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TIMOTHY J. TOBIN (9252)  
4-1191 Kuhio Hwy, Suite B  
Kapaa, Hawaii 96746  
Phone: (808) 822-5529  
Facsimile: (888) 842-1125

Attorney for DEFENDANT

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5TH CIRCUIT COURT  
STATE OF HAWAII

Doreena Olivas-Brun  
CLERK

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT  
STATE OF HAWAII

STATE OF HAWAII,

vs.

KUI PALAMA,

Defendant.

CR. NO. 11-1-0116

FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND ORDER GRANTING  
DEFENDANT'S MOTION TO DISMISS

Hearing Dates: March 13, 2012 and April 5, 2012  
Presiding Judge: Kathleen N.A. Watanabe

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND  
ORDER GRANTING DEFENDANT'S MOTION TO DISMISS**

On March 13, 2012 at 9:00 a.m. and April 5, 2012 at 1:30 p.m., Defendant Kui Palama's Motion to Dismiss came on for hearing in the Fifth Circuit Court, the Honorable Kathleen N.A. Watanabe presiding. Defendant Kui Palama was present, represented by his court-appointed counsel Timothy J. Tobin. Deputy Prosecuting Attorney John Murphy represented the State of Hawaii. The Court received evidence and heard arguments of counsel.

The issues presented were as follows: Whether Defendant's pig hunting, on or about January 17, 2011, falls within the scope of constitutional protection/privilege, more specifically, whether: (a) Defendant is native Hawaiian; and, (b) his claimed right is constitutionally protected as a customary or traditional native Hawaiian practice as codified—but not necessarily enumerated—in article XII, § 7 of the Hawai'i Constitution, HRS §§ 1-1 and/or HRS § 7-1; and, (c) the exercise of the right occurred on undeveloped or less than fully developed property. State

v. Hanapi , 970 P.2d 485, 493-94, 89 Haw. 177, 186 (1998). And whether the State's prosecution of Defendant's protected conduct is constitutional when balancing the State's interest in regulating the exercise of said rights and the reasonableness of Defendant's exercise of said rights. Id.

The Court holds that to the extent findings of fact constitute conclusions of law, and to the extent that conclusions of law constitute findings of fact, they shall be so deemed. The Court finds as follows:

### **FINDINGS OF FACT**

1. In the above-captioned matter, Defendant was charged with simple trespass in violation of HRS 708-815 of the Hawaii Revised Statutes, and hunting on private lands prohibited in violation of HRS 183D-26 of the Hawaii Revised Statutes.
2. On or about the 17<sup>th</sup> day of January, 2011, in the County of Kauai, State of Hawaii, Defendant entered upon Kupo Ridge, situated at Hanapepe Valley ("the subject property"); Defendant entered the subject property by foot accompanied by a mule and dogs; Mr. Palama used a knife to hunt, kill, and gut two wild pigs on the subject property.
3. Defendant establishing through evidence that Defendant is native Hawaiian, that hunting pig is constitutionally protected as a customary or traditional native Hawaiian practice, and that the pig hunting occurred on less than fully developed property.
4. The State offered no evidence to controvert that Defendant is native Hawaiian.
5. The State offered no evidence to controvert that Defendant's pig hunting is constitutionally protected as a customary or traditional native Hawaiian practice.
6. The State offered no evidence to controvert that Defendant's pig hunting occurred on less than fully developed property.

7. Defendant is native Hawaiian, as testimony and exhibits collectively demonstrated that Defendant is a descendant of native Hawaiians who inhabited Kauai prior to 1778, regardless of Defendant's specific blood quantum. See Article XII, section 7 of the Hawaii Constitution; see also Public Access Shoreline Hawaii v. Hawai'i County Planning Comm'n, 79 Haw. 425, 442, 903 P.2d 1246, 1263 (1995) (hereinafter "PASH").
8. Defendant established, through kama'aina and expert testimony, that his hunting pig on the subject property is constitutionally protected as a customary or traditional native Hawaiian practice.
9. Dr. Jonathon Osorio, a professor at the Center for Hawaiian Studies at the University of Hawaii, is qualified to testify as an expert witness on customary and traditional native Hawaiian practices.
10. Based on Dr. Jonathan Osorio's expert testimony, as well as the testimony of kama'aina witnesses, the Court finds that Defendant's pig hunting on the subject property constitutes an established native Hawaiian custom or tradition practiced prior to 1892. See generally State v. Pratt, 243 P.3d 289, 311 (Haw. Ct. App. 2010) cert. withdrawn, SCWC-27897, 2011 WL 1090187 (Haw. Mar. 18, 2011) and cert. granted, SCWC-27897, 2011 WL 1523485 (Haw. Apr. 21, 2011).
11. Defendant and his ohana occupy the same ahupua'a that the subject property is located.
12. Defendant and his ohana maintain a taro farm on the subject ahupua'a.
13. Defendant and his ohana hunt pig for food and subsistence; the pig meat is shared with members of the ohana.
14. Defendant and his ohana hunt pig for cultural reasons.
15. Defendant and his ohana hunt pig to preserve ohana tradition.

16. Defendant and his ohana hunt pig to keep the wild pig population down.
17. Pigs are a nuisance to Kauai's landscape and agriculture; this finding is based on testimony presented by Defense and stipulation by the State of Hawaii.
18. There was nothing unreasonable about the way Defendant hunted pig.
19. The State's attempt to regulate Defendant's conduct—charging Defendant with simple trespass in violation of HRS 708-815 of the Hawaii Revised Statutes, and hunting on private lands prohibited in violation of HRS 183D-26 of the Hawaii Revised Statutes—amounts to a blanket prohibition or extinguishment of Defendant's protected practice of hunting pig on the subject property. PASH at 442.

### **CONCLUSIONS OF LAW**

1. Hawaii's concepts and laws relating to land tenure are unique within United States law. The relevant statutory and constitutional provisions which guide Hawaii's unique framework are Haw. Rev. Stat. § 7-1, Haw. Rev. Stat. § 1-1, and Article XII, section 7 of the Hawaii Constitution.
2. Lawful native Hawaiiaan occupants of an ahupua'a may—for the purposes of practicing native Hawaiian customs and traditions—enter undeveloped lands within the ahupua'a to gather specifically enumerated items. Kalipi v. Hawaiian Trust Co., Ltd. 66 Haw. 1, 3-4, 656 P.2d 745 (1982). Defendant and his ohana are lawful occupants of the subject ahupua'a.
3. The "Hawaiian usage" clause may establish certain customary Hawaiian rights beyond those found in HRS § 7-1. Id. at 751.
4. In the case at bar, pig hunting, while not specifically enumerated in HRS § 7-1, qualifies as a traditional and customary native Hawaiian practice deserving Constitutional

- protection, as Defendant brought forward evidence that hunting pig was an established native Hawaiian custom or tradition practiced prior to 1892. See generally State v. Pratt.
5. Native Hawaiian rights protected by article XII, § 7 may extend beyond the ahupua'a in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner. Pele Defense Fund v. Paty, 73 Haw. 578, 619, 837 P.2d 1247 (1992). In the instant matter, Defendant's Ohana's pig hunting has been customarily and traditionally exercised on the subject property.
  6. Rights of native Hawaiians to enter undeveloped lands owned by others to practice continuously exercised access and gathering rights necessary for subsistence, cultural or religious purposes may be upheld as long as no actual harm was done by the practice. Id. The evidence presented to the Court evidenced that there was no actual harm caused by Defendant hunting pig on the subject property.
  7. Constitutionally protected native Hawaiian rights, reasonably exercised, qualify as a privilege for purposes of enforcing criminal trespass statutes. State v. Hanapi. The reasonable exercise of ancient Hawaiian usage is entitled to protection under article XII, section 7. Id. Here, Defendant's exercise of his ancient Hawaiian usage was reasonable.
  8. Because Defendant satisfied his burden through evidence and testimony, the Court reconciled the competing interests and upheld Defendant's privilege because it was reasonably exercised to the extent feasible.
  9. The regulatory power provided in article XII, section 7 does not justify summary extinguishment of such rights by the State merely because they are deemed inconsistent with generally understood elements of the western doctrine of "property." PASH at 442. Extinguishing traditional rights based simply upon the possible inconsistency of

purported native rights with our modern system of land tenure must fail; the Court's obligation to preserve and enforce such traditional rights is part of the Hawaii State Constitution. Kalipi v. Hawaiian Trust Co., Ltd., at 748. Here, the State's attempt to regulated Defenant's traditional right, through criminal prosecution, amounts to a blanket prohibition or extinguishment of Defendant's protected practice of hunting pig on the subject property.

10. The government must protect the privilege of Defendant to enter the subject property to practice continuously exercised access and gathering rights necessary for subsistence and cultural purposes because no actual harm was done by Defendant. Pele Defense Fund v. Paty, 73 Haw. 578, 619, 837 P.2d 1247 (1992).

11. For the above reasons, Mr. Palama's activities are established native Hawaiian customs or traditions that require this Court's constitutional protection.

**ORDER GRANTING DEFENDANT'S MOTION TO DISMISS WITH PREJUDICE**

NOW, THEREFORE, based on the foregoing Findings of Fact, and Conclusions of Law, it is HEREBY ORDERED, ADJUDGED, AND DECREED, that Defendant Kui Palama's Motion to Dismsiss is GRANTED and the above-captioned matter is HEREBY DISMISSED WITH PREJUDICE.

DATED: Lihue, Hawai'i, APR 25 2012.



**KATHLEEN N.A. WATANABE**

JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM AND CONTENT:

John Murphy, Deputy Prosecutor for State of Hawaii