THE INTERMEDIATE COURT OF APPEALS
STATE OF HAWAII

STATE OF HAWAII Plaintiff vs. RICHARD OBRERO Defendant	1CPC-19-0001669 APPEAL FROM THE FIRST CIRCUIT COURT FOR THE STATE OF HAWAII HON. KEVIN A. SOUZA OPENING BRIEF; APPENDICES A–C

OPENING BRIEF
and
APPENDICES A–C

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INTRODUCTION

This case provides Hawaii's appellate courts an opportunity to address the meaning of a statute that has not been definitively construed before, HRS §801-1. Section 801-1 states: "No person shall be subject to be tried and sentenced to be punished in any court, for an alleged offense, unless upon indictment or information, except for offenses within the jurisdiction of a district court or in summary proceedings for contempt." District courts have criminal jurisdiction only over misdemeanors, petty misdemeanors, and violations. *See* HRS §604-8; *accord* HRS §701-107. Information charging is limited to only certain class B and C felonies. *See* HRS §§806-82 and 806-83. And contempt is not in play here.

If §801-1 means what it plainly says—the State's authority to conduct a trial and to sentence someone accused of Hawaii's most serious offenses requires perfecting those accusations by way of an indictment at some point prior to trial—a mere complaint, while sufficient to justify detaining someone during the pendency of a criminal proceeding, does not suffice to allow the State to subject the accused to trial and punishment for murder, attempted murder, or class A felonies (or, for that matter, any class B and C felonies that cannot be perfected for trial and punishment by an information). And that would mean that the State's practice, for the past forty years or so—of relying on a complaint, and the preliminary hearing finding of probable cause a complaint triggers, to unlock the entirety of a criminal proceeding on Hawaii's most serious offenses, without successfully vetting those accusations, at some point prior to trial, through a grand jury—is and has been entirely unlawful.[1]

[1] *State v. Castro*, 69 Haw. 633, 640, 756 P.2d 1033, 1039 (Haw. 1988), is the earliest case that counsel has found (using the search string: "class a felony" murder /s complaint /s charge! accus!) mentioning the practice of subjecting the accused to trial and punishment for Hawaii's most serious offenses on the strength of only a complaint. Some two dozen cases mention the

In sum, this case presents an issue of first impression for Hawaii's appellate courts, the resolution of which has systemic consequences for the prosecution of criminal offenses in Hawaii. If, as the circuit court here ruled, section 801-1 indeed fails to mean what it says and has no effect, then the grand jury has become as much of a dead letter as would be §801-1, and both would cease to shield individuals from the State abusing its prosecutorial power in cases involving Hawaii's most serious offenses.

CASE STATEMENT

Material facts are not in dispute.

The State initially charged defendant-appellant Richard Obrero by way of six complaints—accusing him of second-degree murder and using a firearm to commit it, and four instances of attempted second-degree murder—signed by a prosecutor and investigating police officers and filed on November 12, 2019. *See* JIMS 90 (order denying dismissal motion), at 3. Before a preliminary hearing occurred, the State sought a grand jury indictment on the six allegations made in the six complaints, as well as on other related offenses, but the grand jury returned a no bill and refused to indict Obrero on any of the offenses that the State submitted to it.[2] *See* JIMS 90, at 4. Ignoring the grand jury's refusal to find probable cause to indict, the State proceeded with the preliminary hearing on the six complaints, at the conclusion of which a district court judge found probable cause and committed Obrero to circuit court. *See* JIMS 90, at 4. A few days later, the State "consolidate[d]" the six complaints into a new single complaint,

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practice over the years in passing (and, in doing so, do not indicate whether the accused waived the right to indictment or not), but none address the §801-1 claim raised here.

[2] The accusations arose from an incident in which Obrero discharged a firearm at five youths, who returned and were again approaching his home, and who were shooting pellets at him from at least one pellet gun, all shortly after police had responded to an earlier burglary complaint and departed. *See* JIMS 70 (dismissal motion), at 3. Self-defense readily explains the grand jury's refusal to indict Obrero.

singed only by a prosecutor, which it then filed in the circuit court on November 18, 2019. *See* JIMS 1 (complaint); JIMS 90, at 4–5. When arraigned on the single, consolidated complaint, Obrero pled not guilty. *See* JIMS 90, at 5; Record on Appeal (RA) at 2 (Dkt. 21 (arraignment minutes)).

On July 12, 2021, Obrero filed a motion to dismiss this matter with prejudice, raising the §801-1 and due process claims he pursues in this appeal. *See* JIMS 70 (motion to dismiss). The State opposed the motion, he filed a reply, and, on September 13, 2021, the circuit court conducted a hearing on the motion, at which the parties reiterated the arguments made in their filings. *See* JIMS 78 (State's opposition); JIMS 82 (Obrero's reply); JEFS 11, Tr. 9/13/2021. At the hearing, the circuit court orally denied Obrero's dismissal motion, culled its factual findings and conclusions of law from the State's opposition memorandum and accompanying prosecutor's declaration, and instructed the State to prepare the court's written order denying Obrero's motion accordingly. *See* JEFS 11, Tr. 9/13/2021, at 30–36. The circuit court signed and filed its State-drafted written order, findings of fact, and conclusions of law denying Obrero's dismissal motion on September 17, 2021. *See* JIMS 90. The circuit court's order is discussed more fully below, in the second section of the argument section of this brief.

This timely interlocutory appeal followed. *See* JEFS 17 (statement of jurisdiction).

Appendix A to this brief provides a copy of the circuit court's written order, findings of fact, and conclusions of law (JIMS 90).

Appendix B to this brief provides a copy of the transcript of the dismissal hearing (JEFS 11, Tr. 9/13/2021).

Appendix C to this brief provides a copy of the State's consolidated complaint (JIMS 1).

POINTS OF ERROR

1. The circuit court erred in ruling that §801-1 does not require the State to obtain an indictment to subject Obrero to trial and punishment on accusations that he committed murder, attempted murder, and a related class A felony firearm offense. The circuit court's erroneous ruling is contained in its order denying Obrero's dismissal motion, which memorializes the circuit court's oral ruling during the hearing it conducted on Obrero's dismissal motion. *See* JIMS 90 (order denying dismissal motion) (Appendix A), at 5–13; JEFS 11, Tr. 09/13/2021 (Appendix B), at 30–36. Obrero's dismissal motion and reply to the State's opposition to his motion, and the oral argument he made at the dismissal hearing, preserved his §801-1 claim for appellate review. *See* JIMS 70 (dismissal motion); JIMS 82 (reply); JEFS 11, Tr. 09/13/2021, at 3–19, 28–30.

In particular, the circuit court's conclusions of law Nos. 14, 16, 20–22, 24, 28, 32, 39, and 42–45 are wrong, beside the point, or, left unqualified, are incomplete and misleading. The principal flaws in these conclusions of law—and, generally, with the entirety of the circuit court's ruling and the State's view of the pertinent constitutional and statutory provisions and court rules—include:

- the failure to explain what HRS §801-1 means, and what effect it has, if it does not mean what it so plainly says;
- the failure to reconcile pertinent court rules, statutes, and article I, section 10 of the Hawaii Constitution, so that each—including §801-1—may be given reasonable effect;

- the failure to abide the hierarchy of positive law, under which an unambiguous, plainly worded statute (such as §801-1) governs over conflicting court rules, to whatever extent reasonable reconciliation is not possible;
- the failure to abide the principle that a statute (such as §801-1) may provide a criminal defendant with greater protection from the State's police power than does the Hawaii Constitution (to whatever extent §801-1 and Section 10 overlap); and,
- the failure to apply the rule of lenity, to whatever extent §801-1's mandate might be thought unclear.

Obrero urges this Court to set aside the circuit court's ruling and hold that §801-1 means what it says: the State may neither put Obrero to trial, nor sentence him thereafter, on the murder, attempted murder, and firearm offenses alleged in the State's complaint absent an indictment perfecting those accusations for trial and sentencing.

2. The circuit court further erred in ruling that the due process clause of article I, section 5 of the Hawaii Constitution, did not require dismissal with prejudice in this matter, given that a grand jury has already refused to indict Obrero, and the State has not asserted (at all, much less persuasively) that it has any new, additional evidence (that it neither knew about nor should have known about at the time it presented its case to the grand jury) that would justify re-presenting its case to a different grand jury panel. The circuit court's ruling on this point is contained in its order denying Obrero's dismissal motion; specifically in its erroneous conclusion of law No. 45 that due process is not violated by subjecting Obrero to trial and punishment after a grand jury as refused to indict him. *See* JIMS 90, at 12. Obrero preserved his claim that, as a matter of due process, dismissal with prejudice was the proper remedy here in his dismissal

motion, reply to the State's opposition to his motion, and orally during the dismissal hearing. *See* JIMS 70, at 15–17; JIMS 82, at 9–10; JEFS 11, Tr. 9/13/2021 at 40–42. Obrero urges this Court to set aside the circuit court's erroneous ruling and remand this matter for dismissal with prejudice.

STANDARDS OF REVIEW

What article I, section 10 of the Hawaii Constitution and HRS §801-1—along with any other pertinent constitutional and statutory provisions and court rules—mean, and how best to reconcile them, are questions of law reviewed de novo on appeal. *See*, *e.g.*, *State v. Shaw*, 150 Hawaii 56, 61, 497 P.3d 71, 76 (Haw. 2021); *State v. Carlton*, 146 Hawaii 16, 22, 455 P.3d 356, 362 (Haw. 2019); *State v. Myers*, 100 Hawaii 132, 134, 58 P.3d 643, 645 (Haw. 2002) ("[a]s the issue on appeal is strictly a matter of law, the standard of review is de novo"). Thus, because the circuit court's ruling denying Obrero's dismissal motion rests on disputed questions of law, involving what §801-1 means and how it is best reconciled with other provisions of law, this Court reviews the circuit court's dismissal ruling de novo in this case.[3] *See*, *e.g.*, *Shaw*, 150

[3] In *State v. Thompson*, ___ Hawaii ___, ___, P.3d ___, 2021 WL 5860477 (Haw. 2021), the Hawaii Supreme Court noted that a trial court's ruling on a motion to dismiss a criminal charge was reviewed for an abuse of discretion. *Thompson*, 2021 WL 5860477, at *3 (citing *State v. Akau*, 118 Hawaii 44, 51, 185 P.3d 229, 236 (Haw. 2008)). The Hawaii Supreme Court then reviewed the ICA's interpretation of HRS §805-1 de novo and held that dismissal was warranted because the State failed to abide the statute's unambiguous requirements for perfecting a criminal complaint. *Thompson*, 2021 WL 5860477, at *3–*6. The Hawaii Supreme Court thereafter rejected the State's argument that the family court had abused its discretion by dismissing the defective complaint, because, given the correct interpretation of §805-1, the State failed to identify any rule or principal of law or practice that the family court had disregarded. *See Thompson*, 2021 WL 5860477, at *6. With respect, it appears that the Hawaii Supreme Court overlooked that the abuse of discretion standard governs appellate review of dismissal rulings that resolve allegations of prosecutorial misconduct, whereas dismissal rulings that turn on sufficiency of the evidence, a question of statutory interpretation, or any other question of law are reviewed de novo. *See*, *e.g.*, *State v. Taylor*, 126 Hawaii 205, 214–215, 269 P.3d 740, 749–750 (Haw. 2011) (discussing the point and applying de novo review to the dismissal issue before it, which turned on a question of law). Although it does not seem the standard of review would

Hawaii at 61, 497 P.3d at 76; *Ryan v. Herzog*, 142 Hawaii 278, 284, 418 P.3d 619, 625 (Haw. 2018). The circuit court's ruling that due process does not require dismissal with prejudice rests on a constitutional question of law that is also reviewed de novo. *See*, *e.g.*, *State v. Sandoval*, 149 Hawaii 221, 232, 487 P.3d 308, 320 (Haw. 2021) ("[w]e answer questions of constitutional law by exercising our own independent constitutional judgment based on the facts of the case").

ARGUMENT

In the discussion that follows, keeping a few pieces of common sense in mind is helpful. Foremost among them is that a prosecutor's or a judge's finding of probable cause is easier to come by than an agreement on probable cause among eight to twelve grand jurors.[4] Such a thought naturally leads to another: that an indictment provides more protection from the State's police power than does either a complaint and the preliminary hearing it triggers or an information, both of which turn only on a prosecutor's and a judge's determinations of probable cause.[5] The procedural history of this case, recited above, proves the point, as the State had no trouble convincing a judge of probable cause at a preliminary hearing just a few hours after it had failed to convince a grand jury panel to indict.

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have made a difference in *Thompson*, *Taylor* indicates that the dismissal ruling should have been reviewed de novo, without an abuse-of-discretion overlay, in Thompson's case. As in *Thompson*, it would similarly seem to make little difference in this case whether the standard of appellate review is de novo all the way down or for an abuse of discretion at some point, given that, if the circuit court got its law wrong, then it will have necessarily abused its discretion by relying on its mistaken view of the law (as *Thompson* itself attests). *See*, *e.g.*, *State v. Plichta*, 116 Hawaii 200, 214, 172 P.3d 512, 526 (Haw. 2007) (reaffirming that a "trail 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"); *State v. Cullen*, 86 Hawaii 1, 15, 946 P.2d 955, 969 (Haw. 1997) ("it is clear that the circuit court abused its discretion … inasmuch as its decision was based upon an incorrect construction of HRS §804-4").

[4] HRPP 6 governs the number of grand jurors necessary to return an indictment.

[5] *See* HRPP 5 (governing preliminary hearings) and HRS §§806-81, et seq. (governing information charging).

A scheme in which an accusation involving Hawaii's most serious offenses must be perfected for trial and sentencing by vetting it through the greater protection a grand jury provides would make eminent sense. The lesser protection provided by a prosecutor's information may suffice for some middling felonies, and the lesser protection provided by a complaint may suffice for Hawaii's least serious offenses, but to put someone on trial and, thereafter, punish them for one of Hawaii's most serious offenses, would require not just a prosecutor's or judge's belief in probable cause, but the shared belief in probable cause of eight to twelve grand jurors memorialized in an indictment. There is nothing unreasonable nor absurd in such a system. It just makes a common-sense correlation between the severity of an alleged offense and the degree of protection necessary to subject someone to trial and punishment for that offense. Such is the system Obrero posits HRS §801-1 helps create.

What the State appears to envision does not, on the other hand, make much sense at all. As the State would have it, subjecting someone to trial and punishment on an indictment or a mere complaint is a matter of prosecutorial discretion. In the system the State envisions, in which complaints and indictments are fungible and any offense (from violations through first-degree murder) is perfected for trial and punishment by either instrument, an indictment would be nothing but a matter of prosecutorial grace. And as this case attests, the State's system, if allowed to persist, permits the State to utterly disregard, with impunity and without consequence, a grand jury's affirmative refusal to find probable cause. Under the State's system, in which a complaint can do all the heavy lifting an indictment does, grand juries cease to be relevant and there is no reason to trouble with indictments at all.

1. To subject Obrero to trial and sentencing on the alleged felonies, HRS §801-1 requires that the State perfect its accusations against him by way of an indictment.

a. Section 801-1 provides: "No person shall be subject to be tried and sentenced to be punished in any court, for an alleged offense, unless upon indictment or information, except for offenses within the jurisdiction of a district court or in summary judgment proceedings for contempt." As statutes go, this one is as straightforward and plainly worded as they come. It sets out a general rule and then sets out two exceptions to that general rule.

Section 801-1's general rule is that an indictment or information is required to perfect an alleged offense for trial and punishment. The two exceptions provide that neither contempt nor an offense within district court jurisdiction need be so perfected for trial and punishment. When read together with the statute addressing a district court's criminal jurisdiction, section 801-1's exceptions clause boils down to exempting contempt, misdemeanors, petty misdemeanors, and violations from §801-1's general rule requiring an indictment or information to perfect an accusation for trial and punishment.[6] Section 801-1 is not ambiguous; there is no doubt, doubleness of meaning, or indistinctiveness or uncertainty in any of any its words or expressions. *See In the Interest of AA*, ___ Hawaii ___, ___ P.3d ___, 2021 WL 5916254, at * (Haw. 2021) ("when there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an

[6] "District courts shall have jurisdiction of, and their criminal jurisdiction is limited to, criminal offenses punishable by fine, or by imprisonment not exceeding one year whether with or without a fine." HRS §604-8. The phrase "offenses punishable by fine" means violations. *See* HRS §701-107(5) ("[a]n offense … constitutes a violation … if no other sentence than a fine, or fine and forfeiture or other civil penalty, is authorized upon conviction"). The phrase "by imprisonment not exceeding one year whether with or without a fine" captures misdemeanors and petty misdemeanors. *See* HRS §§701-107(3) and (4). A district court's criminal jurisdiction is, accordingly, limited to misdemeanors, petty misdemeanors, and violations. *See, e.g., Schwartz v. State*, 136 Hawaii 258, 264, 361 P.3d 1161, 1167 (Haw. 2015); *State v. Villados*, 55 Haw. 394, 395, 520 P.2d 427, 429 (Haw. 1974) (section "604-8 confers upon the district court jurisdiction over misdemeanor cases"); *State v. Wilson*, 55 Haw. 314, 316, 519 P.2d 228, 230 (Haw. 1974) ("a felony … is not triable in the district court").

expression used in a statute, an ambiguity exists" (citations omitted)). Instead, it uses clear language to express a straightforward rule and what is exempt from that rule.

The "fundamental starting point for" construing what §801-1 means is "the language of the statute itself." *State v. Milne*, 149 Hawaii 329, 333, 489 P.3d 433, 437 (Haw. 2021) (citation omitted). And "where the statutory language is plain and unambiguous," this Court's "sole duty is to give effect to its plain and obvious meaning." *Milne*, 149 Hawaii at 333, 489 P.3d at 437 (citation omitted). Because §801-1's language is "plain, unambiguous, and explicit," there is no "look[ing] beyond that language for a different meaning." *State v. Richie*, 88 Hawaii 19, 30, 960 P.2d 1227, 1230 (Haw. 1998). The interpretive inquiry, rather, ends with giving effect to what the statute plainly requires. *See*, *e.g.*, *Kanahele v. Maui County Council*, 130 Hawaii 228, 244, 307 P.3d 1174, 1190 (Haw. 2013) (if "the legislature has unambiguously spoken on the matter in question, then our inquiry ends" (citation omitted)). At least, so long as doing so does not produce an absurd result. *See*, *e.g.*, *Kaheawa Wind Power, LLC v. County of Maui*, 146 Hawaii 76, 88, 456 P.3d 149, 161 (Haw. 2020) ("[a]bsent an absurd or unjust result, the appellate court is bound to give effect to the plain meaning of unambiguous statutory language").

But there is nothing absurd in giving effect to what §801-1 so plainly requires. To the contrary, adding the layer of protection a grand jury indictment provides before trial may be had and punishment imposed on Hawaii's most serious offenses is a sensible, not absurd, thing to require. Such high-stakes cases are, after all, where the temptation towards prosecutorial over-zealousness can be overwhelming and difficult to resist. Sensical, too, is the additional protection an information provides, above that afforded by a complaint, for Hawaii's middling felony offenses. *Compare* HRS §806-81, et seq. (limiting information charging to certain class B and C felonies, requiring judicial review of the information, and allowing the defendant to move to

dismiss an information lacking in probable cause) *with* HRS §805-7 and HRPP 5 (providing for a preliminary hearing on a felony complaint before a district court judge, while allowing for trial and sentencing on lesser offenses without further judicial review of probable cause). Because there is nothing absurd or unjust in giving effect to §801-1's plain language, there is no justification, under the authority cited above, to go rooting around for reasons not to do so. On the facts here, in which the accusations at issue are second-degree murder, a related class-A firearm offense, and four allegations of attempted second-degree murder, giving effect to §801-1 mandates that the State may not subject Obrero to trial or punishment absent an indictment.

b. Even if this Court were to go searching for a reasonable way to ambiguate §801-1 (as the State urged and the circuit court did), none is to be found.

Start with article I, section 10 of the Hawaii Constitution. Section 10 provides: "No person shall be *held* to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury or upon a finding of probable cause after a preliminary hearing held as provided by law or upon an information in writing signed by a legal prosecuting officer under conditions and in accordance with procedures that the legislature may provide, except in cases arising in the armed forces when in actual service in time of war or public danger[.]" (Emphasis added.). Section 10 and §801-1 do not speak to the same thing. Section 10 imposes a restriction on *holding* someone in custody while a criminal proceeding is pending, and it does so without mentioning trial or punishment.[7] Section 801-1, on the other hand, plainly imposes a restriction

[7] Counsel has not found a Hawaii case in which section 10's use of the phrase "held to answer" has been construed; he suspects none have bothered to do so because Section 10's held-to-answer provision so obviously speaks about restricting an accused's liberty prior to conviction and sentencing. Cases have used the phrase "held to answer" in other contexts, however, and invariably done so to refer to the period of detention, or the curtailment of liberty by bail, prior to trial and sentencing. *See*, *e.g.*, *State v. Abihai*, 146 Hawaii 398, 408, 463 P.3d 1055, 1065 (Haw. 2020) (noting Abihai was "held to answer" for an offense from when he was rearrested and bail

on subjecting someone to trial and punishment, without saying anything about curtailing an accused's liberty while a criminal proceeding is pending.

Section 10, in other words, restricts the State from subjecting someone to detention or extracting bail from him absent a grand jury's finding of probable cause, as memorialized in an indictment, or a judge's finding of probable cause, be it upon review of a prosecutor's information and its required exhibit,[8] or at a preliminary hearing triggered by the filing of a felony complaint.[9] Section 801-1 steps in and further restricts the State from subjecting the

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was set until he was sentenced); *State v. White*, 92 Hawaii 192, 199 n.8, 990 P.2d 90, 97 n.8 (Haw. 1999) (noting the phrase "held to answer" has been defined to mean "the date on which the defendant was brought before a judicial officer on some allegation of a crime or series of crimes … upon which that judicial officer ordered the defendant thereafter held in custody or released on bail or recognizance"); *State v. Vaden*, 150 Hawaii 156, 497 P.3d 1104, 2021 WL 5033653, at *6 n.8 (Haw. Ct. App. 2021) (unpublished) (equating being held to answer with the setting of bail). Counsel has not found a case that reads "held to answer" to connote subjecting an accused to trial and punishment, rather than (or even in addition to) subjecting the accused to detention or bail while a criminal proceeding is pending.

[8] In its present incarnation, information charging is governed by HRS §§806-81, et seq. A prosecutor's information must be accompanied by an "exhibit," which must contain an affidavit or declaration and clearly exculpatory evidence, and whatever the prosecutor believes necessary to establish probable cause. *See* HRS §806-84. A circuit court judge (or, if authorized by the chief justice, a district court judge, *see* HRS §806-85(d)) must then review the information and its exhibit for probable cause. *See* HRS §806-85(a). Upon finding probable cause, the judge must then set bail and issue an arrest warrant for the accused. *See* HRS §806-85(c). The statutory scheme further allows a defendant to move to dismiss the information on a claim that the exhibit does not establish probable cause. *See* HRS §§806-86–806-88. Oddly, though, the scheme does not contain a provision for what should happen when the judge's initial review for probable cause reveals that there is none. That lacuna between the initial probable cause review that §806-85 requires and the dismissal motion process set out in §806-86–806-88 seems to suggest that the criminal proceeding may proceed, even when the judge concludes there is no probable cause after §806-86's initial review, unless the defense catches the problem and files a §806-86 dismissal motion. The only consequence of a judge's failure to find probable cause at the initial review stage seems to be that the accused may not be detained on the accusation set forth in the information.

[9] Complaint charging and the preliminary hearing it triggers are prescribed by HRS §805-1, et seq. and HRPP 5. There is no requirement that probable cause support a complaint, but it must be subscribed under oath by a complainant or supported by a duly executed declaration. *See*

accused to trial or punishment on felony offenses absent an indictment or (where allowed by HRS §806-81 et seq.) an information. Section 10, in sum, speaks about initiating a criminal proceeding and "permits the prosecution to charge by indictment, complaint, or information," *State v. Jess*, 117 Hawaii 381, 397, 184 P.3d 133, 150 (Haw. 2008), while §801-1 speaks about perfecting an accusation for trial and sentencing. Section 10 and §801-1 are, accordingly, readily reconciled by recognizing that, while the protection afforded by a felony complaint and a preliminary hearing finding of probable cause suffices to justify detaining someone pending a felony criminal prosecution, the greater protection afforded by an indictment or information must be satisfied to subject someone to the additional hardships of trial and punishment on a felony offense. There is, thus, no conflict between Section 10 and §801-1; just tiered restrictions, keyed to different aspects and stages of a criminal proceeding, and the increasing hardships they entail.

Even if the two provisions were construed (erroneously in Obrero's view) as speaking to the same thing—even if, that is, Section 10 was thought to speak to trial and sentencing—the two would be readily reconcilable, by recognizing that §801-1 provides greater protection to the accused than does Section 10. In *State v. Maldonado*, 108 Hawaii 436, 121 P.3d 901 (Haw.

HRS §805-1. Upon the filing of a complaint, the judge must issue an arrest warrant or penal summons (which may issue in lieu of an arrest warrant when the judge thinks the accusation is "not of a serious nature" and the accused is not likely to "elude justice" when served with the summons. *See* HRS §§805-1 and 805-3. When the accused first appears before the court, the judge then determines whether the accusation is supported by probable cause. *See* HRS §805-7; HRPP 5. Upon finding probable cause, the accused is committed for trial and detained (or released on bail). *See* HRS §805-7. If the judge does not find probable cause, the accused must be released. *See* HRS §805-7. In addition to the judicial determination of probable cause at the first appearance required by HRS §805-7, Rule 5(c) further provides for a preliminary hearing before a district court judge on a complaint that charges felony offenses. If the district court finds probable cause at the preliminary hearing, then the judge "shall commit the defendant to answer in the circuit court." HRPP 5(c)(6). If the judge does not find probable cause at the preliminary hearing, then the judge must "discharge the defendant." HRPP 5(c)(6). Non-felony offenses may be tried in the circuit court or, if the defendant is not entitled or has waived the right to jury trial, in the district court on the basis of a complaint, without an additional finding of probable cause at a preliminary hearing. *See* HRPP 5(b).

2005), for example, the Hawaii Supreme Court recognized that Hawaii's knock-and-announce statute, HRS §803-11, provided greater protection than did constitutional knock-and-announce rules embraced by the reasonableness requirements set forth in the Fourth Amendment to the United States Constitution and article I, section 7 of the Hawaii Constitution. *See Maldonado*, 108 Hawaii at 444, 121 P.3d at 909. In doing so, the Hawaii Supreme Court emphasized that, "where the legislature has enacted a valid statute that provides greater protection than the constitution, conformance to the statutory mandate, and not the lower … standard set forth by the state or federal constitution, is required." *Maldonado*, 108 Hawaii at 444, 121 P.3d at 909 (citation omitted). The same would be equally true here if Section 10 and §801-1 were thought to overlap. By limiting the State to conducting trials and imposing punishment only on an indictment or information, section 801-1 would be providing greater protection to the accused than would Section 10's less restrictive allowance for trial and sentencing on complaints in addition to indictments and informations. And, under *Maldonado*, the State would have to comply with §801-1's more restrictive mandate, rather than the less-restrictive constitutional standard. As *Maldonado* teaches, this is not an instance of a statute trumping a constitutional provision. It is, instead, an instance of a statute granting a stronger right to individuals against the State's police power than does the Hawaii Constitution.

Nor does reading §801-1 together with other statutes and court rules provide a reason to think §801-1 means something it does not say. Court rules are readily set aside, for the simple reason that, if there was conflict between any such court rule and the statute, then the statute would prevail over the rule. *See*, *e.g.*, *State v. Hernandez*, 143 Hawaii 501, 510 n.14, 431 P.3d 1274, 1283 n.14 (Haw. 2018) ("when there is a conflict between a court rule and a statute, the

statute is controlling"). A court rule, in sum, cannot erase or otherwise nullify what §801-1 says.[10]

As for the statutes and court rules governing complaints and preliminary hearings, on which the State and the circuit court so heavily relied, none conflict with §801-1's general rule. In *Thompson*, the Hawaii Supreme Court construed HRS §805-1, the statute governing complaints. In doing so, the Hawaii Supreme Court affirmed that "Hawaii law provides for only a single type of criminal complaint" and that a complaint's purpose is simply "to initiate proceedings through an arrest warrant or a penal summons." *Thompson*, 2021 WL 5860477, at *3. It is similarly well-established that the sole purpose of the judicial determination of probable cause and the preliminary hearing that a complaint triggers in felony cases, in accord with HRS §805-7 and HRPP 5, is to perfect a complaint's accusations for the purpose of detaining the accused during the criminal proceeding, rather than to perfect such accusations for trial and punishment. *See*, *e.g.*, *State v. Tominaga*, 45 Haw. 604, 609, 372 P.2d 356, 359 (Haw. 1962) (recognizing that the "only purpose" of a preliminary hearing "is to determine whether there is sufficient evidence against the accused to warrant his being held for action by a grand jury"); *Moana v. Wong*, 141 Hawaii 100, 106, 405 P.3d 536, 542 (Haw. 2017) (reaffirming that "the 'real purpose' of a preliminary hearing is to confirm that probable cause exists to hold a

[10] The only court rule that might be construed to conflict with §801-1 is HRPP 7(b), which provides that "[a] felony may be prosecuted by complaint" when a district court judge finds probable cause at a preliminary hearing, the defendant has waived the right to a preliminary hearing, or the defendant has waived the right to an indictment. There is plenty of room, however, to avoid such conflict by narrowly construing the word "prosecuted," as used in Rule 7(b), to refer only to the initiation of a criminal proceeding, instead of construing it broadly to include subjecting the accused to trial and punishment. *See*, *e.g.*, *Merriam-Webster's Dictionary*, www.merriam-webster.com (defining "prosecution" to mean "to bring legal action against for redress or punishment of a crime or violation of law" and "to institute legal proceedings"). But even if such a narrowing construction could not be adopted for some reason, effect is given to §801-1's mandate, rather than the rule's allowance, if the two conflict. *See Hernandez*, 143 Hawaii at 510 n.14, 431 P.3d at 1283 n.14.

defendant in custody" (quoting *Chung v. Ogata*, 53 Haw. 364, 366, 493 P.2d 1342, 1343 (Haw. 1972))). Nor should it be overlooked that HRS §805-7, while focused on judicial determinations of probable cause after arrest (on the arrest warrant issued on a complaint or otherwise), refers to "offenses … that can be tried only on indictment by a grand jury[.]" Obrero's reading of §801-1 thus finds support, rather than negation, in §805-7's acknowledgement that there is a body of offenses that can be tried only on an indictment.

Even if, moreover, there was a reasonable way to read ambiguity into §801-1 (which, again, Obrero posits there is not), the rule of lenity would ensure that Obrero's construction of §801-1 should prevail over the State's rendering it a dead letter, for his is the less harsh reading of the statute. "It is … well settled that under the rule of lenity, a penal statute must be strictly construed against the government and in favor of the accused." *State v. Lora*, 147 Hawaii 298, 312, 465 P.3d 745, 759 (Haw. 2020) (quotation marks and brackets silently omitted) (quoting *State v. Woodfall*, 120 Hawaii 387, 396, 206 P.3d 841, 850 (Haw. 2009), and citing *State v. Kalani*, 108 Hawaii 279, 288, 118 P.3d 1222, 1231 (Haw. 2005), and *State v. Shimabukuro*, 100 Hawaii 324, 327, 60 P.3d 274, 277 (Haw. 2002)).

2. The circuit court's reasons for ignoring HRS §801-1's mandate are flawed.

The foregoing discussion evinces that the circuit court's conclusion of law No. 16—in which it concluded that Section 10's held-to-answer provision "clearly authorizes the prosecution of a person" by indictment, information, or upon a finding of probable cause at a preliminary hearing on a complaint—is wrong. JIMS 90, at 5. As explained above, Section 10 ensures that an accused is not held in custody (or required to post bail and abide conditions of pretrial release) while a criminal proceeding is pending, absent a finding of probable cause by a grand jury or a judge, be it memorialized in an indictment or information or found at a preliminary hearing. Section 10 says nothing about "authorizing" everything a State does during

"a prosecution," much less does it "clearly" authorize the State to subject a person to trial or punishment, stages of a criminal proceeding to which Section 10 does not refer. The circuit court's reading of Section 10 in effect elides "held," construing the provision as if it broadly spoke about what is necessary to require someone to answer for an alleged crime. But that "held" does work, and the work it does is to narrow what Section 10 is talking about to the prerequisites for depriving the accused of her liberty during the pendency of her criminal proceeding and while she answers the accusation.

As also noted above, even if Section 10 did "authorize" the State to subject someone accused of a felony to trial and punishment on nothing more than a complaint and preliminary hearing finding of probable cause, the floor it would then set would be raised by §801-1's more stringent mandate. At the dismissal hearing, the circuit court's remarks reflect that it believed Obrero was arguing "that 801-1 supplants Article I, Section 10" and "works to essentially trump Article I, Section 10, of the Hawaii [C]onstitution." JEFS 11, Tr. 09/13/2021, at 33. Such remarks were animated by the circuit court's view that Section 10 provides the *State* with the right to conduct the entirety of a criminal proceeding on a complaint-triggered, preliminary hearing finding of probable cause. *See* JEFS 11, Tr. 09/13/2021 at 32–33; JIMS 90, at 5–6. Such an understanding of Section 10—as protecting the State's right to conduct the entirety of a criminal proceeding on an indictment, information, or complaint at its election—turns Section 10 on its head. "No person shall be held to answer …" is not language that protects the State; it is language that *restricts* the State's use of its police power by vesting individuals with the right not to be held to answer unless Section 10's requirements are met. *See*, *e.g.*, *State v. Tsujimura*, 140 Hawaii 299, 310–311, 400 P.3d 500, 511–5612 (Haw. 2017) (recognizing that "any person" and "[n]o person" are phrases that "function[] to protect" individuals from the State). Nor, in any

event, did the circuit court address how the interplay of §801-1 and Section 10, if the two are deemed to overlap, is any different than the interplay of the statutory and constitutional knock-and-announce rules that led the Hawaii Supreme Court to hold the State must comply with more stringent statutory requirements even though constitutional requirements may be more elastic and forgiving. *See Maldonado*, 108 Hawaii at 444, 121 P.3d at 909.

The circuit court also seems to have largely misunderstood Obrero's argument, insofar as conclusions of law Nos. 14, 20–22, 24, 32, and 42–45 appear to understand his claim to be that this matter must be dismissed because something was wrong with his preliminary hearing. *See* JIMS 90, at 5–13. Obrero does not challenge the preliminary hearing conducted in this case, nor the preliminary hearing process in general. His §801-1 claim is that §801-1 requires an indictment or information to perfect a felony accusation for trial and sentencing, above and beyond the preliminary hearing necessary to justify detaining (or extracting bail from and imposing conditions of release on) the accused while the criminal prosecution is pending. Conclusions of law Nos. 14, 20–22, 24, and 42–45, are thus beside the point, if not incomplete and misleading, to the extent that they suggest this case is about the authority to conduct preliminary hearings.

Conclusion of law No. 43, moreover, wrongly cabins Obrero's argument as contending that the purpose of a preliminary hearing is solely to justify holding someone until the grand jury acts. *See* JIMS 90, at 11–12. His claim is not so narrow. In accord with precedent, he contends that "[t]he real purpose of a preliminary hearing is to confirm that probable cause exists to hold a defendant in custody" while a criminal proceeding is pending. *Moana*, 141 Hawaii at 106, 405 P.3d at 542 (citation and quotation marks omitted). And, as the Hawaii Supreme Court has indeed recognized, in some cases (those involving felonies that can not be perfected by an

information), the "only purpose of a preliminary hearing [will be] to determine whether there is sufficient evidence against an accused to warrant his being held for action by a grand jury[.]" *Tominaga*, 45 Haw. at 609, 372 P.2d at 359 (citation omitted). The circuit court's takeaway from *Tominaga*—that a grand jury's failure to indict is of no consequence—is, moreover, a non sequitur: That an indictment dispenses with the need to conduct a preliminary hearing, because the grand jury's finding of probable cause suffices to justify detaining the defendant while the criminal proceeding is pending, does not suggest that an indictment is not required to subject someone to trial and punishment.

The circuit court's reading of HRPP Rules 5 and 7—in conclusions of law Nos. 28, 32, 36, 39, and 42–44—as allowing for trial and punishment in felony cases absent an indictment or information, and its view that Rules 5 and 7 are "in direct conflict" (COL No. 42) with Obrero's §801-1 claim, are flawed for more fundamental reason. Any conflict between those rules and §801-1 is resolved in favor of giving effect to what the statute requires, not the rules. *See Hernandez*, 143 Hawaii at 510 n.14, 431 P.3d at 1283, n.14. Rule 5(c) does not, in any event, conflict with §801-1, because, as discussed above, the commitment "to answer" a felony accusation, which results from a finding of probable cause at preliminary hearing, does not preclude something more being needed to perfect that accusation for trial and sentencing. As is the case with Section 10, Rule 5 simply speaks to one phase of a felony criminal prosecution—detention while the proceeding is pending—not its entirety. And while Rule 7(b) does, indeed, state that "[a] felony may be prosecuted by a complaint" when the district judge has found probable cause at preliminary hearing (or when the accused waives preliminary hearing or indictment), conflict with §801-1 is readily avoided by construing the rule's use of the word "prosecuted" narrowly, in accord with the rule of lenity, to refer to the initiation of a criminal

proceeding, rather than its entirety. *See* supra note 10. And, in any event, the statute controls if Rule 7 is read to conflict with §801-1. *See Hernandez*, 143 Hawaii at 510 n.14, 431 P.3d at 1283 n. 14.

The circuit court also appears to have accepted the State's proposition that "the HRPP and in particular Rule 5" bring "the charges in this case … within the jurisdiction of the district court." JIMS 90, at 11 (COL 43). That thought runs with the muddled argument that the State made at the dismissal hearing, contending that the felony accusations in this matter did not trigger §801-1's general rule because they fell within §801-1's exception "for offenses within the jurisdiction of a district court." HRS §801-1; *see also* JEFS 11, Tr. 09/13/2021, at 21–25. Such a view of the district court's jurisdiction, which appears to bring within it *all* offenses committed within the circuit in which it sits, would have §801-1's exceptions clause swallow its general rule. Under such an understanding of §801-1's exceptions clause and Rules 5 and 7, an indictment or information would *never* be required to subject an accused to trial and punishment since all offenses would fall within the jurisdiction of a district court.

Court rules, in any event, cannot vest a court with jurisdiction. *See*, *e.g.*, *Schwartz*, 136 Hawaii at 263, 361 P.3d at 1166 ("[t]he criminal jurisdiction of our courts originates in our constitution and is defined by the legislature"). A district court's criminal jurisdiction is defined in HRS §604-8, not Rules 5 and 7. *See Schwartz*, 136 Hawaii at 263, 361 P.3d at 1166; HRS §604-8. The only "offenses" that may be tried in the district court are misdemeanors, petty misdemeanors, and violations. *See* HRS §§604-8 and 701-107; *Wilson*, 55 Haw. at 316, 519 P.2d at 230 ("a felony … is not triable in the district court"). Thus, the only "offenses within the jurisdiction of a district court" that may be tried and punished absent an indictment or information under §801-1's exceptions clause are misdemeanors, petty misdemeanors, and

violations. Reading the HRPP to bring felony offenses within the ambit of §801-1's exceptions clause is, accordingly, not reasonable.

3. Dismissal with prejudice is the proper remedy in this case.

The circuit court further erred, in conclusion of law No. 45, in concluding that Section 5's due process clause does not require dismissal with prejudice on the facts of this matter.

The purpose of a grand jury is to provide a "safeguard" against the State's power to accuse an individual of serious offenses. *Jess*, 117 Hawaii at 397, 184 P.3d at 149 (citation omitted); *see also*, *e.g.*, *Taylor*, 126 Hawaii at 225–226, 269 P.3d at 760–761 (Acoba, J., concurring and dissenting) (discussing the grand jury's "weighty role" to "protect an individual" from the State). "The grand jury functions as a barrier to reckless or unfounded charges and serves as a 'shield against arbitrary or oppressive action, by [e]nsuring that serious criminal accusations will be brought only upon the considered judgment of a representative body of citizens acting under oath and under judicial instruction and guidance.'" *State v. Sua*, 92 Hawaii 61, 73, 987 P.2d 959, 972 (Haw. 1999) (quoting *State v. Kahlbaun*, 64 Haw. 197, 203, 638 P.2d 309, 315 (Haw. 1981); additional citation omitted). If a grand jury's return of a no bill has no consequence, the shield the grand jury is supposed to provide is illusory.

In this matter, a grand jury has affirmatively refused to indict Obrero on second-degree murder, a related class A firearm offense, and four instances of attempted second-degree murder. The State nonetheless seeks to subject him to trial and punishment, even though §801-1 says it may not do so absent an indictment, because a district court judge found probable cause as to those offenses at a preliminary hearing triggered by a prosecutor's complaints. The State, moreover, has made no contention that, within the time allotted by law for bring Obrero to trial, it will return to the grand jury and obtain an indictment. On such a state of facts, due process

should compel dismissal with prejudice. To do anything less would shatter the shield the grand jury is thought to provide.

To be clear, it is not Obrero's contention that a grand jury panel's return of a no bill automatically brings a criminal proceeding to an end, whenever it may occur (although he would have no objection to such a due process rule). Speedy trial rights, enshrined in constitutional and statutory provisions and court rules, require trial to commence within a specified time frame. In Hawaii, that period is six months. *See* HRPP 48. Thus, as a general matter and subject to a caveat, the State may keep building its case and try to get an indictment (or may, for felony offenses within the ambit of §806-83, file an information) throughout that six-month period, even after a grand jury panel has returned a no bill. The caveat is that due process should not allow the State to simply shop the same material evidence to different grand jury panels until it dupes one to indict. Instead of allowing such panel shopping, due process should require the State to demonstrate, once a grand jury returns a no bill, that any subsequent indictment, information, or complaint is based, at least in part, on additional evidence that the State neither knew about, nor (in accord with principles of due diligence) should have known about, at the time it presented its case to the grand jury that returned the no bill. *Cf.*, *e.g.*, *Gillan v. Government Employees Ins. Co.*, 119 Hawaii 109, 122 n. 7, 194 P.3d 1071, 1084 n.7 (Haw. 2008) (recognizing that "forum shopping" is "a practice that should be discouraged as inimical to sound judicial administration" (quoting *Moss v. Am. Int'l Adjustment Co.*, 86 Hawaii 59, 65, 947 P.2d 371, 377 (Haw. 1997) (quoting *Jordan v. Hamada*, 64 Haw. 446, 448, 643 P.2d 70, 72 (Haw. 1982)); quotation marks omitted)).

In Obrero's case, the State has made no contention that it has any new evidence or that it is pursuing and expects to develop any new evidence, which it neither knew about nor should

have known about when it presented its case to the grand jury panel. Absent a persuasive and timely proffer (never made here) that would make a material difference were the State allotted the remaining time on Rule 48's clock to return to the grand jury and try again with such additional evidence, due process should foreclose the State from proceeding with its prosecution of Obrero.

PERTINENT POSITIVE LAW

"No person shall be deprived of life, liberty or property without due process of law[.]" Haw. Const. art. I, §5.

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury or upon a finding of probable cause after a preliminary hearing held as provided by law or upon information in writing signed by a legal prosecuting officer under conditions and in accordance with procedures that the legislature may provide, except in cases arising in the armed forces when in actual service in time of war or public danger[.]" Haw. Const. art. I, §10.

"No person shall be subject to be tried and sentenced to be punished in any court, for an alleged offense, unless upon indictment or information, except for offenses within the jurisdiction of a district court or in summary proceedings for contempt." HRS §801-1.

CONCLUSION

This Court should reverse the circuit court's dismissal ruling and remand this matter for dismissal with prejudice.

DATED: Honolulu, Hawaii, January 10, 2021.

/ s / Thomas M. Otake
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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI‘I

STATE OF HAWAI‘I

v.

RICHARD OBRERO,

Defendant.

CASE NO. 1CPC-19-0001669

COUNT 1:
ATTEMPTED MURDER IN THE FIRST DEGREE
(§705-500, 707-701(1)(a) and 706-656 HRS)
(REPORT NO. 19422657-001)
COUNT 2:
MURDER IN THE SECOND DEGREE
(§707-701.5 and 706-656 HRS)
(REPORT NO. 19422657-002)
COUNT 3:
ATTEMPTED MURDER IN THE SECOND
(§705-500, 707-701.5 and 706-656 HRS)
(REPORT NO. 19422657-003)
DEGREE
COUNT 4:
ATTEMPTED MURDER IN THE SECOND DEGREE
(§705-500, 707-701.5 and 706-656 HRS)
(REPORT NO. 19422657-004)
COUNT 5:
ATTEMPTED MURDER IN THE SECOND DEGREE
(§705-500, 707-701.5 and 706-656 HRS)
(REPORT NO. 19422657-005)

APPENDIX A

COUNT 6:
CARRYING OR USE OF FIREARM IN THE COMMISSION OF A SEPARATE FELONY
(§134-21 HRS)
(REPORT NO. 19422657-006)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING DEFENDANT RICHARD OBRERO'S MOTION TO DISMISS

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING DEFENDANT RICHARD OBRERO'S MOTION TO DISMISS

Defendant's Motion To Dismiss having come on for hearing on September 13, 2021, before the Honorable Kevin A. Souza, the State being represented by Deputy Prosecuting Attorney Lawrence A. Sousie, Defendant Richard Obrero (hereinafter "Defendant") being present and represented by Thomas M. Otake, Esq., also present, and the Court having heard arguments by counsel, and having reviewed the records and files in the instant case, makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On November 7, 2019, Richard Obrero ("Defendant") was placed under arrest by the Honolulu Police Department ("HPD"), in connection with an investigation into the death of a minor male, S.W., who was born in 2003.

2. The HPD's investigation was documented under HPD report number ("Rpt. No.") 19 422657-001, et al. The lead Detective in this investigation was HPD Detective Jason Malacas ("Det. Malacas").

3. On November 9, 2019, former Deputy Prosecuting Attorney Lynn Park ("Deputy Park") reviewed and conferred the HPD's investigation of the events surrounding Defendant's arrest, and filed a number of criminal complaints against Defendant.

4. These complaints, six (6) in total, were filed in the District Court of the First Circuit, State of Hawaii, on November 12, 2019.

5. Such filed complaints, were for the following offenses:

a. Attempted Murder in the First Degree, in violation of Sections 705-500, 707-701(1)(a) and 706-656 of the Hawaii Revised Statutes ("HRS'), in connection with HPD Rpt. No. 19-422657-001, with no specifically named complainant.

b. Murder in the Second Degree, in violation of Sections 707-701.5 and 706-656 of the HRS, in connection with HPD Rpt. No. 19-422657-002, with the named complainant as S.W.

c. Attempted Murder in the Second Degree, in violation of Sections 705-500, 707-701.5, and 706-656 of the HRS, in connection with HPD Rpt. No. 19-442657-003, with the named complainant Penitila Junior Faamoe.

d. Attempted Murder in the Second Degree, in violation of Sections 705-500, 707-701.5, and 706-656 of the HRS, in connection with HPD Rpt. No. 19-442657-004, with the name complaint as Patrick Pili.

e. Attempted Murder in the Second Degree, in violation of Sections 705-500, 707-701.5, and 706-656 of the HRS, in connection with HPD Rpt. No. 19-442657-005, with the name complaint as Coeby Lokeni.

f. Carrying or Use of Firearm in the Commission of a Separate Felony, in violation of Section 134-21 of the HRS, in connection with HPD Rpt. No. 19-422657-006.

g. Each of these offenses was on a separate complaint, and signed by both Deputy Park and Det. Malacas.

6. Thereafter, Defendant's initial appearance occurred on November 12, 2019, before the Honorable Melanie May ("Judge May"). Defendant's case was then scheduled for a Preliminary Hearing on November 14, 2019, at 1:30 p.m.

7. On the morning of November 14, 2019, Deputy Prosecuting Attorney Ashley Tanaka ("Deputy Tanaka") presented this case to Panel C of the Oahu Grand jury.

a. The proposed indictment sought charges against Defendant identical to those above-listed, but in addition, sought additional ones.

b. In addition to the above-listed six (6) offenses, Deputy Tanaka added three more offenses of Carrying or Use of Firearm in the Commission of a Separate Felony, in violation of Section 134-21 of the HRS.

c. After the presentation of her case, the Oahu Grand Jury no billed all proposed offenses.

d. Deputy Tanaka's presentation had failed entirely.

8. Deputy Tanaka proceeded to present the case before Judge May at the Preliminary Hearing in the afternoon on that same day for the originally filed above- listed six (6) offenses. However, Deputy Tanaka's presentation did not conclude, and was furthered until November 15, 2019.

9. On November 15, 2019, Deputy Tanaka concluded her presentation, whereupon Judge May found probable cause as to all offenses and bound the matter over to the Circuit Court. Defendant's Arraignment and Plea in the Circuit Court of the First Circuit, was thereafter set for November 29, 2019.

10. On November 18, 2019, Deputy Tanaka filed a Complaint in this case, that consolidates and mirrors the Complaints that had been filed by Deputy Park.

11. At Defendant's Arraignment and Plea hearing, a "not guilty" plea was entered and his case was assigned to the Honorable Karen T. Nakasone, with a Trial Week of January 27, 2020.

12. After various continuances which are not material to the instant motion, Defendant's present Trial Week is calendared before this Court for November 8, 2021.

13. On July 12, 2021, Defendant filed his Motion to Dismiss ("Defendant's Motion to Dismiss"), seeking dismissal of this case.

CONCLUSIONS OF LAW

14. The Hawaii Constitution does not preclude the State from proceeding to a preliminary hearing on a case, after a prior failed attempt before a grand jury.

15. Article I section 10 of the Hawaii Constitution provides, in part, that "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury or upon a finding of probable cause after a preliminary hearing held as provided by law or upon information in writing signed by a legal prosecuting officer under conditions and in accordance with procedures that the legislature may provide".

16. By its plain language, Article I section 10 of the Hawaii Constitution clearly authorizes the prosecution of a person for a "capital or otherwise infamous crime," in one of three ways: (1) upon indictment of a grand jury, (2) upon a finding of probable cause after a preliminary hearing, or (3) upon an information in writing signed by a legal prosecuting officer, where permitted by law.

17. The clear wording in the Hawaii Constitution, of the three (3) charging avenues, has been reinforced by the words of the Supreme Court of Hawaii (the "SCOH"). In *State v. Jess*, where the SCOH stated "[t]o be sure, article I, section 10 of the Hawai‘i Constitution affords the prosecution more charging mechanisms than its federal analogue, insofar as article I, section 10 permits the prosecution to charge by indictment, complaint, or information . . .

whereas the fifth amendment only allows charging by indictment". 117 Hawaii 381, 397, 18 4P.3d 133, 150 (2008).

18. The SCOH in *Moana v. Wong* stated that "a complaint and preliminary hearing, indictment, and criminal information are separate, parallel methods by which a felony prosecution may be initiated." 141 Hawaii 100, 106, 405 P.3d 536, 542 (2017). Besides citing Hawaii Rule of Penal Procedure ("HRPP") Rules 5(c) and 7, the SCOH also cited *State v. Ogata*, 53 Hawaii 364, 493 P.2d 1342 (1972), and *State v. Tominaga*, 45 Hawaii 604, 372 P.2d 356 (1962) as support for their observation that a prosecution may be initiated via felony complaint and preliminary hearing.

19. It is significant that the words "separate" and "parallel" were used, indicating that these methods are exclusive from, and not dependent upon, each other.

20. Defendant was permissibly charged via complaint after a preliminary hearing in this matter, regardless of whether or not there was an indictment attempt.

21. Defendant's claim that permitting the State to "circumvent the grand jury's return of a no bill," would render the grand jury a nullity, and that the grand jury would cease to operate as a check on the State's power to initiate prosecution of charges that cannot be initiated by felony information, is undermined by the case such an assertion relies upon. *State v. Salas*, 133 Hawaii 186, 324 P.3d 996 (2014). The precise quote from *Salas* is that "A conviction at trial does cure an illegitimate indictment, because if 'a trial could validate an otherwise invalid indictment, the right to indictment by grand jury would be a nullity and the grand jury would cease to operate as a check upon the district attorney's power to initiate prosecution.'" *Id.* at 7 (quotation omitted). The quote referred to in *Salas* is in regards to a defective indictment, not a complaint and preliminary hearing held after a "no bill".

22. HRS §801-1 does not preclude the State from proceeding to a preliminary hearing on a case, after a prior failed attempt before a grand jury

23. Pursuant to HRS §805-7, entitled "Commitment; form of mittimus," "[i]n all cases of arrest for offenses that must be tried in the first instance before a jury . . . the judge in whose jurisdiction or on whose warrant the accused was arrested, upon the appearance of the accused, shall proceed to consider whether there is probable cause to believe that the accused [committed] the offense with which the accused is charged". Here, since Defendant had been charged with felonies which "must be tried in the first instance before a jury", subsequent to Defendant's "initial appearance" on November 12, 2019, Judge May was statutorily required to proceed to determine whether there was probable cause to believe that the charged offenses had been committed, and whether defendant had committed them. *See* HRS §805-7. Judge May calendared and presided over Defendant's Preliminary Hearing that occurred on November 14, and 15, 2019.

24. In accordance with the above, Defendant was permissibly charged via complaint after a preliminary hearing in this matter, regardless of whether or not there was a prior indictment attempt.

25. HRS §801-1 says that "[n]o person shall be subject to be tried and sentenced to be punished in any court, for an alleged offense, unless upon indictment or information, except for offenses within the jurisdiction of a district court or in summary proceedings for contempt."

26. Defendant in this case is not being tried, sentenced, or punished in the district court. Rather Defendant's Preliminary Hearing proceeded in district court, and after a finding of probable cause, his case was bound over for trial and possible sentencing and punishment in the circuit court.

27. HRS §801-1 was first enacted by the Kingdom of Hawaii in 1869, during the time of Kamehameha V, and cannot be read in a silo void of subsequent legal history. That statute was last amended in 1972. In 1997 however, the HRPP were promulgated. *See Moana v. Wong*, 141 Hawaii 100, 110, 405 P.3d 536, 546 (2017).

28. HRPP Rules 5(c), 7(b) and 7(h) explicitly authorize defendants to be prosecuted via district court felony complaint, notwithstanding HRS §801-1. In addition, article I section 10 in its current form was adopted in 1978. *See State v. Martin*, 62 Haw. 364, 375, 616 P.2d 193, 200 (1980) ("article I, Sections 5 and 8 were amended and renumbered as Article I, Sections 7 and 10, respectively, by the Constitutional Convention of Hawaii of 1978 and ratified by the electorate on November 7, 1978").

29. The SCOH has made clear that "article I, section 10 of the Hawai‘i Constitution affords the prosecution more charging mechanisms than its federal analogue, insofar as article I, section 10 permits the prosecution to charge by indictment, complaint, or information. . . whereas the fifth amendment only allows charging by indictment". 117 Hawaii 381, 397, 18 4P.3d 133, 150 (2008). *See also Moana v. Wong*, 141 Hawaii 100, 106, 405 P.3d 536, 542 (2017)

30. It is a cardinal rule of statutory interpretation that the legislature is presumed to know existing law, including the court interpretation of existing law, when enacting statutes. *State v. Reis*, 115 Hawaii 79, 97, 165 P.3d 980, 998 (2007).

31. The general powers of the district courts are described in HRS §604-7. Pursuant to HRS §604-7(e), the "several district courts shall have power to make and award judgments, decrees, orders, and mandates, issue such executions and other processes, and do such other acts and take such other steps as may be necessary to carry into full effect the powers which are or shall be given

them by law or for the promotion of justice in matters pending before them." The district courts have been given the power by law, specifically HRPP Rule 5(c) via HRS §602-11, to schedule, conduct, and rule upon preliminary hearings in which defendants are charged in the district court with felonies, like Defendant in this case.

32. The Hawaii Rules of Penal Procedure ("HRPP") do not preclude the State from proceeding to a preliminary hearing on a case, after a prior failed attempt before a grand jury.

33. Pursuant to HRS §602-11, the SCOH "shall have power to promulgate rules in all civil and criminal cases for all courts relating to process, practices, procedure and appeals, which shall have the force and effect of law." The HRPP are such a set of rules, which had been adopted and promulgated by the SCOH.

34. Specifically, HRPP Rule 5, entitled "Proceedings Following Arrest," sets forth in part the law that governs preliminary hearings in districts courts, specifically, how defendants are processed in the district court when charged with a felony offense. HRPP Rule 5(c). HRPP Rule 5(c) does not merely empower a district court to conduct a preliminary hearing, but mandates that it do so.[5] *See State v. Wilson*, 55 Hawaii 413, 519 P.2d 228 (1974) ("the district court was empowered under Rule 5(d)(2) of the Hawaii Rules of Criminal Procedure [the predecessor to the current HRPP Rule 5(c)] to conduct a preliminary hearing . . .". *See also Gannett Pacific Corp. v. Richardson*, 59 Hawaii 224, 227, 580 P.2d 49, 53 (1878) ("Under the Hawaii Rules of Penal Procedure, the district court has the responsibility of conducting preliminary hearings"). Indeed "[a] preliminary hearing is not a trial. It is a proceeding to determine probable cause". *Toledo v. Lam*, 67 Hawaii 20, 21, 675 P.2d 773, 775 (1984).

35. Under HRPP Rule 5(c)(1), when a defendant is charged with a felony in the district court (as Defendant was), the district court is required to schedule a preliminary hearing, unless the

defendant waives the right to such hearing. In this case, Defendant did not waive his right to a preliminary hearing, which is why Judge May set it for November 14, 2019.

36. HRPP Rule 5(c)(4) reads that "the prosecution and the defendant may introduce evidence and produce witnesses, who shall be subject to cross-examination. The defendant may testify, subject to cross-examination. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary hearing. Motions to suppress must be made to the trial court as provided in Rule 12". The purpose of a preliminary hearing is to attain a determination of probable cause. *Chung v. Ogata*, 55 Hawaii 364, 366, 493 P.2d 1342, 1343 (1972).

37. HRPP Rule 5(c)(6) provides that a preliminary hearing may be disposed of in one of two ways: (1) "if from the evidence it appears that there is probable cause to believe that the felony charged, or an included felony, has been committed and the defendant committed it, the court shall commit the defendant to answer in the circuit court", or (2) absent probable cause, "the court shall discharge the defendant".

38. HRPP Rule 7(h) specifically authorizes a felony complaint to be filed in the district court. HRPP Rule 7(h), Court in which charge filed, provides that (1) An indictment or information shall be filed in the circuit court; (2) A complaint may be filed in either the district or circuit court; provided that a complaint shall not be filed initially in the circuit court when it charges: (i) a felony, and none of the 3 conditions set forth in Rule 7(b) of these rules has yet occurred, or (ii) only an offense or offenses other than a felony.

39. HRPP Rule 7(b) authorizes a felony complaint to be prosecuted under any of the following three conditions: "(1) if with respect to that felony the district judge has found probable cause at a preliminary hearing and has committed the defendant to answer in the circuit court pursuant to Rule 5(c) of these rules; (2) if, pursuant to Rule 5(c)(2) of these rules, the defendant has

waived in open court the right to a preliminary hearing; or (3) if, pursuant to Rule 7(c) of these rules, the defendant has waived in open court the right to an indictment".

40. The plain and unambiguous language of HRPP Rule 7(h) and (b) require that a complaint be filed in the district court in the first instance when the complaint charges a felony. Only after a "district judge has found probable cause at a preliminary hearing and has committed the defendant to answer in the circuit court pursuant to Rule 5(c)" can a complaint be filed in the circuit court.

41. Since Defendant was charged with felony offenses, HRPP Rule 5(c) empowered and required the district court to conduct a preliminary hearing in Defendant's case. Defendant's Preliminary Hearing in this case, was within the jurisdiction of the district court, and no other court. The district court is vested with the power, indeed, the legal obligation, to conduct a preliminary hearing in this case. HRPP Rule 5(c), Section 10 of the Hawaii Constitution, HRS §604-7(e) and HRS §805-7.

42. HRPP Rule 5(c) states that "[i]n the district court, a defendant charged with a felony shall not be called upon to plead, and the proceedings shall be had in accordance with this section (c)." The HRPP and in particular Rule 5, are in direct conflict with Defendant's claim that the charges in this case do not "fall within the jurisdiction of a district court."

43. Although Defendant claims that the purpose of a preliminary hearing is to simply provide justification to hold the accused for subsequent indictment by the grand jury, this simply is not accurate. Defendant cites *Engstrom v. Naauao*, 51 Haw. 318, 459 P.2d 376 (1969), wherein the defendant was indicted by a grand jury. However, as the SCOH made clear in *Engstrom*, "[o]nce a grand jury has returned an indictment, there is no further need for a preliminary hearing. *Id.* at 320, 377. Conversely, if a grand jury does not return an indictment, there is still need for a preliminary hearing, since a defendant is still being accused of charges. *See Id.* at 320, 377. The SCOH made

this apparent in *State v. Tominaga*, 45 Haw. 604, 610, 372 P.2d 356, 360 (1962) when they stated that "the real purpose of a preliminary hearing is to prevent a person from being held in custody without prompt determination of probable cause, if the grand jury finds an indictment no purpose remains for conducting a preliminary hearing…". Defendant's contention that a "no bill" ends prosecution after a district court complaint has been filed, is incorrect, since a "no bill" by a grand jury is not the same as a discharge by a district court judge. *See* HRPP Rule 5(c)(6).

44. A district court's authority to conduct a preliminary hearing in cases involving defendants who are charged with a felony offense is well settled. In *State v. Wilson*, 55 Hawaii 314, 316-317, 519 P.2d 228 (1974), the SCOH said "the district court is empowered under Rule 5(d)(2) [the predecessor to Rule 5(c)] to conduct a preliminary hearing". Similarly, in *Gannett Pacific Corp.v. Richardson*, 59 Hawaii 2224, 227, 580, P.2d 49, 53 (1978), the SCOH said "[u]nder the Hawaii Rules of Penal Procedure, the district courts have the responsibility of conducting preliminary hearings". *See also State v. Jess, Moana v. Wong*, infra. Although Defendant claims that it is only a grand jury that should decide whether criminal proceedings begin, obviously this is tied into its role to consider the issue of probable cause, just like a district court judge. *See State v. Taylor,* 126 Hawaii 205, 226, 269 P.3d 740, 761 (2011).

45. There is no due process violation here based on the State's having utilized the preliminary hearing process after getting a "no bill" at grand jury. There is legal precedent to support what transpired in this case. In *State v. Metcalfe*, 129 Hawaii 206, 297 P.3d 1062 (2013), the defendant was arrested for second-degree murder and a firearm offense. The case was presented to a grand jury, but the grand jury returned a "no bill". The defendant was then charged in the district court via felony complaint. At the conclusion of the preliminary hearing, the district court found probable cause and bound the case over to the circuit court for trial. The defendant was

tried and ultimately convicted of manslaughter. On appeal, the defendant argued that the district court complaint violated double jeopardy and collateral estoppel principles because the grand jury had previously returned a "no bill". The SCOH disagreed. The SCOH held that jeopardy does not attach at the grand jury state, but instead in a jury trial, one the jury is impaneled and sworn. The SCOH agreed with the lower court that double jeopardy does not bar the prosecution from filing a complaint after the grand jury returns a "no bill".

ORDER

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss is DENIED.

Dated at Honolulu, Hawai`i: September 17, 2021.

/s/ Kevin A. Souza

KEVIN A SOUZA
Judge of the above-entitled court

APPROVED AS TO FORM:

/s/ Thomas M. Otake
Thomas M. Otake, Esq.
Attorney for Defendant Obrero

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII,

vs.

RICHARD OBRERO,

Defendant.

CR. NO. 1CPC-19-001669

TRANSCRIPT OF PROCEEDINGS

before the HONORABLE KEVIN A. SOUZA, Eleventh Division, Judge presiding, on Monday, September 13, 2021.

MOTION TO DISMISS; TRIAL CALL

APPEARANCES:

LAWRENCE A. SOUSIE, ESQ. For the State
Deputy Prosecuting Attorney

THOMAS M. OTAKE, ESQ. For the Defendant

REPORTED BY:
Sandra M. N. You, CSR 406, RPR
Official Court Reporter
State of Hawaii

MONDAY, SEPTEMBER 13, 2021

THE LAW CLERK: Now calling Case Number 17, Obrero, Criminal Case Number 1CPC-19-1669, State of Hawaii versus Richard Obrero, for trial call and motion to dismiss.

Appearances, please.

MR. SOUSIE: Good afternoon, Your Honor. Laurence Sousie, deputy prosecuting attorney, for the State of Hawaii.

THE COURT: All right. Good afternoon, Mr. Sousie.

MR. OTAKE: And good afternoon, Your Honor. Thomas Otake on behalf of Richard Obrero, who is present in court.

THE COURT: All right. Mr. Otake, Mr. Obrero, good afternoon.

And welcome. Thank you for being here. Everyone can have a seat.

I want to note that we do have our court reporter present and transcribing the proceedings this afternoon.

Again, we are here in relation to a motion to dismiss that was filed by the defense on July 12, 2021. The Court is in receipt of the motion. I've reviewed the motion. I'm also in receipt of the State's memorandum in

opposition, filed on August 23rd, 2021, as well as the defense's reply brief, which was filed on September 2nd, 2021.

By way of reminder, counsel, we do have our trial week set for November 8th. Today also doubles as a trial call for that matter as well.

It's my intention to take the motion to dismiss up at this time.

I wanted to inform everyone that we are proceeding -- or simulcasting via Zoom. I believe we do have an observer with respect to the Judiciary tuning in as well. All right?

So having said that, let's start with you, Mr. Otake, and --

MR. OTAKE: Thank you, Your Honor.

THE COURT: -- your arguments.

MR. OTAKE: Thank you, Your Honor. Thank you for setting aside time this afternoon to allow for oral argument on this issue.

You know, not to be dramatic, but this is a really important and significant and incredibly interesting issue, not just to Mr. Obrero's case, of course, and his life, but to the criminal justice system as a whole.

I mean, our position is that for decades, really, the prosecutors have been abusing what is allowable

through this preliminary hearing process. You know, I've spent a lot of time looking at this issue and analyzing it and thinking it through. And of course, you know, for what it's worth, we believe we're right. And I'm going to take some time this afternoon to explain why. And I appreciate the Court's patience as I go through this.

You know, I think at first glance, it probably may seem like a complicated issue, but our position is is it's actually not that complicated. When you look at Article I, Section 10, of the constitution, and then you read HRS 801-1, 805-7, and then the court rules, Hawaii Rules of Penal Procedure 7(b)(1), you know, at first glance, it may look as though some of these things contradict each other. But when you put some critical thought and analysis into it, it actually makes sense, and it all works hand in hand.

And that's the case if you embrace the fact that all along, the purpose of a preliminary hearing from way back when until now was supposed to be only to see if there's probable cause to hold someone for subsequent action by the grand jury, not in lieu of action by the grand jury. If you approach it all from that perspective, then everything works together and doesn't contradict itself, including Hawaii Supreme Court case law, which I'm going to talk a little bit about today.

To understand this, I think we have to be really clear about what each of these different provisions are talking about. And they're talking about different parts of the criminal justice process. That's, I think, something I want to highlight.

So if you take, for example, the State says, well, Article I, Section 10, of the constitution allows them to do this, and if it's -- it contradicts 801-1, that's -- the constitution trumps that. But initially I was looking at it from the perspective of, well, the constitution is just the floor of rights that's provided, and the legislature can enact additional rights beyond that, and that's perfectly fine. But when I thought more about it, it's actually -- it's actually just talking about different things.

Article I, Section 10, of the constitution, says: No person shall be held to answer -- held to answer for a capital or otherwise infamous crime, you know, unless on presentment or indictment of a grand jury or finding of probable cause after a preliminary hearing, as provided by law or upon information. And it goes on.

But the key thing is, it says "held to answer." And our position is that means to be held -- you know, if you're going to hold someone in custody to answer, you've got to at least have some kind of probable cause

determination. So that's just to -- when you initiate a case, if you're going to hold them to answer.

801-1, on the other hand -- which, by the way, comes from the Chapter 801 that's entitled Rights of the Accused -- talks about no person shall be subject to be tried and sentenced unless upon indictment or information.

So if you're going to hold someone to answer, you need one of these things in the constitution, but if you're going to try them and sentence them, you need an indictment or information where applicable. So you're talking about different parts.

And I think another thing to emphasize here why it makes sense is -- and, Your Honor, this is why I say it's really -- it seems complicated, but it relies a lot on things we learned early on in law school, really.

The State says, well, the constitution, Article I, Section 10, gives us the right to try someone or to proceed by preliminary hearing. Constitution doesn't provide rights to this -- to the government. Constitution provides protections and rights to the individual. So to say that the constitution somehow allows them to do this, that's wrong.

The constitution, Article I, Section 10, was providing a protection to the individual. And that protection simply was, if we're going to hold you to answer

for a case, we've got to make sure there's probable cause. That's the right of the individual. Then the legislature, through 801-1, says, that's fine, but if you're going to -- if you're going to try someone and sentence them and punish them, you need an indictment or information where applicable.

So I point that out because the State, you know, really says, you know, the constitution allows us -- gives us the right to do that. But you have 801-1. And it's not -- it's not inconsistent with Article I, Section 10. It's talking about a different part of the process, which then brings up, of course, the other thing we learned early on in law school, that the plain and unambiguous language of a statute is controlling. If it's plain, clear, and unambiguous, you cannot go any further.

801-1 -- HRS 801-1 could not be more clear. It talks about, you know, if it's a District Court matter, complaints are okay. This, of course, isn't a District Court matter. And the plain and unambiguous language says you need an indictment or information. We all know what the legislature -- how they restricted the use of informations. So the State ignores in their opposition, provides no good reason why this Court should completely ignore the plain language of a very clear statute.

And further, why does that plain and unambiguous

language make sense? You know, I would submit, if you look at the federal court system -- and this is something that always kind of perplexed me. In federal court, there can be preliminary hearings, but if there's a preliminary hearing, there still needs to be a grand jury indictment. There still needs to be a grand jury indictment. Preliminary hearing is just about timing, holding someone, extending the time period to get an indictment, not in lieu of. So under the federal constitution and federal system, you cannot proceed by preliminary hearing on a serious felony alone.

And I guess this is where it really got me thinking, because Hawaii -- and, in fact, it's embedded; it's in our case law and otherwise. Hawaii has always prided itself on providing more protections than the federal system, than the federal constitution. So why, in this one superimportant scenario, would we provide less? I mean, it just doesn't make sense. It's always the opposite. Hawaii -- the Hawaii case law, statute, constitution provide more.

The concept that the legislature never intended to allow felonies to be pursued by preliminary hearing in lieu of an indictment and the concept that a preliminary hearing was always just meant to see if you could hold someone pending an indictment, it's present in binding

Supreme Court case law, Hawaii Supreme Court case law as well.

We cite the *Engstrom versus Naauao* case. Granted, it's a 1969 case. However, it's still good law. It hasn't been overturned. And that says: Preliminary hearing is for the purpose of determining whether there's probable cause to warrant holding the accused for action by the grand jury.

Then the *State versus Tominaga* case, a 1962 case, again says: The only purpose of a preliminary hearing is to determine whether there's sufficient evidence against an accused to warrant his being held for action by a grand jury.

These are still good law. These have not been overturned. They're binding precedent in Hawaii. You cannot ignore the plain language of a statute, and you can't ignore Hawaii Supreme Court precedence.

You know, interestingly, when you talk to some, you know, sort of older timers, you know, they'll tell you there was a time in Hawaii where that was the practice. There -- if you had -- you always needed a grand jury, even after a preliminary hearing. And the best I can tell from the case law is somewhere in the, you know, '80s, late '80s, they started doing it this other way. And for whatever reason, that wasn't challenged, and that wasn't

raised until recently.

And then I know the State relies and they bring up the Hawaii Rules of Penal Procedure Rule 7. And, you know, first of all, very clearly, statutes trump court rules; court rules don't trump statutes. That's very clear. That's the *State versus Hernandez* case. When there's a conflict between a court rule and a statute, the statute is controlling. However, again, if you go back to what I was saying in the beginning, Your Honor, I don't even think these two things contradict each other because they're talking about different things, again.

And Rule 7 can be construed in a way that's consistent and doesn't offend HRS 801-1; that is, a felony by complaint and a prelim is -- is okay when the prelim is just to hold someone until the grand jury indicts him, that if -- they're talking -- when it says -- Rule 7 says may be prosecuted by complaint, as I explained in our reply memorandum, you're talking about initiating a charge.

You can initiate a charge by complaint. We don't have a problem with that. You can do that. You can have a preliminary hearing. You can do that. We're not saying you cannot prosecute and initiate that way. You can. You just can't try and sentence until there's an indictment.

THE COURT: Can I ask you, then why would

under -- that same Rule 7(b), why would 7(b)(1), which you're referring to now, also be included together with 7(b)(3), where a felony may be prosecuted by complaint if the defendant waives indictment? Why would those two things be considered by rule as essentially the defendant waiving the same thing?

MR. OTAKE: Well -- but I think that's why that even goes further to -- to what we're saying is, is -- and that's something I thought about, too, in terms of 801-1, Your Honor, because when it says, you know, by indictment or information, of course 801-1 was around before, you know, this information charging came up.

But like in the federal system, you can proceed by information, but you have to waive your right to an indictment. So I think I would submit, the rule, you know, for what it's worth, by them saying that, kind of almost infers that, you know, you have a right to an indictment. I mean, I don't know. I mean, that's kind of my -- my take on the rule, Your Honor, is that it doesn't have to be read in a way that's inconsistent with 801-1.

THE COURT: Well, I'm just asking about your reading of 7(b). You're saying the word "prosecuted" --

MR. OTAKE: Yeah.

THE COURT: -- in Rule 7(b), Mr. Otake, would mean that, well, you can start or initiate the process --

MR. OTAKE: Sure.
THE COURT: -- in Circuit Court, but you still have to go get an indictment.
MR. OTAKE: Sure.
THE COURT: But if I look at 7(b)(3), it says a felony may be prosecuted by complaint if the defendant waives his right to --
MR. OTAKE: Sure.
THE COURT: -- an indictment.
MR. OTAKE: No, I understand your point, Your Honor, and it's a valid point.
I -- again, if the Court doesn't believe the two can be read in a way where the rule doesn't offend 801-1, then we go back to statutes trump court rules. So I don't have a good answer for that, except to say that at the end of the day, clearly a statute trumps a court rule.
THE COURT: Okay.
MR. OTAKE: So . . .
THE COURT: Go ahead.
MR. OTAKE: And, you know, the State, they raise certain cases, and I want to talk about a couple of them, because they don't say what the State is saying they say.
And first of all, *State versus Jess*, it had nothing to do with an HRS 801-1 challenge because that wasn't the issue in the case, and it doesn't specifically

say that we're wrong in this motion.

More importantly, the *Moana versus Wong* case, you know, the State pulls one kind of comment from the case out of the larger context. And, you know, the defendants in *Moana* were arguing about their -- that the preliminary hearing was untimely. The Hawaii Supreme Court said it was moot because one defendant was eventually charged by information, the other by indictment.

And there was this one phrase that the State has kind of grasped on to, but if you read *Moana* closely and all of it, it's actually a case that I would submit supports our contention, not -- doesn't -- not hurts it. You know, first of all, the Supreme Court points out that, you know, HRPP 5(c) is about how to initiate a felony charge. Again, the word "initiate"; right?

And it talks about in the case when a defendant is indicted or the charge that -- I mean, the phrase the State has latched on to: When a defendant is indicted or charged by criminal information, a preliminary hearing need not, and under our rules cannot, be conducted. This is because a complaint and preliminary hearing, indictment, and criminal info are separate, parallel methods by which a felony prosecution may be initiated.

So, again, it's talking about initiated. But then it talks about the real purpose of a preliminary

hearing is to confirm that probable cause exists to hold a defendant in custody, and it cites the *Tominaga* case, the point being that a preliminary hearing, again, under Section 10 of the -- Article I, Section 10, is merely to justify holding someone in custody, rather than subjecting him to trial and punishment, which 801-1 addresses. So *Moana*, we would submit, is a good case for us.

And, again, we're saying they can initiate a case by complaint or preliminary hearing. They just, after that -- they can hold someone after that, but then they have to have an indictment before they can try and punish him.

So, again, all these things, I would submit, can be read in a way that's consistent: The constitution, holding to answer; HRS 801-1 saying, okay, before you try and punish them, you need an indictment; and then the rules talking about initiation and prosecution; and then, of course, *Tominaga* and *Engstrom* and the *Moana* cases we think make this all clear.

You know, the other issue, Your Honor, I wanted to talk a little bit about is HRS 805-7, because I know the State brings up that. But I submit that actually helps prove our point. HRS 805-7 says: In all cases of arrest for offenses that must be tried in the first instance before a jury or that can be tried only on indictment by a

grand jury. And then it goes on to say what it says.

THE COURT: Uh-huh.

MR. OTAKE: So 805-7 plainly contemplates that a preliminary hearing finding of probable cause will occur in cases that can be tried only on indictment by a grand jury. And so that's --

THE COURT: Where does it say "preliminary hearing" in 805- --

MR. OTAKE: That's --

THE COURT: -- 7?

MR. OTAKE: -- that's a really good point. It doesn't, Your Honor. But it does talk about --

THE COURT: Isn't this talking about the JDPC process, as opposed to the preliminary hearing process, which is a completely separate thing?

MR. OTAKE: You know, that's -- that's something that I did -- did cross my mind. I thought it was a little unclear. But this -- this -- I think, arguably, this is talking about that JDPC proceeding. At the same time, though, it's -- it is talking about a probable cause finding by a judge on a case that can only be -- can be tried only on indictment by a grand jury.

And so whether or not it's talking about the JDPC or preliminary hearing, which I think, arguably, it could be, it still contemplates that there are cases that

can be tried only on indictment by a grand jury. And, again, that's another statute, 805-7, that I think makes that clear.

So, you know, the State, in their opposition, they really don't address why there's a good reason to simply ignore 801-1. I mean, you can't just simply ignore the plain language of a statute. They offer case law that has nothing to do with 801, and they take, you know, one phrase out of the *Moana* case in which the broader case is actually a good case for us, you know.

And then I think the argument in part is, look, this has been something that's been doing for a long -- we do. It's been happening for a long time. But, of course, past practice is no justification, you know, if something is being done wrong.

You look at, you know, the whole *Apprendi* issue, Your Honor. You know, there was a time, you know, here where we didn't have trials -- jury trials for extended sentencing and all of that. That was done for a long time, and then it was zero consolation that it hadn't been done that way for a long time. So, you know, just because that's the way it's been done for a while doesn't mean it's allowable.

You know, then you have -- so the point is, Your Honor, 801-1 says what it says. And, you know, we can say,

well, maybe it just hasn't been amended or fixed. But the legislature is also -- you know, they've met every year since the statute's been around, and not once have they taken a moment to change it or repeal it or fix it or -- if there's anything wrong with it. So, you know, the statute says what it says.

And I think the -- you know, the Court -- put aside the court rules and -- for a second. You know, I understand the State's argument, well, the constitution controls. You know, the constitution says we can do this; therefore, we can do it. You know, again, sure, you can, you know, hold someone to answer if you do a prelim, but 801-1, that doesn't mean under -- that doesn't render 801-1 moot. I mean, 801-1 is the voice and the will of the legislature.

So the two can coexist. You don't have to say that it's providing more rights. You don't have to say it trumps anything. The two can coexist, is essentially what I -- my argument is.

Aside from 801-1, Your Honor, we do have the due process clause of the constitution argument, and that's that the due process clause is being violated.

I rest primarily on our arguments in that -- in our motion. But I do ask you to consider -- you know, I think we cited to it -- but Justice Acoba's concurring

opinion from the *State versus Taylor* case, where he summarizes past case law that unequivocally confirms that the Hawaii due process and grand jury clause require a grand jury to act prior to prosecution for an infamous crime, you know.

And it just makes sense. I mean, you know, if -- it just -- you know, to present a case to the grand jury and have the will of the -- the grand jury, you know -- the whole point was about, you know, protections; right? I mean, the whole -- it's about providing a protection before we're going to prosecute someone. And -- and the constitution envisioned leaving that in the hands of -- of the citizens.

And then the citizens return a no bill. You say, ah, well, we can go and just do it over here with one District Court judge. And, you know, that offends, in our minds, the whole grand jury system. It offends the due process clause. And it just can't be the right way things can be done, especially when you take into, you know, consideration 801-1 and everything else.

So, you know, I think the -- I'm sure the Court understands our arguments. And I'm willing -- you know, any questions the Court has, we'll try our best to answer them.

But, you know, I really think -- and, you know,

it's kind of taken a while to get my own clarity on some of this, so I -- but that being said, I think our reply brief really summarizes why, you know, all of these things can coexist. You know, we're not saying it's all -- it's just this random, rogue 801-1 and everything else says something otherwise. It's how you really pick out -- really, with a critical eye, look at what these other things say and what 801-1 says, and why that all makes sense. And then you look at it.

That's exactly how it's done in the federal system. It's exactly how it's done. I mean, yeah, it makes sense. You want to hold someone to answer, you better have probable cause, 'cause we don't want to lock people up for -- pretrial for six months, eight months if there's no probable cause. But, you know, if it's an infamous, serious crime, you still need a grand jury before you try them and sentence them.

And I think back in the day, it was a timing issue maybe between when the grand jury was meeting and -- you know, you couldn't get to a grand jury right away. You still want to hold the guy. Well, fine, do a preliminary hearing. You hold them until the grand jury can act.

So that's our arguments, Your Honor. We appreciate the time to make them.

THE COURT: Thank you, Mr. Otake.

MR. OTAKE: Thank you.

THE COURT: Thank you very much.

All right. Mr. Sousie, I'll hear from the State.

MR. SOUSIE: Thank you, Your Honor.

Well, Your Honor, we're going to start, of course, with the Hawaii constitution.

And as Counsel had read, that there are three ways in which to initiate a felony prosecution, and they can do it by felony -- they can do it by complaint. They can do it by indictment. They can do it -- let's see. What's the quote exactly here?

No person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury or upon a finding of probable cause after a preliminary hearing.

This process was noted by Judge Levinson in *State versus Jess*. That's a 2008 case. And Levinson said that Hawaii affords more charging mechanisms than does the federal constitution. And what's why the State referenced *State v. Jess*. So esteemed Judge Levinson felt that, in fact, there were more than one way to initiate a felony prosecution as set forth in the constitution.

And that was echoed by Justice Pollack and refined in *Moana versus Wong*, which is a 2017 case.

Pollack interpreted Article I, Section 10, of the Hawaii constitution to allow a felony prosecution to be initiated, again, by complaint, indictment, or preliminary -- preliminary hearing, complaint, or indictment. And he stated that the complaint, felony information, or indictment are separate, parallel methods by which a felony prosecution may be initiated.

So one is not dependent upon the other. The State believes that's the point that Pollack was making in *Moana versus Wong*, that, in fact, there are three ways in which to do this, and they are separate and independent of each other. They're not necessarily connected.

So if we look at 801-1 and specifically -- it's very brief, of course. And it says that no person shall be subject to be tried and sentenced to be punished in any court for an alleged offense unless upon indictment or information, except for offenses within the jurisdiction of a District Court.

State believes that there's possibly two ways this can be interpreted. Number one, that 801-1 stands by itself, versus the other statutes, which the State will get to in a minute; or that the phrase in 801-1 "except for offenses within the jurisdiction of a District Court," in fact, gives the District Court jurisdiction based on the statutes and the rules to initiate the prosecution.

So if we look at 805-7 -- so you have 801-1 on one side. And quite possibly if the Court adopts the argument that, in fact, the District Court has jurisdiction for which to begin the process, that's then -- that will take us over to the -- the rules and the statutes. But if the Court feels that it doesn't, then we just have to look at the rules -- the other rules and statutes separately.

And those are -- first of all, 805-7, which is: In all cases of arrest for offenses that must be tried in the first instance before a jury, the judge, upon the appearance of the accused, shall proceed to consider whether there is probable cause to believe that the accused is guilty of the offense with which the accused is charged.

And since this is an offense under 806-60, which requires a jury to be impaneled, the State believes that that is a controlling statute.

I know the Court mentioned that it was curious whether this, in fact, addresses JDPC. That's an issue that the State hadn't thought, but it certainly seems to apply to just probable cause -- determination of probable cause at the District Court level.

806-8, prosecution where indictment not essential, it says: In all criminal cases brought in the first instance in a court of record, the prosecution may arraign and prosecute the accused by information,

complaint, or indictment, as the case may be.

Now, rules promulgated, Rule 5 and Rule 7, of course the Court knows that rules are promulgated pursuant to statutes to help clarify. And Rule 5, sub (c), felonies, if the defendant addresses the process and allows for the probable cause hearing and it -- it says: If the defendant does not waive such hearing, the Court shall schedule a preliminary hearing, provided that such hearing shall not be held if the defendant is indicted or charged by information before the date set for such hearing.

Now, also, Rule 5 provides for the disposition of a proceeding that started in District Court. And there's only two ways that a disposition could take effect. One is if the Court shall commit the defendant to answer to the Circuit Court or if the Court discharged the defendant. Okay?

So the point is that the grand jury's coming back with no bill does not discharge the District Court proceeding, because once a District Court proceeding begins, there's only two ways that it can be disposed, and neither of them are that a grand jury returns a no bill.

With respect to 7(b) and 7(h), now --

THE COURT: Well, what if, in your example, the grand jury returns a true bill? Then what?

MR. SOUSIE: Then the -- then the preliminary

hearing is deemed unnecessary.

THE COURT: Okay. But where does that then relate back to the two ways that you described that a preliminary hearing may be --

MR. SOUSIE: Well, the --

THE COURT: -- disposed of?

MR. SOUSIE: -- the State is always free to discontinue, Your Honor. The State is always free to state that they will withdraw the proceeding or discontinue the proceeding with or without prejudice. So the State has that -- the ability to do that.

THE COURT: Okay.

MR. SOUSIE: Now, Rule 7, 7(h) -- we'll start with 7(b), so when felony -- when felony may be prosecuted by complaint. A felony may be prosecuted by a complaint under any of the following three conditions: (1) if, with respect to that felony, the district judge has found probable cause at a preliminary hearing and has committed the defendant to answer in the Circuit Court pursuant to Rule 5(c) of these rules.

Now, Rule 7(h) states that a complaint -- the court in which a charge is filed, a complaint may be filed in either the District or Circuit Court, provided that a complaint shall not be filed initially in the Circuit Court when it charges a felony, and none of the three conditions

set forth in Rule 7(b) of these rules . . .

And we had that in this case. The charge is a felony, and the court has found probable cause. So according to Rule 7(b), read with 5(c), the court -- District Court has jurisdiction. And once the process begins, the District Court -- under 7(h), the State has the right -- and, as a matter of fact, it has to be filed in District Court. It cannot be filed in Circuit Court because the State has met Rule 7(b).

So the State submits that the District Court has jurisdiction. And once the complaint is filed, it has to be -- the process will be brought through until you get to the two dispositions, either probable cause or it's been determined that there is no probable cause.

And the Supreme Court in *Gannett Pacific versus Richardson* and also *State v. Wilson* have noted that the District Courts have responsibility of conducting a preliminary hearing. The State submits that, in fact, this acknowledges the jurisdiction which the courts have.

And with respect to the grand jury, *State v. Metcalfe* is directly on point. There's no double jeopardy issue here. So the State also submits there's no due process concerns.

Counsel referenced State v. -- *Engstrom*. And, in fact, in *Engstrom*, the court ruled that a preliminary

hearing is not a constitutional requirement and is not a prerequisite to the issuance of a grand jury indictment. So, in fact, the State submits that *Engstrom* supports the State's position.

Counsel references the constitution, the phrase "held to answer." State submits "held" is not a custodial hold. It's just being held accountable. I think it's a term of -- probably a term of art.

THE COURT: What's the State's legal authority for that interpretation?

MR. SOUSIE: Oh, there is no legal authority, Your Honor.

THE COURT: Okay.

MR. SOUSIE: Yeah. I think it's a common sense -- I think that to try to assign some sort of legal definition to the word "held" is -- would be difficult. I think "held" is something that can be interpreted in many different ways.

THE COURT: Okay.

MR. SOUSIE: And the Court rightly noted Rule 7(b)(3) with respect to the issuance of a complaint. And also the questions -- the question arises, Your Honor -- I mean, there's a couple of practical things here. If the Court takes the position that a grand jury has to -- that a preliminary hearing -- issuance of a complaint has to go to

a grand jury or be held for a grand jury, then in today's environment, with the pandemic, with no grand jury, then these people would be held for an indefinite period of time. But that's -- that's not a factor due to -- with respect to a legal application, but it is a practical result or it would be a practical result.

Your Honor, this argument -- Counsel's argument is really the same argument made in another case recently, with the Skyap matter. And the State believes that, in fact, it's -- it's -- 801-1 either gives jurisdiction to the District Court, which then brings in 805-7, 806-8, Rule 5 and Rule 7, or it doesn't.

And if the Court rules that 801-1 doesn't, through the phrase "give the District Court jurisdiction," and it doesn't bring in the other statutes, then the State submits that the Court should look at 801-1 versus all the others in the sense of one versus the other, essentially.

And the State submits that the body of law under 805-7, 806-8, Rule 5, and Rule 7 is very detailed. And the process has been laid out. It's very clear. So if it comes down to a balancing act for the Court, the State submits that 801-1 does not hold sway over the other statutes, which all seem to align perfectly well.

So we ask for the Court to deny the motion.

THE COURT: Thank you, Mr. Sousie.

All right. Mr. Otake.

MR. OTAKE: Just very briefly.

Your Honor, it's -- you know, I've never heard of a balancing act where you need -- you know, you just find some balancing act between one statute that says this and the others. I mean, we're bound by, you know, certain canons of how we interpret statutes and whatnot.

But if we want to talk about that, how do we ignore what 801-1 says? How do we ignore, you know, 801-1 saying you need an indictment? How do we ignore 805-7 saying -- or, you know, that there's cases that can be tried only on indictment by a grand jury? How do we ignore what the *Engstrom/Naauao* case says or the *Tominaga* case says?

And, you know, the *Moana* case, I really -- I really believe that's a good case for us. I know the State thinks it's a good case for them. But first of all, the *Jess* case and *Moana* case -- again, in *Jess*, Levinson's talking about charging mechanisms. We're not saying that a complaint is not a charging mechanism. Fine. You want to initiate a case with a complaint? Fine. But you still need to indict if you want to try and sentence.

In *Moana*, it's talking about cases being initiated. But the main thing about *Moana* that I think is just extremely helpful is where the Hawaii Supreme Court,

you know, talks about -- cites the *Tominaga* case and talks about the real purpose of a preliminary hearing is to confirm that probable cause exists to hold a defendant in custody. That's -- they're quoting that case in *Moana*.

And so the -- you know, I think they're taking the whole *Moana* case out of context. But when you read it all, you know, I think it is actually -- I think an extremely helpful case to what our point is.

You know, this interpretation of "held to answer" means this or that, I mean, again, you know, we don't just interpret it however we want. There are ways we are charged to interpret these things, and we can't, you know, where -- you know, we can't look for ways to make our thinking inconsistent. In fact, everything is -- you're supposed to look at it as, how does this all work together? And, you know, "held to answer" is -- can coexist with indictment to try and punish.

Then there's some rule of lenity issues. If we want to talk about some ambiguity in what this or that means, what it means when it says "prosecuted," what it means when it says "held to answer," you know, those -- any ambiguities there should be resolved in favor of the defendant.

The issue he references, the other case in District Court, well, that was postured differently. You

know, there -- we're not saying you can't have a preliminary hearing. You can have a preliminary hearing. You just -- you need to be able to have an indictment before you try and sentence.

So I think Your Honor is well aware of what our arguments are. And, you know, we just -- to us, it all makes sense, you know. It all makes sense. If you look at it from what the case law says, it was always meant to be about prelims, which is you have a prelim to find probable cause to hold someone, but you need subsequent action by the grand jury to try and sentence them. If you read it that way, then this all makes sense.

If not, things are going to conflict. They just are. And I don't think that they were meant to conflict. I think they're meant to all coexist, like the federal system.

Thank you.

THE COURT: All right. Thank you.

All right. I want to begin by thanking counsel for your briefs and your arguments to the Court. They were very concise and to the point and aided the Court in my decision-making process here.

I'll take judicial notice of the records and files of this case, 1CPC-19-1669.

I want to begin by saying that I -- I'm in

agreement with -- and I want to circle back to what Mr. Otake started with, which is, this is a very important issue or set of issues here. And there's no understating that, because at stake here really is a definition of the rules under which the State is allowed to charge defendants and then later on try -- prosecute, try, convict, and sentence defendants under our constitutional and statutory scheme. And so this is really important.

And as Mr. Otake also alluded to, we are dealing with constitutional provisions and statutory provisions and rules of penal procedure that aren't always in harmony with each other and more importantly, are sometimes, frankly, directly contradicting to one another.

You know, HRS 801-1 is a statute that is short and fairly direct and succinct and to the point. And that's what the defense asks the Court to consider in ruling upon its motion, that the charges that Mr. Obrero is facing could have only been brought by way of a grand jury indictment.

And, you know, it's -- it's an important argument to make, and this is a statute that provides the State with sort of that language that, you know, would lend credence to its assertion -- or provide the defense with the language that would lend credence to its assertion. When it comes to statutory construction, I am in agreement

with the defense that, you know, the first place that this Court is commanded to start is based on the plain language of the statute.

And 801-1 does indicate that no person shall be subject to be tried and sentenced to be punished in any court for an alleged offense unless upon indictment or information, except for offenses within the jurisdiction of the District Court.

And that statute standing alone I think could lend itself to the interpretation that Mr. Obrero in this case should have been indicted by grand jury in order for the State to proceed.

You know, quite frankly, though, that statute does not stand alone, and that statute has to be read in pari materia to other statutes, which the State has pointed out, and other constitutional provisions and other rules that are promulgated by our Supreme Court, which, pursuant to HRS 602-11, do have the force and effect of law.

And we start, as the State does, with Article I, Section 10, and *State versus Jess*, wherein Justice Levinson does indicate that Article I, Section 10, does afford more options for the State to proceed with a prosecution than -- than the federal constitution does.

And I look at the plain language of Section -- Article I, Section 10. I certainly do understand the

defense's assertion that Article I, Section 10, is the floor, and the statutes, namely 801-1, set -- or further define what those rights are vis-a-vis defendants. And I also understand the defense's argument that in certain instances, statutes are designed to further clarify and further define the rights of individuals above and beyond the constitution.

I think where I have an issue, though, with the defense is that what they're arguing to me and asking me to rule is that 801-1 supplants Article I, Section 10. I don't hear Mr. Otake saying that today, but I think certainly in the written arguments, that was among the arguments that were made, that 801-1 works to essentially trump Article I, Section 10, of the Hawaii constitution. And that's not something that I can find in the plain meaning of 801-1.

In addition to that, when I look at Rule 5 and Rule -- Rule 5(c) of the Hawaii Rules of Penal Procedure and Rule 7(b) as well as 7(a) to the Hawaii Rules of Penal Procedure, it's clear to this Court that the preliminary hearing process, as defined by the rules, particularly Rule 7(b), does allow the prosecution to proceed by way of a complaint, any subsequent finding of probable cause by a district judge, who then bounds the matter over to Circuit Court where a prosecution can then move forward.

Now, much of the arguments that were presented today ask me, as the judge, to interpret language in the constitution, such as "held to answer," and/or language in the rules of penal procedure, such as, well, what does the term "prosecuted" mean when it appears in the Hawaii Rules of Penal Procedure?

I believe for the purposes of my ruling today, that the term "held to answer" should be given its plain meaning and does mean that a person may be prosecuted or a prosecution may be initiated, a person may be tried, and if convicted, that person may be sentenced for a capital or otherwise infamous crime, at least with respect to the term "held to answer" as it appears in Article I, Section 10, of the state constitution.

I believe that the term "prosecuted" as it appears in Rule 7(b) of the Hawaii Rules of Penal Procedure means that somebody may be not only charged but tried, and if convicted, they may be sentenced in the Circuit Court if a complaint is initiated in District Court and probable cause is found after a preliminary hearing and that matter is then conveyed to the Circuit Court. I believe that's what the term "prosecuted" means in the rule.

But that's my interpretation for the purposes of my ruling today based on my reading of the rules. I've been wrong in the past, and, you know, I'm willing to be

wrong here.

I think that Mr. Otake, on behalf of Mr. Obrero, makes some not only important arguments, but some very -- some very well-founded arguments. And there is much in the statutory scheme that does suggest that maybe what -- maybe Mr. Otake's interpretation of the statutes and the rules as they're set out are correct, particularly when we talk about references to cases that can only be tried on indictment by a grand jury in HRS 805-7.

Now, whether HRS 805-7 pertains only to JDPCs or it pertains to the larger preliminary hearing process, you know, I'm going to find that it doesn't. I don't see the words "preliminary hearing" in 805-7. But both the State and the defense here have conceded that it's possible that 805-7 could relate to the preliminary hearing process. And so these are important arguments to be made.

What I'm going to do for the purposes of my ruling today, Mr. Sousie, is the Court is going to be adopting, respectfully, the findings -- as my findings of fact, the factual allegations laid out in Mr. Dowd's declaration of counsel in the memorandum in opposition. And I will be adopting as my conclusions of law, the law and analysis portion of the State's memorandum in opposition. That's pages 7 through 15 of the memorandum in opposition.

I do so because I would like Mr. Sousie to prepare the Court's findings of fact and conclusions of law denying the motion to dismiss.

I'd like you to circulate that to Mr. Otake for his signature, his review and approval as to form, and present that to the Court for my signature within the ten days that are specified by the Hawaii Rules of Penal Procedure.

At the same time, while I am denying the defense's motion to dismiss, I will say that this may be an issue that may need to go up on interlocutory appeal. I don't know if Mr. Otake is contemplating that. But this may be an issue that may need further refining. It's of the level of importance where perhaps the appellate court may need to weigh in to make a determination as to what the appropriate procedure ought to be going forward with respect to complaints and preliminary hearings on certain felony cases moving forward.

So that's going to be the Court's order today.

Is there anything further, counsel?

MR. SOUSIE: Nothing from the State, Your Honor.

THE COURT: All right. Thank you very much.

That concludes our hearing. Thank you.

MR. OTAKE: Your Honor, we have that trial call.

THE COURT: Oh, yes. Thank you.

Trial call, you want to -- Mr. Otake, do you want to make a -- I can set it for further status. Are we -- is it your intention, you think, to proceed with trial as we're set? Because if so, we can order up our jury. If you'd like more time, then what that may do under the current situation with respect to the trial call is it may initiate a continuance of the trial.

So I'll hear from both counsel at this time with respect to the setting of trial.

MR. SOUSIE: Well, Your Honor, I mean, realistically, November 8th -- I mean, is the Court confident that we could get a panel and that, in fact, we would be able to --

THE COURT: Well -- okay. We're set for trial on the week of November 8th. Right now there's no prohibition on trials going forward. So -- and that's why I brought up the issue of -- you know, this was a motion to dismiss. It was denied.

I don't know if you'd like more time to think about your next move, Mr. Otake. If not --

MR. OTAKE: Yeah. I'm -- well, I mean, we have thought a lot about it. I looked into this issue.

THE COURT: Uh-huh.

MR. OTAKE: I think it's arguably an issue that lends itself to interlocutory appeal, even -- not

necessarily one that is -- requires this Court's permission. Maybe it does; maybe it doesn't. But, you know, it sounds like it's something this Court's willing to entertain even -- if it does require this Court's permission.

I've discussed it, you know, to a certain degree with my client. But I would need to discuss that with him further just in terms of what that all means and, you know, in terms of the process and timing of it all. So, you know -- and because of that, I think, you know --

THE COURT: I think what I can do is I can keep the jury in play for the week of November the 8th. But I can set maybe a further status conference in a couple of weeks.

MR. OTAKE: I think that would --

THE COURT: You can have a couple weeks to --

MR. OTAKE: -- make sense.

THE COURT: -- speak to your client.

MR. OTAKE: You know, I'd rather do that, rather than just agree to move the trial today.

THE COURT: All right. Let's do that, then. Let me set a status conference in a couple weeks. For now we'll keep our trial week of November 8th in play. To the extent that we need to look to ordering up our jury, that's what we will do internally. But we'll set a status in a

couple weeks.

Mr. Otake can have a conversation with Mr. Obrero in terms of whether an interlocutory appeal will be pursued on this issue prior to proceeding to trial or whether this is simply an issue they will preserve to the extent they need to use it for appeal after trial.

And you can report back to me in two weeks as to how you want to proceed, Mr. Otake.

Madam Clerk?

THE CLERK: You want it in two weeks, Judge?

THE COURT: Yes.

THE CLERK: September 27th.

THE COURT: Okay. What time?

THE CLERK: 11 a.m.

MR. OTAKE: Sorry. September 27th?

THE COURT: At 11 -- that's a Monday, at 11 o'clock a.m.

MR. OTAKE: Oh, I'm sorry. That day, I'm probably going to be unavailable all morning.

THE COURT: What about the afternoon?

MR. OTAKE: The afternoon probably could, if it was around 2:00ish or so. I don't know. Is that --

THE COURT: I don't mind. We can set that at 2 o'clock, then.

MR. OTAKE: Okay.

THE COURT: Let's do September 27th at 2 p.m. Okay? We'll set it for further status, but with the understanding that the trial week, counsel, remains the trial week that was specified of November 8th --

MR. OTAKE: Sure.

THE COURT: -- 2021. Okay?

MR. OTAKE: Thank you.

Your Honor, just a couple of -- well, actually, maybe just one other thing related to the motion, and maybe this was just implicit in --

THE COURT: Yeah.

MR. OTAKE: -- in the ruling. But we had the other --

THE COURT: The due process --

MR. OTAKE: Yeah. Just --

THE COURT: Thank you. I didn't -- no, no.

MR. OTAKE: -- just for the purposes of --

THE COURT: And --

MR. OTAKE: -- if there is an appeal.

THE COURT: Yeah. Thank you.

And so, again, I'm adopting as my findings and conclusions the State's -- for the purposes of my ruling today, the State's memorandum in opposition and the findings and arguments -- I'm adopting their legal arguments as my conclusions of law.

I didn't -- you know, so the due process argument is a very interesting argument to me. Again, I'm adopting the State's.

MR. OTAKE: Understood.

THE COURT: But it's a very interesting argument to me. And I think it's an argument that needs to be resolved by the appellate court.

This issue of the State attempting to gain -- go to the grand jury, attempting to gain a true bill, not obtaining a true bill, and then circling back to District Court to advance its complaint at a preliminary hearing setting, does that offend the constitutional notions of due process?

Again, my ruling today, based upon the State's arguments, which I do adopt, is that it does not.

But I think, again, that is something that does perhaps need to be weighed in further by our appellate court, because I don't find -- I mean, you know, I understand the State's argument that there is no double jeopardy concerns with respect to the State going to the grand jury and not getting a true bill. I understand all of that.

But I don't think that there's anything squarely on point with respect to, then does that free them up to then subsequently go and file the complaint or pursue the

complaint at District Court and get a preliminary hearing? That's something I think needs to be weighed in on.

MR. OTAKE: Understood.

So I guess in terms of the order, it's -- on that second issue, it's from the State's briefing?

THE COURT: That's going to be my --

MR. OTAKE: Okay.

THE COURT: I'm adopting their briefing as my findings and conclusions.

Again, I do have some concerns with respect to the due process argument, but as they set it out in their briefing, those are going to be my -- those are going to be my conclusions of law at this time.

MR. OTAKE: Okay. Thank you for that clarification.

MR. SOUSIE: Thank you, Your Honor.

THE COURT: Thank you.

All right. That concludes our hearing.

Thank you very much, counsel.

(Proceedings concluded.)

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C E R T I F I C A T E

STATE OF HAWAII)
)
CITY AND COUNTY OF HONOLULU)

I, SANDRA M. N. YOU, an Official Court Reporter for the First Circuit Court, State of Hawaii, do hereby certify that the foregoing pages comprise a full, true, and correct transcription of the proceedings had on Monday, September 13, 2021, in connection with the above-entitled cause, to the best of my ability.

Dated this 1st day of December, 2021.

/s/ Sandra M. N. You
Sandra M. N. You, CSR 406, RPR
Official Court Reporter

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI‘I

STATE OF HAWAI‘I

v.

RICHARD OBRERO,

Defendant.

CASE NO. _____

COUNT 1:
ATTEMPTED MURDER IN THE FIRST DEGREE
(§705-500, 707-701(1)(a) and 706-656 HRS)
(REPORT/CITATION NO. 19422657-001)
COUNT 2:
MURDER IN THE SECOND DEGREE
(§707-701.5 and 706-656 HRS)
(REPORT/CITATION NO. 19422657-002)
COUNT 3:
ATTEMPTED MURDER IN THE SECOND DEGREE
(§705-500, 707-701.5 and 706-656 HRS)
(REPORT/CITATION NO. 19422657-003)
COUNT 4:
ATTEMPTED MURDER IN THE SECOND DEGREE
(§705-500, 707-701.5 and 706-656 HRS)
(REPORT/CITATION NO. 19422657-004)
COUNT 5:
ATTEMPTED MURDER IN THE SECOND DEGREE
(§705-500, 707-701.5 and 706-656 HRS)
(REPORT/CITATION NO. 19422657-005)

APPENDIX C

COUNT 6:
CARRYING OR USE OF FIREARM IN THE COMMISSION OF A SEPARATE FELONY
(§134-21 HRS)
(REPORT/CITATION NO. 19422657-006)

COMPLAINT

COMPLAINT

The undersigned Deputy Prosecuting Attorney of the City and County of Honolulu, State of Hawai‘i charges:

COUNT 1: On or about November 7, 2019, in the City and County of Honolulu, State of Hawai‘i, RICHARD OBRERO did intentionally engage in conduct which is a substantial step in a course of conduct intended or known to cause the deaths of more than one person, in the same or separate incident, thereby committing the offense of Attempted Murder in the First Degree, in violation of Sections 705-500, 707-701(1)(a), and 706-656 of the Hawai‘i Revised Statutes.

If convicted of this offense or any included felony offense, RICHARD OBRERO may be subject to sentencing in accordance with Section 706-660.1 of the Hawai‘i Revised Statutes where he had a firearm in his possession or threatened its use or used the firearm while engaged in the commission of the felony, whether the firearm was loaded or not, and whether operable or not.

If convicted of this offense or any included felony offense, RICHARD OBRERO may be subject to sentencing in accordance with Section 706-661 and Section 706-662(4)(a) of the Hawai‘i Revised Statutes where he is a multiple offender in that he is being sentenced for two or more felonies, and an extended term of imprisonment is necessary for the protection of the public.

COUNT 2: On or about November 7, 2019, in the City and County of Honolulu, State of Hawai‘i, RICHARD OBRERO did intentionally or knowingly cause the death of S.W. born in 2003, thereby committing the offense of Murder in the Second Degree, in violation of Sections 707-701.5 and 706-656 of the Hawai‘i Revised Statutes.

If convicted of this offense or any included felony offense, RICHARD OBRERO may be subject to sentencing in accordance with Section 706-660.1 of the Hawai‘i Revised Statutes where he had a firearm in his possession or threatened its use or used the firearm while engaged in the commission of the felony, whether the firearm was loaded or not, and whether operable or not.

If convicted of this offense or any included felony offense, RICHARD OBRERO may be subject to sentencing in accordance with Section 706-661 and Section 706-662(4)(a) of the Hawai‘i Revised Statutes where he is a multiple offender in that he is being sentenced for two or more felonies, and an extended term of imprisonment is necessary for the protection of the public.

COUNT 3: On or about November 7, 2019, in the City and County of Honolulu, State of Hawai‘i, RICHARD OBRERO did intentionally engage in conduct which is a substantial step in a course of conduct intended or known to cause the death of Penitila Junior Faamoe, thereby committing the offense of Attempted Murder in the Second Degree, in violation of Sections 705-500, 707-701.5 and 706-656 of the Hawai‘i Revised Statutes.

If convicted of this offense or any included felony offense, RICHARD OBRERO may be subject to sentencing in accordance with Section 706-660.1 of the Hawai‘i Revised Statutes where he had a firearm in his possession or threatened its use or used the firearm while engaged

in the commission of the felony, whether the firearm was loaded or not, and whether operable or not.

If convicted of this offense or any included felony offense, RICHARD OBRERO may be subject to sentencing in accordance with Section 706-661 and Section 706-662(4)(a) of the Hawai‘i Revised Statutes where he is a multiple offender in that he is being sentenced for two or more felonies, and an extended term of imprisonment is necessary for the protection of the public.

COUNT 4: On or about November 7, 2019, in the City and County of Honolulu, State of Hawai‘i, RICHARD OBRERO did intentionally engage in conduct which is a substantial step in a course of conduct intended or known to cause the death of Patrick Pili, thereby committing the offense of Attempted Murder in the Second Degree, in violation of Sections 705-500, 707-701.5 and 706-656 of the Hawai‘i Revised Statutes.

If convicted of this offense or any included felony offense, RICHARD OBRERO may be subject to sentencing in accordance with Section 706-660.1 of the Hawai‘i Revised Statutes where he had a firearm in his possession or threatened its use or used the firearm while engaged in the commission of the felony, whether the firearm was loaded or not, and whether operable or not.

If convicted of this offense or any included felony offense, RICHARD OBRERO may be subject to sentencing in accordance with Section 706-661 and Section 706-662(4)(a) of the Hawai‘i Revised Statutes where he is a multiple offender in that he is being sentenced for two or more felonies, and an extended term of imprisonment is necessary for the protection of the public.

COUNT 5: On or about November 7, 2019, in the City and County of Honolulu, State of Hawai‘i, RICHARD OBRERO did intentionally engage in conduct which is a substantial step in a course of conduct intended or known to cause the death of Coeby Lokeni, thereby committing the offense of Attempted Murder in the Second Degree, in violation of Sections 705-500, 707-701.5 and 706-656 of the Hawai‘i Revised Statutes.

If convicted of this offense or any included felony offense, RICHARD OBRERO may be subject to sentencing in accordance with Section 706-660.1 of the Hawai‘i Revised Statutes where he had a firearm in his possession or threatened its use or used the firearm while engaged in the commission of the felony, whether the firearm was loaded or not, and whether operable or not.

If convicted of this offense or any included felony offense, RICHARD OBRERO may be subject to sentencing in accordance with Section 706-661 and Section 706-662(4)(a) of the Hawai‘i Revised Statutes where he is a multiple offender in that he is being sentenced for two or more felonies, and an extended term of imprisonment is necessary for the protection of the public.

COUNT 6: On or about November 7, 2019, in the City and County of Honolulu, State of Hawai‘i, RICHARD OBRERO did knowingly carry on his person or have within his immediate control or did intentionally use or threaten to use a firearm while engaged in the commission of a separate felony, to wit, Attempted Murder in the First Degree and/or any included felony offense of Attempted Murder in the First Degree, whether the firearm was loaded or not, and whether operable or not, thereby committing the offense of Carrying or Use of Firearm in the Commission of a Separate Felony, in violation of Section 134-21 of the Hawai‘i Revised Statutes. RICHARD OBRERO commits the offense of Attempted Murder in the First Degree, in

violation of Sections 705-500, 707-701(1)(a), and 706-656 of the Hawai‘i Revised Statutes, if he did intentionally engage in conduct which is a substantial step in a course of conduct intended or known to cause the death of more than one person in the same or separate incident.

If convicted of this offense or any included felony offense, RICHARD OBRERO may be subject to sentencing in accordance with Section 706-661 and Section 706-662(4)(a) of the Hawai‘i Revised Statutes where he is a multiple offender in that he is being sentenced for two or more felonies, and an extended term of imprisonment is necessary for the protection of the public.

Dated at Honolulu, Hawai‘i: November 18, 2019.

STATE OF HAWAI‘I

By DWIGHT K. NADAMOTO
Acting Prosecuting Attorney

By /s/ ASHLEY M. TANAKA
ASHLEY M. TANAKA
Deputy Prosecuting Attorney
City and County of Honolulu

STATEMENT OF RELATED CASES

Appellant is not aware of any related cases pending in Hawaii's courts or agencies.