151 Hawai‘i 472
517 P.3d 755

STATE of Hawai‘i, Plaintiff-Appellee,
v.
Richard OBRERO, Defendant-Appellant.

SCAP-21-0000576

Supreme Court of Hawai‘i.

September 8, 2022

Thomas M. Otake, Honolulu, for appellant

Donn Fudo, Honolulu, for appellee

McKENNA, WILSON, AND EDDINS, JJ.; WITH NAKAYAMA, J., CONCURRING SEPARATELY AND DISSENTING, WITH WHOM McKENNA, J., JOINS AS TO SECTIONS II AND III; AND RECKTENWALD, C.J., DISSENTING, WITH WHOM NAKAYAMA, J., JOINS

OPINION OF THE COURT BY EDDINS, J.

I. INTRODUCTION

This case is about what limits, if any, Hawai‘i Revised Statutes (HRS) § 801-1 (2014) imposes on the State's ability to prosecute felonies. The law says:

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

HRS § 801-1.

Defendant-Appellant Richard Obrero argues the State violated HRS § 801-1 by using the complaint and preliminary hearing process to prosecute him for second-degree murder, attempted murder in the first and second degree, and use of firearm in the commission of a separate felony.

We agree. Obrero isn't charged with contempt. And the felonies he's charged with are neither within the jurisdiction of the district court nor chargeable by information, see HRS §§ 806-82 (2014), 806-83 (Supp. 2021). So Obrero is a person who shall not "be subject to be tried and sentenced ... in any court, for an alleged offense, unless upon indictment." HRS § 801-1.

We hold that HRS § 801-1 means what it plainly says: criminal defendants cannot be "subject to be tried and sentenced to be punished in any court, for an alleged offense" without an indictment or information unless the charged offense is either contempt or within the jurisdiction of the district court.

We also hold that defendants are "subject to be tried and sentenced to be punished" at arraignment, when they must either plead guilty, and be subject to sentencing, or plead not guilty, and be subject to trial and possibly also sentencing.

II. PROCEDURAL BACKGROUND

A. Circuit Court Proceedings

On November 12, 2019, the State filed six separate complaints against Obrero, alleging, among other things,[1] that he had committed second-degree murder in violation of HRS §§ 707-701.5 (Supp. 2021) and 706-656.

Two days later, on the morning of November 14, 2019, the State presented its case against Obrero to an O‘ahu Grand Jury.[2] The grand jury returned a no bill. It did not think there was probable cause to believe Obrero committed any of the charged crimes. And it voted against allowing the State to subject Obrero to the indignity, expense, and stigma of a criminal prosecution.

The State was undeterred. On the afternoon of November 14, 2019 – just a few hours after the grand jury returned a no

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bill – the State made its case again,[3] this time at a preliminary hearing before the district court. The hearing was continued to the next day; when it concluded, the district court — unlike the grand jury — found there was probable cause to charge Obrero. It committed Obrero's case to the Circuit Court of the First Circuit.[4]

Obrero pled not guilty at his November 2019 arraignment.

Later, in July 2021, Obrero moved for dismissal of the charges. He argued the State's prosecution of him was unlawful because there was no indictment. He pointed to the plain language of HRS § 801-1 :

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

HRS § 801-1.

Obrero argued that his charges weren't for contempt and didn't fall "within the jurisdiction of a district court." He reasoned that since the charges against him can't be charged by information (which is only available for certain Class B and C felonies, see HRS §§ 806-82, 806-83), he is a person who shall not "be subject to be tried and sentenced to be punished in any court, for an alleged offense, unless upon indictment." See HRS § 801-1.

The State opposed Obrero's motion. It urged the court to look beyond the plain text of HRS § 801-1 and interpret the statute through reference to article I, section 10 of the Hawai'i Constitution.

Before 1982, the Hawai'i Constitution mirrored the federal constitution in requiring grand jury presentments or indictments for felony prosecutions. In 1982, a constitutional amendment rolled back the constitutional grand jury indictment requirement for felony prosecutions. Now, article I, section 10 begins: "No person shall be held to answer for a capital or otherwise infamous crime,[5] unless on a presentment or indictment of a grand jury or upon a finding of probable cause after a preliminary hearing held as provided by law or upon information[6] in writing signed by a legal prosecuting officer ...." (emphasis added).

The State argued that the 1982 amendment didn't just make it *constitutional* for it to initiate felony prosecutions through the complaint and preliminary hearing process, it also effectively nullified HRS § 801-1 's grand jury protections by authorizing the State to use complaints and preliminary hearings to initiate felony prosecutions.

The State supported this position with a discussion of Hawai'i Rules of Penal Procedure Rules (HRPP) 5(c) and 7(b). The former *explicitly* contemplates preliminary hearings as proceedings that may follow the arrest of defendants charged with felonies. The latter — in direct conflict with HRS § 801-1 — states that a felony may be prosecuted by complaint "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 ..." (or if the defendant has properly waived the right to an indictment or preliminary hearing). See HRPP Rule 7(b). The State notes that under HRS § 602-11 the HRPP have the force and effect of law.

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The trial court denied Obrero's motion to dismiss. It relied on the *in pari materia* canon of statutory construction, which provides that laws on the same subject matter should be "construed with reference to each other" so that "[w]hat is clear in one statute may be called upon in aid to explain what is doubtful in another." Wells Fargo Bank, N.A. v. Omiya, 142 Hawai'i 439, 450, 420 P.3d 370, 381 (2018). The court recognized that HRS § 801-1 "standing alone ... could lend itself to the interpretation that Mr. Obrero in this case should have been indicted by a grand jury in

order for the State to proceed." But, it said, HRS § 801-1 does not stand alone; the statute must 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." The court concluded that when HRS § 801-1 was read *in pari materia* with the authorities identified by the State, it did not preclude the State from using the complaint and preliminary hearing process to prosecute Obrero.

B. Proceedings on Appeal

Obrero took an interlocutory appeal to the ICA. He then applied for, and received, transfer to this court.

On appeal, Obrero contends that the circuit court erred by applying the *in pari materia* canon of statutory interpretation.[7] That canon, he contends, applies only where there is something doubtful or ambiguous about a statute. Since HRS § 801-1 is clear on its face, the application of the *in pari materia* canon in this case doesn't resolve ambiguity, it creates it.

The State counters that it is a "fundamental tenet" of statutory interpretation that "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." The State observes that article I, section 10, HRS §§ 805-7 and 806-8, as well as HRPP Rules 5 and 7, all relate to the same topic as HRS § 801-1 : the methods by which a criminal prosecution may be initiated. So, it reasons, HRS § 801-1 ’s meaning should be triangulated through reference to those other authorities.

The State points out that in 1991 the legislature amended HRS §§ 806-6, - 7, and - 8 to add "complaint" to the disjunctive series "information, complaint, or an indictment" and said the amendment's purpose was "to include complaints as a means of commencing a criminal prosecution." See HRS §§ 806-6 (2014), -7 (2014), and -8 (2014). The legislature described the amendment as a " ‘housekeeping measure’ to conform certain provisions of the [HRS] to what is currently practiced under the [HRPP]." House Standing Committee Report Number 1652, in 1991 House Journal, at 1437. The State says we should interpret HRS § 801-1 in light of this legislative history.

On appeal, the State also argues that HRS § 801-1 was repealed by implication. It points to HRS §§ 602-11,[8] 805-7,[9] and 806-8,[10] and HRPP Rules 5 and 7 and argues they "cover

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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" and that HRS § 801-1, therefore, "seems to have been, in part, impliedly repealed or amended" such that it cannot be interpreted as Obrero contends.

Obrero rejects the State's repeal-by-implication argument. Citing State v. Casugay-Badiang, 130 Hawai‘i 21, 305 P.3d 437 (2013), he argues that for a statute to be repealed by implication it must be " ‘plainly irreconcilable’ with some other statute or constitutional provision." Id. at 29, 305 P.3d at 445. Obrero says the State has not shown that "effect can[not] reasonably be given" to both HRS § 801-1 and the constitutional and statutory provisions the State contends implicitly repeal HRS § 801-1.

III. DISCUSSION

HRS § 801-1 plainly states that the State must secure an indictment to subject Obrero to trial and sentencing.[11] We agree with Obrero that we cannot undo this unambiguous statutory requirement with an *in pari materia* analysis: the *in pari materia* canon is used to resolve statutory ambiguity, not create it.

The only ambiguity in HRS § 801-1 is found in the phrase "subject to trial and sentencing." At what point does a criminal defendant become subject to trial and sentencing? We hold that a defendant is subject to trial and sentencing at arraignment, when they must either plead guilty

(and face sentencing) or plead not guilty (and face trial and potentially also sentencing).

In addition to holding that HRS § 801-1 means what it plainly says, we also hold that the statute has not been implicitly repealed. HRS § 801-1 is still good law. And the State's prosecution of Obrero is unlawful because it has not complied with the statute's indictment requirement.[12]

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A. The *in pari materia* canon is inapplicable because HRS § 801-1 is plain on its face: the State needs an indictment to subject Obrero to trial and sentencing

The plain language of HRS § 801-1 leaves little room for confusion or doubt about what the State must do if it wants to subject Obrero to trial and sentencing: the statute says that if the State wants to subject a criminal defendant to trial and sentencing for alleged offenses *other than* contempt or those in the jurisdiction of the district court, it must have an indictment or information.

The State has not advanced any "reasonable, competing interpretations" of what's required by the statute. There is therefore no ambiguity about what HRS § 801-1 requires the State to do before it may "subject Obrero to trial and sentencing." See United States v. Acosta, 363 F.3d 1141, 1155 (11th Cir. 2004) ("[T]he existence of two reasonable, competing interpretations is the very definition of ambiguity." (internal quotation marks omitted)).

The *in pari materia* canon of statutory interpretation is a useful tool for interpreting ambiguous or doubtful statutes. But it should not be used to muddle the meaning of unequivocal, but inconvenient, black letter law. Our rule is "What is clear in one statute may be called upon in aid to explain what is doubtful in another." Wells Fargo Bank, 142 Hawai'i at 450, 420 P.3d at 381 (emphasis added). It is not: "What is clear in one statute may be called upon to create doubt in another." As the Supreme Court explained in Barnes v. Philadelphia & R.R. Co., 84 U.S. 294, 17 Wall. 294, 21 L.Ed. 544 (1872) :

> Where a section or clause of a statute is ambiguous, much aid, it is admitted, may be derived in ascertaining its meaning by comparing the section or clause in question with prior statutes *in pari materia* , but it cannot be admitted that such a resort is a proper one where the language employed by the legislature is plain and free of all uncertainty, as the true rule in such a case is to hold that the statute speaks its own construction.

Id. at 302. See also United States v. Broncheau, 645 F.3d 676, 685 (4th Cir. 2011) ("The principle of in pari materia is applicable ... only where the meaning of a statute is ambiguous or doubtful." (cleaned up)); State ex rel. Clay v. Cuyahoga Cty. Med. Exam'r's Office, 152 Ohio St.3d 163, 94 N.E.3d 498, 503 (2017) (explaining that the *in pari materia* canon was not applicable where the court could not "after reading the statute and giving the words the legislature chose their plain and ordinary meanings, find that the words of the statute are ambiguous").

HRS § 801-1 "speaks its own construction." And because it is unambiguous on its face about what the State must do before it may subject a defendant to trial and sentencing, we cannot use an *in pari materia* reading to nullify its plain meaning.

B. A defendant becomes subject to trial and sentencing at arraignment

To the extent that there is any ambiguity to be found in HRS § 801-1, it is in the phrase "subject to trial and sentencing." "Subject to trial and sentencing" could mean the start of trial. But it could also mean some earlier point in the criminal prosecution where the specters of adjudication and possibly punishment are concrete enough that the defendant is "subject to" them.

We hold that defendants are subject to "be tried and sentenced to be punished" at arraignment. There is no way for a defendant to leave an arraignment without being "subject to be tried"

(if the defendant has pled not guilty) or "subject to be sentenced to be punished" (if the defendant has pled guilty). Cf. State v. Hernandez, 143 Hawai'i 501, 513, 431 P.3d 1274, 1286 (2018) (recognizing that "a guilty plea in itself is a conviction" (cleaned up)). By demanding a plea of either "guilty" or "not guilty," the law subjects defendants to be either tried or sentenced at arraignment. So under HRS § 801-1, the State may initiate a felony prosecution via complaint, but it should secure an indictment

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or information (if applicable) before arraignment.[13] ,[14]

C. HRS § 801-1 has not been repealed by implication

There are only two ways that a law may repeal an earlier statute "by implication." The first is if the two laws are plainly irreconcilable; the second is "if the later act covers the whole subject of the earlier one and is clearly intended as a substitute." See Gardens at W. Maui Vacation Club v. Cty. of Maui, 90 Hawai'i 334, 341, 978 P.2d 772, 779 (1999) (cleaned up); see also Fasi v. City & Cty. of Honolulu, 50 Haw. 277, 285, 439 P.2d 206, 211 (1968) (explaining that repeal by implication occurs 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" (emphasis added)). We have never recognized implicit repeal by implication absent direct conflict between statutes or evidence that a statute is "manifestly designed" to "cover the field" and displace all other law on a subject.

Repeal by implication is disfavored. Gardens at W. Maui Vacation Club, 90 Hawai'i at 340, 978 P.2d at 778.[15] And "if effect can reasonably be given to two statutes, it is proper to presume that the earlier statute is intended to remain in force and that the later statute did not repeal it." State v. Pacariem, 67 Haw. 46, 47, 677 P.2d 463, 465 (1984).

Here, the State has not shown that article I, section 10 or any of the other authorities it cites are either "plainly irreconcilable" with HRS § 801-1 or manifestly designed by the legislature to "cover the field" and embrace the entire law on the initiation of felony prosecutions.

The State is right that HRPP Rules 5 and 7 — which authorize the use of the complaint-and-preliminary-hearing process to initiate felony prosecutions — flatly contradict HRS § 801-1. But these are *rules* made by the Supreme Court, not laws enacted by the legislature. These rules may have the force of law, but they may never "abridge, enlarge, or modify the substantive rights of any litigant." HRS § 602-11. As we explained in Cox v. Cox, "[w]here a court-made rule affecting litigants' substantive rights contravenes the dictates of a parallel statute, the rule must give way." 138 Hawai'i 476, 482, 382 P.3d 288, 294 (2016).[16] ,[17]

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None of the constitutional or statutory authorities the State cites directly conflict with HRS § 801-1. Not article I, section 10 as amended in 1982.[18] Not HRS § 805-7[19] (last amended in 1998). Not HRS § 806-6 or - 8 (last amended in 1991).[20] In fact, HRS §§ 805-7, and 806-8 refer to cases that "can be tried only on indictment by a grand jury" (HRS § 805-7) or "in which the accused may be held to answer without an indictment by a grand jury" (HRS § 806-8). HRS § 806-8 is even titled "[p]rosecution where indictment not essential." The State does not explain how a statute with a title that contemplates the possibility that indictments are, in some circumstances, essential for prosecution could directly conflict with a statute providing that indictments are, in some circumstances, essential for prosecution.

The State's claim that article I, section 10, HRS § 805-7, or HRS § 806-6 or - 8 implicitly repeal HRS § 801-1 by "covering the field" is similarly without merit.

Article I, section 10 cannot "cover the field" because it is manifestly not intended to embrace the entire law on the initiation of criminal

prosecutions in our state. It is a single sentence. It establishes a constitutional floor for prosecutions, and "indicates" the general principle that defendants should not be prosecuted without a probable cause determination from an independent factfinder; but it does not "lay[ ] down rules by means of which those principles may be given the force of law." See DW Aina Le'a Dev., LLC v. State Land Use Comm'n, 148 Hawai'i 396, 403, 477 P.3d 836, 843 (2020).

A single sentence is no substitute for the tangle of laws that came before it concerning the initiation of felony prosecutions. The 1982 amendment of article I, section 10, then, made the repeal of HRS § 801-1 possible, but did not effectuate that repeal by "covering the field" and providing a comprehensive new procedural framework for charging felonies through the complaint and preliminary hearing process.

None of the other one-off statutes the State cites as "implicitly repealing" HRS § 801-1 constitute such a framework either. These are standalone statutes that deal with piecemeal aspects of prosecution. They concern "Commitment; form of mittimus" (

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HRS § 805-7 's title) and oblige the State to furnish defendants with a copy of a complaint or indictment before arraignment (HRS § 806-6). They do not embrace the entire law on the initiation of a felony prosecution.

HRS § 801-1 's history can be traced to 1869, when the Kingdom of Hawai'i adopted a law requiring grand jury indictments for most prosecutions.[21] And America's "[f]ounders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by a presentment or indictment of a Grand Jury." United States v. Calandra, 414 U.S. 338, 343, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) (cleaned up)).

The grand jury "infuses our system of justice with a democratic ethos because ordinary citizens serve as grand jurors." State v. Vega-Larregui, 246 N.J. 94, 248 A.3d 1224, 1239 (2021) (cleaned up)). It "functions as a barrier to reckless or unfounded charges." State v. Kahlbaun, 64 Haw. 197, 203, 638 P.2d 309, 315 (1981). And it serves as a "shield against arbitrary or oppressive action" by ensuring "that serious criminal accusations will be brought only upon the considered judgment of a representative body of citizens acting under oath and under judicial instruction and guidance." Id. (quoting United States v. Mandujano, 425 U.S. 564, 571, 96 S.Ct. 1768, 48 L.Ed.2d 212 (1976)). Put plainly, HRS § 801-1 guarantees that the State may only prosecute someone for one of Hawai'i's most serious offenses if it has an indictment from "ordinary citizens" and not just a determination of probable cause from a single judge.

If the Legislature wants to strip people of the grand jury protections afforded by HRS § 801-1, it is free to do so. It may expressly repeal HRS § 801-1. It may pass a law in direct conflict with HRS § 801-1. It may develop a new comprehensive statutory framework controlling initiation of felony prosecutions and indicate that its framework applies "any law to the contrary notwithstanding." See Fasi, 50 Haw. at 285, 439 P.2d at 211 (holding that statute which used the introductory clause "[a]ny law to the contrary notwithstanding" was "manifest[ly]" designed to "cover the entire field" on its topic.) But it cannot undo the substantive right to a grand jury indictment conferred by HRS § 801-1 with a "housekeeping measure" that sprinkles the word "complaint" throughout a few statutes.[22]

D. The State's prosecution of Obrero is unlawful under HRS § 801-1

The felonies Obrero is charged with are not within the jurisdiction of the district court and may not be charged by information. So under HRS § 801-1, Obrero cannot be arraigned on the charges absent a grand jury indictment. Because the State's prosecution of Obrero proceeded beyond arraignment based on a complaint and probable cause hearing alone, it is unlawful under HRS § 801-1. The charges against Obrero should be dismissed without prejudice.[23]

IV. CONCLUSION

The State cannot subject Obrero to trial and sentencing without a grand jury indictment. See HRS § 801-1.

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We reverse the circuit court's denial of Obrero's motion to dismiss and remand this case to the circuit court for proceedings consistent with this opinion.

CONCURRING AND DISSENTING OPINION BY NAKAYAMA, J., IN WHICH McKENNA, J., JOINS AS TO SECTIONS II AND III

For the reasons discussed in the Chief Justice's Dissent, I agree that the 1982 amendment to article I, section 10 of the Hawai‘i Constitution invalidated Hawai‘i Revised Statutes (HRS) § 801-1. I join wholeheartedly in his Dissent.

I nevertheless concur in the result of the Majority's opinion because Plaintiff-Appellee the State of Hawai‘i's (the State) complaint against Defendant-Appellant Richard Obrero (Obrero) is unconstitutional. In 1982, the Legislature and Hawai‘i voters amended article I, section 10 of the Hawai‘i Constitution to authorize prosecutors to initiate a prosecution upon a judge's finding of probable cause after a preliminary hearing. In this case, the State has seized upon this authority to initiate a prosecution via a preliminary hearing even after a grand jury declined to return a true bill. This violates the purpose of the 1982 amendment, which was to create an alternative — not sequential — method by which the State could initiate a prosecution.

I. BACKGROUND

On November 7, 2019, Obrero fired a gun at several individuals, which led to the death of a minor. That same day, the State arrested Obrero for the minor's death.

On November 12, 2019, the State filed six single-count complaints against Obrero. The District Court of the First Circuit[1] (district court) scheduled Obrero's preliminary hearing for the afternoon of November 14, 2019.

On the morning of November 14, 2019, the State sought a grand jury indictment against Obrero for the offenses included in the complaint, as well as three additional offenses. However, the grand jury refused to return a true bill on all of the offenses.

That afternoon, the State proceeded with the preliminary hearing. At the end of the hearing, the district court found probable cause on the six offenses included in the initial complaints and committed the matter to the Circuit Court of the First Circuit[2] (circuit court).

Obrero moved to dismiss the complaint against him on two grounds. First, Obrero contended that HRS § 801-1 requires the State to prosecute class-A felonies by indictment. Second, Obrero asserted that "the Hawaii Constitution precludes the State's attempt to circumvent the grand jury's ‘No Bill’ determination by way of a complaint and preliminary hearing." Obrero reasoned that the State's act of seeking a preliminary hearing after a grand jury has declined to return a true bill improperly invalidates the province of the grand jury and induces an action deemed unwarranted by the grand jury.

The circuit court denied Obrero's constitutional argument, explaining that

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

The circuit court thus concluded that "Defendant was permissibly charged via complaint after a preliminary hearing in this matter, regardless of whether or not there was an indictment attempt." The circuit court also rejected

Obrero's statutory argument.

Obrero appealed the circuit court's decision to the Intermediate Court of Appeals, and timely sought transfer to this court. This court granted Obrero's transfer application.

II. STANDARD OF REVIEW

A. Constitutional Interpretation

"Issues of constitutional interpretation present questions of law that are reviewed de

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novo." Blair v. Harris, 98 Hawai‘i 176, 178, 45 P.3d 798, 800 (2002) (citation omitted).

> [W]e have long recognized that the Hawaii Constitution must be construed with due regard to the intent of the framers and the people adopting it, and the fundamental principle in interpreting a constitutional provision is to give effect to that intent. This intent is to be found in the instrument itself.

Hanabusa v. Lingle, 105 Hawai‘i 28, 31, 93 P.3d 670, 673 (2004) (quoting Blair, 98 Hawai‘i at 178-79, 45 P.3d at 800-01). "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 v. Kahlbaun, 64 Haw. 197, 201-02, 638 P.2d 309, 314 (1981) (citations omitted).

III. DISCUSSION

A. The State's use of a probable cause hearing after receiving grand jury no-bills is unconstitutional.

1. The language of article I, section 10 is ambiguous.

Article I, section 10 (" section 10") of the Hawai‘i State Constitution presently 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 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; nor shall any person be subject for the same offense to be twice put in jeopardy; nor shall any person be compelled in any criminal case to be a witness against oneself.

Thus, section 10 articulates three methods by which a defendant may "be held to answer for a capital or otherwise infamous crime": (1) on a presentment or indictment of a grand jury; (2) upon a finding of probable cause after a preliminary hearing held as provided by law; or (3) upon information in writing signed by a legal prosecuting officer under conditions and in accordance with procedures that the legislature may provide. The State is therefore correct in arguing that the State may prosecute a defendant "via a district court complaint, upon a finding of probable cause after a preliminary hearing."

However, section 10 is silent on the question of whether the State may use multiple methods to initiate a single prosecution. See generally section 10. Under such circumstances, the meaning of section 10 is ambiguous. See Gray v. Admin. Dir. of the Court, 84 Hawai‘i 138, 148, 931 P.2d 580, 590 (1997) ("When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used ..., an ambiguity exists."). Thus, it is this court's responsibility to determine whether the State's act was constitutional. League of Women Voters of Honolulu v. State, 150 Hawai‘i 182, 192, 499 P.3d 382, 392 (2021).

2. The Legislature proposed amending section 10 to allow prosecution following a

preliminary hearing as an alternative to grand jury indictments, not to supersede grand jury indictments.

An "established rule of [constitutional] construction is that a court may look to the object sought to be accomplished and the evils sought to be remedied by the amendment, along with the history of the times and the state of being when the constitutional provision was adopted." Kahlbaun, 64 Haw. at 202, 638 P.2d at 315 (citations omitted).

Following the 1978 Constitutional Convention, section 10 read in relevant part: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury ...." 1 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 1150 (1980). Based on this language, the State could only initiate a criminal prosecution after obtaining a grand jury indictment. Id.

In 1981, the State House of Representatives proposed H.B. No. 150 "to allow for the initiation of felony criminal prosecutions by

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way of a preliminary hearing as well as a grand jury indictment." H. Stand. Comm. Rep. 582, in 1981 House Journal at 1180. The House Judiciary Committee explained this was necessary because

> The Hawaii State Constitution currently provides that no person may be tried or held to answer for a capital or infamous crime unless prosecution is initiated by a grand jury indictment. Thus, under the present procedure, a felony indictment must be returned by a grand jury, even in cases where probable cause has been established at a preliminary hearing. This procedure necessitates that witnesses must testify twice, once at the preliminary hearing, and again before the grand jury. The requirement for both a preliminary hearing and grand jury hearing serves no useful purpose and only results in additional cost to the government, hardship on witnesses, and needless duplication and delay in the prosecution of felony cases.
>
> Your Committee feels that the passage of this bill removes this additional burden on witnesses without adversely affecting the defendant's rights. In addition, the removal of duplication within the criminal justice system will insure that the defendant receive a speedy trial.

Id. (emphasis added).

Around the same time, the State Senate proposed S.B. No. 142 — "which contain[ed] the same provisions as H.B. No. 150" — "to permit trial of a person for a felony after a preliminary hearing showing probable cause that said person committed the felony." S. Stand. Comm. Rep. No. 405, in 1981 Senate Journal at 1091; S. Stand. Comm. Rep. No. 702, in 1981 Senate Journal at 1212-13. The Senate Judiciary Committee recognized that "the finding of probable cause at a preliminary hearing is a viable alternative to the grand jury indictment." S. Stand. Comm. Rep. No. 405, in 1981 Senate Journal at 1091 (emphasis added). The Senate Judiciary Committee also emphasized that "[t]he present bill does not eliminate the grand jury system, but simply allows an alternate method to grand jury indictment for trial of defendants charged with felonies." Id. (emphasis added). The word "alternative" meant "1. a. The choice between two mutually exclusive possibilities. b. Either of these possibilities. 2. One of a number of things from which one must be chosen." The American Heritage Dictionary 99 (2d. Coll. Ed. 1982).[3] The Senate Judiciary Committee ultimately approved 1981 H.B. No. 150 for the same reasons for which it supported 1981 S.B. No. 142. S. Stand. Comm. Rep. No. 702, in 1981 Senate Journal at 1212-13.

In light of the foregoing, it appears that the

House intended for 1981 H.B. No. 150 to eliminate inefficiencies imposed by sequential probable cause determination processes. See H. Stand. Comm. Rep. 582, in 1981 House Journal at 1180. The Senate's identification of the procedure as "an alternative method" also indicates that the Legislature intended for the State to use one procedure or the other — not both — to initiate a prosecution. See S. Stand. Comm. Rep. No. 702, in 1981 Senate Journal at 1212-13.

3. Voters ratified 1981 H.B. No. 150 to provide an alternative procedure.

Once 1981 H.B. No. 150 passed the three readings requirement in both the House and Senate, the bill was put to voters as a ballot measure. Voters were asked:

> House Bill No. 150 of the Eleventh Legislature, Regular Session of 1981, proposes that Article I, Section 10 of the Constitution of the State of Hawaii be amended to allow a person to be held to answer for a capital or otherwise infamous crime upon a finding of probable cause after a preliminary hearing is held as provided by law. This proposed procedure would be an alternative to the present procedure requiring a presentment or indictment of a grand jury.
>
> Shall the amendment proposed by said House Bill No. 150 be adopted?

(Emphasis added.) Hawai‘i voters approved the ballot measure.

The ballot measure's identification — and the voters' subsequent approval — of the

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preliminary hearing procedure as "an alternative" makes clear that the amendment was not intended to allow the State to utilize both procedures to initiate a single prosecution. In turn, the State's initiation of the prosecution of Obrero after a grand jury declined to return a true bill violates section 10, and is unconstitutional. The circuit court therefore erred in denying Obrero's motion to dismiss.

4. The 1978 constitutional amendments indicate that the State may not override a grand jury's refusal to return a true bill of indictment by seeking a probable cause hearing.

It is also worth noting that, less than five years before the 1982 amendment to section 10, delegates to the 1978 Constitutional Convention and Hawai‘i voters implemented article I, section 11 of the Hawai‘i Constitution ("section 11")[4] to protect grand juries from being dominated by prosecutors. As this court has recognized,

> The grand jury functions as a barrier to reckless or unfounded charges and serves as a "shield against arbitrary or oppressive action, by insuring that serious criminal accusations will be brought only upon the considered judgment of a representative body of citizens acting under oath and under judicial instruction and guidance." United States v. Mandujano, 425 U.S. 564, 571, 96 S.Ct. 1768, 48 L.Ed.2d 212 (1976) ; State v. Pacific Concrete & Rock Co., 57 Haw. 574, 560 P.2d 1309 (1977).
>
> ....
>
> However, [around that time], the grand jury system ha[d] 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. Instead of completely abolishing the grand jury

> system in Hawaii, the 1978 Constitutional Convention sought to cure some of the ills by proposing the concept of the independent grand jury counsel. This proposal sought to relieve the prosecutor of the conflicting roles of advising the grand jury and presenting sufficient evidence to sustain an indictment. Ultimately, this measure would ensure the independence of the grand jury from the domination of the prosecutor.

Kahlbaun, 64 Haw. at 203, 638 P.2d at 315-16 (emphasis added) (citation omitted).

In light of section 11's articulated purpose, it is unreasonable to think that the Legislature and voters amended section 10 to allow prosecutors to override a grand jury's decision. If the Legislature and voters had intended to permit prosecutors such unfettered authority, the Legislature and voters had the opportunity "to abolish the grand jury in total." See id. They did not. Id.

B. The State may return to the grand jury and obtain an indictment if it can present additional evidence.

Although the State may not prosecute Obrero via the constitutionally infirm complaint, the State is not without any further means to seek the prosecution of an individual after a return of no true bill of indictment. Obrero concedes that "a grand jury panel's return of a no bill [does not] automatically bring[ ] a criminal proceeding to an end." However, Obrero argues that "due process should require the State to demonstrate, once a grand jury returns a no bill, that any subsequent indictment ... is based, at least in part, on additional evidence[.]" Obrero is correct.

Given the role of the grand jury and the intent behind the adoption of section 11, the Hawai‘i Constitution does not allow prosecutors to turn to a different grand jury panel to obtain an indictment using identical evidence. Permitting prosecutors to present an identical

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case to different grand jury panels until one grants the desired indictment would undermine the purpose of and protections provided by the grand jury. Delegates and Hawai‘i voters adopted section 11 as part of their efforts to prevent this very result. Id. As such, in my mind, the State may return to the grand jury to seek an indictment of Obrero, but prosecutors must present new evidence that was not presented to the prior panel that had not returned a true bill to obtain a constitutionally valid indictment.

IV. CONCLUSION

For the foregoing reasons, the State's act of filing charges before a grand jury and then initiating a prosecution through a probable cause hearing after a grand jury refused to return a true bill of indictment violates section 10. Therefore, the State's prosecution of Obrero is unconstitutional, and the complaint must be dismissed. Accordingly, I concur in the result of the Majority's opinion.

However, for the reasons discussed in the Chief Justice's Dissent, Obrero's statutory argument is unavailing. As the Chief Justice explains, the 1982 amendment to section 10 invalidated HRS § 801-1 and authorized the State to initiate prosecutions for all felonies by either a grand jury indictment or a probable cause hearing before a judge. I therefore join in the Dissent's analysis of HRS § 801-1.

Sabrina S. McKenna

I join Justice Nakayama's Concurring and Dissenting Opinion as to sections II and III.

DISSENTING OPINION BY RECKTENWALD, C.J., IN WHICH NAKAYAMA, J., JOINS

I. INTRODUCTION

In 1982, the citizens of the State of Hawai‘i voted to ratify an amendment to the Hawai‘i Constitution to allow prosecutors to charge felonies by preliminary hearing. Its purpose and effect, until today, were never disputed: it granted prosecutors discretion to initiate

criminal proceedings by either a grand jury indictment or upon a finding of probable cause by a judge at a preliminary hearing. The Majority's novel interpretation of the constitution departs from forty years of settled law and needlessly frustrates the framers' intent.

This case requires us to consider whether the 1982 amendment of article I, section 10 invalidated Hawai'i Revised Statutes (HRS) § 801-1 (2014), unchanged in its current form at least since 1905. Whereas article I, section 10, as amended, allows a defendant to be charged by preliminary hearing, HRS § 801-1, when read in conjunction with other statutes, requires the State to procure a grand jury indictment in order to prosecute defendants accused of certain felonies.

The text and purpose of the 1982 amendment make clear that it was designed to abrogate the grand jury requirement previously recognized in article I, section 10 and HRS § 801-1. Because effect cannot reasonably be given to both HRS § 801-1 and article I, section 10 of the constitution, the statute must fail. Accordingly, I respectfully dissent.

II. DISCUSSION

The Majority reads HRS § 801-1 as creating a right to grand jury indictment for criminal defendants charged with certain felonies.[1] Majority at 151 Hawai'i at 475, 517 P.3d at 758. In its view, article I, section 10 merely sets the baseline for criminal-charging practices: "The legislature is free to augment or duplicate the rights afforded by the constitution with statutory entitlements. And

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it has done just that with HRS § 801-1." Majority at 151 Hawai'i at 481 n.18, 517 P.3d at 764 n.18.

Respectfully, the Majority fails to account for the fact that HRS § 801-1 was passed more than 100 years before the constitution even allowed felonies to be charged by preliminary hearing – so the legislature could not possibly have intended to exceed the constitution's protections. Moreover, the text, purpose, and legislative history of article I, section 10 underscore that the framers aimed to provide for preliminary hearings as a substitute for the grand jury process, superseding any law to the contrary. It is impossible to give this provision its intended effect without abrogating HRS § 801-1.

First, the text of the 1982 amendment is clear on its own terms. Article I, section 10 now reads in relevant part, with the 1982 addition emphasized: "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 [.]"[2] See 1981 Haw. Sess. Laws, at 475. The text makes plain that a grand jury and a preliminary hearing are equally valid means to prosecute an infamous crime. It places no limits on preliminary hearings other than that they must be "held as provided by law." Its clear import is that wherever a grand jury was previously appropriate, a preliminary hearing, held as provided by law, may be used instead. See Hawaii State AFL–CIO v. Yoshina, 84 Hawai'i 374, 376, 935 P.2d 89, 91 (1997) ("[I]n the construction of a constitutional provision the words are presumed to be used in their natural sense unless the context furnishes some ground to control, qualify, or enlarge them." (quoting Pray v. Jud. Selection Comm'n, 75 Haw. 333, 341, 861 P.2d 723, 727 (1993))). The context of the amendment – prior to its passage or thereafter – does not furnish any grounds to control or qualify the text. To the contrary, for forty years, prosecutors and defense lawyers alike have apparently assumed that any felony may be prosecuted using a preliminary hearing. By its own terms, then, the 1982 amendment is directly contrary to HRS § 801-1 and superseded the statute on the day it was passed. See State v. Casugay-Badiang, 130 Hawai'i 21, 34, 305 P.3d 437, 450 (2013) (Recktenwald, C.J., dissenting) (arguing that where "it is not possible to give effect" to two statutes, and one's language was "clear and sweeping," it impliedly repealed the other).

Even if the text was somehow ambiguous as to the effect of the amendment, the purpose clause of the bill that proposed it, H.B. 150, resolves any ambiguity: "The purpose of this Act is to ... permit a person to be tried for a felony after a preliminary hearing has been held[.]" 1981 Haw. Sess. Laws, at 475 (emphasis added).[3] HRS § 801-1, which prevents those accused of certain felonies from being tried except upon grand jury indictment, is plainly contrary to the amendment's purpose. Nowhere does the bill propose to limit which felonies may be prosecuted by preliminary hearing. More than a committee report or the stray remarks of a legislator, this statement of the amendment's purpose was considered and passed by both houses of the legislature. See Kevin M. Stack, The Enacted Purposes Canon, 105 Iowa L. Rev. 283, 287 (2019) (noting that purpose clauses provide "authoritative context" since they "are enacted into law as part of the statute" (quoting William N. Eskridge, Interpreting Law 105-06 (2016))); cf. N.Y. State Dep't of Soc. Servs. v. Dublino, 413 U.S. 405, 419–20, 93 S.Ct. 2507, 37 L.Ed.2d 688 (1973) ("We cannot interpret federal statutes to negate

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their own stated purposes." (emphasis added)). Accordingly, there can be no doubt that the intended effect of the 1982 amendment was to allow complaint charging for all felonies, superseding HRS § 801-1.

H.B. 150's legislative history further dispels any doubt about the intended effect of the amendment. Like the purpose clause and the amendment itself, the Senate Judiciary Committee report did not qualify the offenses for which a preliminary hearing may be used. S. Stand. Comm. Rep. No. 702, in 1981 Senate Journal, at 1212-13; see also S. Stand Comm. Rep. No. 405, in 1981 Senate Journal, at 1091 (providing, with no qualifying language, that the amendment's purpose was "to permit trial of a person for a felony after a preliminary hearing showing probable cause that said person committed the felony" (emphasis added)). Instead, the Committee noted that "[t]he present bill does not eliminate the grand jury system, but simply allows an alternate method to grand jury indictment for trial of defendants charged with felonies." S. Stand. Comm. Rep. No. 702, in 1981 Senate Journal, at 1213 (emphasis added). Likewise, the House Judiciary Committee indicated that the bill's purpose was "to allow for the initiation of felony criminal prosecutions by way of a preliminary hearing as well as a grand jury indictment." H. Stand. Comm. Rep. No. 582, in 1981 House Journal, at 1180 (emphasis added). No language appears qualifying the reach of the provision or limiting the felonies that could be charged after a preliminary hearing.

The Majority argues that the 1982 amendment should not be read as negating HRS § 801-1 because the two are not "plainly irreconcilable." Majority at 151 Hawai‘i at 480, 517 P.3d at 763. "Repeal by implication is disfavored .... ‘[I]f effect can reasonably be given to two statutes, it is proper to presume that the earlier statute is intended to remain in force[.]’ " Id. at 480, 517 P.3d at 763 (quoting State v. Pacariem, 67 Haw. 46, 47, 677 P.2d 463, 465 (1984) (per curiam)). Because article I, section 10 "does not limit the legislature's ability to place checks on the government's power to prosecute beyond those imposed by the constitution," effect can be given to both HRS § 801-1 and the constitution. Id. at 481 n.18, 517 P.3d at 764 n.18.

Respectfully, the Majority errs by concluding that both enactments can reasonably be given effect. Under the Majority's view, a preliminary hearing suffices to hold a felony defendant, while a grand jury is required to try them. Majority at 151 Hawai‘i at 479-80 & n.13, 517 P.3d at 762-63 & n. 13. But this was already the case before the 1982 amendment. See, e.g., H. Stand. Comm. Rep. No. 582, in 1981 House Journal, at 1180 (describing preliminary hearings as part of "the present procedure" in charging felonies and stating that allowing the State to proceed by preliminary hearing alone would remove "needless duplication and delay in the prosecution of felony cases"). The Majority thus holds that the 1982 amendment merely continued the pre-1982 status quo, at least until the legislature sees fit to repeal HRS § 801-1.

This interpretation cannot be said to give the amendment reasonable effect.

The Majority's argument amounts to the proposition that in order to have any effect at all, article I, section 10 depends entirely on the legislature to act. Majority at 151 Hawai‘i at 481-82, 517 P.3d at 764-65. Article I, section 10 is "no substitute for the tangle of laws that came before it concerning the initiation of felony prosecutions." Id. at 481, 517 P.3d at 764. So, until the legislature chooses to amend or repeal HRS § 801-1, article I, section 10 is entirely inoperative.

Our constitution is not as tentative in its execution as the Majority's view suggests. To the contrary, the text of the constitution itself makes clear that "[t]he provisions of this constitution shall be self-executing to the fullest extent that their respective natures permit." Haw. Const. art. XVI, § 16. The test for whether a provision is self-executing centers on whether its text "indicates that the adoption of implementing legislation is necessary." Cnty. of Hawaii v. Ala Loop Homeowners, 123 Hawai‘i 391, 412, 235 P.3d 1103, 1124 (2010), abrogated on other grounds, Tax Found. of Hawai‘i v. State, 144 Hawai‘i 175, 439 P.3d 127 (2019).

Here, nothing about the language of article I, section 10 indicates that implementing legislation

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was anticipated before the amendment could take effect.[4] The operative language – "[n]o person shall be held to answer ... unless on a presentment or indictment of a grand jury or upon a finding of probable cause after preliminary hearing held as provided by law" - does not "merely indicate[ ] principles, without laying down rules." Ala Loop, 123 Hawai‘i at 410, 235 P.3d at 1122 (quoting State v. Rodrigues, 63 Haw. 412, 414, 629 P.2d 1111, 1113 (1981)). Rather, it provides a clear rule, namely that prosecutors may proceed by preliminary hearing without the "needless duplication" of the grand jury. See H. Stand. Comm. Rep. No. 582, in 1981 House Journal, at 1180. There was, in short, no need for "a comprehensive new procedural framework for charging felonies" in this manner. Majority at 151 Hawai‘i at 481-82, 517 P.3d at 764-65. Although the legislature was free to define the procedures and parameters of the preliminary-hearing process, the amendment's entire effect was not contingent on such implementation.[5]

To the contrary, the intended effect of the 1982 amendment – as evidenced by its plain text and legislative history – was to provide an alternative to the grand jury as the sole method to prosecute infamous crimes. This effect is plainly irreconcilable with HRS § 801-1 ’s mandatory grand jury provision. To give any force at all to the will of the voters and legislature that enacted the amendment, we must hold that it repealed HRS § 801-1 by implication. See Macon v. Costa, 437 So. 2d 806, 810 (La. 1983) ("[W]hile repeals by implication are not favored, a constitutional amendment or provision operates to supersede or repeal all statutes that are inconsistent with the full operation of its provisions.").

The Majority's only answer is that HRS § 801-1 can be reconciled with the amendment because the statute permissibly exceeds the protections offered by the constitution. Majority at 151 Hawai‘i at 481 n.18, 517 P.3d at 764 n.18. The sole authority it cites for this proposition is State v. Maldonado,

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but Maldonado is inapt. In Maldonado, at issue was article I, section 7 of the Hawai‘i Constitution, which required only that a search or seizure be reasonable, and HRS § 803-11 (1993), which provided more specific procedures that an arresting officer must employ upon entering a house. State v. Maldonado, 108 Hawai‘i 436, 444, 121 P.3d 901, 909 (2005). We held that "where the legislature has enacted a valid statute that provides greater protection than the constitution, conformance to the statutory mandate ... is required." Id.

Here, to begin with, no post-1982 legislature ever intended to "provide[ ] greater protection

than the constitution";[6] rather, HRS § 801-1 was passed more than a century before the constitution allowed felony-complaint charging, and so could not possibly have been intended to bolster its protections.[7] Moreover, nothing about the nature of the constitutional right at issue in that case – the right to be free from unreasonable search and seizure – was in conflict with the greater protections that the legislature sought to provide. By contrast, here, the legislature previously provided for grand juries as a mandatory step in felony prosecution, and the framers subsequently provided that a grand jury or a preliminary hearing would suffice. These enactments directly conflict. Therefore, Maldonado is inapposite.

In sum, the idea that article I, section 10 merely provides a "constitutional floor for prosecutions" that the legislature validly exceeded in HRS § 801-1, Majority at 151 Hawai‘i at 481, 517 P.3d at 764, defies the plain language and legislative history of article I, section 10. The 1982 amendment plainly intended to sweep away the grand jury requirement as the sole method to prosecute felonies. The fact that a defunct statute was left on the books should not frustrate the text of the constitutional amendment and the will of the voters and legislative supermajorities that passed it.

III. CONCLUSION

HRS § 801-1 is directly contrary to the text and purpose of article I, section 10. It was therefore superseded and rendered inoperative the day that the 1982 amendment went into effect. The fact that the legislature neglected to take an obsolete statute off the books should not be allowed to defeat the intent of the framers. Accordingly, and for the reasons mentioned above, I respectfully dissent.

Notes:

[1] The State also alleged Obrero had violated HRS § 134-21 (2011) by using a firearm to commit second-degree murder. And that he'd committed one count of attempted murder in the first degree in violation of HRS §§ 705-500 (2014), 707-701(1)(a) (2014 & Supp. 2021), and 706-656 and three counts of attempted murder in the second degree in violation of HRS §§ 705-500, 707-701.5, and 706-656 (2014).

[2] The proposed indictment included the six offenses in the complaint as well as three counts of carrying or use of firearm in the commission of a separate felony in violation of HRS § 134-21.

[3] The State argued that there was probable cause to charge Obrero for the six offenses alleged in the complaint.

[4] The State consolidated its six previously-filed complaints into a single complaint in the circuit court.

[5] Article I, section 10 refers to "infamous crimes," rather than felonies. We have never considered the meaning of the term "infamous crimes" as used in article I, section 10. But in Mackin v. United States, 117 U.S. 348, 354, 6 S.Ct. 777, 29 L.Ed. 909 (1886), the United States Supreme Court held that an "infamous crime" in the context of the Fifth Amendment right to a grand jury indictment excluded "misdemeanors not punishable by imprisonment in the penitentiary." And United States v. J. Lindsay Wells Co., 186 F. 248, 250 (W.D. Tenn. 1910) held that an "infamous crime" was one that may lead to the punishment of imprisonment for more than one year, a definition that encompasses all felonies.

[6] Article I, section 10 was amended again in 2004 to allow for information charging. See 2004 Haw. Sess. L., at 1085.

[7] On appeal, Obrero also argues that the charges against him should be dismissed with prejudice in order to prevent the possibility of a future putative due process injury. Obrero does not claim that his due process rights have been violated and has not shown an imminent "distinct and palpable" possibility that they will be violated. See Kaho‘ohanohano v. State, 114 Hawai‘i 302, 318, 162 P.3d 696, 712 (2007). For these reasons, we decline to address Obrero's due process contentions.

[8] See HRS § 602-11 (2016) ("The supreme court shall have power to promulgate rules in all civil and criminal cases for all courts relating to process, practices, procedure and appeals, which shall have the force and effect of law. Such rules shall not abridge, enlarge, or modify the substantive rights of any litigant, nor the jurisdiction of any of the courts, nor affect any statute of limitations.").

[9] See HRS § 805-7 ("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 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 is guilty of the offense with which the accused is charged.").

[10] HRS § 806-8 says:

> 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.

HRS § 806-8.

[11] We review the court's interpretation of HRS § 801-1 *de novo* . See Gray v. Admin. Dir. of the Court, 84 Hawai‘i 138, 144, 931 P.2d 580, 586 (1997) ("The interpretation of a statute is a question of law reviewable *de novo.* " (Cleaned up.)). However, had Obrero challenged the State's failure to comply with HRS § 801-1 for the first time on appeal, we would presume the validity of the complaint against him and would not reverse his conviction absent a showing that the complaint prejudiced him or could not be construed to charge a crime. See State v. Wheeler, 121 Hawai‘i 383, 399, 219 P.3d 1170, 1186 (2009).

[12] The unlawfulness of the State's prosecution did not deprive the circuit court of subject-matter jurisdiction. Article VI, section 1 of Hawai‘i's constitution gives the courts "original and appellate jurisdiction as provided by law." And under HRS § 603-21.5(a)(1), the circuit courts have jurisdiction over "[c]riminal offenses cognizable under the laws of the State, committed within their respective circuits or transferred to them for trial by change of venue from some other circuit court." HRS § 603-21.5(a)(1) (2016 & Supp. 2021). "Cognizable means ‘capable of being known or recognized,’ or ‘capable of being judicially tried or examined before a designated tribunal; within the court's jurisdiction.’ " Schwartz v. State, 136 Hawai‘i 258, 264, 361 P.3d 1161, 1167 (2015) (cleaned up) (quoting Black's Law Dictionary 316 (10th ed. 2014)).

In Schwartz, we held that a complaint properly invoked the subject-matter jurisdiction of the District Court of the Second Circuit even though it failed to allege an element of the crime it charged. We explained that the statutory requirements for the district court's jurisdiction (found in HRS §§ 604–8 (2016 & Supp. 2021) and 604–11.5 (2016)) were met because the charging document alleged the defendant committed a " ‘known’ and recognized" statutory offense "punishable by a fine and by imprisonment not exceeding one year," "in Lahaina, which is within the Second Circuit." Id. at 264, 361 P.3d at 1167. Here, a similar analysis informs our conclusion that the State's complaint properly invoked the circuit court's subject-matter jurisdiction. The complaint alleged Obrero violated HRS §§ 705-500, 707-701(1)(a), 706-656, 707-701.5, and 134-21, all of which are recognized offenses under the laws of our State. It also alleged Obrero committed these offenses "in the City and County of Honolulu," which is in the First Circuit. By charging Obrero with

committing "[c]riminal offenses cognizable under the laws of the State, committed within [the First Circuit]," the complaint satisfied HRS § 603-21.5(a)(1) 's requirements for invoking the Circuit Court of the First Circuit's subject-matter jurisdiction.

[13] Federal cases concerning the use of informations to initiate federal felony prosecutions provide support for this approach. Unlike article I, section 10, the Fifth Amendment prohibits holding defendants to answer without a grand jury indictment. But several courts have held that the government may still initiate federal prosecutions — and satisfy statutes of limitations — with an information; the Fifth Amendment just means that there needs to be a grand jury indictment before the defendant can be required to plead or be subjected to trial. See United States v. Burdix-Dana, 149 F.3d 741, 742 (7th Cir. 1998) (recognizing that "absence of a valid waiver of prosecution by indictment bars the acceptance of a guilty plea or a trial on the relevant charges" but also holding that filing of information satisfies statute of limitations even where indictment is necessary for further prosecution); United States v. Rothenberg, 554 F.Supp.3d 1039, 1041 (N.D. Cal. 2021) (concluding that information "tolled the statute of limitations" even though defendant had not waived right to grand jury indictment).

[14] HRS § 806-7 also dictates that "[e]very indictment shall be duly found by a grand jury before the arraignment of the accused." HRS § 806-7 (emphasis added).

[15] See also Mahiai v. Suwa, 69 Haw. 349, 357, 742 P.2d 359, 366 (1987) ("[R]epeal by implication is disfavored."); Furukawa v. Honolulu Zoological Soc'y, 85 Hawai'i 7, 19, 936 P.2d 643, 655 (1997) ("Repeals by implication are disfavored.").

[16] See also Hernandez, 143 Hawai'i at 510 n.14, 431 P.3d at 1283 n.14 ("It is self-evident that while a court rule may provide an exception to another court rule, this exception would have no effect upon [a] statutory or constitutional right ....").

[17] Caselaw interpreting HRS § 602-11 makes clear that a right need not come from the constitution to be "substantive." See In re Doe Children, 94 Hawai'i 485, 487, 17 P.3d 217, 219 (2001) (holding that statute setting filing deadlines conferred substantive right); Cox v. Cox, 138 Hawai'i 476, 481, 382 P.3d 288, 293 (2016) (holding that statute directing the family court to consider certain factors in awarding attorney fees conferred substantive right). HRS § 801-1 confers a substantive right in being tried only upon a determination of probable cause from a group of ordinary citizens who are "at arm's length" from the judiciary and can serve as a "buffer or referee between the Government and the people." See United States v. Williams, 504 U.S. 36, 47, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992).

[18] Article I, section 10 places *limits* on the government's power to subject a criminal defendant to the stigma, uncertainty, and expense of criminal prosecution. Cf. Monongahela Navigation Co. v. U.S., 148 U.S. 312, 325, 13 S.Ct. 622, 37 L.Ed. 463 (1893) (describing the Fifth Amendment as "a series of negations, denials of right or power in the government"). Because of article I, section 10, the government could not, for example, force someone to plead "guilty" or "not guilty" to criminal charges based on the results of a social media poll. But the section does not limit the legislature's ability to place checks on the government's power to prosecute beyond those imposed by the constitution. Cf. State v. Maldonado, 108 Hawai'i 436, 444, 121 P.3d 901, 909 (2005) ("[W]here the legislature has enacted a valid statute that provides greater protection than the constitution, conformance to the statutory mandate, and not the lower reasonableness standard set forth by the state or federal constitution, is required."). HRS § 801-1 places restrictions on the government's power to prosecute beyond those found in the constitution. But that does not mean it "conflicts" with the constitution. The legislature is free to augment or duplicate the rights afforded by the constitution with statutory entitlements. And it has done just that with HRS § 801-1. The statute reflects clear legislative

intent that — in addition to whatever constitutional rights they may have under article I, section 10 — certain defendants also have a discrete statutory entitlement to face trial and sentencing only upon an indictment.

[19] HRS § 805-7 identifies the circumstances in which a district court must hold probable cause hearings, but nothing in the statute suggests that the State may try and sentence a defendant based solely on a district court's probable cause determination. To the contrary, the statute explicitly recognizes that there are certain crimes that "can be tried only on indictment by a grand jury":

> 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 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 is guilty of the offense with which the accused is charged.

HRS § 805-7 (emphasis added).

[20] The HRPP recognize that felonies may be charged with complaints where the defendant has waived the right to an indictment. See, e.g. HRPP Rule 7(b)(3). The references in HRS §§ 806- 6, -7, and -8 to the charging of felonies by complaint do not conflict with HRS § 801-1 when they are read as referring to felonies charged by complaint pursuant to HRPP Rule 7(b)(3).

[21] The 1869 version of this law enacted in the Hawaiian Kingdom's penal code was nearly identical to HRS § 801-1 : it exempted offenses within the jurisdiction of a "police court or district justice" from the indictment requirement whereas HRS § 801-1 exempts offenses within the "jurisdiction of a district court." Haw. Kingdom Penal Code 1869, Chapter 2 § 2.

[22] Especially not where, as discussed above, those statutes explicitly contemplate that some cases may only be tried on an indictment. See, e.g., HRS § 806-8 (referring to cases "in which the accused may be held to answer without an indictment by a grand jury").

[23] This conclusion is justified for the reasons set forth in this opinion. But it is hardly the only conclusion that a competent lawyer could arrive at after reading HRS § 801-1 and considering other related authorities concerning the initiation of felony prosecutions. Some of the sharpest legal minds disagree with our holding in this case. See dissent. So our conclusion that the plain language of HRS § 801-1 obliged the State to secure an indictment before subjecting Obrero to trial and sentencing does not mean that a defense lawyer who declined to move for the dismissal of charges for failure to comply with HRS § 801-1 fell below the "range of competence demanded of attorneys in criminal cases." See State v. Salavea, 147 Hawai‘i 564, 576, 465 P.3d 1011, 1023 (2020).

[1] The Honorable Melanie M. May presided.

[2] The Honorable Kevin A. Souza presided.

[3] The 1979 Random House College Dictionary similarly defines "alternative" as "a choice limited to one of two or more possibilities." At 40 (emphasis added).

[4] As adopted in 1979, Section 11 provided:

> Whenever a grand jury is impaneled, there shall be an independent counsel appointed as provided by law to advise the members of the grand jury regarding matters brought before it. Independent counsel shall be selected from among those persons licensed to practice law by the supreme court of the State and shall not be a public employee. The term and compensation for independent counsel shall be as provided by law.

1 Proceedings of the Constitutional Convention of Hawai‘i of 1978, at 1150.

[1] HRS § 801-1 states: "No person shall be subject to be tried and sentenced to be punished in any court, for an alleged offense, unless upon indictment or information, except for offenses within the jurisdiction of a district court or in summary proceedings for contempt." Thus, it mandates grand jury indictment for all offenses other than contempt and those chargeable by information or within the jurisdiction of a district court. As district courts have jurisdiction over only misdemeanors, HRS § 604-8(a) (2016); HRS § 701-107 (2014), and only certain class B and C felonies may be charged by information, see HRS § 806-82 (2014); HRS § 806-83 (Supp. 2017), under the Majority's view, any other felony must be charged by indictment. Majority at 151 Hawai‘i at 475, 517 P.3d at 758.

[2] The full text of article I, section 10 provides:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury or upon a finding of probable cause after a preliminary hearing held as provided by law or upon 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; nor shall any person be subject for the same offense to be twice put in jeopardy; nor shall any person be compelled in any criminal case to be a witness against oneself.

[3] The title of the bill is also indicative of its purpose: "A Bill for an Act Proposing an Amendment to Article I, Section 10, of the Constitution of the State of Hawai‘i to Permit Felony Trials After Preliminary Hearings." 1981 Haw. Sess. Laws, at 475.

[4] This is true notwithstanding that article I, section 10 contains the words "as provided by law." While the words "as provided by law" may "reflect an intent that implementing legislation is anticipated," they are not conclusive, as they may "simply refer[ ] to an existing body of statutory and other law on a particular subject." Ala Loop, 123 Hawai‘i at 412, 235 P.3d at 1124. In the context of article I, section 10, the term "held as provided by law" refers to the well-developed body of law governing preliminary hearings. See, e.g., Hurtado v. California, 110 U.S. 516, 538, 4 S.Ct. 292, 28 L.Ed. 232 (1884) (describing the practice of charging by preliminary proceedings before a magistrate as "an ancient proceeding at common law"). In other words, it means just what it says: the preliminary hearing process must be "held" lawfully, in accordance with the statutes then in effect or passed later to govern its procedures.

[5] Even if further steps were needed to fully operationalize the preliminary-hearing procedure, this was accomplished by Hawai‘i Rules of Penal Procedure (HRPP) Rule 5(c) (2014), governing preliminary hearings in felony proceedings, and HRPP Rule 7(b) (2012), providing that a felony "may be prosecuted by a complaint" if a district judge finds probable cause at a preliminary hearing. The Majority concedes that these provisions "flatly contradict HRS § 801-1" but argues that they cannot supersede the statute, or they would abridge the substantive rights of litigants in violation of HRS § 602-11 (2016). Majority at 151 Hawai‘i at 480-81 & n.17, 517 P.3d at 763-64 & n.17.

However, HRS § 801-1 does not confer a substantive right. As a preliminary matter, given that the 1982 amendment removed the grand jury requirement from the constitution, HRS § 801-1 does not codify constitutional principles and needs not be interpreted to supersede subsequent court rules. See State v. Hernandez, 143 Hawai‘i 501, 513, 431 P.3d 1274, 1286 (2018) ("[O]ur court rules must be construed to conform with the dictates of our constitution when such an interpretation is reasonably possible and to yield when there is irreconcilable conflict."). Moreover, HRS § 801-1 provides only procedural rights because it is not outcome determinative and does not produce rules of decision. See Cox v. Cox, 138 Hawai‘i 476, 482-83, 382 P.3d 288, 294-95 (2016) (citing to

Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 407, 130 S.Ct. 1431, 176 L.Ed.2d 311 (2010), for the proposition that a statute that governs "the manner and the means" by which a right is enforced is not substantive, whereas a statute that "creates a decisional framework" is). The underlying substantive right is a defendant's entitlement to a finding of probable cause by a neutral arbiter prior to standing trial. Cf. Hurtado, 110 U.S. at 538, 4 S.Ct. 292 ("[W]e are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information after examination and commitment by a magistrate, certifying to the probable guilt of the defendant ... is not due process of law."). HRPP Rules 5 and 7 modify the manner and means by which this right is enforced, not the right itself.

[6] Indeed, it is not clear that the grand jury proceeding offers greater protections to defendants at all; the modern preliminary hearing, with all of its procedural safeguards absent at the grand jury – most notably, the defendant's right to be present and to cross-examine witnesses - may afford more protection for the accused. See 2 Proceedings of the Constitutional Convention of 1978 (1980), at 674 (statement of Del. Chu) (stating during discussion of a possible amendment to abolish or limit the grand jury that "the [grand jury] system has been ineffective as a prosecutorial tool, has been surrounded by a veil of secrecy and has often been justifiably called a rubber stamp for the prosecutor"); see also, Note, The Function of the Preliminary Hearing in Federal Pretrial Procedure, 83 Yale L.J. 771, 804 (1974) (noting that because a preliminary hearing is adversarial and has stricter standards for evidence, it "provide[s] a more accurate fact-finding mechanism than would the grand jury").

[7] The Majority also points to language in various statutes that it says indicates that the legislature saw HRS § 801-1 as continuing in effect, including HRS § 805-7 (2014), which refers to "offenses ... that can be tried only on indictment by a grand jury," and HRS § 806-8 (2014), which refers to "criminal cases ... in which the accused may be held to answer without an indictment by a grand jury." Majority at 151 Hawai‘i at 481 & n.19, 517 P.3d 764 & n.19. It suggests that these statutes "contemplate[ ] the possibility that indictments are, in some circumstances, essential for prosecution." Id. at 481, 517 P.3d at 764. However, these provisions became law before the 1982 amendment. Therefore, they are not evidence that there are currently offenses that require a grand jury indictment; rather, they are evidence that such offenses existed at the time that the language in question became law. The fact remains that the Majority today reaches a result that neither the legislature nor the electorate ever intended.
