NO. 27897
NO. 27898
NO. 27899

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

LLOYD PRATT,

Petitioner-Appellant-Defendant,

v.

STATE OF HAWAI`I,

Respondent-Appellee-Plaintiff.

CR. NO. HC 04-147;
CR. NO. HC 04-169;
CR. NO. HC 04-229

APPLICATION FOR WRIT OF CERTIORARI

APPEAL FROM THE
1) DISTRICT COURT DECISION OF APRIL 12, 2006,

DISTRICT COURT OF THE FIFTH CIRCUIT, STATE OF HAWAI`I,
HON. FRANK D. ROTHSCHILD,
PRESIDING;

2) JUDGMENT ON APPEAL, FILED DECEMBER 17, 2010,

INTERMEDIATE COURT OF APPEALS, STATE OF HAWAI`I,
HON. KATHERINE J. LEONARD,
PRESIDING JUDGE;
HON. ALEXA D. M. FUJISE and
HON. CRAIG H. NAKAMURA,
ASSOCIATE JUDGES.

APPLICATION FOR WRIT OF CERTIORARI

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Petitioner LLOYD PRATT hereby requests, pursuant to HRAP 40.1, that this Honorable Court accept certiorari and review the plurality opinion of the Intermediate Court of Appeals in State v. Pratt, 124 Hawai`i 329, 243 P.3d 289 (2010).

DATED: Lihu`e, Hawai`i, March 15, 2011

DANIEL G. HEMPEY
Attorney for Petitioner-Appellant-Defendant

I. QUESTIONS PRESENTED

A. DOES THE DEFENSE OF PRIVILEGE PURSUANT TO ARTICLE XII, SECTION 7 OF THE HAWAI`I CONSTITUTION REQUIRE A BALANCING OF THE REASONABLENESS OF DEFENDANT'S CONDUCT AGAINST THE STATE'S RIGHT TO REGULATE, AND IF SO, HOW IS THE TEST APPLIED, WHO BEARS THE BURDEN OF PROOF AND WILL THE REGULATION FIRST BE SCRUTINIZED FOR CONSTITUTIONAL INFIRMITY?

B. CAN THE LEAD OPINION OF THE ICA STAND WHEN IT WOULD, SUA SPONTE, REVERSE A CONCESSION MADE BY THE STATE AND ADOPTED AS TRUE BY THE TRIAL COURT, WHERE THE MATTER CONCEDED WAS NEVER CHALLENGED, BRIEFED OR EVEN ARGUED BY THE PARTIES ON APPEAL AND WHERE CHALLENGE TO THE CONCEDED MATTER WAS MADE FOR THE FIRST TIME BY AN ICA JUDGE WITH NEITHER NOTICE TO THE PARTIES NOR A MEANINGFUL OPPORTUNITY TO BE HEARD?

II. PRIOR PROCEEDINGS

Petitioner, LLOYD PRATT (hereinafter as "Pratt" or "Petitioner") was charged in the District Court of the Fifth Judicial Circuit, in 2004 with three violations of the Department of Land and Natural Resources (DLNR) camping code (LNR 13-146-04). Essentially, the State alleged that Pratt remained in the Kalalau valley for longer periods of time than were permitted by the subject DLNR regulations and without the requisite permit. Pratt countered that the extended stays were necessary to conduct his traditional and customary naïve Hawaiian practices.

Pratt raised the defense of privilege under Article XII Section 7 of the Hawai`i State Constitution, as set forth in State v. Hanapi, 970 P.2d 485, 89 Haw. 177, (1998).

In State v. Hanapi, infra, this Court articulated a three-part test that a criminal defendant claiming a PASH privilege must prove: (1) he or she must qualify as a "native Hawaiian" within the guidelines set out in PASH; (2) his or her claimed right is constitutionally protected as a customary or traditional native Hawaiian practice; and (3) the exercise of the right occurred on undeveloped or less than fully developed property.

After trial the District Court found that each of "the three prongs in Hanapi have been satisfied." [ROA at 475], and that Pratt's conduct in Kalalau valley was a constitutionally protected traditional and customary Native Hawaiian practice under Article XII, Section 7. See Findings of Fact & Conclusions of Law, May 15, 2006, at FOF ¶13. [ROA at 511].

The trial court further ruled that, "even with such a showing," Pratt had to meet an additional *"competing interests" prong.* Decision and Order on Defendant's Motion to Dismiss . [ROA at 476]. The trial court then conducted a balancing test, imposed the burden of proof regarding the balancing

test on Pratt and ultimately concluded the State's right to regulate the valley was superior to Pratt's right to practice his traditions in the customary way.

Pratt timely appealed to the Intermediate Court of Appeals (hereinafter as "ICA"). A plurality opinion issued on November 17, 2010 and the Judgment was filed on December 17, 2010.

The ICA's "lead" opinion held that Pratt did not prove, despite the prior stipulations, concessions, and findings of the lower courts, that his activities within Kalalau valley were entitled to constitutional protection under Hanapi. Thus, after invalidating the stipulations and concessions made by the parties at trial, the "lead" in the ICA affirmed the conviction and found that the issue of a balancing test needed not be addressed (although later choosing to address it in dicta). State v. Pratt, (ICA Opinion) 124 Hawai`i at 357, 243 P.3d at 318 (2010).

Judge Fujise, concurred in the result (affirmance) only, noting that she would have not contradicted the stipulations and concessions made by the parties, and would not have decided the case on a basis that was not appealed or even argued by the parties. She held that the trial court was correct in imposing the burden of proving reasonableness in a balancing test on Pratt, and held that Pratt did not prove that his conduct was reasonable. State v. Pratt, (ICA Opinion) 124 Hawai`i 329, 357, 243 P.3d 289, 318 (2010). The lack of actual harm done by Pratt was not considered in the balance.

Judge Nakamura dissented, holding that "the case should be decided based on the way in which it was litigated by the parties. The parties litigated this case on the basis that Defendant-[...] had satisfied the three factors set forth by the Hawai`i Supreme Court in State v. Hanapi, 89 Hawai`i 177, 970 P.2d 485 (1998), including that Pratt had met his burden of demonstrating that he was engaged in customary or traditional native Hawaiian practices that fell within the scope of Article XII, section 7 of the Hawai`i Constitution. Id at 358, 318."

Judge Nakamura further wrote that

> "I do not agree that the trial court was correct in ruling that the balance of interests weighed against Pratt and in favor of Plaintiff-Appellee State of Hawai`i (State). In my view, the evidence presented did not show that Pratt's practices resulted in any actual harm. I believe that the trial court erred in denying Pratt's claim of constitutional privilege, and I would reverse Pratt's convictions."

Id. Thus, although the ICA was unanimous in applying some test of reasonableness, each of the thee ICA judge's opinions differ as to the method and burdens of proof by which such reasonableness or the lack thereof should be determined.

III. STATEMENT OF THE CASE

Petitioner offered credible and uncontested evidence including expert testimony that he was: 1) Native Hawaiian; 2) Engaged in traditional and customary Native Hawaiian practices which required that he exceed the time limitations for overnight stays allowed by the existing DLNR regulations; and 3) Conducting his activities on undeveloped land.

In addition to testifying and introducing several documents into evidence, Pratt called Davianna McGregor, Ph.D., a professor of ethnic studies at the University of Hawai`i at Manoa, as an expert witness. "Dr. McGregor has done extensive research on native Hawaiian customs and traditions, and she has developed criteria for evaluating whether a person is engaged in customary and traditional native Hawaiian practices. Dr. McGregor testified that in her opinion, Pratt was 'engaging in traditional and customary native Hawaiian customs and practices related to subsistence and cultural and religious purposes' while in Kalalau Valley." State v. Pratt, ICA Opinion, 124 Hawai`i 329, 359 243 P.3d 289, 319 (2010).

She also testified that "a temporary shelter for extended period of times for farming or for fishing purposes is part of the tradition and custom." [TR at P. 85, L. 19-21]. This opinion extended to the fact that Pratt stayed in Kalalau Valley for extended periods of time. Dr. McGregor testified, "Temporary residence for extended time is a traditional customary practice. It's linked to the -- the responsibilities -- well, I'd say it's necessary to fulfill the responsibilities of caring for the land and caring for the cultural sites and religious sites." [TR at P. 81, L. 10-15]. Finally, Dr. McGregor testified that in her opinion, Pratt's activities are customary and traditional practices protected by Hawai`i law. [TR at P. 82, L. 2-5].

Pratt testified that on each of the dates he was cited for camping violations (July 14, 2004, July 28, 2004, and September 28, 2004), he was in the Kalalau Valley to fulfill his responsibilities as a Kahu and engage in traditional and customary practices as a native Hawaiian.

The trial judge decided the case so "it will be clear from a higher authority [and] will apply to all of the people in the State of Hawai`i" [TR 4/7/06 at 45]. The Findings of Fact included:

> 8. Based on the testimony elicited at the November 4 hearing and concessions made by the State in its brief, the Court finds that Mr. Pratt is [1] a native Hawaiian, [2] that he carried out customary or traditional native Hawaiian practices in Kalalau at the time of the camping, and [3] that this exercise of rights occurred on undeveloped or less than fully developed land. [ROA at 46].
>
> 9. Case and statutory law all suggest that even with such a showing (under Hanapi), the Court must 'reconcile competing interests,' or stated another way 'accommodate competing ... interests' and only uphold such rights and privileges 'reasonably exercised' and 'to the extent feasible' and 'subject to the right of the State to regulate such rights.' See Article XII, section 7, Hawai`i Constitution; Public

Access Shoreline Hawai`i v. Hawai`i County Planning Commission, 79 Hawai`i 425 [903 P.2d 1246] (1995).

The court went on to apply its balancing test.

> 11. The Court finds that the State has a valid interest in protecting and preserving this valuable asset, which means, among other things, controlling the amount of traffic, the length of stay for any one person, and the types of activities that are consistent with this stewardship. This interest when balanced against the rights expounded by Mr. Pratt weigh in favor of the State.
>
> Findings of Fact & Conclusions of Law, filed May 15, 2006, at COL ¶17. [ROA at 515].
>
> THE COURT: I don't agree with you Mr. Hempey that the concept should be limited to [harm done by] just one man because if it was -- if that was the standard that the State can only look at this one man and, well, he's not going to create enough sewage to create a problem so he's not guilty. And so then next week we have two men and then those two don't create enough sewage that's not a not going to create enough sewage to create a problem so he's not guilty. And it doesn't make any sense that we should narrowly look at the problem.
>
> [TR 4/12/2006 at P. 30, L. 9 -P. 31. L.2].*

Thus, *how* a balancing test should be applied and to whom the burden of proof should be put, assuming arguendo that a balancing test should be applied[1], became a significant issue on appeal. It remains the primary basis for this Petition for Writ for Certiorari.

Ultimately, this balancing test was applied by two of the three ICA judges (Fujise concurring in the result and Nakamura dissenting), although each of them applied the balancing test in a different manner and each came to the opposite conclusion as the other.

Judge Fujuse placed the burden of proving "reasonableness" on the Pratt, writing "it was not error for the district court to require a showing that Pratt's exercise of this privilege was reasonable under the circumstances of this case" ICA Opinion, infra at 357, 317. Judge Nakamura, in the dissent, placed the burden of proof on the State, "[i]ndeed, the State did not offer any substantial evidence that Pratt's activities in Kalalau State Park had done any actual harm." ICA Opinion at 358, 318.

The lead opinion of the Intermediate Court of Appeals, however, went so far as to overturn the parties stipulations at trial, [that Pratt had proved the three Hanapi factors] and dispensed entirely with the issue of a balancing test finding that Pratt's conduct was not constitutionally protected under

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[1] Defendant continues to assert that once he has proven the three Hanapi factors (and thus the existence of a constitutionally protected right) that the examination should turn to the reasonableness of the *regulation* – and that the State should have the burden of proving that the subject regulation properly protects the exercise of Native Hawaiian rights.

Hanapi.

Judge Fujise wrote that "I write separately because, in my view, [ ] the State has not cross-appealed from the district court's ruling that Pratt satisfied the three Hanapi prongs..." State v. Pratt, 124 Hawai`i 329, 357, 243 P.3d 289, 317 (2010).

Judge Nakamura wrote, "This case should be decided based on the way in which it was litigated by the parties. The parties litigated this case on the basis that Defendant-Appellant Lloyd Pratt (Pratt) had satisfied the three factors set forth by the Hawai`i Supreme Court in State v. Hanapi, 89 Hawai`i 177, 970 P.2d 485 (1998), including that Pratt had met his burden of demonstrating that he was engaged in customary or traditional native Hawaiian practices that fell within the scope of Article XII, section 7 of the Hawai`i Constitution." Id.

IV. ARGUMENT

Hanapi set forth a three-part test, which a defendant in a criminal case must prove in order to invoke a constitutional defense pursuant to Article XII, section 7 of the Hawai`i Constitution. Once a defendant has established the defense of privilege under Hanapi, the burden of proving the constitutional right was unreasonably exercised should shift to the State. Moreover, Hawai`i courts must examine the regulation at issue to determine whether it properly accommodates the exercise of the constitutional rights.

A. THE ICA COMMITTED GRAVE ERROR BY HOLDING THAT A DEFENDANT WHO HAS PROVEN THAT HIS CONDUCT IS CONSTITUTIONALLY PROTECTED PURSUANT TO ARTICLE XII, SECTION 7, MUST ALSO BEAR THE BURDEN OF PROVING THAT HIS CONDUCT WAS REASONABLE IN AN INCONSISTENTLY-APPLIED BALANCING TEST THAT VIOLATES THE RULE OF LENITY.

Article XII, section 7 of the Hawai`i Constitution expressly provides:

> The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua' a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

This court has found that the drafters of Article XII, Section 7 "intended this provision to protect the broadest possible spectrum of native rights[.] "Pele Defense Fund v. Paty, 73 Haw. 578, 619, 837 P.2d 1247 (1992).

In this case, the principle of affording broad protections to Native Hawaiian practices was violated in the ICA by: 1) Improperly shifting a burden of proving "reasonableness" in an undefined

balancing test to Petitioner-Defendant – with the test being applied differently even among ICA judges; and 2) Failing to require the state to show that the regulation was narrowly tailored so as not to impinge on fundamental Native Hawaiian constitutional rights.

a) Grave Error - Improper Burden Shifting By Lower Courts.

HRS §701-115, governs the burdens of proof and provides in relevant part:

> (2) No defense may be considered by the trier of fact unless evidence of the specified fact or facts has been presented. If such evidence is presented, then:
>
> (a) If the defense is not an affirmative defense, the defendant is entitled to an acquittal if the trier of fact finds that the evidence, when considered in the light of any contrary prosecution evidence, raises a reasonable doubt as to the defendant's guilt; or
>
> (b) If the defense is an affirmative defense, the defendant is entitled to an acquittal if the trier of fact finds that the evidence, when considered in light of any contrary prosecution evidence, proves by a preponderance of the evidence the specified fact or facts which negative penal liability.

This court has described the operation of HRS §701-115 as shifting the burden of proof to the State, once the defendant has made a requisite showing of facts supporting a defense:

> "HRS § 701-115(2) embodies two rules as to the burden of persuasion in cases in which a defense has been raised. In cases involving an affirmative defense, the defendant must prove the facts constituting the defense by a preponderance of the evidence. On the other hand, in cases involving a defense other than an affirmative defense, the prosecution as part of its burden of persuasion must prove beyond a reasonable doubt the facts negativing the defense."

State v. McNulty, 60 Haw. 259, 588 P.2d 438, fn. 4 (1978), cert. denied, 441 U.S. 961, 99 S.Ct. 2406, 60 L.Ed.2d 1066 (1979), overruled on other grounds by Raines v. State, 79 Hawai`i 219, 900 P.2d 1286 (1995).

Here, the trial court found that Pratt satisfied each prong of the Hanapi defense, yet neither it nor the ICA properly applied the principles of HRS § 701-115. The burden of persuasion was never shifted to the State, except in judge Nakamura's dissent.

If the Hanapi privilege is an affirmative defense, and where the trial court found that the defendant proved its three required factors, an acquittal should have automatically ensued pursuant to §701-115 (2)(a). If the Hanapi privilege is not an affirmative defense, then the burden of persuasions should have shifted to the State to "prove beyond a reasonable doubt the facts negativing the defense." This was not required in the case at bar and the State did not present any such evidence at trial. Again, the dissent would have properly applied the correct burden of proof.

Even if a balancing test at the trial level is the correct approach, Hawai`i litigants would benefit[2] from guidance as to how it should be applied and who bears the burden of proving what. The precedent of the ICA opinion is unclear in this regard. The two judges of the ICA who actually applied the balancing test (Fujise and Nakamura) each imposed differing burdens of proof, weighed different factors and ultimately each reached a different result - highlighting the uncertainty in Hawai`i law as to the extent of protection afforded Article XII, section 7 rights.

Judge Nakamura in the ICA dissent wrote that:

> The Hawai`i Supreme Court has "upheld the rights of native Hawaiians to enter undeveloped lands owned by others to practice continually exercised access and gathering rights necessary for subsistence, cultural or religious purposes so long as no actual harm was done by the practice." Pele Defense Fund v. Paty, 73 Haw. 578, 619, 837 P.2d 1247, 1271 (1992). Thus, in analyzing the balance of interests between Pratt and the State and whether Pratt's exercise of traditional and customary native Hawaiian practices in Kalalau State Park was reasonable, we must look to whether Pratt's conduct resulted in actual harm.
>
> ... Indeed, the **State did not offer any substantial evidence that Pratt's activities in Kalalau State Park had done any actual harm**. Although the trial court raised the question of whether permitting Pratt's conduct might result in the creation of a whole community in Kalalau State Park, Pratt testified, without contradiction, that he had not seen any other kahu performing the type of work he was performing in Kalalau State Park.
>
> Based on the State's concessions and the evidence presented in this case, I conclude that the trial court erred in ruling that the balance of interests weighed against Pratt and in denying Pratt's claim of constitutional privilege. Accordingly, I would reverse Pratt's convictions.

ICA Opinion at 358, 318. Judge Fujise, however, placed the burden of proving "reasonableness" on the defendant, writing, "it was not error for the district court to require a showing that Pratt's exercise of this privilege was reasonable under the circumstances of this case". ICA Opinion, infra at 357, 317.

Pratt contends that the approach taken in Judge Nakamura's dissent in the ICA, in noting that Pratt did no harm and that the State did not prove Pratt's conduct to be unreasonable, is consistent with Hawai`i statutes governing burdens of proof as well as the broader constitutional issues. Thus,

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[2] The ICA notes how in this case, Pratt filed a motion for appointment of new counsel, alleging that the public defender refused to present his Native Hawaiian rights defense. ICA Op. at 292, 332. Petitioner respectfully suggests that fairness and judicial efficiency support a more clearly defined approach to Article XII, section 7 privilege cases such that it may be utilized, when appropriate, by the statewide Public Defender in the defense of indigents.

the dissent represents a superior approach to protecting constitutional rights over the plurality, which would require a defendant to prove that his traditions and cultural practices are "reasonable," a daunting, if not impossible task where, per the ICA majority, violating a State regulation alone is sufficient to have one's conduct deemed unreasonable. The opinion of the trial court and of the plurality in the ICA would, if left to stand, leave in place a holding that could summarily extinguish Native Hawaiian cultural rights by use of DLNR regulation – perhaps every time.

In addition to mis-applying the burden of proof, the ICA also applied the balancing test in an inconsistent and arbitrary manner. While Judge Nakamura properly considered that Pratt caused no actual harm, the other judges automatically found cause against Pratt solely because the regulation was offended. This approach, however, ignores the notion that a State's regulations are supposed to be subordinate to its constitution.

Although PASH did not discuss the precise nature of Hawai`i's "limited property interest," one limitation would be that constitutionally protected Native Hawaiian rights, reasonably exercised, qualify as a privilege for purposes of enforcing criminal trespass statutes. Pele Defense Fund v. Paty, 73 Haw. 578, 620, 837 P.2d 1247, 1272 (1992).

Finally, Defendant continues to assert that because the third prong of the Hanapi test – undeveloped land – already assumes reasonableness, that a balancing test was never required under Hanapi. In Pele Defense Fund v. Paty, 73 Haw. 578, 837 P.2d 1247 (1992), the Hawai`i Supreme Court noted, "the 'undeveloped lands' limitation was imposed by the [Kalipi] court *to balance the concept of land ownership with that of native rights.*" 73 Haw. at 618. (emphasis added). Thus, in many respects, it is the fact that traditional customary practices are being done on undeveloped lands that makes them, prima facia, reasonable under Pele Defense Fund. Pratt contends that because PASH concluded that traditional and customary practices were reasonable, when conducted on undeveloped land, that trial courts should not re-impose an additional burden on cultural practitioners of proving even more reasonableness beyond the three Hanapi factors (including, of course, that the conduct took place on undeveloped land).

If, however, a balancing test for reasonableness is to be applied, the State should properly bear the burden of proof and a proper weight should be given to the actual harm or lack of actual harm caused by a defendant's conduct.

b) Grave Error – Failure to Examine Whether Regulation Offends PASH Rights.

Pratt further contends that a criminal conviction in his case is improper absent proof that the subject regulation was tailored to accommodate the traditional and customary practice.

While the State has the authority to regulate customary and traditional Native Hawaiian practices, it must do so reasonably; and "the State is obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible." Public Access Shorelines Hawai`i v. Hawai`i County Planning Comm., 79 Haw. 425, supra, 79 Haw. at 450 n. 43, 903 P.2d at 1271 n. 43.

> This court has applied "strict scrutiny" analysis to " 'laws ... impinging upon fundamental rights expressly or impliedly granted by the [c]onstitution,' " in which case the laws are " 'presumed to be unconstitutional unless the state shows compelling state interests which justify such classifications,' " Holdman v. Olim, 59 Haw. 346, 349, 581 P.2d 1164, 1167 (1978), (citations) and that the laws are "narrowly drawn to avoid unnecessary abridgments of constitutional rights."

State v. Mallan, 86 Hawai`i 440, 467, 950 P.2d 178, 205 (1998).

In the case at bar, both lower courts have held that Pratt was exercising a fundamental constitutional right. Clearly a DLNR regulation that criminalizes the harmless exercise of that right impinges on the right. Yet no constitutional analysis was applied to the *regulation* – only to the *defendant's* conduct. In this instance, the DLNR regulation should have been "presumed to be unconstitutional unless the State showed compelling State interests which justify such classifications, and that the regulations were narrowly drawn to avoid unnecessary abridgments of constitutional rights."

Here, the State's witness was questioned about accommodation of such rights.

> Q. And when faced with a conflict between regulation and native rights, what criteria does that state board, I think you said, use to decide (inaudible)?
>
> A. That I don't know.

Transcript of November 4, 2005. Page 112.

Yet, no analysis was done below as to whether this testimony was sufficient proof that the DLNR regulations are narrowly drawn to avoid abridgments of constitutional rights.

"State agencies [...] may not act without independently considering the effect of their actions on Hawaiian traditions and practices". Ka Paakai O Kaaina v. Land Use Comm'n, 94 Hawai'i 31, 41, 7 P.3d 1068, 1078 (2000). Petitioner contends that it was grave error for the ICA to convict after he proved that his conduct involved the exercise of a fundamental constitutional right, without any examination whatsoever as to whether the offended regulation was ""narrowly drawn to avoid unnecessary abridgments of constitutional rights."

Regardless of whether or not reasonableness is implied by the use of undeveloped lands, or

measured by the trial courts, Petitioner continues to argue that his conviction should not stand without some meaningful proof that the subject DLNR regulations would accommodate traditional and customary practices on undeveloped land.

c) Grave Error – Failure to Invoke Rule of Lenity

Given the split between the ICA Judges as to who has the burden of proving reasonableness or unreasonableness, as well as the split as to the method by which the defendant's harm should be measured, the ICA committed grave error by failing to invoke the rule of lenity. The existence and the proper application of a balancing test, having been applied for the first time in this case by different judges with different burdens of proof and yielding different results, are too ambiguous on which to support a criminal conviction. Lenity should have been invoked.

"The supreme court [has] opined that, where practices associated with the ancient way of life require utilization of the undeveloped lands of others, and have been continued to be exercised, the continuation of those practices is protected under HRS § 1-1, so long as no actual harm is done thereby. ICA Opinion, infra at 304, 344, referring to Kalipi v. Hawaiian Trust Co., Ltd., 66 Haw. 1, 10, 656 P.2d 745, 751-52. (1982).

"When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists." State v. Young, 109 P.3d 677, 680, 107 Hawai`i 36, 39 (Haw. 2005) quoting Gray v. Administrative Director of the Court, 84 Hawai`i 138, 144, 931 P.2d 580, 586 (1997).

> Where a criminal statute [or case law] is ambiguous, it is to be interpreted according to the rule of lenity. See State v. Kaakimaka, 84 Hawai`i 280, 292, 933 P.2d 617, 629 ("Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." (Quoting Busic v. United States, 446 U.S. 398, 406, 100 S.Ct. 1747, 64 L.Ed.2d 381 (1980).)), reconsideration denied, 84 Hawai`i 280, 933 P.2d 617 (1997); State v. Auwae, 89 Hawai`i 59, 70, 968 P.2d 1070, 1081 (App.1998) (because ambiguity exists as to legislative intent with respect to applicable unit of prosecution under statute, rule of lenity requires that statute be interpreted to allow only single punishment in such circumstances), overruled on other grounds by State v. Jenkins, 93 Hawai`i 87, 997 P.2d 13 (2000). Under the rule of lenity, the statute must be strictly construed against the government and in favor of the accused. See Staples v. United States, 511 U.S. 600, 619, n. 17, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994) ("[U]nder [the rule of lenity,] an ambiguous criminal statute is to be construed in favor of the accused.").

State v. Shimabukuro, 60 P.3d 274, 277, 100 Hawai`i 324, 327 (Haw. 2002):

Here, the lead opinion of the ICA summarily disregarded Pratt's invocation of the rule of lenity. Pratt argues that the proof of ambiguity (as to the burden of proof in a balancing test and the proper application of such a test) is "in the pudding". There is a total disagreement between the ICA

plurality as to whether the Pratt properly proved the existence of a right and a total disagreement about how the reasonableness of his conduct should be issued.

Thus the case falls squarely within principles of lenity, and such ambiguities should be resolved against the State.

B. THE LEAD, OPINION OF THE ICA CANNOT STAND WHEN IT WOULD, SUA SPONTE REVERSE A CONCESSION MADE BY THE STATE AND ADOPTED AS TRUE BY THE TRIAL COURT, WHERE THE MATTER CONCEDED WAS NEVER CHALLENGED, BRIEFED OR EVEN ARGUED BY THE PARTIES ON APPEAL AND WHERE CHALLENGE TO THE CONCEDED MATTER WAS MADE FOR THE FIRST TIME BY AN ICA JUDGE WITH NEITHER NOTICE TO THE PARTIES NOR A MEANINGFUL OPPORTUNITY TO BE HEARD.

In the lead opinion in the ICA, the plurality wrote "

> "[a]lthough the parties in effect agreed that the three Hanapi factors were met, the State's concession is not binding on us and does not relieve us from our obligation to "exercis[e] our own independent constitutional judgment based on the facts of the case.". Id at 309, 349.

Pratt asserts that the lead ICA Judge was incorrect in finding an obligation to overturn stipulated facts, without first affording notice, or an opportunity to be heard, or to present additional evidence or expert testimony on an issue that was not argued, briefed, or raised by the parties.

"The basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner." State v. Adam, 97 Hawai`i 475, 482, 40 P.3d 877, 884 (2002) (internal quotation marks and citation omitted). "[T]his court has said, 'Legal issues not raised in the trial court are ordinarily deemed waived on appeal.'" Kau v. City & County of Honolulu, 104 Hawai`i 468, 475 n. 6, 92 P.3d 477, 484 n. 6 (2004) (internal quotation marks and citation omitted).

"The duty of this court, as of every other judicial tribunal is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." Wong v. Bd. of Regents, 62 Haw. 391, 395, 616 P.2d 201, 204 (1980). See also In re Hawaiian Elec. Co., 56 Haw. at 267, 535 P.2d at 1107 (holding that it is not "deem[ed] advisable to decide [a] particular issue, inasmuch as it was not briefed and argued before this court"). E & J Lounge Operating Co., Inc. v. Liquor Com'n of City and County of Honolulu 118 Hawai`i 320, 339, 189 P.3d 432, 451 (2008).

Due process requires that cases not be decided by appeals courts based on overturning trial

rulings that were agreed to by the parties and the lower court, and when no notice was given to the parties that the issue would be raised, and no opportunity was presented to Petitioner to offer an additional factual basis or additional expert testimony to support the conceded facts.

For example, the lead ICA opinion writes:

> "There is no evidence in the record, and no factual findings, that it was customary that an ancient Hawaiian person of lesser rank could simply take such responsibilities onto himself or herself." State v. Pratt, 124 Hawai`i 329, 355, 243 P.3d 289, 315 (Hawai`i App.,2010)

Had Petitioner been given notice that an appellate judge was going to require additional testimony from Petitioner's expert on this issue – even after the State conceded, he absolutely would have provided expert testimony to contradict the class-based approach mentioned above.

From Petitioner's perspective, the case has almost played out like a trap, with the State conceding an important point at trial, the trial court agreeing that the matter had been proven, and with the Petitioner then losing the case on appeal because an ICA judge held that he failed to present additional evidence on the very same conceded issue.

"[U]nchallenged factual findings are deemed to be binding on appeal, which is to say no more than that *an appellate court cannot, under the auspices of plain error, sua sponte revisit a finding of fact that neither party has challenged on appeal." Id., quoting* Okada Trucking v. Board of Water Supply. 97 Hawai`i 450, 459, 40 P.3d 73 (2002) (emphasis added). "In light of the foregoing, the ICA erred in holding *sua sponte* that the hearings officer was wrong[.]" Okada, 97 Hawai`i at 459. The Okada Court found grave error on this ground, granted certiorari, and reversed. *Id.* "There must be an end to litigation and it is not in the interest of good judicial administration to permit the raising of new issues ad infinitum." Bank of Hawai`i v. Crozier, 1959 WL 11642, 2 (Hawai`i Terr.) (Haw.Terr. 1959).

"Findings of fact ... that are not challenged on appeal are binding on the appellate court." *Id.* at 458, *citing* Taylor-Rice v. State, 91 Hawai`i 60, 65, 979 P.2d 1086 (1999) ("if a finding is not properly attacked it is binding"); *see also,* Olelo v. Office of Information Practices, 116 Hawai`i 337, 348, 173 P.3d 484 (2008

Here a single ICA Judge essentially re-litigated the case, against Petitioner's expert, without notice or an opportunity for the Petitioner to respond. Petitioner contends that this violates due process. If the lack or failure of expert testimony is to be an issue in this case, Petitioner seeks remand to answer the various challenges to his expert testimony that were made in the lead opinion.

Accordingly, Petitioner respectfully suggests that this Court grant certiorari and further review.

DATED: Lihu`e, Hawai`i, March 15, 2011

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IN THE SUPREME COURT OF THE STATE OF HAWAI`I

LLOYD PRATT, Petitioner-Appellant-Defendant, v. STATE OF HAWAI`I, Respondent-Appellee-Plaintiff.	CR. NO. HC 04-147; CR. NO. HC 04-169; CR. NO. HC 04-229. CERTIFICATE OF SERVICE [RE: APPLICATION FOR WRIT OF CERTIORARI]

CERTIFICATE OF SERVICE

The undersigned, who is not a party to this action and who is over the age of eighteen years, hereby certifies that two true and correct copies of Petitioner-Appellant-Defendant's Petition for Writ of Certiorari was duly served on the following parties via U.S. Postal Service, postage prepaid, on the date below:

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/s/ Daniel G. Hempey
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