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IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI, Respondent/Plaintiff-Appellee,

vs.

DANIEL TAYLOR, Petitioner/Defendant-Appellant.

NO. SCWC-28904

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. 28904; CR. NO. 07-1-0253)

December 15, 2011

CONCURRING & DISSENTING OPINION BY ACOBA, J.

I respectfully dissent[1] in that the evidence presented to the grand jury was insufficient to indict Petitioner/Defendant-Appellant Daniel Taylor (Petitioner) for theft in the first degree, Hawaiʻi Revised Statutes (HRS) §§ 708-830(1)

[1] I agree with the majority that Petitioner's State prosecution was not barred, and, thus, I do not address Petitioner's argument in that respect.

(1993)[2] and 708-830.5(1)(a) (1993),[3] and the evidence that was presented was seemingly misleading. Accordingly, I would reverse the March 16, 2011 judgment of the Intermediate Court of Appeals (ICA), and the November 14, 2007 findings of fact, conclusions of law, and order denying Petitioner's motion to dismiss the indictment filed by the circuit court of the first circuit (the court), and remand for dismissal of the indictment without prejudice for lack of probable cause.

I.

It is well established that a defendant has a "substantial constitutional right to a fair and impartial grand jury proceeding[,]" State v. Joao, 53 Haw. 226, 228-30, 491 P.2d 1089, 1091-92 (1971), and "due process of law[,] as guaranteed by . . . [a]rticle I, [s]ections 4[4] and 8[5] to the Hawaiʻi

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[2] HRS § 708-830(1) provides that "[a] person commits theft" if the person "[o]btains or exerts unauthorized control over property. A person obtains or exerts unauthorized control over the property of another with intent to deprive the other of the property." (Emphasis added.)

[3] HRS § 708-830.5(1)(a) provides that "[a] person commits the offense of theft in the first degree if the person commits theft . . . [o]f property or services, the value of which exceeds $20,000[.]"

[4] As related in Pulawa, "[t]his section is now identified in the amended Hawaii Constitution as [a]rticle I, [s]ection 5, Due Process and Equal Protection." Pulawa, 62 Haw. at 211 n.4, 614 P.2d at 375 n.4. Article 1, section 5 of the Hawaiʻi Constitution provides that "No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry."

[5] As related in Pulawa, "[t]his section is now identified in the amended Hawaii Constitution as [a]rticle I, [s]ection 10, Indictment, Double Jeopardy, Self-incrimination." Pulawa, 62 Haw. at 211 n.5, 614 P.2d at 375 n.4. Article I section 10 provides in pertinent part that "[n]o 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

Constitution[,]" State v. Pulawa, 62 Haw. 209, 211, 614 P.2d 373, 375 (1980). Indeed, there is a "constitutional necessity for grand jury action prior to prosecution for felonies[.]" State v. Tominaga, 45 Haw. 604, 611, 372 P.2d 356, 360 (1962). See Territory v. Goto, 1923 WL 2749, at *19 (Haw. Terr. 1923) (noting that "[n]o person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury") (internal quotation marks and citation omitted). "[T]he grand jury plays an important, constitutionally mandated role" in "[f]air and effective law enforcement" inasmuch as "its task is to inquire into the [e]xistence of possible criminal conduct and to return only well-founded indictments[.]" Branzburg v. Hayes, 408 U.S. 665, 687-88, 690 (1972); see Costello v. United States, 350 U.S. 359, 362 (1956) (noting that the "basic purpose" of a grand jury is to "provide a fair method for instituting criminal proceedings against persons believed to have committed crimes").

The grand jury must carry out its constitutionally mandated role by returning an indictment only upon finding probable cause for the charge therein. State v. Ganal, 81 Hawaiʻi 358, 367, 917 P.2d 370, 379 (1996). "Probable cause is

writing signed by a legal prosecuting officer under conditions and in accordance with procedures that the legislature may provide[.]" (Emphases added.) Article 1, section 10 was amended in 2002 "to permit prosecutors and the attorney general to initiate felony criminal charges by filing a written information signed by the prosecutor or the attorney general setting forth the charge in accordance with procedures and conditions to be provided by the state legislature." Watland v. Lingle, 104 Hawaiʻi 128, 130, 85 P.3d 1079, 1081 (2004) (quoting S.B. No. 996, H.D. 1, C.D. 1).

established by 'a state of facts as would lead a person of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused.'" State v. Ontai, 84 Hawaiʻi 56, 63, 929 P.2d 69, 76 (1996) (quoting State v. Chung, 75 Haw. 398, 409-10, 862 P.2d 1063, 1070 (1993)); see State v. Freedle, 1 Haw. App. 396, 400, 620 P.2d 740, 743 (1980) (noting that "the facts [must be] such as would lead a [person] of reasonable caution or prudence to believe and conscientiously entertain a strong suspicion of guilt of the accused"). Thus, "[t]o meet the grand jury requirement of article I, section 10, an indictment must be specific enough to ensure that the grand jury had before it all the facts necessary to find probable cause." State v. Israel, 78 Hawaiʻi 66, 72-73, 890 P.2d 303, 309-10 (1995).

Based on the foregoing, a grand jury's weighty role is to determine whether criminal proceedings should begin. Correlatively, the grand jury's role is also to protect an individual from unwarranted or unfounded prosecution, when probable cause is lacking. See State v. Bell, 60 Haw. 241, 242-43, 589 P.2d 517, 519 (1978), overruled on other grounds by State v. Chong, 86 Hawaiʻi 282, 949 P.2d 122 (1997) (noting that "the grand jury's responsibilities include . . . the determination of whether there is probable cause to believe that a crime has been committed[,]" and stating that the grand jury is responsible for "the protection of citizens against unfounded criminal

prosecutions"); see also Chong, 86 Hawaiʻi at 289, 949 P.2d at 129 (stating that the "function of a grand jury [is] to protect against unwarranted prosecution") (quoting Bell, 60 Haw. at 256-57, 589 P.2d at 526 (Kidwell, J., concurring)).

Additionally, as noted, the grand jury must be fair and impartial in performing its duties. See Joao, 53 Haw. at 230, 491 P.2d at 1092 (noting that a defendant has a constitutional right to a fair and impartial grand jury proceeding). If the grand jury is presented with misleading evidence, an individual may be wrongly charged and prosecuted. See State v. Wong, 97 Hawaiʻi 512, 527, 40 P.3d 914, 929 (2002) (determining that dismissal of the indictment with prejudice was necessary when the grand jury was misled by the evidence presented by the prosecution, which prevented it "from operating with fairness and impartiality"). The grand jury cannot be fair or impartial when presented with misleading evidence. In this case it is plain for the reasons stated infra that the evidence was insufficient to find probable cause under article I, section 10, and that the evidence was seemingly misleading, violating Petitioner's constitutional right to a fair and impartial grand jury proceeding.

II.

On June 17, 2004, Petitioner removed 157 artifacts from Kanupa Cave, and subsequently attempted to sell the artifacts.

On March 24, 2006, the United States government charged Petitioner with conspiring, in violation of 18 U.S.C. § 371, to violate 18 U.S.C. § 1170(B), which prohibits the selling, purchasing, or using for profit or transporting for sale or profit any native American cultural item obtained in violation of the Native American Graves Protection and Repatriation Act ("NAGPRA").[6] That charge alleged that "because many of the artifacts contained labels," Petitioner "knew the artifacts had either belonged to the J.S. Emerson Collection or had been cared for by a museum[.]" (Emphasis added.) On that day, March 24, Petitioner pled guilty.

Pursuant to the plea agreement, Petitioner acknowledged that the artifacts "contained labels indicating they belonged to the J.S. Emerson Collection, which was a collection of artifacts taken from Kanupa [C]ave in the late 1800s and sold to

[6] The United States Congress enacted NAGPRA, in pertinent part, to "repatriate Native American human remains, associated funerary objects, sacred objects, and objects of cultural patrimony currently held or controlled by Federal agencies and museums." United State v. Corrow, 119 F.3d 796, 800 (10th Cir. 1997). "NAGPRA . . . provides for an administrative process under which the agency [or museum] will decide to whom remains should be repatriated." Na Iwi O Na Kupuna O Mokapu v. Dalton, 894 F. Supp. 1397, 1405 (D. Haw. 1995). As to remains and associated funerary objects, upon the request of a Native Hawaiian organization, a federally-funded museum must expeditiously repatriate those remains and/or items when, inter alia, the "affiliation" of the deceased individual and/or items to the Native Hawaiian organization has been shown. 43 C.F.R. § 10.10(b). As to unassociated funerary objects, sacred objects, and objects of cultural patrimony, upon the request of a Native Hawaiian organization, a museum must expeditiously repatriate those items when, inter alia, the "cultural affiliation" of the object is established, and the Native Hawaiian organization "presents evidence which, if standing alone before the introduction of evidence to the contrary, would support a finding that the museum . . . does not have a right of possession to the objects[,]" and the museum is unable to present evidence proving that it does have a right of possession. 43 C.F.R. § 10.10(a). Within 90 days of receipt of a written request from a Native Hawaiian Organization seeking repatriation, "[r]epatriation must take place[.]" 43 C.F.R. § 10.10.

museums[.]" In the plea agreement, Petitioner agreed that he "knew the artifacts belonged to the J.S. Emerson Collection[,]" and "[t]o conceal the fact that some of the artifacts belonged to a well-known collection, [Petitioner] removed the J.S. Emerson labels from these artifacts." (Emphases added.) The contents of the plea agreement, although known to Respondent/Plaintiff-Appellee (Respondent or the State), were not divulged to the grand jury except by some general references, as noted infra.

III.

On May 23, 2007, Respondent sought a grand jury indictment against Petitioner for theft in the first degree as indicated supra, based on his removal of the artifacts from the cave approximately three years before. The sole witness before the grand jury was Abraham Kaikana (Kaikana), a special agent with the Office of the Attorney General.

A.

Before the grand jury, Kaikana testified that he was assigned to follow-up on an investigation of "theft of Hawaiian artifacts" from Kanupa Cave. Kaikana was asked if he could "describe" the "significance" of Kanupa Cave with respect to the "Hawaiian artifacts that are a part of the J.S. Emerson [C]ollection[.]" Kaikana explained that Joseph Swift Emerson (hereinafter J.S. Emerson or Emerson), a surveyor, collected artifacts from Kanupa Cave in the 1800s and sold some of the artifacts to the Bishop Museum and Peabody Museum in

Massachusetts. The prosecution asked Kaikana if some of the artifacts were "repatriated from both the Bishop Museum and the Peabody Essex" Museum, to which Kaikana responded, "Yes, they were." Kaikana had reviewed the plea agreement that was filed in federal court, which "discussed some of the facts relating to the theft[.]" When asked to describe the "facts" that were presented in that plea agreement, Kaikana responded that the plea agreement "said" Petitioner entered the cave, where he "saw" 157 artifacts.

Kaikana testified that the artifacts had "Emerson tags o[n] their labels[,]" "indicating that they were from the collection[.]" (Emphasis added.) When asked whether the artifacts containing Emerson labels indicated "that they were from the [Emerson C]ollection[,]" Kaikana responded, "Yes[,]" and explained that Emerson placed labels on the items to document them. (Emphasis added.) When queried if Petitioner "knew that these items belonged to the Emerson [C]ollection[,]" Kaikana responded, "Yes, he did[; h]e saw Emerson tags on the items when he went into the cave." (Emphasis added.)

Kaikana confirmed that Petitioner had acknowledged, in Petitioner's plea agreement, that Petitioner knew the items belonged to the Emerson Collection, and Kaikana confirmed that specific items removed by Petitioner were part of the Emerson Collection. When asked whether items "appeared to have been from the Emerson Collection[,]" he responded in the affirmative. (Emphasis added.) He repeatedly confirmed that the artifacts

"had Emerson labels[,]" making them "part of the Peabody Collection[.]" Some of the items had "Bishop Museum labels." Kaikana explained that two items Petitioner took from the cave were appraised at $500,000 to $750,000; three other items were appraised at $300,000 to $450,000; in total, the value of the items obtained from the cave was estimated to be in the range of $800,000 to $2,000,000.

At the end of his testimony, a grand juror asked whether there was documentation as to when the artifacts "went back into the cave[.]" Kaikana responded,

> Yes, it's documented. Hui Malama was part of that, [the Office of Hawaiian Affairs (OHA)], [the] State, and the Bishop Museum. When it came back from, uh, Peabody, uh, Museum and Bishop Museum, they all got together, brought the thing back to Kanupa and it was repatriated, reburied it, the beginning of 2000 [or] 2003[.]

(Emphasis added.)

B.

Subsequently, the grand jury began deliberations. Three minutes after commencing, it returned, issuing an indictment stating that, in violation of HRS §§ 708-830(1) and 708-830.5(1)(a), on June 17, 2004, Petitioner "obtain[ed] or exert[ed] unauthorized control over the property of another, to wit[,] artifacts from Kanupa Cave, having a value which exceeds [$20,000], with intent to deprive the other of the property, thereby committing the offense of Theft in the First Degree[.]" HRS § 708-800 (1993) defines "[p]roperty of another" in pertinent part as "property which any person, other than the defendant, has

possession of or any other interest in, even though that possession or interest is unlawful[.]" (Emphasis added.)

C.

On July 24, 2007, Petitioner filed a motion to dismiss the indictment (Petitioner's motion), arguing, in pertinent part, that "evidence that the State adduced before the grand jury" was insufficient, as a matter of law, to indicate the artifacts were the "property of another[.]" (Citing HRS § 708-800.) Respondent opposed the motion, arguing that it was "only required to prove that the property belonged to another [other] than [Petitioner]."

On August 30, 2007, the court held a hearing on Petitioner's motion and asked the parties for supplemental briefing on whether HRS chapter 6E indicated that the State owned the artifacts. As requested, on September 12, 2007, Respondent submitted a supplemental memorandum arguing that because Kanupa Cave is located on State property, pursuant to HRS § 6E-7 (1993),[7] the artifacts were "historic property" and, thus, the property of "another," i.e., the State.[8]

On September 13, 2007, Petitioner submitted a supplemental memorandum in support of his motion arguing in pertinent part that the artifacts were not the property of

[7] HRS § 6E-7(a) provides in pertinent part that "[a]ll historic property located on lands or under waters owned or controlled by the State shall be the property of the State."

[8] Respondent maintained that, "for the purpose of this prosecution, the State would argue that the stolen Hawaiian artifacts are the property of another, the State[.]"

another inasmuch as no person had "possession" of, or "any other interest" in, them. (Quoting HRS § 708-800.) According to Petitioner, the State's "interest in the artifacts is solely to 'preserve' them for 'proper disposition' to the lineal or cultural descendants of the people with whom the artifacts were interred[,]" which would not suffice as an "interest" under HRS § 708-800. In Petitioner's view, even if a Native Hawaiian organization had ownership rights in the property under NAGRPA, "the indictment must still be dismissed because the State did not present evidence that such an organization was the owner of the artifacts during the grand jury proceedings." (Quoting HRS § 6E-7.)

On October 5, 2007, the court denied Petitioner's motion, and on November 14, 2007, issued findings of fact, conclusions of law, and an order, concluding that the State had indicated it had a property interest in the artifacts pursuant to HRS § 6E-7:

> **Conclusions of law**
> . . . .
> 15. The indictment in the [S]tate theft cases alleges, inter alia, that [Petitioner] "would obtain or exert unauthorized control over the property of another . . . ." [Petitioner] alleges that the property belongs to no one. [Respondent] alleges that it has a property interest in the property due to [HRS 6E-7] which states[,] "All historic property located on lands or under waters owned or controlled by the State shall be the property of the State."
> 16. The statutory definitions in [HRS] § 708-800, [] of the terms, "control over property", "obtain", "property of another", and "unauthorized control over property" leads to the conclusion, as held in [Nases, 65 Haw. at 218, 649 P.2d at 1139,] that "where the offense is obtaining control over the property of another, proof that the property was the property of another is all that is necessary and the naming of the person owning the property in the indictment is

> surplusage." In other words, the elements, "unauthorized control of the property of another" of theft, make it an offense for a person to exert control over property when he is not authorized by the person who has possession of or any other interest in the same property.

(Emphasis added.) The court did not, however, specifically address under HRS § 708-830(1) who the "another" was in the instant case. It stated only, as discussed infra, the statutory definition of "another" and noted that Respondent identified itself as having a property interest in the artifacts.

IV.

On December 13, 2007, Petitioner filed, and the court granted, a motion for an interlocutory appeal pursuant to HRS §641-17 (Supp. 2007).[9] On appeal to the ICA, Petitioner argued that there was insufficient evidence to support the indictment inasmuch as the evidence presented to the grand jury indicated the artifacts were the "property" of the Bishop Estate and Peabody Essex museums, but "neither museum possessed the artifacts or retained any sort of property interest in them after they were repatriated[.]" (Emphasis in original.) According to Petitioner, "[s]ince the State obtained its indictment on a theory -- the artifacts were property of another because they were part of the Emerson Collection that 'belonged to' the Bishop and Peabody museums -- that is legally impossible, the indictment must be dismissed."

[9] HRS § 641-17 provides in pertinent part that, "[u]pon application made . . . an appeal in a criminal matter may be allowed to a defendant from the circuit court to the intermediate appellate court, . . . from a decision denying a motion to dismiss[.]"

Without responding to Petitioner's argument that the evidence was insufficient to support the indictment, Respondent countered that the indictment was not facially defective[10] and that Petitioner's inability to "claim ownership" in the property was "important for prosecutorial purposes." According to Respondent, the State owned Kanupa Cave, and, thus, had a "legitimate possessory interest in the artifacts pursuant to HRS chapter 6E." (Emphasis added.)

The ICA rejected Petitioner's argument, determining that "specification of the actual owner of the property for purposes of this theft charge is not required and only evidence that the property was not that of [Petitioner] is required." State v. Taylor, No. 28904, 2011 WL 661793, at *9 (App. Feb. 23, 2011) (emphasis added). In the ICA's view, the evidence, which included that Petitioner "acknowledged in his Plea Agreement that he knew the items belonged to the Emerson Collection, he saw Emerson tags on the items, and he removed the Emerson tags[,]" id. (emphasis added), demonstrated that the "artifacts once were possessed by Emerson and the museums, and that the State, Hui Malama, OHA, and Bishop Museum participated in the repatriation and reburial at Kanupa Cave[,]" which was enough to show that Petitioner did not own the property. Id. (emphasis added).

[10] Respondent argued that it was not required "to name the artifacts' actual owner in the charging document[,]" and that the indictment "contain[ed] the necessary charging information[.]"

V.

Petitioner applied for a writ of certiorari, asking in pertinent part whether the ICA erred when it determined that the only evidence necessary was that the property was not that of Petitioner, and that there was sufficient evidence to support the indictment:

> Does the State establish that an item is 'property of another' simply by proving that the defendant did not own it, or must the State prove something more to establish that an item is an article of value that someone other than the defendant possesses or has some other interest in and therefore within the statutory definition of property of another?

VI.

In connection with his question, Petitioner contends, "[t]hat the artifacts were once a part of the Emerson Collection held by the Bishop and Peabody museums did not provide probable cause to find that the artifacts were 'property of another' because, as a matter of law, neither museum retained any interest in the artifacts at the time [P]etitioner took them from Kanupa [C]ave."

Respondent opposes Petitioner's Application,[11] arguing in pertinent part that there "was more than sufficient evidence

[11] Respondent also argues that Petitioner did not assert in his briefs that the indictment should be dismissed because there was insufficient evidence to support probable cause that the artifacts were the property of another, but argued instead that, as a matter of law, the Kanupa Cave artifacts are not property of another. Respondent is wrong. It is plain, as indicated supra, that Petitioner, in addition to arguing that the artifacts were not the property of the State or any Native Hawaiian organization, also argued that, even if they were, that evidence was not presented to the grand jury.

that others had a possessory or other interest in the artifacts" (citing HRS § 708-800), inasmuch as "other entities (namely, the State, Hui Malama, OHA and Bishop Museum) had an interest in the artifacts." (Emphasis added.) According to Respondent's Opposition (Opposition), those four entities have a "clear cut 'other interest' in the artifacts[,]" inasmuch as they "participated in the repatriation and reburial [of the artifacts]." In its Opposition, Respondent contends that because Hui Malama, OHA, and perhaps Bishop Museum have "at least a cultural interest in the artifacts, HRS § 708-800's interest is easily satisfied." (Emphasis added.) Respondent also "clarif[ies]" that it "never asserted that it owns the artifacts[,]" but merely maintained that it has a "legally cognizable interest" in the artifacts "for purposes of this prosecution." (Emphasis in original.)

At oral argument before this court, it was unclear what interest was claimed. Respondent said that the four entities had an interest, but declined to state expressly what interest was held by those entities. Instead, Respondent maintained that the four entities "partly" had a cultural interest in the artifacts, but the interest in the artifacts was more "properly" characterized simply as "an interest" or "any interest." (Emphases added.) On the other hand, Respondent alternatively maintained that an interest "encompasses" a cultural interest.

VII.

A.

To reiterate, based on the evidence presented, the grand jury must have had "probable cause" that Petitioner committed theft in the first degree to return an indictment. Probable cause is established when "a state of facts" would lead a "person of ordinary caution or prudence" to believe and "conscientiously entertain a strong suspicion" of guilt. Ontai, 84 Hawaiʻi at 63, 929 P.2d at 76. "Conscientious" is defined as "meticulous, careful[,] scrupulous[,]" Merriam Webster's Collegiate Dictionary 245 (10th ed. 1993), and "Strong" is defined as, inter alia, "urgent, compelling[, i.e.,] grounds for believing him guilty[,]" Webster's Third New Int'l Dictionary 2265 (1993). Obviously, as the majority states, evidence "'support[ing] an indictment need not be sufficient to support a conviction[.]'" Majority opinion at 33-34 (quoting Ganal, 81 Hawaiʻi at 367, 917 P.2d at 379). However, under our law as ordinarily understood, the State must still present "a state of facts" that would lead a cautious person to meticulously, carefully, or scrupulously entertain an urgent or compelling suspicion that Petitioner committed theft in the first degree.

B.

In order for the grand jury to have meticulously, carefully, or scrupulously entertained an urgent or compelling suspicion that Petitioner committed theft in the first degree,

the State must have produced evidence of each essential element of the offense to the grand jury. Ontai, 84 Hawaiʻi at 46, 929 P.2d at 77. There are three material elements for theft in the first degree, that the defendant intended to "(1) obtain or exert control over the property of another; (2) deprive the other of his or her property; and (3) deprive another of property that exceeds $20,000 in value." State v. Duncan, 101 Hawaiʻi 269, 279, 67 P.3d 768, 778 (2003) (citation omitted).

In the context of the instant case, the dispute is whether the State produced evidence to the grand jury of the first element, that Petitioner obtained or exerted control over the property of another at the time he took the artifacts out of the cave. To determine whether the State submitted evidence "that the property was the property of another" at that point, Nases, 65 Haw. at 218, 649 P.2d at 1139, this court must construe and apply the definition of "property of another" to ascertain whether any evidence submitted to the grand jury supported this element. As indicated before, "property of another" is defined in pertinent part as "property which any person, other than the defendant, has possession of or any other interest in[.]" HRS § 708-800 (emphasis added).

1.

Possession has been described in this jurisdiction as follows:

> "The law, in general, recognizes two kinds of possession: actual possession and constructive possession. A person who

> knowingly has direct physical control over a thing at a given time is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion over a thing, either directly or through another person or persons, is then in constructive possession of it."

State v. Jenkins 93 Hawaiʻi 87, 110, 997 P.2d 13, 36 (2000) (emphases added) (quoting State v. Mundell, 8 Haw. App. 610, 617, 822 P.2d 23, 27 (1991) (citing Black's Law Dictionary 1163 (6th ed. 1990))); see Hawaiʻi Criminal Jury Instruction No. 6.06 (explaining actual and constructive possession, and noting that "[i]f two or more persons share actual or constructive possession of a thing, possession is joint"). As to "any other interest," HRS § 708-800 indicates that such interest must be a "property" interest. (Emphasis added.)

First, the construction of the words "any other interest" is subject to the rule of ejusdem generis. "The doctrine of ejusdem generis states that where general words follow specific words in a statute, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." Singleton v. Liquor Comm'n, 111 Hawaiʻi 234, 243 n.14, 140 P.3d 1014, 1023 n.14 (2006). "[A]ny other interest" is a general phrase following the specific term "property[.]" Accordingly, the general phrase "any other interest" must be construed "to embrace only objects similar in nature[,]" to property, the "object[] enumerated by the preceding specific words[.]" Id. "[A]ny other interest[,]" then, must relate to a property interest. Thus,

the person must either have possession of, or any other property interest in, the property.

Second, reference to the Model Penal Code, which, according to the majority, was a basis for the definition of property of another found in HRS § 708-800, majority opinion at 30 n.29, indicates that the interest must relate to a property interest. The Model Penal Code section 223.0(7) defines "property of another" to include "any property in which any person other than the defendant has an interest which the actor is not entitled to infringe[.]" (Emphasis added.) The Model Penal Code and Commentaries § 223.2 at 168 (Official Draft and Revised Comments 1980) (hereinafter MPC Commentary) explains that the foregoing definition includes "any ownership or possessory interest of another." The MPC Commentary confirms that the purported "interest" must be a property interest, inasmuch as it explains that the type of relationship between the "thief and the owner of property" is not material to determine whether the thief took property of another; contrastingly, it is material that the thief "sets out to appropriate a property interest" and the thief takes control over an "interest in property beyond any consent or authority given." Id. (emphases added).

Further elucidating that the interest must be a property interest, the MPC Commentary states that a person who has a property interest in property may be convicted of theft if

that person unlawfully takes the property from another person who also has a property interest:

> There are some circumstances when a person ordinarily considered the owner of property may nevertheless be convicted of theft[.] This result follows from the provision in the definition of "property of another" that includes an interest in property held by another "regardless of the fact that the actor also has an interest in the property." Thus, a partner may be convicted of theft of partnership property. Parties to joint bank accounts also may be convicted of stealing from each other by unauthorized withdrawals from the account. At common law, and still in some states, convictions were prevented by the conception that each joint owner had title to the whole of jointly owned property, so that one of the parties could not misappropriate what already belonged to him. Whatever the merits of such notions in the civil law, it is clear that they have no relevance to the efforts of the criminal law to deter impairment of the economic interests of other people. There was modern legislation in effect when the Model Penal Code was drafted that expanded the law of theft to reach such situations. Moreover, a number of states have enacted or proposed a broad notion of "property of another" since the promulgation of the Model Code.

Id. at 169-70 (footnotes omitted) (emphases added). Thus, inasmuch as it is "material" that the alleged thief takes control over an "interest in property[,]" and that an "owner" of property (i.e., someone who has a property interest) can be convicted of theft when he steals from another person who "may be considered the owner" (i.e., another person who has a property interest in property), the MPC Commentary confirms that the "interest" must be a property interest.

A construction of "any other interest" as anything other than a property interest would violate due process. "[A] basic principle of due process is that an enactment is void for vagueness if its prohibitions are not clearly defined[,]" State v. Manzo, 58 Haw. 440, 454, 573 P.2d 945, 954 (1977), and a criminal statute is required to be sufficiently definite as to

give notice of the type of conduct prohibited so that a citizen may know how to avoid incurring its legal sanctions, State v. Petrie, 65 Haw. 174, 649 P.2d 381 (1982). A statute that does not give notice to a person of what conduct is prohibited is unduly vague and violates due process. If a person can be charged with theft when the person "obtain[s] or exert[s] control over[,]" 101 Hawaiʻi at 279, 67 P.3d at 778, property which a person has some "interest" in, irrespective of the type of interest, as Respondent has at various times claimed, then it is unclear what conduct is prohibited.

2.

Based on the foregoing, and, pursuant to the definition of "property of another," Respondent had to present some evidence that a person had direct physical control over the artifacts (actual possession), or knowingly had both the power and the intention to exercise dominion over the artifacts (constructive possession), at the time Petitioner took the items from Kanupa Cave or, at the time, had a property interest in the artifacts such as to allow a cautious person to meticulously, carefully, or scrupulously entertain an urgent or compelling belief that the artifacts were the property of another. In the instant case, it is plain that there was no evidence presented to the grand jury that would enable a cautious person to entertain such a suspicion.

VIII.

A.

There was no evidence that any person had direct physical control over, or knowingly had the power and intention to exercise dominion over, the artifacts.[12] The grand jury was told that the artifacts were "reburied" in Kanupa Cave in 2000 or 2003. Kanupa Cave was inpenetrable because there was a "rock" "blocking the cave entrance[.]" However, there was no evidence presented to the grand jury that from the time of reburial, when the items were allegedly restored to the original site, to the time they were removed, the artifacts were actually or constructively possessed by another.

B.

Respondent also did not present evidence that any person had a property interest in the artifacts. Rather, Respondent relies on Kaikana's answer to a grand juror's question to the effect that Hui Malama, OHA, Bishop Museum, and the State reburied and repatriated the artifacts, provided the grand jury with evidence that one or more of those four entities had an "other interest" in the artifacts and perhaps a "cultural" interest. But some "interest" or a "cultural" interest is not sufficient to satisfy the element of property of another inasmuch

[12] Respondent appears to agree, inasmuch as at oral argument before this court, Respondent did not "concede" that no entity possessed the artifacts, but declined to answer whether there was any evidence of constructive possession presented to the grand jury.

as it does not indicate that some person had a property interest in the artifacts.[13]

Moreover, the mere references to repatriation and reburial in answer to the grand juror's question, and the State's reference to repatriation when asking whether the artifacts were "eventually repatriated from both the Bishop Museum and the Peabody Essex[Museum,]" would not indicate to any conscientious juror that repatriation and reburial vested some entity with any property interest in the artifacts. "[R]epatriate" is defined as "to restore or return to the country of origin, allegiance, or citizenship[,]" and "burial" is defined as "the act or process of burying[.]" Merriam Webster's Collegiate Dictionary at 153, 991 (10th ed. 1993). Taking these words in their ordinary meaning, the mere fact that the artifacts were buried and "returne[d]" to their state of "origin," would not suggest, to a conscientious grand juror, that any person had a property interest in those artifacts at the time they were taken by Petitioner. The terms repatriation and reburial have no material meaning in this case outside of NAGPRA. Obviously Respondent did not present its case

[13] The majority acknowledges that the State presented no authority to support the proposition that a "cultural interest" would qualify as an "other interest" under HRS § 708-800. Majority opinion at 30 n.29. Nevertheless, the majority asserts that it "express[es] no opinion with regard to [the] merits" of the State's argument since it concludes "that someone other than [Petitioner] had a possessory interest in the artifacts[.]" Id. However, the State specifically advances Hui Malama, OHA, Bishop Museum, and/or the State as being the entity or entities with an interest in the artifacts. Inasmuch as no other person or entity aside from Emerson, the museums, and the aforesaid entities is mentioned, none of whom the majority identifies as having an interest or was shown to the grand jury to have had an interest in the artifacts at the time they were taken, the record is simply devoid of the existence of that "someone" who allegedly had a "possessory interest." Id.

to the grand jury based on facts establishing an interest derived from NAGPRA, inasmuch as the evidence presented to the grand jury focused on ownership by virtue of the Emerson Collection and by the museums.

Pursuant to NAGPRA, when a Native Hawaiian organization requests the return of "sacred objects or objects of cultural patrimony" and presents evidence that the "museum [currently housing such objects does] not have the right of possession" to those objects, such museum must repatriate or return such objects to the Native Hawaiian organization unless the museum can prove that it has a "right of possession"[14] to the objects.[15] 25 U.S.C. § 3005(c); 43 C.F.R. 10.10(a). "This provision of NAGPRA means that if a museum has . . . ceremonial or sacred objects[,] the museum does not have valid title to them, and they must be repatriated." John Alan Cohan, An Examination of Archeological Ethics and the Repatriation Movement Respecting Cultural

[14] Under NAGPRA, a right of possession is defined in pertinent part as "possession obtained with the voluntary consent of an individual or group that had authority of alienation. The original acquisition of a . . . sacred object or object of cultural patrimony from [a] . . . Native Hawaiian organization with the voluntary consent of an individual or group with authority to alienate such object is deemed to give right of possession of that object[.]" 25 U.S.C. § 3001. None of the elements fitting the NAGPRA definition of "possession" was presented to the grand jury.

[15] Kaikana testified that he reviewed the plea agreement and that the artifacts had been repatriated from both the Bishop Museum and Peabody Essex Museum. Although the contents of the plea agreement were not presented to the grand jury, the plea agreement indicated that Petitioner admitted to "transport[ing] for sale and profit" and consipring with other "to sell, use for profit, and transport for sale and profit" "cultural items obtained in violation of [NAGPRA]" "that had been reptriated and re-buried at Kanupa Cave." As noted before, the term "repatriation" has no relevant meaning outside the context of NAGPRA, and the actual facts of this case as one originating in NAGPRA was never disclosed to the grand jurors.

Property, 27-SPG Environs Envtl. L. & Pol'y J. 349, 419 (2004). Thus, the "repatriation" of such items to the appropriate organization is only legally sanctioned under NAGPRA. 25 U.S.C. § 3005(c); 43 C.F.R. 10.10(a). Consequently, under NAGPRA, when an item is repatriated to a Native Hawaiian organization, at the time of repatriation, that organization may have actual possession of that item and, also, "a right of possession" of that item. See Francis P. McManamon & Larry v. Nordby, Implementing the Native American Graves Protection and Repatriation Act, 24 Ariz. St. L.J. 217, 219 (1992) ("NAGPRA . . . affirms the right of such individuals or groups to decide disposition or take possession of such items.") (Emphasis added.) When items are repatriated to more than one Native Hawaiian organization, at the time of repatriation, those entities could have "joint" constructive possession of those items. Cf. Castro Romero v. Becken, 256 F.3d 349, 354 (5th Cir. 2001) ("NAGPRA establishes rights of tribes and lineal descendants to obtain repatriation of human remains and cultural items from federal agencies and museums[.]"). NAGPRA thus suggests a Native Hawaiian organization, at the time of repatriation, could have a property interest and possession of artifacts that were repatriated to it.

NAGPRA, however, does not direct the Native Hawaiian organization to do anything with the items upon repatriation. In other words, NAGPRA does not indicate that the Native Hawaiian

organization must rebury, keep, enshrine, memorialize, or possess the artifacts. It follows, then, that a Native Hawaiian organization that has possession of, and a property interest in, an artifact due to repatriation, may lose possession of the artifacts and property interest prior to the time they were taken.

However, no mention of NAGPRA or the facts constituting a NAGPRA claim, or continuing possession by a Native Hawaiian organization[16] were presented to the grand jury.[17] Hence, whether or not any property interest under the statute existed at the time Petitioner took the artifacts from the cave would not be known to, or could be considered by, the grand jury in the absence of facts presented to it establishing a NAGPRA-related property interest. Indeed, without the presentation of facts supporting a property interest in a Native Hawaiian organization, a grand juror acting meticulously, carefully, or scrupulously could not entertain an urgent or compelling belief that a Native Hawaiian organization had any property interest in the artifacts

[16] Kaikana's reference to Hui Malama and OHA would not indicate to the grand jury that those organizations were Native Hawaiian organizations as described in NAGPRA. Nor would any conscientious juror be able to infer that Hui Malama or OHA was a Hawaiian organization as described in NAGPRA. Respondent conceded as much during oral argument, stating that the evidence that Hui Malama and OHA are statutorily defined by NAGPRA as Native Hawaiian organizations was not in the grand jury transcript.

[17] NAGPRA also provides for the repatriation of human remains, associated funerary objects, and unassociated funerary objects in addition to sacred objects and objects of cultural patrimony. See 25 U.S.C. § 3005(a); 43 C.F.R. § 10.10. The foregoing discussion illustrates that a Native Hawaiian Organization conceivably could have had a possessory or property interest in the artifacts at the time they were taken by Petitioner, but that no such evidence was presented to the grand jury in this case. As noted supra, NAGPRA itself does not require retention of a possessory interest after repatriation.

that were repatriated or reburied.[18] Based on the foregoing, there was no evidence presented to the grand jury that would enable a cautious person to entertain a "strong suspicion" that Petitioner obtained or exerted control over artifacts that another person had direct physical control over, or knowingly had the power and intention to exercise dominion over, or that another person had a property interest in, the artifacts.

IX.

Respondent's switching of theories at every stage of litigation only underscores the infirmity of the indictment. It is plain that throughout the proceedings Respondent has been in search of a theory that would support the indictment. Its theories have been inconsistent, thereby blowing "hot and cold" throughout this case. See Roxas v. Marcos, 89 Hawaiʻi 91, 124, 969 P.2d 1209, 1242 (1998) (noting that parties cannot play "fast and loose with the court or blow[] hot and cold during the course of litigation.") (internal quotation marks and citation omitted); cf. State v. Rodrigues, 67 Haw. 496, 498, 692 P.2d 1156, 1158 (1985) (noting that, because the prosecution offered only one theory, this court would not review new, alternative theories on appeal).

[18] The majority asserts that the State was not required to specify which entity or entities had a possessory or other interest in the artifacts. Majority opinion at 35. However, as elucidated by the foregoing discussion, there was no evidence presented to the grand jury suggesting that any entity retained such an interest in the artifacts.

A.

Respondent's first theory was that Petitioner did not own the artifacts and that the property belonged to another. However, Respondent failed to present evidence to the grand jury that the property belonged to another, inasmuch as it did not show that the artifacts were in the possession of any person, and did not show that any person had any property interest in the artifacts at the time Petitioner took them. See discussion supra. Indeed, insofar as Respondent attempted to do so, its presentation was misleading, as discussed infra.

Respondent's subsequent argument to the court was that because Kanupa Cave is located on State property, pursuant to HRS § 6E-7 the artifacts were "historic property" and, thus, the property of the State. However, there was no evidence presented to the grand jury that Kanupa Cave was on State land, as Respondent conceded in oral argument, or that the State had any "historic property" interest in the artifacts. Thus, Respondent's "HRS § 6E-7" argument, as indicated supra, cannot sustain the indictment.

B.

On appeal to the ICA, perhaps realizing that there was insufficient evidence that the artifacts were the property of another, Respondent changed its theory and argued for the first time that Petitioner could not "claim ownership in the stolen property[,]" which is the only issue "important for prosecutorial

purposes[.]" (Citing Nases, 65 Haw. at 218, 649 P.2d at 1139-40.)[19] But as the majority notes, the ICA was wrong in stating that evidence that the property was not that of Petitioner was enough to support the indictment. Majority opinion at 35. "Property" is defined in HRS § 708-800 in pertinent part as "any money, personal property, real property, thing in action, evidence of debt or contract, or article of value of any kind." An item may not be the property of the defendant, but it may also not be the "property" of any person, because someone does not possess it or have any property interest in it at the time of the taking. Along these lines, the ICA erred in determining that the fact the artifacts "once were possessed" by Emerson and the Museums was sufficient to establish that they were the property

[19] It bears mentioning that the facts and holding of Nases have no bearing on the instant case. There, the defendant went into "Kalakaua Kleaners[,]" of which Setsuko Yokoyama was the manager and owned its stock. 65 Haw. at 218, 649 P.2d at 1139. The defendant took a calculator that was on the counter, and was subsequently convicted of theft in the third degree, a misdemeanor because he stole the calculator. Id. at 217, 649 P.2d at 1139. In the charge, the calculator was alleged to be the property of "Setsuko Yokoyama doing business as Kalakaua Kleaners," id. at 217-18 649 P.2d at 1139, whereas the calculator was proven to be the property of Kalakaua Kleaners. The defendant argued that there was a fatal variance in the charge and the proof. Id. This court rejected that argument, noting that it was "undisputed" that the calculator "was the property of another[,]" and determining that "there is no fatal variance between the charge and the proof." Id.

Thus, all that can be extracted from Nases is that, when there are two entities that could have legally owned the calculator, and the two entities were similar, that one entity was alleged in the charge does not render fatal the fact that it was determined the calculator was the property of the other similar entity. Thus, presumably, if the instant case went to trial and it was proven that the artifacts belonged to the State, Nases may be relied upon for the argument that there is no "fatal" variance between the charging document (insofar as it just says that Petitioner took property from another) and the evidence presented at trial. However, it has no bearing on the sufficiency of the evidence presented to the grand jury to return an indictment in the first place and, thus, is irrelevant to the instant case.

of another. Taylor, 2011 WL 661793, at *9 (emphasis added). The items must be currently "possessed" by another person at the time of the deprivation in order to charge Petitioner with theft. Thus, Respondent's third theory was legally wrong.

C.

On certiorari, Respondent argues to this court, for the first time in its Opposition, that the Hawaiian entities that were involved in repatriation have a "cultural" interest in the artifacts. To reiterate, no evidence of a "cultural" interest in any particular Hawaiian entity was presented to the grand jury within the framework of NAGPRA because that was not Respondent's theory at that time. Hence, this theory also cannot validate the indictment.

"[T]he[] personal beliefs," Dalton, 894 F. Supp. at 1409 n.9, of Native Hawaiian organizations such as Hui Malama, which may have had cultural ties to the artifacts, must be respected. However, Respondent failed to present to the grand jury a cultural connection within the purview of a property interest as defined in HRS § 708-800. A cursory review of the federal register indicates that some of the items at issue were noticed to be repatriated. See Notice of Intent to Repatriate Cultural Items in the Possession of the Peabody Essex Museum, Salem, MA, 66 Fed. Reg. 63, 17572-17573 (Apr. 2, 2001) (noting that unassociated funerary objects found by J.S. Emerson in

Kanupa Cave were to be repatriated to Hui Malama I Na Kupuna O Hawaiʻi Nei, Ka Lahui Hawaiʻi, and OHA).[20]

D.

Further, at oral argument Respondent declined to identify the nature of the "interest" upon which Respondent relied. Respondent also retreated from its chapter 6E theory, saying that the State does not "depend" on HRS chapter 6E for purposes of sustaining the indictment, but merely cites it for the purpose of giving the State an interest that can be proven at trial, thus contradicting what it had represented to the court and to this court,[21] and more importantly to the grand jury.

To reiterate, Respondent stated in its supplemental memorandum to the court that "Kanupa Cave, where the artifacts comprising the J. Emerson [C]ollection that were re-interned, is located on State property. Therefore, pursuant to [HRS] section

[20] I take judicial notice of the following newspaper article indicating repatriation occurred. See Hawaiʻi Rules of Evidence (HRE) Rule 201(b) (indicating that a judicially noticed fact must be "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"); see also Allen v. City & County of Honolulu, 58 Haw. 432, 438, 571 P.2d 328, 331 (1977) (taking judicial notice of the facts "from the newspapers at the time"). In the instant case, the following fact is "capable of accurate and ready determination" if one reviews the federal register. See Sally Agpa, Place of Unrest, Artifacts found on the black market hail from this disturbed crypt, Honolulu Star Bulletin, Aug. 26, 2004 ("According to the Federal Register[,]. . . the items from the Bishop Museum, which still had their identification stickers, were repatriated to three native Hawaiian organizations in 1997: Hui Malama I Na Kupuna O Hawaii Nei ("group caring for ancestors of Hawaii"), OHA and the Hawaii Island Burial Council[,]" and "[t]he items from the Peabody Essex [Museum], which also had identification stickers, were repatriated to Hui Malama, OHA and Ka Lahui Hawaii in the spring of 2003, according to the Federal Register.").

[21] As noted before, Respondent argued in its Opposition that "the State has a legally cognizable interest in the artifacts, pursuant to HRS chapter 6E, for purposes of this prosecution[,]" (emphasis in original), and the State had an "'other interest' for the . . . reason it owns the land upon which the artifacts were placed."

6E-7, [all] objects[,] . . . including the re-interned Hawaiian artifacts, are 'historic property.'" (Emphases added.) In that memorandum, Respondent "argue[d] that the . . . artifacts are the property of another, the State[.]" (Emphasis added.) Thus, it is plain that Respondent had argued that the artifacts were "property" of the State, in conflict with its subsequent position. Respondent's effort to find a theory to support the indictment confirms what is manifest: that there was no evidence presented to the grand jury that the artifacts were the property of another at the time of the taking, as necessary to establish probable cause that theft was committed by Petitioner.

X.

A second independent ground warranting dismissal of the indictment is that Kaikana's testimony was misleading in indicating that the property belonged to the Emerson Collection or the Museums.[22]

A.

The evidence that was presented would lead the grand jury to believe that the artifacts were the "property" of the Emerson Collection, the Peabody Essex Museum, or the Bishop

[22] Implicit in Petitioner's argument that the evidence presented to the grand jury could not sustain the indictment is the assertion that the evidence presented was misleading. If the evidence, which suggested that the museums or the Emerson Collection had the artifacts, could not support the indictment because it was impossible for those entities to have had any possession of or property interest in those artifacts, as Petitioner contends, then, necessarily, the evidence suggesting as such was misleading (Petitioner argued that it was "particularly egregious" that "the State pitched a legally impossible theory to the grand jury to indict [Petitioner.]") (Emphasis added.)

Museum at the time Petitioner took them from the cave. The grand jury was told, repeatedly, that artifacts belonged to[23] the Emerson Collection that were partly sold to[24] the Peabody Essex Museum and the Bishop Museum. The grand jury was informed that Petitioner acknowledged that the items belonged to the Emerson Collection,[25] Petitioner knew that the items were part of that collection,[26] the artifacts were indeed part of the Emerson Collection,[27] from the Peabody Museum, and that the artifacts contained Emerson labels identifying them as being part of the Peabody collection, and the Bishop Museum and that Petitioner removed the labels to sell them.

Based on Respondent's presentation, a grand juror would be left to believe that, after the repatriation and burial, followed by the removal of Emerson tags by Petitioner from the artifacts, the Emerson Collection, the Bishop Museum, or the Peabody Essex Museum retained some interest in the property, not that the artifacts were the property of another entity. Nothing

[23] Kaikana testified that Emerson "put Emerson tags" on the items he "collected[,]" answered "Yes[]" when asked if Petitioner knew the items belonged to the Emerson Collection, and answered [y]es[]" when asked if items "were a part of the Emerson Collection[.]"

[24] Kaikana testified that Emerson sold the items he took from Kanupa Cave to the "Bishop Museum and Peabody Museum in Massachussetes [sic]."

[25] Kaikana answered "Yes[]" when asked if Petitioner had acknowledged that he knew the items belonged to the Emerson Collection.

[26] See supra note 25.

[27] Kaikana answered "Yes[]" when asked if the artifacts were "from the [Emerson C]ollection[,]" and confirmed that the items were "[f]rom the Peabody Museum[,]" when asked if the items were a part of the Emerson Collection, and answered yes when asked if the items were "part of the Emerson Collection from the Peabody Museum[.]"

was said of NAGPRA and the involvement of the State, Hui Malama, OHA or the Bishop Museum because of NAGPRA. Thus, it would be pure speculation, not strong suspicion by a conscientious grand juror, to infer that the State, Hui Malama, OHA, or the Bishop Museum retained a possessory or other property interest in the artifacts inasmuch as there are no facts at all in the record that such is the case.

Instead, the evidence presented to the grand jury was by way of Kaikana's testimony which essentially mirrored the contents of the federal court plea agreement supporting Respondent's conviction for a federal offense with elements different from that of HRS §§ 708-830(1) and 708-830.5(1)(a). Plainly, the defect in Respondent's case is that its presentation to the grand jury followed along the lines of the plea agreement which rested on the artifacts having been Native Hawaiian cultural items, Petitioner's knowledge that they were such cultural items, and his sale of those cultural items--matters, not sufficient to establish that anyone retained a possessory or ownership interest in the artifacts at the time they were taken, as required under HRS §§ 708-830(1) and 708-830.5(1)(a). Thus, although Respondent relied on the contents of the federal plea agreement, there was insufficient evidence therein to satisfy the elements of HRS §§ 708-830(1) and 708-830.5(1)(a), the state theft statute. The plea agreement was obviously intended to

support the federal offense and that offense did not require a showing that the artifacts were the property of another.

B.

This court has affirmed dismissal of an indictment based on misleading evidence. See State v. Wong, 97 Hawaiʻi 512, 514, 516, 40 P.3d 914, 916, 918 (2002). In Wong, a grand jury returned an indictment charging Henry Peters (Peters), a former Bishop Estate trustee, with theft and criminal conspiracy, and Jeffrey Stone (Stone) with, inter alia, criminal conspiracy and accomplice to theft. Id. at 516, 40 P.3d at 918. It was alleged that Stone secured the sale of Peters' residential apartment for $192,500 more than its alleged value. Id. The indictment stated, among other things, that Peters was induced to approve Stone's acquisition of a construction project on Bishop Estate land and Stone convinced another person to pay $192,500 more for Peters' apartment than it was worth. Id. at 514, 40 P.3d at 916. It was alleged that $192,500 should belong to Bishop Estate, and Peters' retention of that value was a theft from Bishop Estate.

The State called Nathan Aipa, then chief operating officer and formerly General Counsel for the Estate, to explain whether "Peters knew that any benefit he received from a transaction in which the trust was also involved needed to be returned to the trust[,]" and asked him about an unrelated matter, the "McKenzie Methane investment," for which legal advice was sought and conveyed to the Bishop Estate trustees. Id. at

516, 40 P.3d at 918. Regarding the McKenzie Methane investment, Aipa testified that the trustees "were advised about the ethical propriety of investing in projects related to [Bishop] Estate's investments in McKenzie Methane; that it might be a breach of trust for a trustee to invest in an investment related to the Estate's investment; and that Peters had invested in McKenzie Methane." Id. at 523, 40 P.3d at 925.

According to this court, "[t]he limited testimony the State elicited from Aipa left the impression that Peters' investment in the McKenzie Methane matter was a breach of trust[,]" and "wrongfully implied that Peters had breached his fiduciary responsibility then and was in breach of trust again in the matter before the grand jury." Id. In this court's view, "[l]eaving the grand jury with such a misleading inference 'undermined the fundamental fairness and integrity of the grand jury process' and prevented the grand jury 'from the exercise of fairness and impartiality' with regard to Peters that due process demands." Id. (quoting Chong, 86 Hawaiʻi at 284, 949 P.2d at 124 (1997) (emphasis added)). This court concluded that "[t]he State's presentation of Aipa's testimony clearly induced an action other than that which grand jurors in uninfluenced judgment would have deemed warranted on evidence fairly presented to them." Id. at 523, 40 P.3d at 925 (emphasis added).

Similarly, Kaikana's testimony that the artifacts "belonged" to, or were a "part" of, the Emerson Collection, or

that the items were a "part" of the Emerson Collection from the Peabody Museum, or the Bishop Museum, "left the impression" that the artifacts belonged to one of those entities, "wrongfully impl[ying,]" id., that those entities still had possession of or a property interest in the artifacts at the time the artifacts were taken. "Leaving the grand jury with such a misleading inference" "undermined the fundamental fairness and integrity of the grand jury process" inasmuch as the grand jury was improperly led to believe that the artifacts were the "property" of one of the entities. Id. (internal quotation marks and citation omitted).

Putting aside improper evidence, remaining evidence may be sufficient to support an indictment. For example, in State v. Scotland, 58 Haw. 474, 476, 572 P.2d 497, 498 (1977), this court reversed the circuit court's quashing of the indictment for the offense of promoting a harmful drug. The circuit court had determined a police detective's statement to the grand jury that he knew the defendant "had been pushing drugs" should result in dismissal of the indictment. Id. at 478, 572 P.2d at 498.

However, this court noted that "where sufficient legal and competent evidence is presented to a grand jury, the reception of illegal or incompetent evidence would not authorize the court to set aside an indictment if the remaining legal evidence, considered as a whole, is sufficient to warrant the indictment." Id. at 476, 572 P.2d at 498 (emphasis added)). It

was determined that there was sufficient legal and competent evidence, aside from the statement, to return an indictment. This court relied on the fact that an undercover police officer testified to the grand jury that the defendant attempted to sell cocaine to him, and actually sold hashish to him, and that the defendant told him that if the police officer was interested in purchasing more, the defendant would be in contact with him. Id. at 477, 572 P.2d at 499.[28]

In the instant case, putting aside Kaikana's misleading testimony, there was no "remaining legal evidence[,]" Wong, 58 Haw. at 476, 572 P.2d at 498, to indicate that the artifacts were the property of another. Although Kaikana answered that Hui Malama, OHA, the State, and the Bishop Museum repatriated and reburied the artifacts, that testimony would not suggest that the artifacts were in the possession of another or that those entities had any property interest in the artifacts at the time

[28] Similarly, in Freedle, 1 Haw. App. at 402, 620 P.2d at 741, the ICA determined that there was sufficient evidence to support an indictment charging manslaughter. There, the decedent was issued parking tickets, and when the decedent protested, an altercation developed between the decedent and the defendant, Officer Freedle, during the course of which the decedent was killed. Id. At the grand jury proceeding, there was testimony that Officer Freedle pushed the decedent up against the police car, reached for his gun, and the gun fired. Id. at 397, 620 P.2d at 741. This court determined that there was sufficient evidence to support an indictment of manslaughter, reasoning, "It flies in the face of reason to say that the grand jurors, as men of ordinary caution, could not have believed and conscientiously entertained a strong suspicion that" the defendant "in drawing his firearm under these circumstances, consciously disregarded a substantial and unjustifiable risk that his conduct would cause the gun to discharge and thus, cause the death of the decedent." Id. In the instant case, "[i]t flies in the face of reason to say that the grand jurors, as [persons] of ordinary caution[,]" id., would believe that the artifacts were the property of another at the time they were taken based on the sole fact that some entities convened and reburied the artifacts.

of the taking. To reiterate, without knowledge of NAGPRA and/or the presentation of facts establishing a NAGPRA property interest, a cautious conscientious juror would have no way to suspect that the artifacts were the property of another person when they were taken in 2004. Here, it is evident that Petitioner was unfairly prejudiced, inasmuch as, without the misleading testimony, there was no evidence to suggest that the artifacts were the property of another. See Scotland, 58 Haw. at 477, 572 P.2d at 499 (noting that a specific showing of prejudice is necessary to make a court's dismissal of the indictment erroneous).

XI.

Based on the foregoing, I would reverse the ICA's judgment, vacate the court's order, and remand for dismissal of the indictment without prejudice.

XII.

In the majority's view, (1) "multiple parties could have a concurrent or shared property interest" in the artifacts, majority opinion at 30 n.29, (2) the "value of the items and the manner and circumstances in which they were reburied were sufficient to create a 'strong suspicion' that someone other than [Petitioner] retained a right of possession in the artifacts and that the items were accordingly the 'property of another' when [Petitioner] took them[,]" id. at 33; and (3) it can be inferred

"that the artifacts had been purposely secreted in the cave and not simply discarded[,]" id. at 32.

A.

First, even if HRS § 708-800 contemplates that multiple parties have a "shared property interest" or shared possessory interest,[29] majority opinion at 30 n.29, the majority fails to explain what evidence was presented to the grand jury indicating that "multiple parties" had any "shared property interest[,]" id. (emphasis added), or a shared possessory interest in the artifacts that were taken from Kanupa Cave.

In the instant case, in presenting its case to the grand jury, the State did not have any theory of ownership. The majority in fact acknowledges this. See majority opinion at 29 n.28 ("[T]he State . . . did not explicitly identify any specific theory of ownership during its presentation to the grand jury.") The majority mentions several entities throughout its opinion, implicitly suggesting that at least one or more of them could have had an interest in the artifacts. However, the only evidence presented to the grand jury was that the artifacts were reburied and were said to have belonged to the Emerson Collection and Bishop Estate and Peabody Essex Museums. See discussion supra. As explained before, and as acknowledged by the majority,

[29] I read the majority's reference to a "shared property interest" to mean only that possession of an item can be jointly held, a proposition established in this jurisdiction. See discussion supra; see also Hawaiʻi Criminal Jury Instruction No. 6.06 (noting that possession of an item can be jointly held). Similarly, I believe a shared possessory interest means only that joint constructive possession of an item is possible. See id.

majority opinion at 28 (noting that only the individual or organization to whom the artifacts were repatriated would have any right of possession), the Emerson Collection, Peabody Essex Museum, and Bishop Museum did not have any "property interest" in the artifacts, or possession of the artifacts. Thus, as stated, the evidence was misleading.

The majority argues that Kaikana testified that J.S. Emerson took the artifacts out of the cave, sold them to the Bishop Museum and Peabody Essex Museum, and in turn, the artifacts were repatriated from the museums and reburied.[30] Majority opinion at 31-33. Thus, the majority asserts that the evidence did not leave the impression that the artifacts continued to belong to either museum. Id. at 33 n.32. The majority additionally points out that artifacts bore Emerson tags or labels, Petitioner knew the artifacts belonged to the Emerson Collection, and that Petitioner took the Emerson tags off the artifacts when he attempted to sell them, see majority opinion at 31-33, to support its conclusion that there was sufficient evidence that "someone" had a possessory or ownership interest in the artifacts. Majority opinion at 33.

But, under the grand jury testimony, if neither J.S. Emerson nor the museums had an interest, then who had an interest? The grand jury returned an indictment stating that

[30] The grand jury was told that J.S. Emerson took artifacts out of Kanupa Cave and sold not all of but "part of" or "some of" those artifacts to the Bishop Museum and the Peabody Essex Museum.

Petitioner "obtain[ed] or exert[ed] unauthorized control over the property of another," thus indicating that it believed someone had an ownership or property interest in the artifacts.[31] The majority fails to indicate who "another" was and who had an interest. This is not surprising because, as noted previously, the record, much less the grand jury transcript, is devoid of any facts indicating that any entity was vested with a possessory or property interest at the time of taking.

As noted supra, under NAGPRA, a Native Hawaiian organization could conceivably have had a possessory interest but no evidence indicating that such was the case was presented to the grand jury. "Repatriation" provided for in NAGPRA was never explained to the jury and so no inference could be drawn of possession or interest in the artifacts in any entity at the time they were taken by Petitioner. While the majority maintains that the identity of "another" under the theft statute need not be specified, nothing indicates that anyone had an interest in the artifacts based on the evidence presented.

B.

In addition, contrary to the majority's position, the

[31] To reiterate, the transcript is replete with references to the artifacts belonging to the Emerson Collection, the artifacts bearing Emerson labels, Petitioner having acknowledged and knowing that the items belonged to the Emerson Collection, part of the J.S. Emerson artifacts having been sold to the Bishop Museum and Peabody Essex Museum, and the artifacts being part of the Emerson Collection from the Bishop Museum and Peabody Essex Museum. Because, NAGPRA was not referenced, repatriation was not defined, and no Hawaiian organization was mentioned with respect to NAGPRA, it is inconceivable that the grand jury believed that an entity other than the J.S. Emerson collection or one of the museums had an interest in the artifacts at the time they were taken.

artifacts' value and the manner and circumstances in which they were reburied would not lead a conscientious and prudent juror to entertain a "strong suspicion" that they were the property of another. Majority opinion at 31-33. The apparent value of the objects does not indicate that the objects were the property of another for the plain reason that value has no connection to whether a person had possession of the artifacts, or a property interest in the artifacts. Jenkins 93 Hawaiʻi at 110, 997 P.2d at 36.

The value of the artifacts is not relevant to the element of whether the defendant obtained or exerted control over the property of another, Duncan, 101 Hawaiʻi at 279, 67 P.3d at 778, inasmuch as the value of items has no connection to the conduct of the defendant in obtaining or exercising control over the items. Instead, value is an attendant circumstance element relevant only to the degree of the charge. See HRS § 708-830.5(a) (noting that theft in the first degree is committed when the person takes property or services, "the value of which exceeds $20,000"); HRS § 708-831(1)(b) (stating that theft in the second degree is committed when the person takes "property or services the value of which exceeds $300"); HRS § 708-832(1)(a) (providing that theft in the third degree is committed when the person takes "property or services the value of which exceeds $100"); see also State v. Cabrera, 90 Hawaiʻi 359, 361, 978 P.2d 797, 799 (1999) (noting that, in a charge of second-degree theft,

the "attendant circumstance" was the "value" of property). Thus, the value of the artifacts is not indicative, or evidence, of whether Petitioner obtained or exerted control over the property of another, the question at issue here.

As to the "manner and circumstances" of the artifacts' burial, the grand jury was not presented with any facts regarding the "manner and circumstances" that would indicate that they were the property of another because it was not told about NAGPRA, the facts establishing a NAGPRA claim, or that artifacts could be repatriated to a Native Hawaiian organization under NAGPRA, thereby potentially giving such an organization actual possession of, and a property interest in, the artifacts;[32] or, alternatively, that Kanupa Cave was on State land, and, consequently, under HRS chapter 6E the State had a property interest in the artifacts, inasmuch as it owned the cave. The

[32] Along the same lines, the majority posits that "assuming" the artifacts were "repatriated pursuant to NAGPRA as [Petitioner] suggests, the artifacts would have been repatriated to a culturally affiliated organization or lineal descendant[, and that] individual or organization . . . would have had a right of possession in the artifacts at the time the artifacts were repatriated." Majority opinion at 28 (emphasis added) (internal citation omitted). First, it is not Petitioner who "suggests" that the artifacts were repatriated pursuant to NAGPRA. Rather, this proposition originates in the federal plea agreement. The majority's statement that repatriation would have meant that an individual or organization would have had a right of possesssion in the artifacts at the time of repatriation does not establish this as a matter of fact inasmuch as repatriation under NAGPRA was never explained to the grand jury. Moreover, no entity was identified as a "culturally affiliated organization" or "lineal descendant" since no evidence regarding NAGPRA or any NAGPRA-related claim was presented to the grand jury. Finally, it is irrelevant whether someone could have retained an interest in the artifacts at the time the artifacts were repatriated. The relevant issue in this case is whether there was any evidence presented to the grand jury that anyone retained a possessory or property interest in the artifacts at the time they were taken. Hence, the grand jury could not have entertained a compelling suspicion that an individual or entity had possession of, or a property interest in, the artifacts at the time that they taken inasmuch as that theory was simply never presented to the grand jury.

description of the artifacts and its location (in a cave) and the circumstances of its burial would not, to a meticulous, careful, or scrupulous person, result in the urgent or compelling suspicion that another person had possession of, or a property interest in, the artifacts at the time that they were later taken.

C.

The majority's suggestion that it can be "reasonably inferred" that the artifacts were "purposely secreted" and not "discarded" inasmuch as the cave entrance had been covered with a rock, the items were enclosed in cloth, and reburial had been undertaken, majority opinion at 32, cannot be drawn from the facts. Without the actual facts underlying repatriation and reburial, placement of items in the cave, either in 2000 or 2003, would not lead a conscientious juror to "infer" that, at the time the items were later taken in 2004, any entity involved in the repatriation retained possession of, or a property interest in, the artifacts. The placement may have been for the purpose of returning the items to their original condition or setting, or an expression of the reverence owed to the artifacts. However, without any predicate facts, a grand juror could not conscientiously infer that the placement meant that a right of possession continued in another person up until the time the artifacts were taken. The State's presentation of evidence to

the grand jury simply did not rest on the actual facts of the case.

XIII.

Based on the foregoing, I must respectfully dissent. As noted, Respondent may have been able to present evidence sufficient to establish probable cause, but simply failed to do so. It is manifest Respondent did not do so because in deciding that it was acceptable to simply inform the jury that the property belonged to the Emerson Collection and once was housed in the Peabody Essex Museum or the Bishop Museum, it applied an erroneous construction of the theft statute. The resulting journey from the court to this court has been a series of failed alternative theories that do not conform to the evidence presented to the grand jury. To uphold the indictment would usurp our announced adherence to the proposition that an indictment must only be returned based on probable cause, see Bell, 60 Haw. at 242-43, 589 P.2d at 519 (noting that the grand jury must determine whether there is probable cause to believe that a crime has been committed), and that a defendant has a constitutional right to a fair and impartial grand jury proceeding, see Joao, 53 Haw. at 230, 491 P.2d at 1092 (stating that a defendant has a constitutional right to a fair and impartial grand jury proceeding). Respectfully, unless we take the grand jury's function seriously, this decision unfortunately lends credence to the often-repeated criticism that the grand

jury has become a rubber stamp. State v. Kahlbaun, 64 Haw. 197, 203, 638 P.2d 309, 315 (1981) ("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.").

/s/ Simeon R. Acoba, Jr.

Associate Justice

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