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No. SCAP-21-0000576

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII Plaintiff-Appellee vs. RICHARD OBRERO Defendant-Appellant	1CPC-19-0001669 APPEAL FROM THE FIRST CIRCUIT COURT FOR THE STATE OF HAWAII HON. KEVIN A. SOUZA REPLY BRIEF

REPLY BRIEF

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ARGUMENT

I. The State's Assertions Lack Merit

1. Defendant-appellant Richard Obrero's opening brief lays out his argument supporting a simple proposition: HRS §801-1 means what it says; the accused may neither be tried on a felony, nor sentenced for one, unless the State has perfected its allegations against the accused in an indictment or, if allowed for that felony, an information. *See* HRS §801-1 ("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."); *accord* HRS §§710-1077(1)(a) and (3)(a) (defining summary contempt, a petty misdemeanor); *Evans v. Takao*, 74 Haw. 267, 842 P.2d 255 (Haw. 1992) (discussing summary contempt); HRS §604-8 (establishing district court criminal jurisdiction over offenses punishable by a fine and imprisonment of a year or less); HRS §§701-107(3), (4), and (5) (classifying offenses punishable only by a fine as violations and those punishable by a year or less of imprisonment as misdemeanors and petty misdemeanors). Given its exceptions carving misdemeanors, petty misdemeanors, and violations from its ambit, section 801-1 is a statute that speaks about two stages, trial and sentencing, of a felony case and requires the State to obtain an indictment or file an information (as may be appropriate) to unlock those two stages. Section 801-1 does not peg *when* the State must obtain the requisite key to unlock trial and sentencing. It just requires the State to do so at, obviously, some unspecified point prior to trial.

Eighty-four percent (if not more) of the State's answering brief defends a practice that Obrero does not attack and that §801-1 doesn't implicate—the use of complaint-charging and the preliminary-hearing process to start a felony case. The first 21 pages (and then some) of the State's 25-page answering brief insists that article I, section 10 of the Hawaii Constitution and a smattering of statutes and court rules vest the State with a right to start—the State uses words like instigate (AB at 8, 22), commence (AB at 15, 20), and initiate (AB at 2–4, 8–9, 11, 14, 17–20, 23, 25)—a felony case with a complaint and the preliminary-hearing process a complaint triggers.[1] But §801-1 does not impose a restriction on how a felony case begins. True enough,

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[1] It is difficult to ascribe the word "argument" to very much of what the State puts into its answering brief. The State largely devotes those first 21 pages of its brief to stringing various

the requirement that §801-1 *does* impose is sated when the State elects to start a criminal case with a grand jury indictment or, when allowed, an information. But that hardly segues into what the State is saying—that it may ignore §801-1's plain mandate when it opts to start a felony case with a complaint and the preliminary-hearing process. When such a case is so begun, section 801-1 still steps in to require that, at some point thereafter but before trial, the State must obtain an indictment from a grand jury or file an information in accord with HRS §§806-81, et seq. The State's defense of complaint-charging and the preliminary-hearing process is entirely beside the point.

2. The State relies heavily, if not entirely, on the in-pari-materia canon, but that interpretative canon lacks salience here. *See* AB at 2, 6, 8. The State uses the canon to pivot away from §801-1 to instead focus on article I, section 10 of the Hawaii Constitution and various other statutes and court rules, on the notion that what is clear in all those other things should be used to explain what is doubtful in §801-1. *See*, *e.g.*, AB at 8. Two things trip up that pivot.

a. As reading §801-1 evinces (and as explained above and in Obrero's opening brief), section 801-1 does not, as the State would have it, "speak to the method by which a person may be held to answer for a felony offense" or otherwise talk about how a felony case begins. AB at 8; *but see* OB at 5–6, 13–15. "Held to answer," Section 10's topic, is not a phrase §801-1 uses. Section 801-1 speaks about "subject[ing]" someone to trial and sentencing, not holding them while doing so, much less about how a case is started. Elsewhere in its brief, the State acknowledges that a criminal case has many different stages, *see* AB at 15; trial and sentencing are but two of them, and occur well after the charging stage got the case rolling. All the things that the State asserts grant it the authority to start a felony case with a complaint and preliminary hearing do not speak to the stages of a criminal proceeding that §801-1 protects.[2] The in-pari-materia canon is thus also beside the point.

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quotations together one after the other in a way that recalls, and ends up reading as, an old-time chapbook. Such a quotation strand does not provide much in the way of reasoned argument.

[2] With perhaps the lone exception of HRPP 7(b); "perhaps," because the rule allows for a narrowing construction that would not conflict with §801-1. *See* OB at 19, n.10. If such a construction is unappealing, a court rule cannot, in any event, carry the day against a conflicting statute. *See State v. Hernandez*, 143 Hawaii 501, 510 n.14, 431 P.3d 1274, 1283, n.14 (Haw. 2018); OB at 19, n.10. In its answering brief, the State does not cite *Hernandez*, nor does it acknowledge the statutes-trump-rules principle for which it stands.

b. The other tripping stone is that there is nothing doubtful in §801-1 in the first place. The State—puzzlingly—never quotes §801-1, nor does the State identify which of its words or phrases leaves doubt about what that word or phrase means. The State inverts the in-pari-materia canon to contend that this Court should turn to other sources of law to *cast* doubt *on* (rather than to clarify doubt in) §801-1's plain language. When a statute's language is plain, however, this Court's "sole duty" is to acknowledge that the statute means what it says. *State v. Milne*, 149 Hawaii 329, 333, 489 P.3d 433, 437 (Haw. 2021); *see also*, *e.g.*, *State v. Demello*, 136 Hawaii 193, 195, 361 P.3d 420, 433 (Haw. 2015) ("[w]here there is no ambiguity in the language of a statute, and the literal application of the language would not produce an absurd or unjust result, clearly inconsistent with the purposes and polices of the statute, there is no room for judicial construction and interpretation, and the statute must be given effect according to its plain and obvious meaning"). All those other sources of law, moreover, do not cast doubt on §801-1 anyway; some even shore up the proposition that it means what it says. *See* OB at 13–20; *see also*, *e.g.*, HRS §805-7 (acknowledging that there are "offenses … that can be tried only on an indictment by a grand jury").

3. Scattered throughout the State's defense of complaint-charging and the preliminary-hearing process are other odd assertions. When talking about Section 10, for instance, the State faults Obrero for reading Section 10 as restricting the State's power to hold the presumptively innocent and, thus, as protecting an accused's liberty from being unjustly infringed prior to trial. *See* AB at 14 (contending Obrero's "novel interpretation" of Section 10 lacks support in the provision's language because Section 10 does not use the words "detention, bail, custody, or other words or phrasing to that effect" (emphases omitted)). The State goes so far as to assert that construing Section 10's use of the phrase "held to answer" as meaning "holding someone" in pretrial detention, or otherwise restricting her liberty by extracting bail and imposing bail conditions on her, is "atextual." AB at 14. It is hard to follow the reasoning behind such assertions, turning, as they do, on some notion that the word "held" should carry anything but its ordinary meaning.

That the Hawaii Constitution separately protects the accused from the imposition of excessive bail is, yet again, beside the point. *See* AB at 14 (asserting that reading Section 10 as imposing a restriction on the State's power to subject the accused to pretrial restraints on her liberty "creates a superfluity concern" because article I, section 12 forbids "excessive bail" and

allows a court to "dispense with bail" entirely in most cases). Once again, though, the segue is hard to spot in whatever point the State is trying to make. Perfecting an accusation for the purpose of infringing the accused's liberty (be it by way of pretrial detention or the extraction of bail and imposition of bail conditions) prior to trial requires compliance with the preliminary-hearing process, the information-charging process, or the grand-jury process. Once Section 10's requirement is thereby met, then Section 12 steps in to add, in cases in which Section 10 has been satisfied and bail imposed, that the bail extracted from the accused can't be excessive. Nothing about the way Sections 10 and 12 cooperate with each other renders either unnecessary or superfluous. As to what this appeal is about, moreover, Sections 10 and 12 do not implicate the trial and sentencing stages of a felony case, which §801-1 place beyond a strait gate, *cf. Matthew* 7:14 (KJV), which only an indictment or, in some cases but not this one, an information can unlock.

The State is the party distorting Section 10 here, not Obrero. The State construes Section 10 as "vest[ing]" the State with a right to elect the method it uses to start a criminal case. AB at 17; *see also*, *e.g.*, AB at 8, 10–11, 17-18. But Section 10's language plainly imposes a restriction on the State's use of its police power and is hardly the type of constitutional language used to grant the State a power. *See* OB at 21–22 (discussing what *State v. Tsujimura*, 140 Hawaii 299, 310–311, 400 P.3d 500, 511–512 (Haw. 2017), teaches on this point; yet another case the State refuses to acknowledge). The State also takes that right to be one that stretches omnivorously beyond the initial charging stage in a felony case to authorize the State to conduct *all* the various stages that comprise a felony case, from charging through sentencing. *See* AB at 7–22. The State never explains, however, how the phrase "held to answer" is a skeleton key that unlocks every stage of a felony case. To cut the phrase into such a skeleton key would, at a minimum, require eliding the word "held" entirely. It also seems to require eliding the "to answer" bit too or, at least, distorting it to refer to every stage of a criminal case, rather than the stage—a trial or plea colloquy—where the accused indeed answers the State's accusation. Obrero's reading, on the other hand, allows the phrase "held to answer" to mean what it says. In addressing what the State must do to hold the accused to answer for an infamous crime, Section 10 restricts the State's power to infringe an accused's liberty before the accused answers the State's allegations, be it during a plea colloquy (in which the answer is, 'yes, I did it') or at trial (at which the answer is, 'no, I didn't do it'). A conviction after the accused has answered the accusation against him then

takes over, to carry on the work Section 10 did while the accused remained presumptively innocent, and serves to justify further infringement of the convict's liberty for the remainder of the case.

4. Odd, too, are the State's contentions that Obrero fails to identify "the harm from which an accused needs the protection" an information or indictment provide and that a preliminary hearing provides the accused *more* protection than would an indictment or information; as if the State was doing Obrero a favor by doing things its way. *See* AB at 15–18. Dredging up curated snippets from the 1978 constitutional convention, the State asserts that a judge's finding of probable cause at a preliminary hearing provides greater protection to the accused than a grand jury's finding of probable cause because some convention delegates believed grand jurors did naught but what a prosecutor bid them to do, whereas judges were assumed to be more independent. *See* AB at 16–18.

Whatever may have been behind the view some delegates had about grand jurors fifty years ago, the present case belies the notion that grand jurors are minions. Here, the grand jury refused to rubber stamp the allegations against Obrero. (You would not know that from reading the State's answering brief, because the State pretends this case began with the preliminary hearing conducted *after* the grand jury handed the State a no bill. *See* AB at 1, 1–6, 8, 22. This Court should not accept the State's unspoken invitation to ignore such an elephant.) Section 801-1 guards against the harm of subjecting someone to the rigor and ignominy of trial and sentencing on Hawaii's most serious offenses, without the approval of the citizenry that the grand jury represents or, for somewhat less serious offenses, without passing its accusations through the regimen §§806-81, et seq. prescribes.

The State's notion that a preliminary hearing provides greater protection than an indictment is equally askew. Common sense teaches that less protection is provided by one person's finding of probable cause than is provided by requiring the concurrence of eight to twelve grand jurors on probable cause. *See* OB at 11–12. Sure, the probable cause standard remains the same. *See* AB at 15 (emphasizing that point). But it is much harder (as any extended family can readily attest and Obrero's case demonstrates) to secure the agreement of eight to twelve people on something than it is to convince just one person of that thing. *See* AB at 15–18 (ignoring this point).

5. Yet another oddity, and the last Obrero will call out in this section, is the State's assertion that he has underestimated the number of cases in which the State has violated §801-1 over the years. *See* AB at 20–21 & n.8 (asserting that the search string Obrero used "identifie[s] 53 cases" not the "[s]ome two dozen" he notes in his opening brief). Even if the imprecise and charitable use of understatement in Obrero's opening brief is taken as having done so, *see* OB at 5-6 & n.1, that the State may have violated §801-1 *more* than he estimates is hardly a point in the State's favor.[3]

II. The State's repeal-by-implication argument should be dismissed as too poorly developed to address and is, in any event, unpersuasive.

The State makes only one argument that really counters Obrero's reliance on §801-1 to dismiss this case—that §801-1 has been repealed by implication. *See* AB at 22. The State neglects, however, to remind this Court that "repeal by implication is disfavored." *State v. Casugay-Badiang*, 130 Hawaii 21, 27, 305 P.3d 437, 443 (Haw. 2013). Moreover, to find that §801-1 has been repealed by implication requires first finding that §801-1 is "plainly irreconcilable" with some other statute or constitutional provision. *Casugay-Badiang*, 130 Hawaii at 28–29, 305 P.3d at 444–445. That kind of conflict simply does not exist here. *See* OB at 5–6, 11–24. Having failed to even quote §801-1, the State has not established that §801-1's language is plainly irreconcilable with any of the statues or constitutional provisions it invokes, such that "effect can[not] reasonably be given" to both §801-1 and those other statutes and constitutional provisions. *Casugay-Badiang*, 130 Hawaii at 29, 305 P.3d at 445; *see also* OB at 15–25 (reconciling §801-1 with the other provisions of law the State invokes so that everything, including §801-1, may be given reasonable effect).

The State's failure to develop its repeal-by-implication "argument" beyond a mere conclusory assertion that §801-1 has been impliedly repealed, furthermore, precludes meaningful appellate review, be it under a rubric of waiver or forfeiture or some other rationale. *See, e.g.*, *Hawaii Ventures, LLC v. Otaka, Inc.*, 114 Hawaii 438, 478, 164 P.3d 696, 736 (Haw. 2007) ("an appellate court is not obligated to address matters for which [a party] has failed to present

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[3] Consider, though, that the State hasn't accounted for the many cases that first passed through the ICA on their way to this Court or litigiously produced more than one appellate decision (and, thus, should count only once). Nor, apparently, has the State culled out false hits that do not appear to have violated §801-1, be it due to a defendant's waiver or for some other reason.

discernable arguments"); *State v. Kahanaoi*, 2012 WL 5359188, at *2 (Haw. Ct. App.) (Oct. 31, 2012) (unpublished) ("a series of conclusory assertions is not an argument").

III. The rule of lenity.

Obrero submits that if this Court believes that §801-1's language harbors an ambiguity he's missing, then it should turn to the rule of lenity to resolve that ambiguity in his favor and to preclude trial in the absence of an indictment in his case. *See* OB at 20. The State adopts a rather strange understanding of the rule of lenity as being applicable only when the statute at issue "affects the penalties" a defendant may face or "criminalizes behavior without fair notice." AB at 24. The State's notion that the rule of lenity only applies to resolve an ambiguity in a statute setting the punishment for a crime or defining criminal conduct is not correct. The rule applies to any penal or criminal statute. *See*, *e.g.*, *State v. Woodfall*, 120 Hawaii 387, 396, 206 P.3d 841, 850 (Haw. 2009) (collecting cases). Section 801-1 is a penal, not a civil, statute; it is therefore fair game for the rule of lenity.

The caselaw collected in *Woodfall*, however, evinces that there is room for this Court to clarify when the rule comes into play. Some cases treat lenity as a rule of last resort, which comes into play only when other sources of clarity have been exhausted. *See Woodfall*, 120 Hawaii at 396, 206 P.3d at 850; *State v. Aiwohi*, 109 Hawaii 115, 129, 123 P.3d 1210, 1224 (Haw. 2005). Other cases turn to lenity merely upon finding an ambiguity, thereby signaling that the rule is one of first, not last, resort. *See*, *e.g.*, *State v. Shimabukuro*, 100 Hawaii 324, 328, 60 P.3d 274, 277 (Haw. 2002).

The United States Supreme Court's caselaw, to which this Court has turned in articulating the rule's ambit, echoes such confusion, as the debate between Justices Gorsuch and Kavanaugh in *Wooden v. United States*, 142 S.Ct. 1063 (2022), attests. *See Wooden*, 142 S.Ct. at 1075–1076 (Kavanaugh, J., concurring), and at 1082–1086 (Gorsuch, J., concurring, joined by Sotomayor, J.). Justice Kavanaugh teases a restrictive rule out of precedent and contends that the rule of lenity applies "only when" a criminal statute remains "grievously ambiguous" after the court has consulted "everything from which aid can be derived," including legislative history and other such questionable sources of a law's meaning. *Wooden*, 142 S.Ct. at 1075–1076. Justices Gorsuch and Sotomayor take a more lenient approach. They recognize that the rule is simply "a new name for an old idea—the notion that penal laws should be construed strictly." *Wooden*, 142 S.Ct. at 1802. Because a penal statute should be strictly construed from the get-go, "[t]he right

path is the more straightforward one. Where the traditional tools of statutory interpretation yield no answer, the judge's next step isn't to legislative history or the law's unexpressed purposes. The next step is to lenity." *Wooden*, 142 S.Ct. at 1085–1086. Such an approach, turning to lenity on the early side rather than as a last resort, best "ensur[es] that an individual's liberty always prevails over ambiguous laws." *Wooden*, 142 S.Ct. at 1082. The rule of lenity, in other words, should be the first "rule of statutory construction" a court turns too, not the last. *Wooden*, 142 S.Ct. at 1082. To whatever extent the present matter might allow, Obrero urges this Court to clarify its own rule-of-lenity caselaw and agree with the views Justices Gorsuch and Sotomayor espouse.

To be clear, though, Obrero does not believe that §801-1 is ambiguous to begin with; instead, he maintains that §801-1's language is as plain as can be in requiring that the State obtain an indictment to unlock trial and sentencing on the offenses the State accuses him of committing.

IV. Obrero's due process claim.

The State's conclusory assertions that Obrero's due process claim should fail are unpersuasive for the same reason everything else in its answering brief is not persuasive, because the State pretends Obrero contends something he does not. Ignoring the no bill that the grand jury handed to it, the State mistakenly asserts Obrero claims that starting a felony case upon a preliminary hearing finding of probable cause offends due process. *See* AB at 25. That is not Obrero's due process argument. *See* OB at 25–27.

He invokes the due process clause of article I, section 5 of the Hawaii Constitution to support his assertion that this matter should be dismissed with prejudice, rather than without prejudice, on his §801-1 claim. He claims that once a grand jury returns a no bill on felonies for which an indictment, in accord with §801-1, must be obtained to subject the accused to trial and sentencing, due process should step in to ensure that that State, in accord with basic notions of due diligence, does not shop the same evidence to different grand jury panels until it dupes a panel to indict where others have not. The process he contends should be due imposes on the State the burden to demonstrate, in a no-bill case, that any subsequent return to the grand jury (or subsequently filed information when allowed) is justified by the discovery of new evidence, which the State neither knew about, nor should have known about, when it went before the panel that handed it a no bill. That is the only rule that will prevent the State from serially shopping the

same evidence to different grand jury panels, if, as his due process argument presumes will be the case if this Court reaches the due process issue, section 801-1 indeed requires an indictment to subject the accused to trial and sentencing on Hawaii's most serious offenses. He does not seek some sort of blanket rule, as the State suggests he does, that precludes the State from proceeding with a criminal case whenever a grand jury returns a no bill. He, instead, proposes the more modest rule articulated above and set forth in his opening brief.[4] *See* OB at 25–27. Applying that rule in his case compels dismissal with prejudice, because the State (despite repeated opportunities to do so) has never asserted, much less persuasively demonstrated, that it could abide by that rule within the time Hawaii's speedy-trial laws allow. *See* OB at 25–27.

V. The State would have this Court apply the wrong standard of review.

The State urges this Court to review the circuit court's order denying Obrero's §801-1 and due process claims for an abuse of discretion. *See* AB at 7. As noted in Obrero's opening brief, this Court's review of his claims, which turn wholly on questions of law rather than fact, is de novo, although it is doubtful that it really matters, because both standards produce the same outcome in a case such as this one. *See* OB at 10 & n.3.

VI. A Final Point.

In his transfer application, Obrero flagged a point he urges this Court to revisit in an appropriate case, acknowledging that his might not be such a case because the point was not raised below and was only spotted during the drafting of his transfer application. *See* Defendant-Appellant-Petitioner's Application for Transfer to the Hawaii Supreme Court, SCAP-21-000576, JEFS Dkt. 1 (TA), at 9–10. The allegations in the State's complaint evince that the State believes it may seek extended-term sentences on attempted first-degree murder and attempted second-degree murder. *See* JIMS 1 (RA at 1) (complaint). The extended-term scheme, however, does not authorize extended-term sentences for those offenses. *See* HRS §706-661; *see also* TA at 9–10.

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[4] That rule does not conflict with using a complaint and the preliminary-hearing process to justify detaining the accused (or otherwise restricting the accused's liberty by bail conditions) while the State diligently investigates, amasses its evidence, and seeks an indictment from the grand jury, which is, in fact, what the complaint and preliminary hearing process is for in a felony case. *See*, *e.g.*, *State v. Tominaga*, 45 Haw. 604, 609, 372 P.2d 356, 359 (Haw. 1962) ("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") (yet another case and proposition that the State fails to reckon with in its answering brief).

At its convenience, this Court should consider correcting the State's mistaken understanding of the offenses for which it may seek extended-term sentences.

Finally, and as noted with chagrin in Obrero's transfer application, counsel again apologizes for incorrectly reciting the murder charges against Obrero. His opening brief mistakenly asserted that he was charged with one count of second-degree murder, with a related firearm charge, and four counts of attempted-second degree murder. *See* OB at 6. The State accuses him of one instance of attempted first-degree murder (Count 1), an instance of second-degree murder (Count 2), three instances of attempted second-degree murder (Counts 3, 4, and 5), and using a firearm to commit the completed second-degree murder offense alleged in Count 2 (Count 6). *See* OB at 86–90 (appended copy of the complaint, JIMS 1 (RA at 1)).

CONCLUSION

Amidst all its other hyperbolically purple prose, the State "doth protest"[5] that *it* is the party in this matter standing up for the "free opinion of the sovereign people of Hawaii," protecting the sovereign people's free opinion from being "overridden" and unmade by Obrero's capacious, atextual, and "unadorned" attack on the people's will and "the public good." AB at 18; *see also id.* at 8 (characterizing Obrero as giving §801-1 a "capacious reading"), 10 (insinuating that Obrero as trying to "unmake" Section 10), and 14 (portraying Obrero as giving Section 10 an "atextual interpretation"). Coming from the party who entirely elides and seeks the power to utterly ignore the return of a no bill by grand jurors, such a contention should not be well taken. It should provoke a grimace, and a stern rebuke.

This Court should reverse the circuit court's dismissal ruling and remand this matter for entry of an order dismissing the charges against Obrero with prejudice, because subjecting him to trial and sentencing in the absence of an indictment would violate §801-1, and the State has not demonstrated that it intends, and can, satisfy §801-1 before trial must occur.

DATED: Honolulu, Hawaii, April 4, 2022.

/ s / Thomas M. Otake
THOMAS M. OTAKE
Attorney for Defendant
Richard Obrero

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[5] Queen Gertrude, *The Tragical History of Hamlet Prince of Denmark*, act III, sc. 2, l. 226 (A.R. Braunmuller ed.), in William Shakespeare, *The Complete Works* (Penguin 2002) (Steven Orgel and A.R. Braunmuller gen. eds.).