SCAP-21-0000576

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

STATE OF HAWAI‘I, Plaintiff-Appellee, vs. RICHARD OBRERO, Defendant-Appellant.	) CASE NO. 1CPC-19-0001669)) APPEAL FROM THE FINDINGS OF FACT,) CONCLUSIONS OF LAW AND ORDER) DENYING DEFENDANT RICHARD) OBRERO’S MOTION TO DISMISS) filed 9/17/2021)) FIRST CIRCUIT COURT)))) HONORABLE KEVIN A. SOUZA

ANSWERING BRIEF OF THE STATE OF HAWAI‘I

APPENDIX “A”

and

CERTIFICATE OF SERVICE

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ANSWERING BRIEF OF THE STATE OF HAWAI‘I

I.

COUNTERSTATEMENT OF THE CASE

A. Introduction

State of Hawai‘i, Plaintiff-Appellee (hereinafter "Appellee") presented evidence during a preliminary hearing that concluded with the district court finding probable cause to commit Richard Obrero, Defendant-Appellant (hereinafter "Defendant") to circuit court to answer for the crimes of: (count 1) attempted murder in the first degree, in violation of *Hawai‘i Revised Statutes* (hereinafter "*HRS*") §§ 705-500, 707-701(1) (a), and 706-656; (count 2) murder in the second degree, in violation of *HRS* §§ 707-701.5 and 706-656; (count 3) attempted murder in the second degree, in violation of *HRS* §§ 705-500, 707-701.5 and 706-656; (count 4) attempted murder in the second degree, in violation of *HRS* §§ 705-500, 707-701.5 and 706-656; (count 5) attempted murder in the second degree, in violation of *HRS* §§ 705-500, 707-701.5 and 706-656; and (count 6) carrying or use of firearm in the commission of a separate felony, in violation of *HRS* § 134-21. *See generally, Judiciary Electronic Filing and Service System* JUDICIARY INFORMATION MANAGEMENT SYSTEM (hereinafter "*JEFS*"); "Internal eCourt Kōkua"; *"eCourt Kōkua* JUDICIARY INFORMATION MANAGEMENT SYSTEM"; "Case ID or Citation Number" "1CPC-19-0001669" (hereinafter "*JIMS*, 1CPC-19-0001669"), "Docket" (hereinafter "Dkt.") #1. In the instant appeal Defendant contends: 1) "To subject [him] 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[ ]"; 2) "The circuit court's reasons for ignoring HRS §801-1's mandate are flawed[ ]"; and 3) "Dismissal with prejudice is the proper remedy in this case." *See* Defendant's opening brief (hereinafter "OB") at page 2.

B. Motion To Dismiss

"On July 12, 2021, [Defendant] filed a motion to dismiss this matter with prejudice, raising the §801-1 and due process claims". OB at page 7 (external citation omitted). On September 13th, 2021, the circuit court held the hearing on Defendant's motion to dismiss. *See JEFS*, Dkt. #11, transcript of September 13th, 2021 hearing (hereinafter "Dkt. #11, Tr. 9/13/2021"). Defendant did not call witness nor offer evidence in support of his motion. *Ibid.* Defendant argued, in relevant part,

> . . . 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. . . .
>
> 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. . . .
>
> 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. [Dkt. #11, Tr. 9/13/2021 at 4:17-25, 5:16 -25, 6:1-11[1] (quotation marks altered)]

After considering the arguments and submissions of counsel, the circuit court denied Defendant's motion to dismiss ruling, in pertinent part,

> 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. . . .
>
> . . . among the arguments that were made, [was] that 801-1 works to essentially trump Article I, Section 10, of the Hawai[']i constitution. And that's not something that I can find in the plain meaning of 801-1. [*continued*]

[1] The number preceding the colon references the page(s) and the number(s) following the colon references the line(s) from which Appellee cited the information taken from *JEFS*.

> In addition . . . it's clear to this Court that the preliminary hearing process, as defined by the rules [*i.e.*, *Hawai'i Rules of Penal Procedure* (hereinafter "*HRPP*")], 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. . . .
>
> . . . '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.
>
> . . . 'prosecuted' as it appears in Rule 7(b) of the Hawai[']i 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. . . . [Dkt. #11, Tr. 9/13/2021 at 32:13-18, 33:8-25, 34:7-22]

On or about September 17th, 2021, the deputy prosecutor filed the "FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING DEFENDANT RICHARD OBRERO'S MOTION TO DISMISS" (hereinafter "Order") (upper case letters in original, bold font omitted)). *See generally, JIMS*, 1CPC-19-0001669, Dkt. #90, Order. The following conclusions of law (hereinafter "CoL") are at issue:

> 14. The Hawai[']i Constitution does not preclude the State from proceeding to a preliminary hearing on a case, after a prior failed attempt before a grand jury. . . .
>
> 16. By its plain language, Article I section 10 of the Hawai[']i 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. [quotation marks altered] . . .
>
> 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 Hawai[']i 186, 324 P.3d 996 (2014). [*continued*]

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'. [quotation marks altered]

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. . . .

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. . . .

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 Hawai['']i of 1978 and ratified by the electorate on November 7, 1978'). [quotation marks altered] . . .

32. The Hawai['']i 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. . . .

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). [citation in original, quotation marks altered]

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'. [quotation marks altered] . . .

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.' [quotation marks altered]

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). [quotation marks altered]

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 Hawai[']i 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 Hawai[']i [ ]224, 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 Hawai[']i 205, 226, 269 P.3d 740, 761 (2011). [quotation marks altered]

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 Hawai[']i 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'. [quotation marks altered]

JIMS, 1CPC-19-0001669, Dkt. #90, Order at pages 5-13.

II.

COUNTERSTATEMENT OF THE STANDARDS OF REVIEW

A. Constitutional Amendments

> . . . the cardinal principle of judicial review [is] that constitutional amendments ratified by the electorate will be upheld unless they can be shown to be invalid beyond a reasonable doubt. . . . The burden of showing this invalidity is upon the party challenging the results of the election. And '(e)very reasonable presumption is to be indulged in favor of a constitutional amendment which the people have adopted at a general election.'

Kahalekai v. Doi, 60 Haw. 324, 331, 590 P.2d 543, 549 (1979) (quotation marks altered, citations in original omitted).

B. Statutory Construction

HRS § 1-12 provides: "All provisions of the Hawai[']i Revised Statutes relating to general statutory construction shall apply not merely to laws now in force but to all hereafter enacted, unless otherwise expressed or obviously intended."

HRS § 1-14 provides: "The words of a law are generally to be understood in their most known and usual signification, without attending so much to the literal and strictly grammatical construction of the words as to their general or popular use or meaning."

HRS § 1-15 provides: "Where the words of a law are ambiguous:"

> (1) The meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning.
>
> (2) The reason and spirit of the law, and the cause which induced the legislature to enact it, may be considered to discover its true meaning.
>
> (3) Every construction which leads to an absurdity shall be rejected.

HRS § 1-16 provides: "Laws *in pari materia*, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called in aid to explain what is doubtful in another."

C. Motion To Dismiss Charge

'A [trial] court's ruling on a motion to dismiss [a charge] is reviewed for an abuse of discretion.' . . .

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

State v. Thompson, 150 Hawai'i 262, 266, 500 P.3d 447, 451 (2021) (quotation marks altered, citations omitted).

III.

ARGUMENT

A. The Constitution Of The State Of Hawai'i, As Well As Statutes, Rules, And Case Law Authorized The State To Hold Defendant To Answer For Murder And Other Felony Offenses *Via* Preliminary Hearing

1. Introduction

As Defendant's primary argument he declares, "To subject [him] 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." OB at page 13 (bold font omitted). Relatedly, Defendant also declares, "The circuit court's reasons for ignoring HRS §801-1's mandate are flawed[ ]" and "[d]ismissal with prejudice is the proper remedy in this case." OB at pages 20 and 25, respectively (bold font omitted). Undergirding Defendant's argument is his contention, "Section 801-1's general rule is that an indictment or information is required to perfect an alleged offense for trial and punishment[;]" (OB at page 13), and

> . . . Because §801-1's language is 'plain, unambiguous, and explicit,' there is no 'look[ing] beyond that language for a different meaning.' . . . The interpretive inquiry, rather, ends with giving effect to what the statute plainly requires. . . . At least, so long as doing so does not produce an absurd result. [OB at page 14 (quotation marks altered, and citations in original omitted)]

As discussed below, Defendant's capacious reading of *HRS* § 801-1 ignores the fundamental tenet of statutory that commands that "[l]aws *in pari materia*, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called in aid to explain what is doubtful in another." *HRS* § 1-16. *HRS* § 801-1, as do §§ 602-1, 805-7, and 806-8, as well as *HRPP* Rules 5 and 7 speak to the method by which a person may be held to answer for a felony offense.

2. Law authorizing a person to be held to answer for felony offenses upon a finding of probable cause after a preliminary hearing

"[T]he prosecutor bears 'the responsibility of determining whether or not to instigate a formal criminal proceeding[ ]'". *Thompson*, 150 Hawai'i at 269, 500 P.3d at 454 (external citation omitted, quotation marks altered). In the instant case, the deputy prosecutor instigated the formal prosecution of Defendant by way of a preliminary hearing as authorized by article I, section 10 of the Constitution of the State of Hawai'i and laws related thereto.

Contrary to Defendant's accusation, Appellee is not requesting this Honorable Court "to go searching for a reasonable way to ambiguate §801-1" (OB at page 15), nor is such a search necessary in light of Defendant's suggestion–

> Start with article I, section 10 of the Hawai[']i Constitution. Section 10 [that] 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[.]' [OB at page 15 (emphasis in original, quotation marks altered)]

The subject matter of article I, section 10 and the law related thereto, in particular, *HRS* §§ 805-7 and 806-8, as well as *HRPP* Rule 5 and 7 and *HRS* § 801-1 is the same–methods by which a criminal prosecution may be initiated–and "shall be construed with reference to each other. What is clear in one statute may be called in aid to explain what is doubtful in another." *HRS* § 1-16.

Juxtaposing the text of *HRS* § 805-7 with that of § 801-1 reveals ambiguity and uncertainty as to whether a criminal prosecution for a felony offense may be initiated *via* a preliminary hearing,[2] and as such, an "interpretive inquiry" is warranted, notwithstanding Defendant's contrary view. [3] OB at page 14 (citation in original omitted). The circuit court noted correctly that section 10 was an achievement of the 1978 Constitutional Convention of Hawai'i during which article I was amended, certain sections therein were renumbered, and the provision at the heart of this appeal was added–"upon a finding of probable cause after a preliminary hearing held as provided by law"–after which the electorate ratified the amendment. *See generally, JIMS*, 1CPC-19-0001669, Dkt. #90, Order CoL #28 at page 8. The "1978 Constitutional Convention provided to each voter an informational booklet which summarized each proposed amendment" that "fairly and sufficiently advised voters of the substance and effect" of the proposed amendments.[4] *State v. Kahlbaun*, 64 Haw. 197, 205, 638 P.2d 309, 316 (1981) (external citation omitted).

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[2] *HRS* §§ 602-11 and 806-8, as well as *HRPP* Rules 5 and 7 relate to procedures for holding a person to answer for felony offenses *via* a preliminary hearing, and as such, accentuate the ambiguity and uncertainty.

[3] Defendant declares that "[b]ecause §801-1's language is 'plain, unambiguous, and explicit,' there is no 'look[ing] beyond that language for a different meaning.' . . . The interpretive inquiry, rather, ends with giving effect to what the statute plainly requires." OB at page 13 (quotation marks altered, citations omitted).

[4] The Hawai'i Supreme Court noted:

> . . . Summaries of the amendments were published in the newspapers, as well as in a 'Con-Con Summary' which was mailed by the Convention to the residence of every registered voter in the State.[ ] An advertising supplement which purported to contain the full text of the amendments was distributed through the newspapers in every county. The daily proceedings of the Convention were covered and regularly reported upon by the news media. Informational sessions regarding the ballot and voting procedures were conducted by the office of lieutenant governor for the benefit of the public. By these means and sources, the voter could have reasonably educated and familiarized himself with the significance and substance of the bulk of the proposed amendments before going to the polls. Further the newspaper supplement was available at the polls for the voter's examination. The informational booklet which was made a part of the ballot also contained a digest of the amendments. [*Kahalekai*, 60 Haw. at 340, 590 P.2d at 553–54 (quotation marks altered, footnote omitted)]

Notably, the Hawai‘i Supreme Court recognizes that "'[t]he courts did not make the Constitution; [and] the courts may not unmake the Constitution'". *Kaho'ohanohano v. State*, 114 Hawai‘i 302, 351, 162 P.3d 696, 745 (2007) (external citation omitted, quotation marks altered). Relatedly,

> . . . '[e]very reasonable presumption is to be indulged in favor of a constitutional amendment which the people have adopted at a general election.' . . . '[t]he people are presumed to know what they want, to have understood the proposition submitted to them in all of its implications, and by their approval vote to have determined that [the] amendment is for the public good and expresses the free opinion of a sovereign people.'

Watland v. Lingle, 104 Hawai‘i 128, 133, 85 P.3d 1079, 1084 (2004), *as clarified* (Mar. 19, 2004) (citations in original omitted, quotation marks altered).

Correlatively, "well-established rules of construction" teach:

> 'The fundamental principle in construing a constitutional provision is to give effect to the intention of the framers and the people adopting it. This intent is to be found in the instrument itself. When the text of a constitutional provision is not ambiguous, the court, in construing it, is not at liberty to search for its meaning beyond the instrument. However, if the text is ambiguous, extrinsic aids may be examined to determine the intent of the framers and the people adopting the proposed amendment.'

State ex rel. Anzai v. City & County of Honolulu, 99 Hawai‘i 508, 519, 57 P.3d 433, 444 (2002) (quotation marks altered, external citation omitted).

The application of the foregoing principles supports the circuit court's conclusion that the "Hawai[']i Constitution does not preclude the State from proceeding to a preliminary hearing on a case, after a prior failed attempt before a grand jury". *JIMS*, 1CPC-19-0001669, Dkt. #90, Order CoL #14 at page 6. As support for its conclusion, the circuit court noted correctly:

> By its plain language, Article I section 10 of the Hawai[']i 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. [*JIMS*, 1CPC-19-0001669; Dkt. #90, Order CoL #16 at page 5 (quotation marks altered)]

As support for its reading of the "plain language" of "Article I section 10 of the Hawai[ʻ]i Constitution", the circuit court noted the pronouncements of the Hawai‘i Supreme Court set forth in *State v. Jess*, 117 Hawai‘i 381, 184 P.3d 133 (2008), *as corrected* (Apr. 4, 2008), and *Moana v. Wong*, 141 Hawai‘i 100, 405 P.3d 536 (2017), *as amended* (Nov. 30, 2017). *See generally, JIMS*, 1CPC-19-0001669, Dkt. #90, Order CoL ## 17 and 18 at pages 5-6. In *State v. Jess*, 117 Hawai‘i 381, 397, 184 P.3d 133, 149 (2008), *as corrected* (Apr. 4, 2008), the court stated, in relevant part, "To 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". Similarly, in *Moana v. Wong*, 141 Hawai‘i 100, 106, 405 P.3d 536, 542 (2017), *as amended* (Nov. 30, 2017), the court–citing article I, section 10 and *Hawai‘i Rules of Penal Procedure* Rule 7(a)–(b)–declared, "a complaint and preliminary hearing, indictment, and criminal information are separate, parallel methods by which a felony prosecution may be initiated." (footnote omitted). With regard to the pronouncement in *Moana*, the circuit court found "significant that the words 'separate' and 'parallel' were used, indicating that these methods are exclusive from, and not dependent upon, each other". *JIMS*, 1CPC-19-0001669, Dkt. #90, Order CoL #19 at page 6 (quotation marks altered).

With regard to the requirement set forth in article 1, section 10 that a "preliminary hearing" be "held as provided by law", the circuit court noted correctly that "HRS § 805-7, entitled 'Commitment; form of mittimus'", provides:

> . . . '[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'. [*JIMS*, 1CPC-19-0001669, Dkt. #90, Order CoL #23 at page 7 (bracketed text in original, quotation marks altered)]

Relatedly, *HRS* § 806-8 provides:

> In criminal cases brought in the first instance in a court of record, but in which the accused may be held to answer without an indictment by a grand jury, the legal prosecutor may arraign and prosecute the accused upon an information, complaint, or an indictment at the prosecutor's election; and in all criminal cases brought in the first instance in a court of record the prosecutor may arraign and prosecute the accused by information, complaint, or indictment, as the case may be, whether there has been a previous examination, or commitment for trial by a judge, or not.

The circuit court noted correctly that "[p]ursuant to HRS § 602-11" the law regulating preliminary hearings authorized by article 1, section 10 includes "[t]he HRPP" promulgated by the Hawai'i Supreme Court. *JIMS*, 1CPC-19-0001669, Dkt. #90, Order CoL #33 at page 9 (quotation marks altered). In relevant part, *HRS* § 602-11 provides, "The supreme court shall have power to promulgate rules in all . . . criminal cases for all courts relating to process, practices, procedure and appeals, which shall have the force and effect of law." Correlatively, article VI, section 7 of the Constitution of the State of Hawai'i also vests the Hawai'i Supreme Court with the rule-promulgating authority: "The supreme court shall have power to promulgate rules and regulations in all civil and criminal cases for all courts relating to process, practice, procedure and appeals, which shall have the force and effect of law."

With respect to *HRPP* Rule 5, the circuit court concluded correctly, that "[s]pecifically, 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." *JIMS*, 1CPC-19-0001669, Dkt. #90, Order CoL #34 at page 9 (external citation omitted, quotation marks altered)]. The circuit court also held correctly that,

> . . . 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 . . . [*JIMS*, 1CPC-19-0001669, Dkt. #90, Order CoL #35 at pages 9-10] . . . [*continued*]

> . . . 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'. [*JIMS*, 1CPC-19-0001669, Dkt. #90, Order CoL #37 at page 10 (citation in original, quotation marks altered)]

Moreover, the circuit court noted correctly:

> . . . 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 . . . [*JIMS*, 1CPC-19-0001669, Dkt. #90, Order CoL #39 at pages 10-11 (citation in original, quotation marks altered)]

As the circuit court also concluded correctly, *HRPP* Rule 7(h) (2) provides, in relevant part, "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". *JIMS*, 1CPC-19-0001669, Dkt. #90, Order CoL #38 at page 10 (citation in original, quotation marks altered).

Defendant is being held to answer for murder and other felonies offenses for which the district court found probable cause to believe he committed following the presentation of evidence at the preliminary hearing provided for in article I, section 10 and the laws related thereto including, *inter alia*, *HRS* §§ 602-11, 805-7, and 806-8, as well as *HRPP* Rules 5 and 7. Perhaps sensing that his interpretation of *HRS* § 801-1 will not end the "interpretive inquiry", Defendant declares that there is "no conflict between Section 10 and §801-1" because "[s]ection 10 and §801-1 do not speak to the same thing". OB at pages 16-17. In Defendant's interpretive inquiry he posits, in relevant part,

> 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,[ ] or at a preliminary hearing triggered by the filing of a felony complaint.[ ] Section 801-1 steps in and further restricts the State from subjecting the accused to trial or punishment on felony offenses absent an indictment or (where allowed by HRS §806-81 et seq.) an information. [OB at pages 16-17 (citations and footnotes omitted, quotation marks altered)]

Defendant's novel interpretation of article I, section 10 is without the support of any text in the section. The text of article I, section 10 does not include *detention, bail, custody*, or other words or phrasing to that effect. Furthermore, Defendant's interpretation creates a superfluity concern by ignoring the existing constitutional protection regarding–using his phrasing– "detention or extracting bail". Article 1, entitled "Bill of Rights" section 12 entitled "Bail; Excessive Punishment" provides, in relevant part, "[e]xcessive bail shall not be required . . . The court may dispense with bail if reasonably satisfied that the defendant or witness will appear when directed, except for a defendant charged with an offense punishable by life imprisonment". Relatedly, the legislature has codified the constitutional right to bail. *See generally, Chapter 804*, Part I. BAIL; RECOGNIZANCE.

Defendant's interpretive inquiry also includes his atextual interpretation of "*held* to answer" set forth in article I, section 10 as "impos[ing] a restriction on *holding* someone in custody while a criminal proceeding is pending". OB at page 15 (emphasis in original, external footnote omitted). As support for his interpretation Defendant contends,

> Counsel has not found a Hawai[']i 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. . . . 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. [OB at pages 15 and 16 n. 7 (quotation marks altered, citations omitted)]

Oddly, Defendant seems to undermines his interpretation by acknowledging that "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)". OB at page (citation in original, quotation marks altered). Relatedly, the Hawai'i Supreme Court holds, "The initiation of criminal proceedings-through 'a formal felony prosecution, preliminary hearing, indictment, information or arraignment'—' 'is the starting point of our whole system of adversary criminal justice.'" *State v. Luton,* 83 Hawai'i 443, 449–

50, 927 P.2d 844, 850–51 (1996) (footnotes omitted) (quoting *State v. Masaniai*, 63 Haw. 354, 360, 628 P.2d 1018, 1023 (1981) (following *Kirby v. Illinois*, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972)). *State v. Reis*, 115 Hawai‘i 79, 87, 165 P.3d 980, 988 (2007) (quotations marks altered, citations in original); *see also*, *HRS* § 701-108(5) (a "prosecution is commenced . . . when . . . a complaint is filed"). Furthermore, the "critical stages of a criminal proceeding include trial, post-verdict motions, sentencing, effectuating an appeal, and minimum term hearings conducted by the Hawai‘i Paroling Authority (HPA)." *State v. Uchima*, 147 Hawai‘i 64, 74, 464 P.3d 852, 862 (2020).

As part of Defendant's interpretive inquiry he also contends,

> Even if the two provisions were construed . . . 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. OB at page 17]
>
> . . . 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. [OB at page 18]

The accuracy of Defendant's contention is doubtful as evidenced by his conspicuous failure to identify the harm from which an accused needs the protection *HRS* § 801-1 purportedly provides. Nor would Defendant seem to be able to do so in light of his acknowledgment that he "does not challenge the preliminary hearing conducted in this case, nor the preliminary hearing process in general". OB at page 22. The probable cause standard applicable to preliminary hearings–the same standard that applies to grand jury proceedings[5]–protects an accused from unfounded charges. "'Probable cause' has been defined as 'a state of facts as would lead a person of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused." *State v. Taylor*, 126 Hawai‘i 205, 218, 269 P.3d 740, 753 (2011) (quotation marks altered, external citation omitted).

[5] *State v. Taylor*, 126 Hawai‘i 205, 218, 269 P.3d 740, 753 (2011) ("'A grand jury indictment must be based on probable cause.'") (quotation marks altered, external citation omitted)).

Moreover, a preliminary hearing affords an accused additional protections that are unavailable at a grand jury proceeding. Initially, *HRS* § 805-7 provides, in relevant part, "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, the judge [who is presumed to know and shall comply with the law[6]] . . . 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". On the other hand, there is no judge presiding over a grand jury proceeding. Furthermore, and unlike a grand jury proceeding, during a preliminary hearing an accused may: be present, have the assistance of counsel, cross-examine the State's witnesses, testify on his or her own behalf, call his or her own witnesses to testify, present evidence, and argue against a finding of probable cause.

Furthermore, Defendant's notion regarding the purported protection a grand jury provides does not reflect accurately or completely the sentiments of the delegates attending the 1978 Constitutional Convention. In *Kahlbaun*, the Hawai'i Supreme Court noted the delegates' concern that

> . . . in recent years, the grand jury system has come under severe criticism. Rather than being a shield to unfounded charges as intended, critics charge that the grand jury has become a rubber stamp of the prosecuting attorney.[ ]. These criticisms were not unfounded; thus, a substantial movement developed to abolish the grand jury in total. [64 Haw. at 203–04, 638 P.2d at 315–16 (footnote omitted)]

Moreover, with regard to "Amendment No. 10", the delegates of the 1978 Constitutional Convention discussed the fundamental differences between preliminary and grand jury proceedings. Delegate Chu observed:

> I believe that the best judicial enforcement of crime is one that is fast and fair and firm. The present grand jury system in Hawai[']i promotes none of these. Grand jury hearings and preliminary hearing are similar in their essential characteristics, and are therefore duplicative. However, the distinguishing characteristics between the two hearings make the grand jury susceptible to abuse and delay. The purpose of both is a preliminary determination, prior to trial or immediately after arrest, that probable cause exists that the accused committed the crime. Witnesses are required to be at both hearings are subjected to the same line of questioning. [*continued*]

[6] *See Hawai'i Revised Code of Judicial Conduct* Rule 1.1 ("A judge shall comply with the law, including the *Hawai'i Revised Code of Judicial Conduct.*")

> True, the grand jury has protected the good name of the innocent, as Delegate Tam mentioned; however, the secrecy philosophy, with modern-day communications and media communications, is quite unrealistic. Many times we have situations where the grand jury deliberations are watched by the media and when witnesses come out they are questioned by the media, and there is certainly more than speculation as to what is going on in the grand jury proceeding. . . .
>
> The preliminary hearing is normally public, and the accused and his attorney may confront and question all the witnesses. The evidence is usually fresh and the witnesses usually most candid at this earlier proceeding. Because the preliminary hearing is public, it is subject to public scrutiny and safeguards against abuse. In contrast, the grand jury proceeding is not only secret but subject to the control of the prosecutor. Neither the accused nor his attorney has a right to be present . . .

Proceedings of the CONSTITUTIONAL CONVENTION OF HAWAII of 1978, Volume II COMMITTEE OF THE WHOLE DEBATES at pages 673, 674-675.

Defendant's interpretation of article I, section 10 as only and "obviously speak[ing] about restricting an accused's liberty prior to conviction and sentencing"[7], also ignores

> . . . 'the oft-stated proposition that '(t)he people are presumed to know what they want, to have understood the proposition submitted to them in all of its implications, and by their approval vote to have determined that (the) amendment is for the public good and expresses the free opinion of a sovereign people.'

Kahalekai, 60 Haw. at 331, 590 P.2d at 549 (quotation marks altered, external citations omitted). The citizens of the State of Hawai'i ratified article I, section 10 and in doing so vested Appellee with the constitutional authority to initiate a criminal prosecution for felony offenses "upon a finding of probable cause after a preliminary hearing held as provided by law". "'[T]he people are presumed to know what they want, to have understood the proposition submitted to them in all of its implications, and by their approval vote to have determined that [the] amendment is for the public good and expresses the free opinion of a sovereign people.'" *Watland*, 104 Hawai'i at 133, 85 P.3d at 1084

(citing *Kahalekai v. Doi*, 60 Haw. 324, 331, 590 P.2d 543, 549 (1979) (quotation marks altered, certain citations in original omitted)).

[7] *See generally*, OB at pages 15 and 16 n.7.

The free opinion of the sovereign people of Hawai‘i cannot be overridden by Defendant’s unadorned claim that *HRS* § 801-1 provides “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”. OB at pages 17 and 18. In any case, the circuit court heeded the command of the people and noted the Hawai‘i Supreme Court also appears to have done so:

> . . . The clear wording in the Hawai[‘]i 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 Hawai[‘]i 381, 397, 184 P.3d 133, 150 (2008). [*JIMS*, 1CPC-19-0001669, Dkt. #90, Order CoL #17 at page 5-6 (citations in original, quotation marks altered]
>
> . . . 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 Hawai[‘]i 100, 106, 405 P.3d 536, 542 (2017). [*JIMS*, 1CPC-19-0001669, Dkt. #90, Order CoL #18 at page 6 (citations in original, quotation marks altered]

HRS §§ 602-11, 805-7, 806-8, as well as *HRPP* Rules 5 and 7 are further evidence supporting the conclusion that the people of Hawai‘i–through the action of their elected representatives–determined that the public good is served by permitting a person to be held to answer for felony offenses upon a finding of probable cause after a preliminary hearing as provided by law.

Defendant’s proffered reconciliation of article I, section 10 and *HRS* § 805-5 with § 801-1 reveals a number of other interpretive flaws. “[I]t is beyond the power of the legislature to amend the Hawai‘i Constitution merely through the enactment of a state law. *See* Haw. Const. art. XVII, § 3”. *State ex rel. Anzai*, 99 Hawai‘i at 522, 57 P.3d at 447 (external citation in original, footnote omitted). Defendant’s interpretation of §801-1 effects an amendment to article I, section 10 that the legislature would lack authority to enact. *See* Article III, Section 1 of the Constitution of the State of Hawai‘i (“The legislative power of the State shall be vested in a legislature . . . Such power shall extend to all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States.”).

Moreover, Defendant's interpretation ignores the Hawai'i Supreme Court's repeated pronouncement: "article I, section 10 permits the prosecution to charge by indictment, complaint, or information". *Jess*, 117 Hawai'i at 397, 184 P.3d at 149; *see also*, *Moana*, 141 Hawai'i at 106, 405 P.3d at 542 (citing article I, section 10 and *Hawai'i Rules of Penal Procedure* Rule 7(a)–(b) the court declared, "a complaint and preliminary hearing, indictment, and criminal information are separate, parallel methods by which a felony prosecution may be initiated") (footnote omitted)). The legislature has not acted in any manner that casts doubt on the *Jess* court's pronouncement that "article I, section 10 permits the prosecution to charge by indictment, complaint, or information". *Ibid.* Nor has the legislature acted in any manner that casts doubt on the *Moana* court's pronouncement that pursuant to article I, section 10 and *Hawai'i Rules of Penal Procedure* Rule 7(a)-(b) "a complaint and preliminary hearing, indictment, and criminal information are separate, parallel methods by which a felony prosecution may be initiated." *Id.* at 106, 405 P.3d at 542 (footnote omitted).

"The legislature is vested with legislative power by the Hawai[']i State Constitution, art. III, sec. 1. Legislative power is defined as the power to enact laws and to declare what the law shall be." *Sherman v. Sawyer*, 63 Haw. 55, 57, 621 P.2d 346, 348 (1980) (external citation omitted). "Such power shall extend to all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States." Article III, Section 1 of the Constitution of the State of Hawai'i. Pursuant to enactments of the legislature, "[t]he State shall have the power to provide for the safety of the people from crimes against persons and property." Article IX, Section 10 of the Constitution of the State of Hawai'i. "The legislature is presumed to know the law when it enacts statutes, including this court's [*i.e.*, Hawai'i Supreme Court] decisions". *Peer News LLC v. City & County of Honolulu*, 138 Hawai'i 53, 69, 376 P.3d 1, 17 (2016). "'Where the legislature fails to act in response to our statutory interpretation, the consequence is that the statutory interpretation of the court must be considered to have the tacit approval of the legislature and the effect of legislation.'" *Gray v. Admin. Dir. of the Court, State of Hawaii*, 84

Hawai‘i 138, 143 n. 9, 931 P.2d 580, 585 n.9 (1997) (quoting *State v. Dannenberg*, 74 Haw. 75, 83, 837 P.2d 776, 780 (1992) (brackets omitted)).

In 1991, the legislature amended *HRS* § 806-8 adding "complaint" to the disjunctive series "information, complaint, or an indictment". The legislative history of the amendment to § 806-8 reveals the legislature's approval of the Hawai‘i Supreme Court's pronouncement that the law provides "separate, parallel methods"–"a complaint and preliminary hearing, indictment, and criminal information"–"by which a felony prosecution may be initiated". *Moana*, 141 Hawai‘i at 106, 405 P.3d at 542. House Standing Committee Report Number 1652 notes:

> The purpose of this bill is to include complaints as a means of commencing a criminal prosecution.
>
> This amendment is a housekeeping measure that would conform certain provisions of the Hawai[‘]i Revised Statutes to what is currently practiced under Hawai[‘]i Rules of Penal Procedure.

House Journal (1991), at 1436. Relatedly, Senate Standing Committee Report Number 476 notes: "The purpose of this bill is to include complaints as a means of commencing a criminal prosecution. This bill is a housekeeping measure to conform certain provisions of the Hawai[‘]i Revised Statutes to current practice under Hawai[‘]i Rules of Penal Procedure." Senate Journal 1991, at 947. Furthermore, in 1998, the legislature amended *HRS* § 805-7, without deleting or amending any text that disturbs the Hawai‘i Supreme Court's recognition that "article I, section 10 permits the prosecution to charge by indictment, complaint, or information". *Jess*, 117 Hawai‘i at 397, 184 P.3d at 149; *see also*, *Moana*, 141 Hawai‘i at 106, 405 P.3d at 542.

Defendant cannot dispute genuinely the accuracy of the legislature's recognition that "current practice" includes the use of preliminary hearings to hold people to answer for felony offenses as among the "means of commencing a criminal prosecution". Senate Standing Committee Report Number 476, in 1991 Senate Journal, at 947. The conclusion derives support from Defendant's announcement:

> *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 Hawai[‘]i's most serious offenses on the strength of only a complaint. [*continued*]

> Some two dozen cases mention the 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. [OB at page 5 n. 1[8]]

The inclusion of "as provided by law" in the text of article I, section 10 empowers the legislature to establish the procedure by which a person may be held to answer for felony offenses upon a finding of probable cause after a preliminary hearing. *See State v. Rodrigues*, 63 Haw. 412, 415, 629 P.2d 1111, 1114 (1981) ("The phrase 'as provided by law' in the context of other state constitutional provisions has been construed as a direction to the legislature to enact implementing legislation." (quotation marks altered)). Interpreting, *inter alia*, *HRS* §§ 602-1, 805-7, and 806-8, as well as *HRPP* Rules 5 and 7, as establishing the process, practice, and procedure for preliminary hearings is consistent with and effects the constitutional amendment to article I, and as such, does not produce an absurd result. *HRS* § 801-1 as Defendant interprets the section "requires that the State perfect its accusations against him by way of an indictment"[9], and as such, cannot co-exist with article I, section 10 and law the legislature has enacted that permitted Appellee to hold Defendant to answer for murder and the other felony offenses upon the district court's finding of probable cause after the preliminary hearing.

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[8] Notably, Appellee's run of Defendant's "search string" in WestLaw Edge identified 53 cases– https://1.next.westlaw.com/Search/Results.html?query=adv%3A%20%22class%20a%20felony%22%20murder%20%2Fs%20complaint%20%2Fs%20charge%21%20accus%21&jurisdiction=HI-CS&saveJuris=False&contentType=CASE&querySubmissionGuid=i0ad740350000017f9f1520aa8c2c85d4&startIndex=1&searchId=i0ad740350000017f9f1520aa8c2c85d4&kmSearchIdRequested=False&simpleSearch=False&isAdvancedSearchTemplatePage=False&skipSpellCheck=False&isTrDiscoverSearch=False&thesaurusSearch=False&thesaurusTermsApplied=False&ancillaryChargesAccepted=False&proviewEligible=False&eventingTypeOfSearch=BOL&trailingSpace=False&transitionType=Search&contextData=%28sc.Search%29. Last visited March 18th, 2022 12:12 PM Hawai'i Standard Time. For the convenience of this Honorable Court, in Appendix "A" Appellee has reproduced the list of cases WestLaw Edge identified using Defendant's "search string". Not to be overlooked, are the numerous other types of serious felonies offenses charged *via* complaints.

[9] OB at page 13 (bold font in original omitted).

"Laws may be repealed either entirely or partially by other laws." *HRS* § 1-7. "The repeal of a law is . . . is implied when the new law contains provisions contrary to, or irreconcilable with, those of the former law. *HRS* § 1-9. The authorities and interpretive inquiry set forth above reveal that *HRS* §§ 602-1, 805-7, and 806-8, as well as *HRPP* Rules 5 and 7 *cover the field* regulating the process, practices, and procedure that authorize a person to be held to answer for felony offenses upon a finding of probable cause after a preliminary hearing. Therefore, *HRS* § 801-1 seems to have been, in part, impliedly repealed or amended to the extent it can be interpreted as Defendant desires. *Cf. Gardens at W. Maui Vacation Club v. County of Maui*, 90 Hawai'i 334, 340–41, 978 P.2d 772, 778–79 (1999) (external citation omitted) ("when [a] latter act is exclusive, that is, when it covers the whole subject to which it relates, and is manifestly designed by the legislature to embrace the entire law on the subject, it will be held to repeal by implication all prior statutes on that matter whether they are general or special").

As noted above, the deputy prosecutor bore "'the responsibility of determining whether or not to instigate a formal criminal proceeding[ ]'" against Defendant. *Thompson*, 150 Hawai'i at 269, 500 P.3d at 454 (external citation omitted, quotation marks altered). Pursuant to article I, section 10, the law related thereto, and the well-established practice in this jurisdiction, the deputy prosecutor instigated the formal criminal proceeding against Defendant by presenting evidence during the preliminary hearing, after which the district court found probable cause to commit Defendant to circuit court to answer for the charge of murder and other felony offenses. The circuit court's conclusions of law set forth in 14, 20–22, 24, 28, 32, 36, 39, and 42–44 all relate to the propriety of the deputy prosecutor's instigation of the formal criminal proceedings against Defendant *via* the preliminary hearing. Accordingly, on the record unique to this case, Defendant has not sustained his burden of establishing–by a strong showing–that the circuit court's denial of his motion to dismiss "'clearly exceed[ed] the bounds of reason or disregard[ed] rules or principles of law or practice'" to his "'substantial detriment'". *Thompson*, 150 Hawai'i at 266, 500 P.3d at 451 (quotation marks altered, citations iomitted).

B. Inapplicability Of Rule Of Lenity

Defendant also declares,

> Even if, moreover, there was a reasonable way to read ambiguity into §801-1 (which, again, [he posits there is not), the rule of lenity would ensure that [his] 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)). [OB at page 20 (quotation marks altered, citations in original)]

With all respect that is due, Defendant's invocation of the rule of lenity must fail.

The interpretive inquiry set forth above resolves the ambiguity and uncertainty as to whether a preliminary hearing is among the methods by which a criminal prosecution for felony offenses may be initiated–simply put, it is. As the circuit court concluded correctly and succinctly: "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." *JIMS*, 1CPC-19-0001669, Dkt. #90, Order CoL #22 at page 7 (quotation marks altered). As support for its conclusion, the circuit court relied upon the "plain language, Article I section 10 of the Hawai[ʻ]i Constitution", *HRS* §§ 602-11, 604-7, and 805-7, *HRPP* Rules 5 and 7, and the pronouncements of the Hawaiʻi Supreme Court set forth in *Jess, Moana, and Reis*. *See generally, JIMS*, 1CPC-19-0001669, Dkt. #90, Order at CoL ##16, 23, 28, 30, 31, and 33 at pages 5-9. The authorities the circuit court noted reveal unambiguously and with certainty that a person may be held to answer for felony offenses upon a finding of probably cause after a preliminary hearing, and as such, the rule of lenity is not triggered. *See State v. Kalani*, 108 Hawaiʻi 279, 288, 118 P.3d 1222, 1231 (2005) (holding "the term 'intimate parts,' as used in HRS § 707–700 is not ambiguous and both the legislative history and this court's prior opinions demonstrate that the interior of the mouth is a part of the body typically associated with sexual relations. Accordingly, Kalani's argument regarding the rule of lenity lacks merit" (quotation marks altered, external citation omitted)).

Defendant's misplaced reliance on the rule of lenity might stem from an incomplete understanding of the type of ambiguity and or uncertainty to which the rule speaks. Defendant declares, "'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.'" OB at page 20 (quotation marks altered, citations omitted). Perhaps, a more complete recitation of the rule of lenity would also note that generally the rule applies in circumstances in which there are divergent interpretations of a penal statute with one interpretation being more favorable to an individual than the other. The Hawai'i Supreme Court recognizes,

> When a statute is ambiguous, and the legislative history does not provide sufficient guidance, we follow the rule of lenity. *Aiwohi,* 109 Hawai'i at 118, 123 P.3d at 1213 ('In the absence of clear statutory language, and with no legislative guidance vis-á-vis legislative history, the applicable doctrine is the rule of lenity.' (citing *State v. Shimabukuro,* 100 Hawai'i 324, 327, 60 P.3d 274, 277 (2002) (stating that "[w]here a criminal statute is ambiguous, it is to be interpreted according to the rule of lenity"))); *State v. Kaakimaka,* 84 Hawai'i 280, 292, 933 P.2d 617, 629 (1997) (stating that "[a]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity") (citations omitted). This 'means that the court will not interpret a state criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what the legislature intended.' *State v. Sakamoto,* 101 Hawai'i 409, 413 n. 3, 70 P.3d 635, 639 n. 3 (2003) (quoting *State v. Soto,* 84 Hawai'i 229, 248–49, 933 P.2d 66, 85–86 (1997)). Accordingly, "[u]nder the rule of lenity, the statute must be strictly construed against the government and in favor of the accused." *State v. Kalani,* 108 Hawai'i 279, 288, 118 P.3d 1222, 1231 (2005) (quoting *Shimabukuro,* 100 Hawai'i at 327, 60 P.3d at 277) (internal quotation marks omitted); *see also Bayly,* 118 Hawai'i at 15, 185 P.3d at 200 (ruling that, under the rule of lenity, it is 'more appropriate to adopt a less expansive meaning of the term 'collision' ').

State v. Woodfall, 120 Hawai'i 387, 396, 206 P.3d 841, 850 (2009), *as corrected* (May 15, 2009) (citations in original, quotation marks altered).

In this case, Defendant does not appear to be arguing that the circuit court's interpretive inquiry affects the penalties for murder or the other felony offenses the district court found probable cause to believe he committed. Nor does Defendant argue that the circuit court's holding criminalizes behavior without fair notice. Accordingly, Defendant's invocation of the rule of lenity does not warrant the relief he seeks.

C. Initiation Of Criminal Prosecution Of Defendant Upon The Finding Of Probable Cause After The Preliminary Hearing Does Not Offend Due Process

Defendant also declares, in relevant part,

> 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 [him]. [OB at page 27]

Due Process is not a talismanic incantation that requires no further elaboration by Defendant regarding its application to the issue in this appeal. Conspicuously absent from Defendant's argument is the specific aspect of due process that undergirds his constitutional argument. That said, Defendant's argument seems to be weakened by his acknowledgement: "[He] does not challenge the preliminary hearing conducted in this case, nor the preliminary hearing process in general." OB at page 22. The deputy prosecutor cannot be fairly faulted for initiating the formal criminal prosecution against Defendant *via* the preliminary hearing–as authorized by article I, section 10 of the Constitution of the State of Hawai'i, *HRS* §§ 602-11, 805-7, 806-8, as well as *HRPP* Rules 5 and 7 and as Defendant is aware a common practice for decades–that concluded with the district court finding probable cause to hold him to answer for the crimes of "second-degree murder, a related class A firearm offense, and four instances of attempted second-degree murder". OB at page 25. Based upon the record unique to this case, Defendant's due process argument does not warrant the relief he seeks.

IV.

CONCLUSION

Based on the foregoing arguments and authorities, Appellee requests respectfully that this Honorable Court affirm the circuit court's "FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING DEFENDANT RICHARD OBRERO'S MOTION TO DISMISS".

Dated at Honolulu, Hawai'i: March 23, 2022.

Respectfully submitted,

STATE OF HAWAI'I
Plaintiff-Appellee

By STEVEN S. ALM
Prosecuting Attorney

/s/ Donn Fudo
Deputy Prosecuting Attorney
City and County of Honolulu

APPENDIX “A”

1. State v. Yamada

Supreme Court of Hawai‘i. November 13, 2002 99 Hawai’i 542 57 P.3d 467

CRIMINAL JUSTICE - Homicide. Charge of first-degree murder of multiple victims cannot be mitigated into multiple manslaughter convictions.

Synopsis

Defendant was convicted, after a jury trial in the Third Circuit Court, Greg K. Nakamura, J., of two counts of manslaughter. Defendant appealed. The Supreme Court, Levinson, J., held that: (1) instruction on mitigation of the offense to manslaughter was plain error, because it deprived defendant of his constitutional right to unanimous verdict; (2) single charge of first-degree murder of multiple victims cannot be mitigated into multiple manslaughter convictions; and (3) defendant’s videotaped reenactment of his role in the killings was admissible under hearsay exception for statements made for purposes of medical diagnosis or treatment.

Vacated and remanded.

Acoba, J., filed a concurring opinion.

Ramil, J., filed a dissenting opinion.

...erred in: (1) instructing the jury on the offense of murder in the first degree, in violation of HRS §707...

...they were to find all of the elements of the charged offense beyond a reasonable doubt before they reach[ed] the insanity defense [,]” (b) the circuit court separated a single charge of murder in the first degree into two charges of manslaughter, and (c) the instruction was “extremely complicated, unnecessarily...

...to the offense of manslaughter under Count I of the complaint; (3) sentencing Yamada for two offenses of manslaughter under Count I of the complaint; and (4) disallowing as evidence the audio portion of a...

2. State v. Quitog

Supreme Court of Hawai‘i. April 28, 1997 85 Hawai’i 128 938 P.2d 559

CRIMINAL JUSTICE - Double Jeopardy. State was barred from retrying defendant for attempted second-degree murder, after mistrial, given prosecution’s abandonment during first trial of originally charged offense.

Synopsis

Defendant filed posttrial motions to dismiss originally charged offense of attempted second-degree murder after the trial court had declared a mistrial based upon “manifest necessity” in first trial. The First Circuit Court denied defendant’s motions. Defendant appealed. The Supreme Court, Levinson, J., held that: (1) trial court’s declaration of mistrial based on manifest necessity was not an abuse of discretion; (2) State Constitution’s double jeopardy clause barred retrial of defendant as to originally charged offense of attempted second-degree murder given prosecution’s abandonment of that charge during closing argument of first trial and hung jury in first trial; but (3) double jeopardy did not bar retrial on lesser included offenses of attempted second-degree murder.

Vacated in part, and remanded.

...his post-trial motion to dismiss Count I of the complaint, which charged him with the attempted second degree murder of George Stanley, “on double jeopardy grounds” and the second...
...its commission. I. BACKGROUND On March 22, 1994, Quitog was charged by complaint with attempted murder in the second degree in violation of Hawai‘i Revised Statutes...
...don’t recall the date. Q.And one [count] of [the complaint in] the case concerns the charge of Attempted Murder in the Second Degree? A.Yes. Q.And I understand...

3. State v. Ababa

Intermediate Court of Appeals of Hawai‘i. November 29, 2002 101 Hawai’i 344 68 P.3d 618

CRIMINAL JUSTICE - Counsel. Defendant’s belief that police would get him an attorney did not trigger duty to contact attorney.

Synopsis

Defendant was charged with attempted murder in the first degree, murder in the second degree, attempted murder in the second degree, and place to keep pistol or revolver. The District Court, First Circuit, Michael Town, J., granted defendant’s motion to suppress statements. State appealed. The Intermediate Court of Appeals, Foley, J., held that: (1) defendant’s desire to have counsel advise him and his belief that police would provide him with an attorney did not trigger the statutory duty of law enforcement to contact an attorney for defendant; (2) defendant was not denied “a fair opportunity” to consult with an attorney; (3) officers properly informed defendant of his *Miranda* rights; and (4) defendant made valid waiver of rights to counsel and against self-incrimination after his initial invocation of right to counsel.
Order vacated and case remanded.

...On January 5, 2000, Defendant–Appellee Harvey Ababa (Ababa) was charged by complaints filed in the District Court of the First Circuit, Honolulu Division, with Attempted Murder in the First Degree, Murder in the Second Degree, Attempted Murder in the Second Degree, and Place to Keep Pistol or...
...Circuit Court of the First Circuit (circuit court) on all charges were filed on January 11, 2000, and Ababa was charged in the circuit court by complaint filed January 13, 2000, with the following: Attempted Murder in the First Degree, in violation of Hawaii Revised Statutes...

4. State v. Briones

Supreme Court of Hawai’i. December 14, 1989 71 Haw. 86 784 P.2d 860

Defendant was convicted in the First Circuit Court, Honolulu County, of attempted first-degree murder, second-degree murder, attempted second-degree murder, and firearm-related charges. Defendant appealed. The Supreme Court, Hayashi, J., held that once jury found defendant guilty of inchoate crime of attempted first-degree murder,...

Synopsis

Defendant was convicted in the First Circuit Court, Honolulu County, of attempted first-degree murder, second-degree murder, attempted second-degree murder, and firearm-related charges. Defendant appealed. The Supreme Court, Hayashi, J., held that once jury found defendant guilty of inchoate crime of attempted first-degree murder, it was precluded from also considering second-degree murder and attempted second-degree murder charges.

Affirmed in part, reversed in part, and remanded.

...meanwhile, sustained injury but survived. In May 1987, Defendant was charged by complaint with the following offenses: I) attempted first degree murder; II) second degree murder; III) attempted second degree murder; IV) place to keep a firearm; and V) possession of...

...indicted for certain crimes. As to the attempted first degree murder count, the complaint charged that Defendant intentionally shot Peralta and Queja “in the same...

5. Hughes v. State

Intermediate Court of Appeals of Hawai‘i. December 30, 2021 150 Hawai‘i 364 (Table, Text in WESTLAW), Unpublished Disposition 501 P.3d 333

The Circuit Court of the Second Circuit (Circuit Court) denied the Hawai‘i Rules of Penal Procedure (HRPP) Rule 40 petition filed on March 3, 2016, by self-represented Petitioner-Appellant Michael Ray Hughes (Hughes). Hughes appeals from the “Findings of Fact, Conclusions of Law, and Order Dismissing HRPP Rule 40 Petition”...

...July 5, 1989, in CR 89-0225(1), the State charged [Hughes] via Complaint with Attempted Murder in the First Degree (Count One); Terroristic Threatening in the...

...in not providing Hughes with requested documents and transcripts without charge; (3) in determining that all but one of Hughes’s claims...

...grand jury; (5) in dismissing Claim 2, alleging that the complaint against Hughes in his underlying criminal case was illegally amended...

6. State v. Becker

Intermediate Court of Appeals of Hawai‘i. March 30, 2021 149 Hawai‘i 172 (Table, Text

in WESTLAW), Unpublished Disposition 484 P.3d 185

Defendant-Appellant Mark Vincent Becker (Becker) appeals from the Judgment Conviction and Sentence, Notice of Entry (Judgment) entered on August 1, 2018, in the Circuit Court of the Second Circuit (Circuit Court). On April 25, 2017, Becker was charged by complaint with one count of Attempted Murder in the Second Degree (Attempted Murder) in...

...Rhonda I.L. Loo presided. On April 25, 2017, Becker was charged by complaint with one count of Attempted Murder in the Second Degree (Attempted Murder) in violation of Hawaii Revised Statutes (HRS) §§ 705-500...

...instructions to the jury included: Instruction No. 17 In the Complaint, the Defendant, MARK BECKER, is charged with the offense of Attempted Murder in the Second Degree. A person commits the offense of...

7. State v. Kapua

Intermediate Court of Appeals of Hawai‘i. April 25, 2008 117 Hawai’i 355 (Table, Text in WESTLAW), Unpublished Disposition 181 P.3d 434

Defendant–Appellant Johnston Kapua (“Kapua”) appeals from the Judgment entered on November 9, 2006, by the Circuit Court of the First Circuit (circuit court). He challenges the portion of the Judgment that sentenced him to an extended term of imprisonment of twenty years. Kapua was charged by complaint with attempted second degree...

...years. The Honorable Karl K. Sakamoto presided. Kapua was charged by complaint with attempted second degree murder. The jury found Kapua guilty of the included offense of...

8. State v. Aplaca

Supreme Court of Hawai‘i. June 13, 2001 96 Hawai’i 17 25 P.3d 792

CRIMINAL JUSTICE - Sentencing. Failing to have jury determine infant victim’s age in enhancing sentence was harmless error.

Synopsis

Defendant was convicted in the First Circuit Court, Richard K. Perkins, J., of attempted murder in the second degree, and was given an enhanced sentence of 15 years imprisonment. Defendant appealed. The Supreme Court, Levinson, J., held that: (1) evidence as sufficient to support conclusion that defendant inflicted child’s injuries, despite his testimony that he neither shook nor hurt child; (2) attempted second-degree

murder was not an “unclassified” offense for purposes of sentencing and was not treated as a class C felony, pursuant to enhancements under statute governing offenses against children; and (3) failing to instruct jury to determine whether infant victim was under the age of eight and whether defendant knew it, or should have known it, was harmless error.
Affirmed.

...P.2d at 901 & n. 12 I. RELEVANT BACKGROUND By complaint, Aplaca was charged, inter alia, with attempted murder in the second degree in relevant part as follows: On...
...the death of [Katiana], thereby committing the offense of Attempted Murder in the Second Degree, and [Katiana] was eight years (8...
...a general verdict finding Aplaca guilty of attempted second degree murder, the circuit court imposed a sentence of life with the...

9. State v. Moore

Supreme Court of Hawai‘i. July 17, 1996 82 Hawai’i 202 921 P.2d 122

Defendant was convicted in the First Circuit Court of attempted second-degree murder of his wife and of use of firearm in commission of felony, and he appealed. The Supreme Court, Moon, C.J., held that: (1) sua sponte instructions were not required on attempted reckless manslaughter, attempted extreme mental or emotional disturbance (EMED)...

Synopsis
Defendant was convicted in the First Circuit Court of attempted second-degree murder of his wife and of use of firearm in commission of felony, and he appealed. The Supreme Court, Moon, C.J., held that: (1) sua sponte instructions were not required on attempted reckless manslaughter, attempted extreme mental or emotional disturbance (EMED) manslaughter, or assault in first or second degree; (2) prosecutor’s statements during opening argument regarding expected testimony of defendant’s wife did not substantially prejudice defendant’s fundamental rights; (3) complaint sufficiently alleged offense of attempted second-degree murder; (4) wife’s statement to police officer identifying defendant as her assailant was admissible under excited utterance exception to hearsay rule; and (5) admission of wife’s testimony at supervised release hearing did not violate defendant’s right of confrontation.
Affirmed.

...203VIII Indictment and Information 203 852 k. Attempt. (Formerly 210k110(17) Complaint tracking applicable language of attempt statute virtually verbatim, charging that...
...intended or known to cause death of his wife, sufficiently charged offense of attempted second-degree murder, though intent to kill was alleged indirectly. HRS §705...
...85 (1983) Count I of the October 11, 1993 amended complaint, in language identical to that of the original complaint, charged Moore in pertinent part as follows: COUNT I:

On or...

10. State v. Conklin

Supreme Court of Hawai‘i. November 04, 2003 102 Hawai’i 527 (Table, Text in WESTLAW), Unpublished Disposition 78 P.3d 340

CRIMINAL JUSTICE - Sentencing. Statutory amendment to sentencing laws for murder did not apply to defendant.

Synopsis

Defendant was convicted in the First Circuit Court of murder and was sentenced to life imprisonment. Defendant appealed. The Supreme Court held that: (1) statutory amendment to sentencing laws for murder did not apply to defendant, and (2) repeal of statute pursuant to which murder defendant was sentenced did not render his sentence invalid.

Affirmed.

...December 23, 1985, Defendant–Appellant William M. Conklin (Defendant) was charged by complaint with murder, Hawai‘i Revised Statutes (HRS) § 707–701 (1976) , allegedly committed...

11. State v. De Guair

Supreme Court of Hawai‘i. August 18, 2005 108 Hawai’i 179 118 P.3d 662

CRIMINAL JUSTICE - Pleas. Rule requiring court to determine accuracy of guilty plea does not apply to nolo contendere plea.

Synopsis

Background: The Circuit Court of the Third Circuit, Greg Nakamura and Terence T. Yoshioka, JJ., entered orders denying defendant’s motion to vacate his sentence for attempted manslaughter and his petition for post-conviction relief. Defendant appealed.

Holdings: The Supreme Court, Levinson, J., held that:

1 rule requiring court to determine accuracy of guilty plea does not apply to nolo contendere plea, and

2 it was immaterial whether facts failed to establish the offense of attempted manslaughter on nolo contendere plea.

Affirmed.

Acoba, J., filed concurring and dissenting opinion.

...wounding William Mariani. On December 24, 1992, De Guair was charged by complaint in Cr. No. 92–509 with the following offenses: (1) murder in the second degree (Count I), in violation of Hawai‘i...

...Revised Statutes (HRS) §707–701.5 (1986) ; (2) attempted murder in the second degree (Count II), in violation of HRS...

...§§705–500 (1986) and 707–701.5 ; (3) attempted murder in the first degree (Count III), in violation of HRS...

12. State v. Tunoa

Intermediate Court of Appeals of Hawai‘i. March 06, 2007 113 Hawai’i 393 153 P.3d 464

CRIMINAL JUSTICE - Prosecutorial Misconduct. Alleged prosecutorial misconduct was not reversible error.

Synopsis

Background: Defendant was convicted, after a jury trial in the First Circuit Court, Karl K. Sakamoto, J., of second-degree murder and use of firearm in commission of murder. Defendant appealed.

Holdings: The Intermediate Court of Appeals, Lim, J., held that:

1 alleged prosecutorial misconduct during cross-examination of defendant’s brother was not reversible error;

2 alleged prosecutorial misconduct of elected prosecuting attorney was not reversible error;

3 prosecutor’s introductory remark during voir dire was proper; and

4 prosecutor’s “red herring” closing argument was not plain error.

Affirmed.

...The Honorable Karl K. Sakamoto presided. I.Background. Defendant was charged via complaint with murder in the second degree (count I), place to keep loaded...
...and use of a firearm in the commission of the murder (count V). During a hearing on various pretrial motions held...

13. State v. Cullen

Supreme Court of Hawai‘i. October 21, 1997 86 Hawai’i 1 946 P.2d 955

CRIMINAL JUSTICE - Homicide. Jury instruction on attempted first-degree murder was in no way prejudicially insufficient, erroneous, inconsistent, or misleading.

Synopsis

Defendant was convicted, following jury trial in the First Circuit Court, of attempted murder in first degree and possession of firearm by person convicted of certain crimes. Defendant appealed, and state cross-appealed from grant of motion for bail pending appeal and from findings of fact with respect thereto. The Supreme Court, Levinson, J., held that: (1) jury instruction on offense of attempted first-degree murder did not omit material element of offense by failing to state that offense required perpetrator to act with intent to cause two or more deaths as part of common scheme or plan; (2) jury was adequately informed that guilty verdict as to charge of attempted first-degree murder precluded guilty verdicts as to charges of second-degree murder and attempted

second-degree murder; (3) jury instruction on attempted first-degree murder satisfied any arguable requirement that instruction include limitation “under the circumstances as the defendant believed them to be”; (4) court’s erroneous failure to repeat definition of phrase “substantial step” in instructing jury regarding attempted second-degree murder was not prejudicial; (5) all conditions for release on bail pending appeal must be met before postconviction bail may be granted; and (6) defendant was not entitled to bail pending appeal from attempted first-degree murder conviction only.
Convictions and sentences affirmed.

...as the shooter. Accordingly, on December 6, 1993, Cullen was charged by way of complaint with one count of attempted murder in the first degree in violation of HRS §§705...
...1)(a) 2 and 706–656 3 one count of murder in the second degree in violation of HRS §§707...
...1) 4 and 706–656 5 one count of attempted murder in the second degree in violation of HRS §§705...

14. Rivera v. State

Intermediate Court of Appeals of Hawai‘i. June 30, 2009 121 Hawai’i 31 (Table, Text in WESTLAW), Unpublished Disposition 211 P.3d 89

Petitioner–Appellant Styran Eddie Rivera (Rivera) appeals from the “Findings of Fact, Conclusions of Law, and Order Granting Motion to Dismiss Petition for Post–Conviction Relife [sic] and Supplemental Petitions” filed on January 28, 2008 by the Circuit Court of the First Circuit (circuit court). We affirm. On January 6,...
...6, 2000, in Criminal No. 00–01–0029, Rivera was charged by way of complaint with three counts of murder in the second degree, one count of murder in the first degree, and one count of hindering prosecution...

15. State v. Masaoka

Intermediate Court of Appeals of Hawai‘i. November 28, 2008 119 Hawai’i 322 (Table, Text in WESTLAW), Unpublished Disposition 196 P.3d 324

Defendant–Appellant Patrick T. Masaoka appeals from the May 21, 2007 Judgment of Conviction and Sentence entered in the Circuit Court of the First Circuit (circuit court). On December 28, 2005, the State of Hawai‘i charged Masaoka in a complaint with the Attempted Murder in the First Degree of Honolulu police sergeant Patrice Gionson,...
...Alm presided. On December 28, 2005, the State of Hawai‘i charged Masaoka in a complaint with the Attempted Murder in the First Degree of Honolulu police sergeant Patrice Gionson...

16. State v. Holbron

Supreme Court of Hawai‘i. October 20, 1995 80 Hawai’i 27 904 P.2d 912

Homicide. There is no offense of attempted manslaughter premised upon defendant attempting recklessly to cause death of another person.

Synopsis

Defendant was convicted in the First Circuit Court of attempted murder. Defendant appealed. The Intermediate Court of Appeals, 10 Haw.App. 629, 862 P.2d 1079, affirmed, and defendant applied for writ of certiorari. The Supreme Court, Levinson, J., held that: (1) there is no offense of attempted manslaughter premised upon defendant attempting recklessly to cause death of another person, overruling*Tagaro*, 7 Haw.App. 291, 757 P.2d 1175, but (2) trial court’s erroneous instruction on attempted manslaughter was harmless.

Affirmed.

...such, but is a “mitigating defense” that serves to reduce murder to manslaughter, see also Matias, 74 Haw. at 199, 840...
...an alleged violation of the statute obviously could not be charged as voluntary manslaughter in an indictment or complaint; rather, a defendant can be convicted of this form of manslaughter only if he or she is initially charged with first or second degree murder and the prosecution fails to negative the defense of “extreme...

17. State v. Rumbawa

Intermediate Court of Appeals of Hawai‘i. January 29, 2001 94 Hawai’i 513 17 P.3d 862

CRIMINAL JUSTICE - Lesser Included Offenses. Reckless endangering in first degree is an included offense of attempted murder in second degree.

Synopsis

Defendant was convicted in the First Circuit Court of reckless endangering in the first degree, four counts of terroristic threatening in the first degree, and place to keep pistol or revolver. Defendant appealed. The Intermediate Court of Appeals, Foley, J., held that: (1) reckless endangering in the first degree is an included offense of attempted murder in the second degree; (2) defendant committed offense of intended reckless endangering in the first degree; and (3) evidence was sufficient to find that defendant harbored separate and distinct intents, so as to support convictions on four counts of terroristic threatening in the first degree.

Affirmed.

...Court by FOLEY , J. Defendant–Appellant Jason Rumbawa (Rumbawa) was charged

by complaint with the following: Count 1, Attempted Murder in the First Degree in violation of Hawai‘i Revised Statutes...
...701(1)(b) , and 706–656 (1993) Count 2, Attempted Murder in the Second Degree in violation of HRS §§705...

18. State v. Yamamoto

Intermediate Court of Appeals of Hawai‘i. August 26, 2009 121 Hawai’i 201 (Table, Text in WESTLAW), Unpublished Disposition 216 P.3d 127

Defendant–Appellant Keith T. Yamamoto (Yamamoto) appeals from the judgment entered by the Circuit Court of the First Circuit (circuit court) on September 26, 2007 that convicted and sentenced him for (1) Count One, the lesser included offense of Assault in the First Degree (Assault 1) in violation of Hawaii Revised Statutes (HRS) §...
...12, 2004, Plaintiff–Appellee State of Hawai‘i (State) filed a complaint that charged Yamamoto with committing the following offenses: (1) Count One, Attempted Murder in the Second Degree as to CW; (2) Count Two...

19. State v. Metcalfe

Supreme Court of Hawai‘i. March 19, 2013 129 Hawai’i 206 297 P.3d 1062

CRIMINAL JUSTICE - Experts. Pathologist could provide expert testimony that cause of death was shotgun wound to back at distance of 60 feet.

Synopsis

Background: Defendant was convicted in the Circuit Court, Third Circuit, Hawaii County, Ronald Ibarra, J., of manslaughter and carrying or using a firearm in the commission of a separate felony. He appealed. The Intermediate Court of Appeals, 2012 WL 1071503, affirmed. Defendant filed an application for a writ of certiorari.

Holdings: The Supreme Court, Recktenwald, C.J., held that:

1 forensic pathologist was qualified to provide expert testimony that victim’s cause of death was a shotgun wound to the back at a distance of approximately 60 feet;

2 firearms instructor was qualified to provide expert testimony about tests that he had conducted with defendant’s shotgun to determine how widely its pellets dispersed at various distances;

3 firearms instructor’s knowledge of firearms showed that his testimony about the dispersal tests was sufficiently reliable to be admissible as expert testimony;

4 trial court was not required to give an unrequested jury instruction on the use of confinement as protective force;

5 instructions on self defense did not mislead the jury about the subjective prong of an

assessment of defendant’s self-defense claim;
6 defendant was not entitled to a jury instruction on defense of property;
7 defendant was not prejudiced by trial court failure sua sponte to give a cautionary instruction on the use of medical marijuana; and
8 defense counsel was not ineffective for cross examining police officer about the mechanism of a shotgun.
Affirmed.
Acoba, J., dissented and filed opinion in which Sakamoto, J., sitting by assignment, joined.

...Metcalfe on two counts against [] Metcalfe for the offenses of Murder in the Second Degree as amended in count one of...
...entertain a strong suspicion that [Metcalfe] had committed the proposed charges.
c)On June 25, 2009, the State filed an amended complaint charging the same offenses for which the grand jury had...
...[H]onorable Joseph Florendo found probable cause existed for the said complaint and that the [S]tate had presented sufficient evidence to convince...

20. Briones v. State

Supreme Court of Hawai’i. March 31, 1993 74 Haw. 442 848 P.2d 966

Defendant was convicted of attempted first-degree murder, second-degree murder, attempted second-degree murder, and firearm-related offenses by the First Circuit Court, Honolulu County. Defendant appealed. The Supreme Court, 71 Hawaii 86, 784 P.2d 860, remanded after affirming in part. Defendant’s petition for postconviction...

Synopsis
Defendant was convicted of attempted first-degree murder, second-degree murder, attempted second-degree murder, and firearm-related offenses by the First Circuit Court, Honolulu County. Defendant appealed. The Supreme Court, 71 Hawaii 86, 784 P.2d 860, remanded after affirming in part. Defendant’s petition for postconviction relief was dismissed by the Circuit Court. Defendant sought review. The Supreme Court, Klein, J., held that: (1) jury instructions did not create impermissible presumption of guilt; (2) guilty verdict of attempted first-degree murder charge for shooting of two victims was factually inconsistent with separate charges for second-degree murder and attempted second-degree murder; and (3) trial and appellate counsel were ineffective for failing to raise inconsistencies of verdict.
Reversed in part, vacated in part, and remanded for new trial.
Levinson, J., concurred and filed opinion in which Moon, J., joined.

...and Floracindo Queja, Jr. The defendant, Isagani P. Briones, is charged in Count II of the complaint, with the offense of murder in the second degree of Floracindo Queja, Jr. There are two elements to the offense of murder in the second degree, each of which the prosecution must...

21. State v. Yoko Kato

Supreme Court of Hawai‘i. June 18, 2020 147 Hawai‘i 478 465 P.3d 925

CRIMINAL JUSTICE — Evidence. Admissibility of third-party culpability evidence is properly governed by evidence rules, without having to also satisfy legitimate tendency test.

Synopsis

Background: Defendant was convicted in the Circuit Court, First Circuit, of reckless endangering in the second degree, and she appealed. The Intermediate Court of Appeals affirmed. Defendant filed application for writ of certiorari.

Holdings: The Supreme Court, Pollack, J., held that:

1 admissibility of third-party culpability evidence is properly governed by evidence rules, defining relevant evidence and excluding relevant evidence on grounds of prejudice, without having to also satisfy legitimate tendency test;

2 for third-party culpability evidence to be admissible, it is sufficient, for relevancy considerations, that defendant has provided direct or circumstantial evidence tending to show that the third person committed the crime; abrogating *State v. Rabellizsa*, 903 P.2d 43; *State v. Peralto*, 18 P.3d 203; and *State v. Griffin*, 266 P.3d 448;

3 circuit court erred in precluding defendant from introducing third-party culpability evidence and in foreclosing defense counsel from arguing, in closing argument, that third party had assaulted victim or had framed defendant for attack;

4 circuit court’s error, in precluding defendant from introducing third-party culpability evidence and in foreclosing defense counsel from arguing, in closing argument, that third party had assaulted victim, was not harmless;

5 circuit court utilized the proper standard and did not abuse its discretion in evaluating third party’s invocations of his Fifth Amendment privilege; and

6 evidence supported defendant’s conviction for reckless endangering in the second degree.

Vacated and remanded.

...of Honolulu, on the island of O‘ahu. She was subsequently charged by complaint in the Circuit Court of the First Circuit (circuit court) with attempted murder in the second degree in violation of Hawai‘i Revised Statutes...

...On November 8, 2013, the State of Hawai‘i (the State) charged Yoko Kato (Kato) by complaint with Attempted Murder in the Second Degree. A.The Trial 1.The State’s...

22. State v. Torres

Intermediate Court of Appeals of Hawai‘i. December 15, 2009 122 Hawai’i 2 222 P.3d 409

CRIMINAL JUSTICE - Evidence. Error in allowing agent to give opinion testimony regarding time frame in which gun had been fired was not harmless.

Synopsis

Background: Defendant was convicted in a jury trial in the Circuit Court of second-degree murder. Defendant appealed.

Holdings: The Intermediate Court of Appeals, Nakamura, C.J., held that:
1 incriminating statements defendant made to co-worker were sufficiently corroborated by independent evidence;
2 evidence was sufficient to find that victim was dead and that defendant had knowingly caused victim’s death;
3 federal law rather than State law applied in determining whether evidence from defendant’s car was lawfully seized;
4 initial search of defendant’s car and the subsequent search by federal agents were valid under the federal automobile exception to the warrant requirement;
5 defendant implicitly consented to a security inspection of his unattended car when he attempted to enter closed military base;
6 military base commander was authorized to issue search warrant to search defendant’s car;
7 agent’s opinion on the time frame in which defendant’s gun had been fired required expert testimony;
8 error in allowing federal agent to give opinion testimony regarding the time frame in which gun had been fired was not harmless; and
9 circuit court properly informed the jury of the distinction between direct and circumstantial evidence.
Vacated and remanded.

...or participation in act by accused in general. Initial federal complaint filed against murder defendant, which charged both defendant and victim with the theft of approximately $80,000, was irrelevant to defendant’s murder trial and thus properly excluded; to the extent that defendant...
...hiding, he did not need to introduce the initial federal complaint to do so. [25] 110 Criminal Law 110XXIV Review 110XXIV...

23. State v. Perez

Intermediate Court of Appeals of Hawai‘i. October 23, 1998 90 Hawai’i 113 976 P.2d 427

CRIMINAL JUSTICE - Instructions. Charge that jury must be “firmly convinced” of defendant’s guilt is reversible error.

Synopsis
Following jury trial before the First Circuit Court, defendant was convicted of attempted second-degree murder, two counts of first-degree reckless endangering, attempted first-degree assault. Defendant appealed. The Intermediate Court of Appeals, Acoba, J., held that: (1) instruction on defendant’s required state of mind for offense of attempted murder in second degree was not plain error; (2) instruction which merely advised that “self-control” was significant factor in determining whether defendant was acting under influence of extreme mental and emotional disturbance unduly singled out that factor and was reversible error; and (3) instruction that jury should convict if it was “firmly convinced” of defendant’s guilt was reversible error.
Vacated and remanded.

...substantive offense). HAWJIC 14.02A (West 1997) entitled, “Attempted Murder Second Degree—Purpose to Cause Proscribed Result: H.R.S. §§705...
...provides as follows: [In Count (count number) of the Indictment/ Complaint, the] [The] Defendant, (defendant’s name), is charged with the offense of Attempted Murder in the Second Degree. A person commits the offense of...

24. Whiting v. State

Supreme Court of Hawai‘i. July 09, 1998 88 Hawai’i 356 966 P.2d 1082

CRIMINAL JUSTICE - Double Jeopardy. Reprosecution for EMED manslaughter barred as crime was special defense to murder rather than chargeable offense.

Synopsis

Defendant’s conviction of manslaughter due to extreme mental or emotional disturbance (EMED manslaughter) in prosecution for murder was reversed by the Intermediate Court of Appeals for trial error. On remand, the Circuit Court denied defendant’s initial and renewed motions to dismiss on double jeopardy grounds. The Intermediate Court of Appeals affirmed, holding that State was authorized to again prosecute defendant for second-degree murder, but that double jeopardy mandated that any conviction of that crime would be reversed to EMED manslaughter. Defendant sought writ of certiorari. The Supreme Court, Klein, J., held that: (1) reprosecution on charge of second-degree murder was barred by double jeopardy; (2) as EMED manslaughter was not chargeable offense or lesser included offense to murder, but result of special defense to murder charge, reprosecution for EMED murder was not possible; and (3) prosecution for reckless manslaughter as lesser included offense was not barred.

Affirmed and remanded; opinion of Intermediate Court of Appeals vacated.

...Distress; Temporary Insanity. (Formerly 203k39 203k31 Defendant may not be charged with manslaughter due to extreme mental or emotional disturbance in indictment or complaint as EMED manslaughter is defense to charge of murder that mitigates culpability, rather than offense. HRS §707–702...

25. State v. David

Intermediate Court of Appeals of Hawai‘i. September 30, 2020 148 Hawai‘i 279 (Table, Text in WESTLAW), Unpublished Disposition 472 P.3d 1124

Defendant-Appellant Peter David (David) appeals from the February 28, 2019 Judgment of Conviction and Sentence entered by the Circuit Court of the First Circuit (Circuit Court). On January 12, 2011, Plaintiff-Appellee State of Hawai‘i (State) charged David by Complaint with: murder in the second degree for the death of his cousin, Santhony...

...On January 12, 2011, Plaintiff-Appellee State of Hawai‘i (State) charged David by Complaint with: murder in the second degree for the death of his cousin...

26. State v. Gomes

Supreme Court of Hawai‘i. May 26, 2005 107 Hawai’i 308 113 P.3d 184

CRIMINAL JUSTICE - Postconviction Relief. Ruling of Apprendi v. New Jersey did not apply retroactively to petitions attacking previously imposed sentences.

Synopsis

Background: Defendant filed motion to withdraw nolo contendere plea to charge of second degree murder. The Second Circuit Court denied the defendant’s motion, and the Intermediate Court of Appeals affirmed. The Supreme Court, 897 P.2d 959, vacated the conviction and remanded. On remand, defendant was convicted by jury in the circuit court of sexual assault in the first degree and the included offense of reckless manslaughter, and sentenced to concurrent, extended terms in prison. The Supreme Court affirmed. The circuit court denied defendant’s pro se motion to correct an allegedly illegal sentence, and the Supreme Court affirmed. Defendant’s pro se federal habeas petition was also denied by the federal district court. The circuit court denied defendant’s second, pro se motion to correct an allegedly illegal sentence. Defendant appealed. The Intermediate Court of Appeals, 107 Hawaii 253, 112 P.3d 739, affirmed. Certiorari was granted.

Holding: The Supreme Court, Levinson, J., held that ruling of *Apprendi v. New Jersey* did not apply retroactively to petitions attacking previously imposed sentence Intermediate Court of Appeals judgment affirmed.

Acoba, J., filed concurring opinion, in which Duffy, J., joined.

...form, as set forth in the ICA’s opinion: Gomes was charged by complaint [in Cr. No. 91–0374(2)] with Sexual Assault in...
...Hawai‘i Revised Statutes (HRS) §707–730 (Supp.1992) , and Murder in the Second Degree, HRS §707–701.5 (Supp...

27. State v. Gomes

Intermediate Court of Appeals of Hawai‘i. March 23, 2005 107 Hawai’i 253 112 P.3d 739

CRIMINAL JUSTICE - Pleas. Upon defendant’s withdrawal of plea, State was free to try defendant on charge it had dismissed pursuant to plea bargain.

Synopsis

Background: Following appellate affirmance of conviction and sentence, denial of motion to correct or reduce sentence, and denial of petition for writ of habeas corpus in

federal district court, defendant filed petition to correct sentence and conviction. The Circuit Court, Second Circuit, Shackley F. Raffetto, J., denied petition. Defendant appealed.
Holdings: The Intermediate Court of Appeals, Lim, J., held that:
1 State could try defendant on previously dismissed charge after defendant withdrew negotiated plea, and
2 defendant was precluded from challenging matters already decided in previous proceedings.
Affirmed.
Nakamura, J., concurred and filed opinion.

...ICA’s decision and order that it be depublished. Gomes was charged by complaint [in Cr. No. 91–0374(2)] with Sexual Assault in...
...Hawai‘i Revised Statutes (HRS) §707–730 (Supp.1992) , and Murder in the Second Degree, HRS §707–701.5 (Supp...

28. State v. Kato

Intermediate Court of Appeals of Hawai‘i. March 19, 2019 144 Hawai‘i 137 (Table, Text in WESTLAW), Unpublished Disposition 436 P.3d 1220

Defendant-Appellant Yoko Kato (Kato) was charged by complaint with Attempted Murder in the Second Degree. A jury found her guilty of Reckless Endangering in the Second Degree. She appeals from the Judgment of Conviction and Sentence (Judgment) entered by the Circuit Court of the First Circuit (Circuit Court) on March 11, 2015. Kato contends that:...

...Hiraoka , JJ.) MEMORANDUM OPINION Defendant-Appellant Yoko Kato (Kato) was charged by complaint with Attempted Murder in the Second Degree. A jury found her guilty of...

29. State v. Wilmer

Supreme Court of Hawai‘i. September 19, 2001 96 Hawai’i 336 31 P.3d 193

CRIMINAL JUSTICE - Prosecutorial Misconduct. Sua sponte mistrial for prosecutor’s misconduct in murder trial was not product of manifest necessity.

Synopsis
Editor’s Note: The opinion of the Supreme Court of Hawai’i, in *State v. Wilmer,* published in the advance sheet at this citation, 31 P.3d 193-202, was withdrawn from the bound volume because rehearing is pending.

...prejudice. I.BACKGROUND On May 27, 1997, Christopher Wilmer was charged via

complaint with one count of murder in the second degree for the death of Gordon Granger...

30. State v. Gomes

Intermediate Court of Appeals of Hawai’i. April 15, 1994 Not Reported in P.2d 1994 WL 129846

Nolo Contendere Plea. Trial court did not abuse its discretion in denying motion to withdraw plea.

...the record, we answer no and affirm. FACTS Defendant was charged by complaint with Sexual Assault in the First Degree, Hawai’i Revised Statutes (HRS) §707–730 (Supp.1992) , and Murder in the Second Degree, HRS §707–701.5 (Supp...

31. State v. Costa

Supreme Court of Hawai‘i. March 31, 2008 118 Hawai’i 209 (Table, Text in WESTLAW), Unpublished Disposition 187 P.3d 593

Background: Defendant was convicted in the Fifth Circuit Court of second degree murder and he appealed. Holdings: The Supreme Court held that: 1(1) requirement of “request” for instruction explaining consequences of verdict of not guilty by reason of mental defect was satisfied when defendant consented to instruction.; 3(2) jury...

Synopsis
Background: Defendant was convicted in the Fifth Circuit Court of second degree murder and he appealed.
Holdings: The Supreme Court held that:
1 requirement of “request” for instruction explaining consequences of verdict of not guilty by reason of mental defect was satisfied when defendant consented to instruction.;
2 jury instructions were not inconsistent; and
3 trial counsel was not deficient in failing to object to consequences instruction.
Affirmed.

...island of Kaua‘i. Three days after his arrest, Costa was charged by written complaint with the murder of Jerves. On March 14, 2006, Costa filed a Notice...

32. State v. Metcalfe

Intermediate Court of Appeals of Hawai‘i. March 30, 2012 130 Hawai’i 347 (Table, Text

in WESTLAW), Unpublished Disposition 310 P.3d 1048

Defendant–Appellant Kevin C. Metcalfe (Metcalfe) appeals from the March 25, 2010 judgment entered by the Circuit Court for the Third Circuit (circuit court). Plaintiff–Appellee State of Hawai‘i (State) charged Metcalfe by amended complaint with one count of Murder in the Second Degree in violation of Hawaii Revised Statutes (HRS)...

...Circuit (circuit court). 1 Plaintiff–Appellee State of Hawai‘i (State) charged Metcalfe by amended complaint with one count of Murder in the Second Degree in violation of Hawaii Revised Statutes...

33. State v. Wilmer

Supreme Court of Hawai‘i. September 19, 2001 97 Hawai’i 238 35 P.3d 755

Defendant charged with second-degree murder moved for dismissal with prejudice for prosecutorial misconduct. The Third Circuit Court, sua sponte, declared mistrial without prejudice, and defendant appealed. The Supreme Court, Nakayama, J., held that: (1) defendant’s motion did not constitute consent to mistrial; (2) circumstances constituting...

Synopsis

Defendant charged with second-degree murder moved for dismissal with prejudice for prosecutorial misconduct. The Third Circuit Court, *sua sponte,* declared mistrial without prejudice, and defendant appealed. The Supreme Court, Nakayama, J., held that: (1) defendant’s motion did not constitute consent to mistrial; (2) circumstances constituting manifest necessity for the declaration of a mistrial need not be beyond the control of the parties, and need not be a sudden and overwhelming emergency, overruling *State v. Lam*, 75 Haw. 195, 857 P.2d 585; (3) prosecutorial misconduct did not amount to manifest necessity requiring mistrial; and (4) retrial was barred on double jeopardy grounds.

Reversed.

...prejudice. I.BACKGROUND On May 27, 1997, Christopher Wilmer was charged via complaint with one count of murder in the second degree for the death of Gordon Granger...

34. State v. Pinero

Supreme Court of Hawai’i. July 25, 1989 70 Haw. 509 778 P.2d 704

Defendant was convicted in the First Circuit Court, City and County of Honolulu, Ronald B. Greig, Evelyn B. Lance, Wilfred K. Watanabe, and Daniel G. Heely, JJ., of

first-degree murder and unlawfully possessing firearm, and he appealed. The Supreme Court, Nakamura, J., held that: (1) admitting evidence of defendant’s prior encounter...

Synopsis

Defendant was convicted in the First Circuit Court, City and County of Honolulu, Ronald B. Greig, Evelyn B. Lance, Wilfred K. Watanabe, and Daniel G. Heely, JJ., of first-degree murder and unlawfully possessing firearm, and he appealed. The Supreme Court, Nakamura, J., held that: (1) admitting evidence of defendant’s prior encounter with another police officer was abuse of discretion; (2) expert testimony that cause of victim’s death was homicide rather than accident improperly told jury what result to reach and was inadmissible; (3) instruction on lesser included offense of manslaughter which did not inform jury of when defense of mitigating mental or emotional disturbance should be considered was error; and (4) failure to instruct jury on mental element of firearms offense was error.

Vacated and remanded.

...court for a new trial. I. The two-count criminal complaint filed by the Prosecuting Attorney of the City and County of Honolulu charged that Clyde Pinero committed the offense of murder in the first degree by “intentionally or knowingly caus[ing] the...

35. State v. Fetelee

Intermediate Court of Appeals of Hawai‘i. April 18, 2007 114 Hawai’i 151 157 P.3d 590

CRIMINAL JUSTICE - Evidence. Evidence of prior violent involving defendant was admissible as part of the res gestae of charged offenses.

Synopsis

Background: Defendant was convicted in the First Circuit Court, Michael D. Wilson, J., of attempted murder in the second degree, attempted assault in the second degree, and theft in the second degree. Defendant appealed.

Holdings: The Intermediate Court of Appeals, Foley, J., held that:

1 evidence of prior incident in which defendant, while intoxicated and angry as a result of a vehicle blocking his driveway, forcibly entered an apartment, threw a fan into ceiling, and punched individual was admissible as part of the res gestae of charged offenses that occurred minutes later;

2 trial court did not abuse its discretion by permitting the state to reopen its case to present the testimony of witness on the issue raised in the motions in limine hearing; and

3 trial court did not commit plain error by failing to instruct the jury, prior to trial testimony of witnesses regarding prior incident, on the limited purpose of their testimony.

Affirmed.

...D. Wilson presided. I. On June 23, 2003, the State charged Fetelee via a Complaint with Attempted Murder in the Second Degree, in violation of Hawaii Revised Statutes...

36. Domingo v. State

Supreme Court of Hawai’i. May 26, 1994 76 Hawai’i 237 873 P.2d 775

Counsel. Counsel was not ineffective.

Synopsis

Defendant was convicted by the First Circuit Court, Honolulu County, Marie N. Milks, J., of murder, and he appealed. The Supreme Court, Padgett, J., 69 Haw. 68, 733 P.2d 690, reversed and remanded. After his conviction following retrial was affirmed on appeal, 71 Haw. 657, 833 P.2d 897, defendant filed petition for postconviction relief. The First Circuit Court denied petition, and defendant appealed. The Supreme Court, Klein, J., held that: (1) defendant did not establish ineffective assistance of counsel based on his decision to waive jury trial; (2) defendant did not establish ineffective assistance on appeal for failure to raise issue that trial judge improperly weighed evidence; and (3) circuit court’s failure to enter specific findings of fact and conclusions of law in denying petition was harmless error.
Affirmed.

...we affirm. I. BACKGROUND On April 22, 1985, Domingo was charged by way of complaint with the murder of his stepfather in violation of Hawaii Revised Statutes (HRS...

37. State v. Renon

Supreme Court of Hawai’i. March 18, 1992 73 Haw. 23 828 P.2d 1266

Defendant was convicted in the First Circuit Court, City and County of Honolulu, of second-degree murder, attempted murder in first degree, and unlicensed carrying of firearm. Another defendant was convicted as accomplice to murder. Defendants appealed. The Supreme Court, Moon, J., held that evidence of prior shooting...

Synopsis

Defendant was convicted in the First Circuit Court, City and County of Honolulu, of second-degree murder, attempted murder in first degree, and unlicensed carrying of firearm. Another defendant was convicted as accomplice to murder. Defendants appealed. The Supreme Court, Moon, J., held that evidence of prior shooting incident involving defendants’ gang and rival gang was relevant and admissible.
Affirmed.

...of Manuel, as well as a firearms violation. Masulit was charged in a separate complaint with attempted murder in connection with the Mini Park shooting and a firearms...

38. State v. Gomes

Supreme Court of Hawai‘i. June 09, 1995 79 Hawai’i 32 897 P.2d 959

Pleas. A defendant should have been allowed to withdraw his plea of nolo contendere.

Synopsis

Defendant filed motion to withdraw nolo contendere plea to charge of second-degree murder. The Second Circuit Court denied the defendant’s motion, and the Intermediate Court of Appeals affirmed. The Supreme Court, Klein, J., granted certiorari, and held that: (1) defendant should have been allowed to withdraw his plea, and (2) a defendant is entitled to withdraw his nolo contendere plea before imposition of sentence where defendant has never expressly admitted guilt, defendant advances claim of new information or changes circumstances with factual support that if believed by reasonable juror would exculpate him, there has been no undue delay in moving to withdraw plea, and prosecution has not otherwise met its burden of establishing that it relied on plea to its substantial prejudice.

Vacated and remanded.

...to withdraw his [or her] plea.” I. FACTS Gomes was charged by complaint with Sexual Assault in the First Degree, Hawai ‘i Revised Statutes (HRS) §707–730 (Supp.1992) , and Murder in the Second Degree, HRS §707–701.5 (Supp...

39. State v. Janto

Supreme Court of Hawai‘i. October 21, 1999 92 Hawai’i 19 986 P.2d 306

CRIMINAL JUSTICE - Competency to Stand Trial. Abuse of discretion is proper standard for reviewing competency determination.

Synopsis

Defendant was convicted of second-degree murder following jury trial in the First Circuit Court. Defendant appealed, and state filed cross-appeal based on denial of its motion for enhanced sentence. The Supreme Court, Nakayama, J., held that: (1) confession to murder was voluntary despite defendant’s ingestion of mind-altering substances the night before; (2) determination regarding a defendant’s fitness to proceed will be reviewed for abuse of discretion, overruling *State v. Soares,* 81 Hawai’i 332, 916 P.2d 1233; (3) finding that defendant was competent to stand trial was not abuse of discretion; (4) dental bridgework, eyeglass frame, and eyeglass lens allegedly belonging to victim and found at crime scene were admissible; (5) record did not support ineffective assistance claims; (6) allegation that murder was especially heinous, atrocious, or cruel, so as to support enhanced sentence, must be made in indictment, and findings on that issue are to be made by trier of fact; and (7) applicability of enhanced sentence must be determined by way of bifurcated proceeding.

Affirmed.

...and aftermath had occurred. On June 20, 1997, Janto was charged via complaint with one count of murder in the second degree. On September 16, 1997, the prosecution...

40. State v. Johnson

Intermediate Court of Appeals of Hawai‘i. August 02, 2001 96 Hawai’i 462 32 P.3d 106

CRIMINAL JUSTICE - Appeals. Order denying motion to withdraw no contest plea to manslaughter was not an appealable final order.

Synopsis

Defendant, who was convicted of manslaughter following entry of no contest plea, filed motion to withdraw plea and for other relief. The Third Circuit Court, Grey K. Nakamura, J., denied motion. Defendant appealed. The Intermediate Court of Appeals, Lim, J., held that: (1) order denying defendant’s motion to withdraw no contest plea was not an appealable final order, nor an immediately appealable collateral order, and (2) exercise of Intermediate Court of Appeals’ supervisory power was not appropriate to hear defendant’s appeal.

Appeal dismissed.

...May Amano. I.Background. On May 3, 1995, Defendant was charged by complaint with murder in the second degree, in violation of Hawaii Revised Statutes...

41. State v. Van Dyke

Supreme Court of Hawai‘i. May 16, 2003 101 Hawai’i 377 69 P.3d 88

CRIMINAL JUSTICE - Instructions. Error in failing to instruction the jury on “force” and “deadly force” was not harmless.

Synopsis

Defendant was convicted by a jury in the First Circuit Court, Virginia Lea Crandall, J., of reckless manslaughter. Defendant appealed. The Supreme Court, Levinson, J., held that: (1) jury instructions on the applicability of the justification of self-defense to second-degree murder and reckless manslaughter were not prejudicially insufficient or misleading; (2) trial court error in failing to instruction the jury on “force” and “deadly force” was not harmless and warranted reversal of reckless manslaughter conviction; and (3) the defendant’s state of mind is a fact that must be determined by the trier of fact based on the direct and circumstantial evidence adduced at trial; overruling *State v. Napoleon*, 2 Haw.App. 369, 633 P.2d 547 (1981).

Reversed.

...III. B. Procedural Background On April 11, 2000, Montez was charged by complaint with the offense of second degree murder, in violation of HRS §707–701.5 (1993). 12...

42. State v. Young

Supreme Court of Hawai‘i. May 24, 2000 93 Hawai’i 224 999 P.2d 230

CRIMINAL JUSTICE - Homicide. Reckless torture does not support sentence enhancement.

Synopsis

Defendant was convicted, after a jury-waived trial in the First Circuit Court, of second-degree murder and was given an enhanced sentence of life imprisonment without possibility of parole. Defendant appealed. The Supreme Court, Nakayama, J., held that: (1) evidence did not establish physical or mental disease defense to penal responsibility; (2) evidence did not establish manslaughter by reason of extreme mental or emotional distress (EMED); (3) to establish that a second-degree murder is especially heinous, atrocious, or cruel as a conscienceless or pitiless crime that is unnecessarily torturous to a victim, as basis for sentence enhancement, the prosecution must prove beyond a reasonable doubt that the victim suffered unnecessary torture and that the defendant intentionally or knowingly inflicted unnecessary torture on the victim; and (4) evidence did not establish that defendant unnecessarily tortured the victim.

Conviction affirmed; sentence vacated, and remanded.

Ramil, J., filed an opinion concurring in part and dissenting in part, in which Moon, C.J., joined.

...understand what was happening. On May 21, 1997, Young was charged by complaint with murder in the second degree. The complaint also alleged that the...

43. State v. Vinuya

Intermediate Court of Appeals of Hawai‘i. August 29, 2001 96 Hawai’i 472 32 P.3d 116

CRIMINAL JUSTICE - Searches and Seizures. Defendant had reasonable expectation of privacy in his bedroom in his parents house.

Synopsis

Defendant was convicted in the Second Circuit Court, Artemio C. Baxa, J., of assault in the second degree, carrying or use of a firearm in the commission of a separate felony, place to keep firearm, prohibited possession of a firearm, and possession of a prohibited firearm, after sawed-off shotgun was found in defendant’s locked bedroom at his mother’s house. Defendant appealed. The Intermediate Court of Appeals, Lim, J., held that: (1) defendant had reasonable expectation of privacy in bedroom; (2) mother had actual authority to consent to search of common areas of house; (3) mother did not have actual authority to consent to search of defendant’s locked bedroom; (4) exigent circumstances did not exist to justify search; (5) erroneous admission of sawed-off shotgun was not harmless error; and (6) evidence was insufficient to support conviction of possession of a prohibited firearm.

Reversed in part, judgment vacated and remanded in part.

...a few days later. On July 23, 1999, he was charged by complaint with attempted murder in the first degree, carrying or use of a firearm...

44. Lewi v. State

Supreme Court of Hawai‘i. November 07, 2019 145 Hawai‘i 333 452 P.3d 330

CRIMINAL JUSTICE — Sentencing. Paroling authority required to set forth written explanation when it determines minimum term of imprisonment for the felony offender.

Synopsis

Background: Postconviction petitioner sought to vacate, set aside, or correct judgment or to release petitioner from custody. The Circuit Court, Third Circuit, denied the petition, and defendant appealed. The Intermediate Court of Appeals, 140 Hawai’i 4, 2017 WL 2365286, affirmed. Petitioner petitioned for writ of certiorari.

Holdings: The Supreme Court, McKenna, J., held that:

1 public defender did not illegally induce postconviction petitioner’s plea to the lesser included offense of manslaughter by falsely promising that he would receive two years of imprisonment plus probation in exchange for the plea;

2 petitioner failed to specify what information in the presentence investigation and report (PSI) deputy public defender should have challenged, as required to support an ineffective assistance of counsel claim;

3 petitioner was properly convicted of both manslaughter and weapons offenses;

4 petitioner had no right to be present at status conference; but

5 petitioner raised a colorable claim that the Hawaii Paroling Authority (HPA) acted arbitrarily and capriciously in maintaining his level of punishment at Level III on his manslaughter conviction;

6 the Hawaii Paroling Authority (HPA) is required to set forth a written justification or explanation, beyond simply an enumeration of any or all of the broad criteria considered, when it determines that the minimum term of imprisonment for the felony offender is to be set at a Level II or Level III punishment; and

7 petitioner raised a colorable claim that the circuit court provided inadequate reasons on the record for imposing consecutive sentences.

Affirmed in part, vacated in part, and remanded.

...A.Underlying Criminal Proceedings On October 7, 2008, the State charged Lewi via Complaint with five offenses: Count 1, Murder in the Second Degree, in violation of Hawai‘i Revised Statutes...

45. State v. Schroeder

Supreme Court of Hawai‘i. August 30, 1994 76 Hawai’i 517 880 P.2d 192

Sentencing. Imposition of minimum mandatory sentence without notice to defendant denied due process.

Synopsis

Defendant, whose convictions for first-degree robbery and kidnapping were affirmed on direct appeal, 7 Haw.App. 664, 807 P.2d 52, filed motion to correct sentence. The circuit court denied the motion and the Intermediate Court of Appeals, 10 Haw.App. 535, 880 P.2d 208,affirmed as to robbery sentence but remanded with instructions to vacate sentence for kidnapping. The prosecution petitioned for certiorari. The Supreme

Court, Levinson, J., held that defendant had due process right to be given reasonable notice of circuit court’s intention to sua sponte impose mandatory minimum sentence to kidnapping conviction as well as to first-degree robbery conviction where prosecution sought imposition of mandatory minimum sentence only with respect to robbery conviction; imposition of mandatory minimum sentence as to the kidnapping conviction amounted to plain error affecting defendant’s substantial rights.
Affirmed.

...omitted). In State v. Estrada, supra, the defendant (Estrada) was charged in a single-count complaint with the attempted murder of a Maui County police officer. A jury convicted Estrada...

46. State v. Beaudet-Close

Supreme Court of Hawai‘i. June 24, 2020 148 Hawai‘i 66 468 P.3d 80

CRIMINAL JUSTICE — Privileges. Defendant invoked right to remain silent by refusing to participate in reenactment of altercation with victim during questioning about the incident.

Synopsis
Background: Defendant was convicted in the Circuit Court, Third Circuit, Melvin H. Fujino, J., of attempted murder in the second degree. Defendant appealed, and the Intermediate Court of Appeals, 2018 WL 6258691, affirmed. Defendant applied for writ of certiorari.
Holdings: The Supreme Court, Nakayama, J., held that:
1 defendant invoked his constitutional right to remain silent during police interview when he declined detective’s request that he participate in a reenactment of altercation with victim, and
2 State infringed defendant’s right to remain silent by showing jury a video of him refusing to participate in the reenactment.
Vacated and remanded for new trial.

...On November 9, 2016, the State of Hawai‘i (the State) charged Beaudet-Close by complaint with Attempted Murder in the Second Degree and Assault in the First Degree...

47. State v. Haili

Supreme Court of Hawai‘i. December 03, 2003 103 Hawai’i 89 79 P.3d 1263

CRIMINAL JUSTICE - Confrontation. Admission of murder victim’s hearsay statements violated constitutional confrontation rights.

Synopsis
Defendant was convicted, on retrial following mistrial in the First Circuit Court, Karen

Ahn, J., of second-degree murder, and was sentenced to life with possibility of parole. Defendant appealed. The Supreme Court, Duffy, J., held that: (1) victim’s hearsay statements were not subject to exclusion as statements made in anticipation of divorce litigation; (2) trial court did not abuse its discretion in admitting victim’s hearsay statements pursuant to hearsay exceptions in rules of evidence; (3) admission of such statements violated defendant’s state and federal constitutional right to confront adverse witnesses; (4) trial court did not abuse its discretion in refusing to individually voir dire particular juror at time court and counsel were settling jury instructions; (5) evidence that defendant was experiencing emotional distress at time of offense was insufficient to establish extreme mental or emotional disturbance (EMED) in absence of evidence that defendant had lacked self-control; and (6) trial court was not required to define term “extreme mental or emotional disturbance.”
Vacated and remanded.
Acoba, J., concurred in part and dissented in part, with opinion.

...stand. B. Procedural Background On June 18, 1996, Danny was charged by complaint with murder in the second degree. He was tried by a jury...

48. State v. Brooks

Intermediate Court of Appeals of Hawai‘i. October 21, 2011 125 Hawai‘i 462 264 P.3d 40

CRIMINAL JUSTICE - Confrontation. Application of rule of completeness to testimonial hearsay statement offered by defendant did not violate the Confrontation Clause.

Synopsis
Background: Defendant was convicted in the Circuit Court, First Circuit, Richard W. Pollack, J., of manslaughter, kidnapping and robbery. Defendant appealed.
Holding: The Intermediate Court of Appeals, Nakamura, C.J., held that admission of additional portions of unavailable accomplice’s statement to police under rule of completeness did not violate the Confrontation Clause.
Affirmed.

...back and choked Arifuku. III. Brooks and Rangamar were jointly charged by complaint with second degree murder (Count 1); kidnapping (Count 2); and first degree robbery (Count...

49. State v. Castro

Supreme Court of Hawai’i. May 17, 1988 69 Haw. 633 756 P.2d 1033

Defendant was convicted in the First Circuit Court, City and County of Honolulu, Robert Won Bae Chang, Ronald B. Greig, Daniel G. Heely, and Marie N. Milks, JJ., of

attempted murder and assault in the first degree. Defendant appealed. The Supreme Court, Nakamura, J., held that: (1) evidence of defendant’s aggressive and...

Synopsis

Defendant was convicted in the First Circuit Court, City and County of Honolulu, Robert Won Bae Chang, Ronald B. Greig, Daniel G. Heely, and Marie N. Milks, JJ., of attempted murder and assault in the first degree. Defendant appealed. The Supreme Court, Nakamura, J., held that: (1) evidence of defendant’s aggressive and violent character was inadmissible; (2) expert should not have been allowed to testify to bolster complaining witness’ credibility; (3) defendant should not have been shackled during trial; and (4) it was reversible error to instruct jury that it could return guilty verdict on both attempted murder and first-degree assault.
Vacated and remanded.

...the assailant. And he was apprehended shortly thereafter. B. The Complaint filed by the Prosecuting Attorney charged Michael Castro with attempted murder, in violation of Hawaii Revised Statutes (HRS) §§705–500...

50. State v. Lavoie

Supreme Court of Hawai‘i. November 22, 2019 145 Hawai‘i 409 453 P.3d 229

CRIMINAL JUSTICE — Weapons. Failure to give a merger instruction constituted plain error, and was not harmless beyond a reasonable doubt.

Synopsis

Background: Defendant was convicted in the Circuit Court of the Second Circuit, Joseph Cardoza, J., of murder in the second degree, ownership or possession prohibited of any firearm, and place to keep loaded firearms other than pistols and revolvers. Defendant appealed. The Intermediate Court of Appeals, 142 Hawaii 211, 2018 WL 1905957, affirmed. Defendant petitioned for writ of certiorari.
Holdings: The Supreme Court, Pollack, J., held that:
1 defendant did not open the door to otherwise inadmissible testimony about prior incidents of abuse;
2 evidence of prior bad acts by defendant against victim was inadmissible to rebut defendant’s extreme mental or emotional disturbance defense (EMED);
3 evidence of prior bad acts by defendant against victim was inadmissible to rebut defendant’s lack of penal responsibility defense;
4 erroneous admission of prior bad acts evidence was not harmless;
5 trial court improperly instructed the jury on the use of prior bad acts evidence;
6 trial court was not required to define term “extreme mental or emotional disturbance”; but
7 trial court’s failure to give a merger instruction with regard to felon in possession and place to keep offenses constituted plain error, and was not harmless beyond a reasonable doubt, overruling *State v. Stangel*, 2015 WL 836928.
Vacated and remanded.

...Valley, and the couple had four children together. Lavoie was charged by complaint in

the District Court of the Second Circuit with the following offenses: murder in the second degree in violation of Hawai‘i Revised Statutes...

51. State v. Feliciano

Supreme Court of Hawai‘i. July 05, 2005 107 Hawai’i 469 115 P.3d 648

CRIMINAL JUSTICE - Double Jeopardy. “Same elements” test for double jeopardy applies in cases involving multiple punishment in single prosecution.

Synopsis

Background: Defendant was convicted in the First Circuit Court, Richard K. Perkins, J., of attempted murder in second degree, place to keep pistol or revolver, and carrying, using, or threatening to use firearm in commission of separate felony. Defendant appealed.

Holdings: The Supreme Court, Duffy, J., held that:

1 as a matter of first impression, “same elements” test for double jeopardy applied in multiple punishment cases; overruling *State v. Santiago,* 8 Haw.App. 535, 813 P.2d 335, and *State v. Caprio,* 85 Hawaii 92, 937 P.2d 933;

2 convicting defendant of both attempted murder and use of firearm, based on same act of shooting victim, did not violate double jeopardy;

3 convicting defendant of both attempted murder and place to keep did not violate double jeopardy;

4 convicting defendant of both place to keep and use of firearm did not violate double jeopardy;

5 double jeopardy did not bar imposition of mandatory minimum term sentence for attempted murder;

6 substantial evidence supported conclusion that defendant was penally responsible for his conduct; and

7 trial court did not err in concluding defendant was not acting in self-defense.

Affirmed.

Dissenting opinion by Acoba, J.

...of HRS §134–6(a) and (e) 9 The complaint also alleged that, under the attempted murder in the second degree charge, Feliciano was subject to sentencing in accordance with HRS§706...

52. State v. Smith

Intermediate Court of Appeals of Hawai‘i. March 09, 2021 149 Hawai‘i 153 484 P.3d 166

CRIMINAL JUSTICE — Sentencing. Trial court erred when it imposed new sentence upon defendant that was more severe than defendant’s prior sentence.

Synopsis

Background: Following affirmance on appeal of convictions of assault, terroristic threatening, sexual assault, and kidnapping, 106 Hawaii 365, 105 P.3d 242, defendant filed motion to review consecutive sentence. The Circuit Court, Second Circuit, denied the motion but found the sentence imposed for kidnapping was illegal and directed defendant to file petition for post-conviction relief. As directed, defendant filed the petition. The Circuit Court granted the petition and ordered defendant to be resentenced. The Circuit Court then resentenced defendant. Defendant filed motion to reduce his sentence based on medical condition. The Circuit Court denied the motion. Defendant appealed.
Holdings: The Intermediate Court of Appeals, Hiraoka, J., held that:
1 trial court’s resentencing of defendant, following his post-conviction petition, terminated proceedings and left nothing further to be accomplished by trial court;
2 amended notice of appeal from order denying motion to review consecutive sentence did not apply to later order denying motion to reduce sentence;
3 trial counsel’s filing of amended notice of appeal from earlier order denying motion to review consecutive sentence denied defendant due process;
4 trial court’s original sentencing order specifically ordered that defendant serve consecutive terms;
5 trial court erred when it imposed new sentence that was more severe than defendant’s prior sentence;
6 trial court adequately explained rationale for imposing consecutive sentences when resentencing defendant; and
7 defendant’s diagnosis of stage 3 throat cancer did not require reduction in defendant’s sentence.
Affirmed in part, vacated in part, and remanded.

...at 246-49 PROCEDURAL HISTORY The Criminal Case Smith was charged by complaint with attempted murder (Count 1), terroristic threatening (Count 2), sexual assault (Counts 3...

53. State v. Fetelee

Supreme Court of Hawai‘i. January 31, 2008 117 Hawai’i 53 175 P.3d 709

CRIMINAL JUSTICE - Evidence. Rules of Evidence superseded res gestae doctrine, which was no longer an independent grounds for admissibility of evidence.

Synopsis
Background: Defendant was convicted in the First Circuit Court, Michael D. Wilson, J., of attempted murder in the second degree, attempted assault in the second degree, and theft in the fourth degree. Defendant appealed. The Intermediate Court of Appeals affirmed, and defendant filed an application for a writ of certiorari.
Holdings: After accepting the application, the Supreme Court, Moon, C.J., held that:
1 the Rules of Evidence had superseded the common law res gestae doctrine, and the doctrine was no longer an independent grounds for admissibility of evidence;
2 evidence that defendant had entered neighbor’s apartment and punched a visitor, ten minutes before the incidents leading up to the charged offenses, was not probative of

defendant’s intent to commit the charged offenses; and
3 prior bad-acts evidence was not probative of defendant’s motive in committing the charge offenses, but instead was evidence that only demonstrated defendant’s propensity towards anger and provoking fights.
Conviction vacated, and case remanded.
Nakayama, J., concurred in the result and filed opinion.

...him.” B. Procedural History On June 23, 2003, the prosecution charged Fetelee, via a three-count complaint, with attempted murder in the second degree, attempted assault in the second degree...

V.

STATEMENT OF RELATED CASES

Appellee is unaware of any related cases pending before the Hawai‘i courts or agencies.

SCAP-21-0000576

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

STATE OF HAWAI‘I, Plaintiff-Appellee, vs. RICHARD OBRERO, Defendant-Appellant.	) CASE NO. 1CPC-19-0001669)) APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING DEFENDANT RICHARD OBRERO’S MOTION TO DISMISS filed 9/17/2021)) FIRST CIRCUIT COURT)))) HONORABLE KEVIN A. SOUZA

CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2022, I served by electronic notification through JEFS a copy of the Answering Brief of the State of Hawai‘i to:

THOMAS M. OTAKE #7622
Email: thomas@otakelaw.com
Attorney for RICHARD OBRERO

/s/ Donn Fudo
Deputy Prosecuting Attorney
City and County of Honolulu