IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI, Respondent/Plaintiff-Appellee,

vs.

LLOYD PRATT, Petitioner/Defendant-Appellant.

NO. SCWC-27897

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NOS. 27897, 27898 AND 27899)
(CR. NOS. HC04-147, HC04-169 and HC04-299 - CONSOLIDATED)

May 11, 2012

CONCURRING AND DISSENTING OPINION BY ACOBA, J.,
WITH WHOM MCKENNA, J., JOINS

I write separately for three reasons. First, I would vacate the conviction of Petitioner/Defendant-Appellant Lloyd Pratt (Petitioner) and remand for a new trial because, based on plain error, the record reveals serious questions about whether there was sufficient evidence to convict and whether Petitioner

knowingly and voluntarily waived his right to have Respondent/Plaintiff-Appellee the State of Hawaiʻi (Respondent or the State) prove each element of the offense beyond a reasonable doubt.

Second, in my view, to establish the defense that conduct is constitutionally protected as a native Hawaiian activity, a defendant must also demonstrate that his or her conduct was reasonable; additionally, I would not require courts to use a "totality of the circumstances" test required by the majority as this test is unnecessary and invites consideration of matters beyond the established benchmarks set forth in State v. Hanapi, 89 Hawaiʻi 177, 970 P.2d 485 (1998). Third, I believe that on appeal Judge Leonard had the right to review Respondent's concession that Petitioner's activities were traditional and customary Native Hawaiian practices because that issue was germane to the application of Hanapi and article XII, section 7 of the Hawaiʻi Constitution,[1] and as judges we exercise our own independent judgment on constitutional questions based on the facts of the case.

[1] Article XII, section 7 of the Hawaiʻi Constitution 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.

I.

Regarding the first reason, Petitioner was convicted of the offense of "Closed Area," Hawaiʻi Administrative Rules (HAR) Rule § 13-146-4. He ostensibly stipulated to facts that would satisfy the elements of the offense. However, his testimony at court proceedings and his counsel's statement in oral argument contradicted the stipulation, calling into serious question whether there was substantial evidence to support the conviction. Additionally, there is no indication in the record that Petitioner understood that, by so stipulating, he was waiving his right to have Respondent prove each element of the offense beyond a reasonable doubt. It was plain error for Petitioner not to have raised this on appeal. Additionally, that violation rendered the stipulation entered into between Petitioner and Respondent inequitable and unfairly prejudicial. Accordingly, I would vacate the judgment of conviction filed by the court and remand the case for a new trial.

A.

Petitioner was cited on July 14, July 28, and September 28, 2004, for the offense of "closed area" at Kalalau State Park (the park), in violation of HAR § 13-146-4. HAR § 13-146-4 provides in relevant part as follows:

> § 13-146-4 Closing of areas. (a) The board or its authorized representative may establish a reasonable schedule of visiting hours for all or portions of the premises and close or restrict the public use of all or any

> portion thereof, when necessary for the protection of the area or the safety and welfare of persons or property, by the posting of appropriate signs indicating the extent and scope of closure. All persons shall observe and abide by the officially posted signs designating closed areas and visiting hours.

(Emphases added.)

On September 21, 2005, Petitioner filed a Motion to Dismiss (Motion), arguing that at the times he was cited, he was engaged in constitutionally protected activity under article XII, section 7 of the Hawaiʻi Constitution. Petitioner maintained that his activity was protected as a native Hawaiian right under Hanapi, 89 Hawaiʻi at 177, 970 P.2d at 485, which requires a defendant asserting the right to establish the following three factors: (1) that he or she "qualif[ies] as a 'native Hawaiian[,]'" i.e., persons who are "'descendants of native Hawaiians who inhabited the islands prior to 1778,' and who assert otherwise valid customary and traditional Hawaiian rights [] entitled to constitutional protection regardless of their blood quantum[,]" id. at 185-86, 970 P.2d at 493-94 (quoting Public Access Shoreline Hawaiʻi v. Hawaiʻi Cnty. Planning Comm'n (PASH), 79 Hawaiʻi 425, 449, 903 P.2d 1246, 1270 (1995)), (2) the "claimed right is constitutionally protected as a customary or traditional native Hawaiian practice[,]" id., and (3) "the exercise of the right occurred on undeveloped or 'less than fully developed property[,]'" id. (quoting PASH, 79 Hawaiʻi at 450, 903 P.2d at 1271).

A hearing was held on Petitioner's Motion on November 4, 2005. On March 10, 2006, the court issued an order denying the Motion. The court concluded that Petitioner had satisfied the three prongs of Hanapi. However, the court noted that, in addition, the court must uphold the right only if "reasonably exercised" and only to the "to the extent feasible[.]" (Citing PASH, 79 Hawaiʻi at 442, 451, 903 P.2d at 1263, 1272.) (Internal quotation marks omitted.) The court ultimately decided that Respondent's interest in protecting and preserving the park outweighed Petitioner's interest in exercising his rights under the Hawaiʻi Constitution.

B.

Prior to trial, on April 12, 2006, Respondent and Petitioner stipulated to the following facts: (1) "On July 14, 2004, July 28, 2004 and September 28, 2004, [Petitioner] was camping in [Kalalau State Park (the park)"; (2) "At each of the times that [Petitioner] was camping[,] the . . . location where he was camping was a closed area"; (3) "Prior to each of the times when [Petitioner was] camping in [the park,] signs were posted stating that the locations where [Petitioner] was camping was a closed area"; and (4) "Immediately prior to each of the times when camping, [Petitioner] both saw the signs and had actual knowledge that the locations in [the park] where he was camping was a closed area." (Emphases added.)

At trial, Respondent stated to the court at the outset, "At the risk of shocking you this is going to be probably one of the shorter matters today." The court responded, "No I'm not shocked at all. . . . [R]eally, the whole crux of this is the appellate issue that I have on the motion that I denied. And [] I assumed that we probably wouldn't even have a trial, . . . and that any sentence . . . would be stayed pending appeal[.]" (Emphasis added.) Respondent replied, "It's a trial on stipulated facts[.] . . . [T]he [c]ourt just makes a finding on the stipulated facts. And then . . . it's a very clear appellate record." (Emphasis added.) Respondent further related that, in light of the stipulated facts, there is "a very clear violation on its face, and I don't think that they're disputing it" so "[t]he issue is really [the] PASH defense." (Emphasis added.) Respondent and defense counsel then presented their arguments regarding Petitioner's defenses, including that Petitioner had engaged in constitutionally protected activity.

C.

Following trial, on May 15, 2006, the court entered its Findings of Facts (findings) and Conclusions of Law (conclusions). The court entered the following relevant findings:

> 1. On July 14, 2004, July 23, 2004, and September 28, 2004, [Petitioner] camped in [the park].
> 2. On said dates, [the park] location where [Petitioner] was camping was a closed area. Signs were posted stating

> [the park] location where [Petitioner] was camping was a closed area.
> 3. [Petitioner] saw the signs and had actual knowledge that the location in [the park] where he was camping was a closed area.
> 4. On all said dates, [the park] was located in the County of Kauai, State of Hawaiʻi.
> 5. During this period of time [Petitioner] did not have a permit to camp in [the park].
> 6. [HAR §] 13-146-04 prohibits certain types of camping without a permit in Hawaiʻi State Parks.
> 7. On July 14, 2004, July 28, 2004 and July 28, 2004 [Petitioner] was camping without a permit in [the park] within the meaning of [HAR §] 13-146-04.
> 8. [Petitioner] was charged with [sic] three separate criminal cases for camping without a permit based on his camping at [the park].
> 9. [Petitioner] filed a Motion to Dismiss based on his assertion, among other things, that his activities were constitutionally protected customary and traditional native Hawaiian Practices.
> 10. [Petitioner's] Motion to Dismiss also asserted the defense of privilege base on [Hanapi, 89 Haw. 177, 970 P.2d at 485].
> 11. A full evidentiary hearing was held on November 4, 2005, at which time [Petitioner] testified and also offered Dr. Davianna McGregor as an expert witness in Hawaiʻi cultural and traditional practices. Wayne Souza, Parks District Superintendent for Kauai for the [DLNR], testified for [Respondent].
> . . .
> 13. Based on the testimony elicited at the November 4 hearing and concessions made by [Respondent] in its brief, the Court finds that Petitioner is [(1)] a native Hawaiian, [(2)] that he carried out customary or traditional native Hawaiʻi practices in Kalalau at the time of the camping, and [(3)] that his exercise of rights occurred on undeveloped or less than fully developed land.
> . . .
> 15. The Court denied [Petitioner's] Motion to Dismiss by written opinion on February 20, 2006 and ordered the case to proceed to trial.
> 16. At trial, the parties stipulated that the evidence and issues offered at the hearing on the Motion to Dismiss were deemed to have been introduced at trial.
> . . .
> 18. [At trial, Petitioner argued that he] . . . had established that his conduct was privileged under the three-part test in [Hanapi] and based on the Hawaiʻi Constitution.
> . . .

The court entered the following relevant conclusions:

> 3. [Respondent] has an interest in keeping the [park] a wilderness area, to protect the area for all to enjoy, conserve park resources and provide for the health and safety of all who visit the area.

> . . .
> 5. In furthering these interests, [Respondent] has the right to promulgate reasonable regulations restricting the number of persons in the [park] at any given time, the length or duration of individuals being in the [park], the amount of traffic in [the park] and the activities undertaken with the [park].
> . . .
> 7. On July 14, 2004, July 28, 2004 and September 28, 2004, [Petitioner] violated [HAR §] 13-147-4 and is guilty as charged in cases HC04-147, HC04-169 and HC04-229.
> 8. [Petitioner] satisfied all three prongs of the affirmative defense as set forth in [Hanapi].
> . . .
> 11. This Court finds that [Respondent] 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 stewardship. This interest when balanced against the rights expounded by [Petitioner] weigh in favor of [Respondent].

(Brackets omitted; emphases added.)

II.

A.

Our penal code establishes that "[a] defense is a fact or set of facts which negatives penal liability." HRS § 701-115 (1993). Thus, before any defense may be considered by the trier of fact, the trier of fact must first determine that all elements of the offense have been established beyond a reasonable doubt. State v. Miyashiro, 90 Hawaiʻi 489, 500-01, 979 P.2d 85, 96-97 (App. 1999) (concluding that the court's failure to "instruct the jury that it was required to unanimously agree that all elements of the charged offenses had been established beyond a reasonable doubt before considering the entrapment defense" was error because the jurors may have concluded "that if they failed to reach agreement as to the affirmative defense of entrapment, they

were required to return a guilty verdict, even if they had not unanimously determined whether the prosecution had established all the elements of the charged offenses beyond a reasonable doubt"). The right to have the prosecution prove each element beyond a reasonable doubt is both statutorily[2] and constitutionally[3] guaranteed. State v. Murray, 116 Hawaiʻi 3, 10, 169 P.3d 955, 962 (2007); see also State v. Lima, 64 Haw. 470, 474, 643 P.2d 536, 539 (1982) ("It is well established, as a precept of constitutional as well as statutory law, that an accused in a criminal case can only be convicted upon proof by the prosecution of every element of the crime charged beyond a reasonable doubt.") (Citations omitted.)

B.

HAR § 13-146-4(a) permits the Department of Land and Natural Resources (the board) "or its authorized representative" to "establish a reasonable schedule of visiting hours for all or portions of the premises and close or restrict the public use of

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[2] HRS § 701-114 (1993) provides:

> (1) Except as otherwise provided in section 701-115, no person may be convicted of an offense unless the following are proved beyond a reasonable doubt:
> (a) Each element of the offense[.]

(Emphasis added.)

[3] The due process clauses of the fourteenth amendment to the United States Constitution and article I, section 5 of the Hawaiʻi Constitution mandate that the prosecution prove every element of the charged crime beyond a reasonable doubt. See State v. Maelega, 80 Hawaiʻi 172, 178, 907 P.2d 758, 764 (1995).

all or any portion thereof, when necessary for the protection of the area or safety and welfare of persons or property, by the posting of appropriate signs indicating the extent and scope of closure." HAR § 13-146-4(a) further mandates that "[a]ll persons [] observe and abide by the officially posted signs designating closed areas and visiting hours."

In order to convict a person under HAR § 13-146-4(a), then, Respondent was required to prove beyond a reasonable doubt that (1) there was an "officially posted sign[,]" (2) that "designat[ed]" the area in which Petitioner was cited as a "closed area[,]" (3) the "signs indicat[ed] th[e] extent and scope of closure[,]" and (4) Respondent did not "abide by" the directives on the signs.

C.

At the heart of any criminal case is the question of whether the prosecution has met its burden of establishing each element of the charged offense beyond a reasonable doubt. Here, the record is silent as to whether Petitioner understood he had such a right or that Petitioner knowingly waived this right. For example, although Petitioner stipulated to having camped in a "closed area"; that "signs were posted stating that the locations where [Petitioner] was camping [were] closed area[s]"; and that he "saw the signs and had actual knowledge that the locations in [the park] where he was camping [were] closed area[s]";

Petitioner contradicted these matters at the hearing on his Motion. When asked, "In the area that you're alleged to illegally be, do you know of any signs that say what hours you can and can't be there?" Petitioner answered, "No." Petitioner was also asked whether he knew "of any signs regulating the entry times" "in the area." Again, Petitioner answered, "No."

At oral argument before us, it was noted that Petitioner had stipulated that he was in a closed area but that it was unclear whether Petitioner "was actually in a closed area[.]" Oral Argument, Hawaiʻi Supreme Court, at 10:22-11:17 (May 19, 2011), available at http://www.courts.state.hi.us/courts/oral_arguments/archive/oasc27897.html. Petitioner's counsel was asked, "Was he in a closed area?" and, "What did the signs say?" Id. Counsel responded that he did not "remember any evidence of any signs." Id. at 11:31-35. Additionally, counsel observed that this was "the first time the issue ha[d] been raised" and revealed that "he did not believe there was any evidence in the record that [it] was a closed" area. Id. at 12:56-13:36. This directly contradicts the facts to which Petitioner stipulated.

Respectfully, the parties' and the court's focus appears to have been on fashioning a record for a "test case" to

obtain an appellate ruling on the constitutional defense issue.[4] The court convicted Petitioner of violating HAR § 13-146-4(a) without any assurance that Petitioner personally understood that the stipulation amounted to a waiver of Petitioner's right to have the prosecution adduce evidence establishing each element of the offense beyond a reasonable doubt. This apparent lack of attention to the elements of HAR § 13-146-4(a) is further reflected in the court's findings and conclusions. For example, the court characterized HAR § 13-146-4(a) as "prohibit[ing]

[4] The majority contends that the timing of the stipulation and Petitioner's testimony indicate that the stipulation reflected a "tactical decision" not to dispute whether the prosecution satisfied its burden. See majority opinion at 14, 15. However, as noted, at the earlier hearing on his Motion, Petitioner contradicted the matters to which he later stipulated. The fact that the contents of the stipulation were contrary to Petitioner's earlier testimony at the hearing would seem to render the subsequent stipulation all the more suspect, and suggests that Petitioner's waiver was not tactical. Although the majority states that the "contradictions on the record from [Petitioner's] testimony were offered prior to the stipulation," see majority opinion at 17, the contradiction in the record arises from the stipulation, because the contents of the stipulation are inconsistent with Petitioner's prior testimony and with his counsel's statements on certiorari. In any event, in oral argument on certiorari, Petitioner's counsel confirmed after the stipulation was made that it was "unclear" whether Petitioner was "actually in a closed area[,]" thus contradicting the stipulation.

Moreover, if "an action or omission of trial counsel has no obvious basis for benefitting a defendant's case[,]" it not considered tactical or strategic. See Briones v. State, 74 Haw. 442, 463, 848 P.2d 966, 976 (1993) ("Specific actions or omissions alleged to be error but which had an obvious tactical basis for benefitting the defendant's case will not be subject to further scrutiny. . . . If, however, the action or omission had no obvious basis for benefitting defendant's case and it 'resulted in the withdrawal or substantial impairment of a potentially meritorious defense,' then the knowledge held and investigation performed by counsel in pursuit of an informed decision will be evaluated as that information that, in light of the complexity of the law and the factual circumstances, an ordinarily competent criminal attorney should have had.") (citation omitted). This is not a narrow view but the applicable law. Here, the decision to enter into the stipulation purportedly admitting liability did not appear to have "an obvious basis for benefitting [Petitioner's] case[,]" and in light of the inconsistencies in this case may have "'resulted in the withdrawal or substantial impairment of a meritorious defense[.]'" See id. (citation omitted).

certain types of camping without a permit in Hawaiʻi State Park[.]" Finding 6. The court additionally found that on the various dates at issue, Petitioner "was camping without a permit in [the park] within the meaning of [HAR §] 13-146[-4]. Finding 7. But, as discussed, Petitioner was cited for being in a "closed area," and HAR § 13-146-4(a) allows the DLNR to "close or restrict" areas of public parks "by the posting of appropriate signs indicating the extent and scope of closure" and mandates that "[a]ll persons [] observe and abide by the officially posted signs designating closed areas and visiting hours."

Thus, the ordinance under which Petitioner was cited, charged, and convicted does not prohibit camping without a permit, but penalizes one who fails to abide by officially posted signs designating an area as closed. The record, insofar as Petitioner testified that he was not aware of, and did not observe, any signs indicating that the areas in which he was cited were "closed areas," as well as appellate counsel's acknowledgment that he did not believe there was any evidence adduced regarding that element, raises serious questions as to whether there were any officially posted signs indicating the park or any area thereof was a "closed area," what the alleged signs actually said, and whether Petitioner failed to abide by the information on the alleged signs.

III.

In light of the contradictions noted supra, sufficient evidence is lacking to support Petitioner's conviction for violation of HAR § 13-146-4. "The test on appeal in reviewing the legal sufficiency of the evidence is whether, when viewing the evidence in the light most favorable to the prosecution, substantial evidence exists to support the conclusion of the trier of fact." State v. Bui, 104 Hawaiʻi 462, 467, 92 P.3d 471, 476 (2004) (quoting State v. Pone, 78 Hawaiʻi 262, 265, 892 P.2d 455, 458 (1995)). "'Substantial evidence is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to reach a conclusion.'" Id. (quoting State v. Silva, 75 Haw. 419, 432, 864 P.2d 583, 590 (1993)).

In addition to the inconsistency between Petitioner's testimony at trial and the stipulation, and counsel's admission that there was no evidence presented regarding signs indicating that Petitioner was in a "closed area," Respondent acknowledged that the factual record in this case was not developed. See Oral Argument, Hawaiʻi Supreme Court, at 23:17-23:24. (May 19, 2011), available at http://www.courts.state.hi.us/courts/oral_arguments/archive/oasc27897.html (stating at that the "factual issues in this case were not flushed out sufficiently"). Respondent noted that there are "fundamental factual issues" in

this case[,]" id. at 23:27-29, including where exactly Petitioner was in the park when he was cited, "where [] the delineated camp grounds" are, and whether the "entire valley [is] closed" because the area is traditionally open "for camping at the shoreline during the summer months." Id. at 23:31-23:48. "These issues were not flushed out[,]" Respondent stated. Id. at 23:51-54.

It was noted that Respondent stipulated that this was a "closed area[,]" a "closed area" is defined by the regulations as "a place that is off-limits[,]" and so under the facts of this case, "a native Hawaiian kahu cannot go to the [area in which Petitioner was cited]." Id. at 23:56-24:16. Respondent, however, conceded that "on this record, it's unclear" because the area in which Petitioner was cited is not "off-limits" but "camping in the [area] is off-limits." Id. at 24:17-35. In addition, Respondent indicated that its understanding is that the area in which Petitioner was cited is at least "open for hiking" but "it's not that you cannot step foot in the area." Id. at 25:43-56. Respondent acknowledged that although this court was deciding the constitutional criminal defense, the "record wasn't very well developed[,]" and the facts were not "flushed out in the record." Id. at 24:36-46, 25:56-58.

In light of Respondent's answers, there is no reasonable basis for "viewing the evidence in the light most favorable to the prosecution." Bui, 104 Hawaiʻi at 467, 92 P.3d

at 476 (internal quotation marks and citation omitted). In any event, here, the evidence was not credible. "Credibility" is "'the quality that makes something (a witness or some evidence) worthy of belief[.]'" State v. Walsh, 125 Hawaiʻi 271, 298, 260 P.3d 350, 377 (2011) (quoting Black's Law Dictionary 423 (9th ed. 2009)). Although Petitioner and Respondent stipulated that Petitioner was in a "closed area" when he was cited, Respondent apparently acknowledged at oral argument that the area was not "closed" as defined by the regulations. Moreover, although Petitioner stipulated that there were signs indicating that the area was closed, his own testimony contradicted the existence of such signs. In addition, his counsel stated that no evidence regarding signs or its content were admitted into evidence. Thus, the evidence purportedly supporting Petitioner's conviction in this case, including the stipulation, lacks qualities making it worthy of belief. Id. In turn, because the evidence cannot be reasonably believed, with respect to proving the elements of the offense, it cannot be said to be of sufficient probative value to support conviction. See Black's Law Dictionary at 638 (defining "probative evidence" as "[e]vidence that tends to prove or disprove a point at issue").

Finally, a person of reasonable "caution" is one who uses "prudent forethought to minimize risk." Merriam Webster at

182. In light of the foregoing, a person could not reasonably conclude that the elements had been proven beyond a reasonable doubt. Furthermore, a prudent person could not accept these circumstances as minimizing the risk that the conviction was wrong. Thus, the evidence would not enable a reasonably cautious person to conclude that Petitioner was guilty of the offense. State v. Maldonado, 108 Hawaiʻi 442, 436, 121 P.3d 901, 907 (2005). Vacation of the conviction is thus required.[5]

IV.

Whether Petitioner's waiver of his right to have Respondent prove each element of the offense beyond a reasonable doubt was knowing and voluntary must also be called into question. As stated in Murray, "many defendants may not know that they have a right to have all elements proven beyond a reasonable doubt" or that a stipulation to elements "must be objected to during trial or the right to object may be lost." Murray, 116 Hawaiʻi at 13-14, 169 P.3d at 965-966. Thus, where a

[5] See State v. Puaoi, 78 Hawaiʻi 185, 191, 891 P.2d 272, 278 (1995) (noting that a "conviction cannot be supported where there is no evidence to establish a material element of the offense charged beyond a reasonable doubt[,]" and "[a] conviction based on insufficient evidence of any element of the offense charged is a violation of due process and thus constitutes plain error"); see also State v. Hirayasu, 71 Haw. 587, 589, 801 P.2d 25, 26 (1990) (concluding that there was insufficient evidence to support Appellant's conviction, and noting that "although Appellant did not raise the issue of sufficiency of the evidence, 'the power to sua sponte notice plain errors or defects affecting substantial rights clearly resides in this court'" (quoting State v. Hernandez, 61 Haw. 475, 482, 605 P.2d 75, 79 (1980) (internal quotation marks omitted)); State v. Lee, 90 Hawaiʻi 130, 135, 976 P.2d 444, 449 (App. 1999) (noting that the prosecution's failure to offer evidence in support of an element of the offense "would rise to the level of plain error").

defendant waives this constitutional right, we have a duty to conduct an independent review of the record to ensure such right was not violated. See State v. Staley, 91 Hawaiʻi 275, 277, 982 P.2d 904, 906 (1999) ("[A]lthough not asserted . . . as a point of error on appeal, we hold, based on our independent review of the record, that [the defendant's] constitutional right to testify was violated."); see also State v. Waiau, 60 Haw. 93, 97, 588 P.2d 412, 415 (1978) (stating that "the interests of justice require that appellant have a means of escape from the position in which he was improperly induced to place himself in this case").

A.

Murray foresaw that, where a defendant stipulates to elements of an offense, it may be difficult to determine on appeal whether the defendant knowingly and voluntarily waived his right to have each element proven beyond a reasonable doubt. 116 Hawaiʻi at 12, 169 P.3d at 964. Murray explained that prior cases in this jurisdiction establish that a defendant's waiver of a fundamental right must be knowing and voluntary, and must come directly from the defendant. Id. at 10, 169 P.3d at 962 (citing State v. Ibuos, 75 Haw. 118, 121, 857 P.2d 576, 578 (1993)). Murray noted that in Tachibana v. State, this court held "'that in order to protect the right to testify under the Hawaiʻi Constitution, trial courts must advise criminal defendants of

their right to testify and must obtain an on-the-record waiver of that right in every case in which the defendant does not testify.'" Id. at 11, 169 P.3d at 963 (quoting Tachibana, 79 Hawaiʻi 226, 236, 900 P.2d 1293, 1303 (1995)); cf. State v. Lewis, 94 Hawaiʻi 292, 294–95, 12 P.3d 1233, 1235–36 (2000) (explaining that although the colloquy requirement to establish the knowing and voluntary nature of a defendant's waiver of his or her right to testify is not implicated where a defendant chooses to testify, where the defendant chooses to testify, the court must inform the defendant of his or her right to testify or not to testify, and ensure that the defendant's decision is his or her "own decision").

As pointed out by Murray, 116 Hawaiʻi at 10, 169 P.3d at 962, trial courts in this state are required to engage in on-the-record colloquies with criminal defendants when the waiver of other fundamental rights are at issue. See, e.g., State v. Kupau, 76 Hawaiʻi 387, 395–96 n.13, 879 P.2d 492, 500–01 n.13 (1994) (right to included offense instructions); Ibuos, 75 Haw. at 121, 857 P.2d at 578 (right to trial by jury); State v. Vares, 71 Haw. 617, 622–23, 801 P.2d 555, 558 (1990) (right to counsel); Conner v. State, 9 Haw. App. 122, 126, 826 P.2d 440, 442–43 (1992) (entry of guilty plea). In light of the foregoing, Murray held that a defendant may not be deemed to have waived his or her right to have the prosecution prove each element beyond a

reasonable doubt unless the trial court engages in an on-the-record colloquy with the defendant ensuring that the defendant has knowingly and voluntarily waived such a right. Murray, 116 Hawaiʻi at 12, 169 P.3d at 964.

Here, as noted, the record reveals that both Petitioner and his counsel contradicted the stipulation of facts which underlay his conviction. Indisputably, there has been no valid Murray waiver via an on-the-record colloquy in this case.[6] Consequently, it cannot be demonstrated that Petitioner understood his right to have Respondent prove each element of the offense beyond a reasonable doubt, and that he knowingly and voluntarily waived that right. See Murray, 116 Hawaiʻi at 11-12, 169 P.3d at 963-64.

The majority contends, however, that the "main concern informing Murray is not present in [this] case because [Petitioner] is on the record as personally admitting to the essential facts supporting conviction." Majority opinion at 17. However, the "main concern" of Murray was not to ensure that the

[6] The majority states that Petitioner made "a tactical decision to focus on affirmative defenses, rather than "disputing" the prosecution's prima facie case." Majority opinion at 16. In light of the record, it would not appear this strategy had an "obvious basis for benefitting [Petitioner's] case." Briones, 74 Haw. at 463, 848 P.2d at 976. Also, with all due respect, the majority shifts the burden from the prosecution to the defense. Petitioner does not have to "disputing" the prosecution's case. Instead, the prosecution's burden to prove every element of the offense with which Petitioner was charged beyond a reasonable doubt remains consistent even in the face of an affirmative defense. Murray, 116 Hawaiʻi at 10, 169 P.3d at 962; see also Miyashiro, 90 Hawaiʻi at 498, 979 P.2d at 94.

defendant in that case, rather than his counsel, stipulated to the convictions; instead, it was to ensure that the defendant understood that by stipulating to his prior convictions he was waiving his right to have the prosecution prove his prior convictions beyond a reasonable doubt in court. 116 Hawaiʻi at 12, 169 P.3d at 964 ("[A] colloquy between the trial court and the defendant is the best way to ensure that a defendant's constitutional right such as waiver of proof of an element is protected, and that the defendant has knowingly and voluntarily waived such a right.") (emphasis added). Thus, Murray held that the court must engage in a colloquy "to ensure a defendant's right is knowingly and voluntarily waived." Murray 116 Hawaiʻi at 11, 169 P.3d at 963.

Here, the court did not engage in a colloquy to ensure Petitioner understood that he was giving up the right to have the prosecution prove every element of the offense by entering into a stipulation. The majority nevertheless suggests that it can be assumed that Petitioner, by personally signing the written stipulation, also understood that he was waiving his rights. See majority opinion at 17. But this is not a legitimate assumption to draw. The stipulation did not set forth the rights Petitioner was waiving. Thus, in the absence of an on-the-record colloquy, Petitioner's conviction cannot stand. See Murray, 116 Hawaiʻi at 14, 169 P.3d at 966 (remanding for a new trial because "the court

did not engage [defendant] in a colloquy regarding waiving proof of an element of the charge).[7]

B.

Petitioner was tried and convicted before this court issued its opinion in Murray. However, Murray was decided while Petitioner's case was pending on appeal before the ICA. Defense counsel should have brought Murray to the attention of the ICA. See Hawaiʻi Rules of Appellate Procedure Rule (HRAP) 28(j) (2011) ("Parties may, by letter to the appellate clerk, bring to the appellate court's attention pertinent and significant authorities published after a party's brief has been filed, but before a decision") (emphasis added). Defense counsel also could have raised Murray in his Application.

Despite defense counsel's failure to bring Murray to the attention of the ICA and this court, we may sua sponte notice plain error infringing on a defendant's constitutional rights.[8]

[7] In this case, both counsel and Petitioner signed the stipulation. Presumably, in Murray, counsel stipulated to the defendant's prior convictions with the consent of the defendant. Respectfully, the distinction that Petitioner signed the stipulation, relied upon by the majority, see majority opinion at 17, is immaterial. The question is not whether Petitioner himself or his counsel signed the stipulation but, rather, whether Petitioner understood the implication of the stipulation as waiving his constitutional rights. Plainly, there is nothing in the record that would support such an understanding by Petitioner.

[8] The majority states that the "power to deal with plain error is one to be exercised sparingly and with caution." Majority opinion at 17. I do not suggest the power to notice plain error is unrestrained. State v. Kelekolio, 74 Haw. 479, 515, 849 P.2d 58, 75 (1993) ("[W]here plain error has been committed and substantial rights have been affected thereby, the error may be noticed even though it was not brought to the attention of the trial (continued...)

State v. Miller, 122 Hawaiʻi 92, 123, 223 P.3d 157, 188 (2010); see also State v. Heapy, 113 Hawaiʻi 283, 305, 151 P.3d 764, 786 (2007) ("noting that "[a]ppellate courts, in criminal cases, may sua sponte 'notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings'" (quoting State v. Fox, 70 Haw. 46, 56, 760 P.2d 670, 675-76 (1988)); State v. Mahoe, 89 Hawaiʻi 284, 972 P.2d 287 (1998) (stating that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court" and, thus, noticing error infringing on the defendant's "constitutional rights to due process and unanimous jury verdict . . . [a]lthough not raised by [the defendant] on appeal"); State v. Richie, 88 Hawaiʻi 19, 33, 960 P.2d 1227, 1241 (1998) (stating that although the alleged statutory violation "was not raised below and was not included in the point of error section of [the defendant's opening brief" this court may "address it sua sponte . . . despite the failure of trial counsel and appellate counsel to properly raise this issue[,]" because this court has reviewed such violations for

[8](...continued)
court."). This case warrants plain error review because, in the absence of a colloquy, Petitioner cannot be presumed to have knowingly and voluntarily waived his constitutional right to have the prosecution prove every element of the charged offense. To hold otherwise would "seriously affect the fairness, integrity, or public reputation of judicial proceedings." State v. Nichols, 111 Hawaiʻi 327, 334, 141 P.3d 974, 981 (2006).

plain error in that past"); Hirayasu, 71 Haw. at 589, 801 P.2d at 26 (stating that, "although Appellant did not raise the issue of sufficiency of the evidence, 'the power to sua sponte notice plain errors or defects affecting substantial rights clearly resides in this court'" (quoting Hernandez, 61 Haw. at 482, 605 P.2d at 79) (internal quotation marks omitted); accord State v. Grindles, 70 Haw. 528, 530, 777 P.2d 1187, 1189 (1989). In Murray, the defendant failed to object to the stipulation entered by counsel, and we nevertheless held the stipulation was invalid in the absence of a colloquy. 116 Hawaiʻi at 13, 169 P.3d at 965. This case and Murray are indistinguishable, and there is no reason to follow a different course here.

C.

In assessing whether Petitioner's constitutional right was violated, this court has an obligation to independently review the record. See Staley, 91 Hawaiʻi 275, 277, 982 P.2d 904, 906 (1999) (concluding based on this court's independent review of the record that the defendant's constitutional right to testify was violated); see also State v. Hicks, 113 Hawaiʻi 60, 70, 148 P.3d 493, 503 (2006) ("'We answer questions of constitutional law by exercising our own independent constitutional judgment based on the facts of the case.'" (Quoting State v. Friedman, 93 Hawaiʻi 63, 67, 996 P.2d 268, 272 (2000).)); Cf. Hanapi, 89 Hawaiʻi at 182, 970 P.2d at 490 (noting

that this court "answer[s] questions of constitutional law by exercising [] independent constitutional judgment based on the facts of the case" under the right/wrong standard).[9]

With respect to the record, based on the stipulation, the court concluded that "[o]n July 14, 2004, July 28, 2004 and September 28, 2004, [Petitioner] violated [HAR §] 13-147-4 and is guilty as charged in cases HC04-147, HC04-169 and HC04-229." Conclusion 7. The parties' agreement as to a legal conclusion is not binding on this court. Beclar Corp. v. Young, 7 Haw. App. 183, 190, 750 P.2d 934, 938) (App. 1988) (stating that "the parties' agreement on the question of law is not binding on us"); see also Assoc. of Apartment Owners of Newtown Meadows ex rel. its Bd. of Dirs. v. Venture 15, Inc., 115 Hawaiʻi 232, 254, 167 P.3d 225, 247 (2007) (stating that this court is not bound by the parties' concession of law). This court reviews conclusions of law de novo. Hicks, 113 Hawaiʻi at 70, 148 P.3d at 503 ("A trial court's conclusions of law, however, are reviewed de novo, under the right/wrong standard of review.").

Furthermore, "'[a] stipulation in and of itself may be

[9] Although the parties agreed in this case to certain facts, where constitutional rights are at stake, the court is duty bound, even in the absence of a request or acquiescence of any party, to scrutinize the stipulation to assess whether it is appropriate and supported by the record. Cf. In re Doe, 90 Hawaiʻi 200, 211, 978 P.2d 166, 177 (stating that "before he or she approves of and orders a settlement agreement into effect, a family court judge is duty bound, independent of the request or acquiescence of any party, to scrutinize the settlement agreement for the purpose of determining whether it is appropriate and enforceable").

set aside if it was 'made inadvertently, unadvisedly or improvidently' and 'will operate inequitably and to the prejudice of one of the parties, provided all parties may be placed in the condition in which they were before the stipulation was made.'" In re Doe, 90 Hawaiʻi at 211, 978 P.2d at 177 (App. 1999) (quoting State v. Foster, 44 Haw. 403, 423, 354 P.2d 960, 971 (1960)) (ellipsis and other citations omitted); accord Murray, 116 Hawaiʻi at 13, 169 P.3d at 965. Petitioner himself testified that he was not aware of, or did not observe, any signs indicating that the areas in which he was cited were "closed areas[.]" His appellate counsel acknowledged during oral argument that there was no evidence in the record that the areas in which Petitioner was cited were closed areas. Respondent agreed that, based on the record, it is unclear whether Petitioner was in a "closed area" as defined by the regulation. These facts plainly undermine the stipulation, and thus, also, conclusion 7.[10] Consequently, based on the record, the stipulation was inadvertent, unadvised, or improvident. Because

[10] The majority contends that the absence of evidence to prove this element "is to be expected" because, "having executed the stipulation, the prosecution did not present its case in chief at trial." See majority opinion at 16. For the reasons mentioned before, whether the prosecution did so or not, the conviction cannot be sustained based on our review because of a lack of substantial evidence. Assuming, arguendo, that the record does not contain evidence due to the stipulation, this only underscores the need for a colloquy. To ensure that a defendant understands that the prosecution has the burden of producing evidence to prove each element of the offense, and that stipulating to facts will result in a waiver of that right makes the colloquy all the more essential.

Respondent had the burden of establishing the elements of HAR § 13-146-4 beyond a reasonable doubt, the stipulation would "operate inequitably and to the prejudice of [Petitioner]" because the record does not indicate Petitioner understood the implication of his stipulation. The stipulation, then, must be deemed invalid. Murray, 116 Hawaiʻi at 13, 169 P.3d at 965. Accordingly, Petitioner's conviction must be vacated and the case remanded for a new trial.

IV.

A.

Regarding the second reason, while Petitioner's conviction should be vacated, I reach the first question raised by Petitioner of whether "the defense of privilege pursuant to article XII, section 7 of the Hawaiʻi Constitution require[s] a balancing of the reasonableness of [Petitioner's] conduct against [Respondent's] right to regulate[,]" because the majority addresses it.[11] As held by this court in Hanapi, 89 Hawaiʻi at 185-86, 970 P.2d at 493-94, where a defendant asserts that the conduct for which he or she was charged is constitutionally protected under article XII, section 7, the defendant must prove the three factors previously referred to, see supra.

[11] I concur in the majority's holding that the constitutional defense asserted by Petitioner in this case is governed by the test set forth in Hanapi, 89 Hawaiʻi at 185-86, 970 P.2d at 493-94.

In addition, only "'the reasonable exercise of ancient Hawaiian usage is entitled to protection under article XII, section 7.'" Hanapi, 89 Hawaiʻi at 184, 970 P.2d at 492 (quoting PASH, 79 Hawaiʻi at 442, 903 P.2d at 1263) (emphasis in original). Thus, in my view a defendant bears the burden of proving that the three Hanapi factors have been satisfied and that his or her exercise of rights under article XII, section 7 was reasonable. Although not discussed by the majority, inasmuch as the defendant bears the burden of demonstrating that his or her conduct is constitutionally protected, and only a reasonable exercise of a defendant's article XII, section 7 right is entitled to protection, a defendant must demonstrate that his or her conduct was reasonable in addition to satisfying the three-prong test set forth in Hanapi.

B.

Also, I respectfully disagree with the majority's conclusion that, in balancing the respective interests of native Hawaiians and the State's interest in regulating those rights, the court must consider the "totality of the circumstances." As explained, supra, the current Hanapi test sets out benchmarks for the defense. The court must identify the respective interests of the defendant and the State and balance those interests to determine which is of greater weight. These benchmarks are to be applied in every case, and whether they have been met is

necessarily dependent on the facts of the particular case.

However, introducing the concept of "totality of the circumstances" when there are already settled criteria in Hanapi renders the Hanapi test imprecise and invites consideration of matters beyond the benchmarks. "Totality of the circumstances" connotes something broader than consideration of the relevant criteria which are already to be supported by the facts in each case. For that reason, adding a "totality of the circumstances" gloss to the existing benchmarks risks expanding the scope of analysis to include extraneous matters that may adversely affect the integrity of the test outcome. See State v. Ketchum, 97 Hawaiʻi 107, 133, 34 P.3d 1006, 1032 (2001) (Acoba, J., concurring and dissenting) (stating that the "totality of circumstances test. . . is unnecessary and only invites confusion, not clarity").

The majority disagrees, stating that it does not read Kalipi v. Hawaiian Trust Co., Ltd., 66 Haw. 1, 656 P.2d 745 (182), Pele Defense Fund, 73 Haw. 578, 837 P.2d 1247, PASH, 79 Hawaiʻi 425, 903 P.2d 1246, and Hanapi, 89 Hawaiʻi 177, 970 P.2d 485, as establishing settled criteria for courts to follow. However, although the majority on the one hand states that the cases do not establish a constitutional test with settled criteria, see majority opinion at 28, the majority itself derives from these cases a test that incorporates the Hanapi factors and

balances the interests of defendants against the State, and, on more than one occasion, refers to these as a "three-factor Hanapi test" and a "balancing test." Majority opinion at 17, 24-25.

Along the same lines, the majority claims that it reads the cases as underscoring the importance of the court's "careful judgment" in resolving cases involving Traditional and Customary Native Hawaiian rights. Majority opinion at 29. But this theory finds no support in the cases themselves, for the cases make no mention of the court's "careful judgment" to determine whether a defendant can assert as a defense that the conduct for which he or she was charged is constitutionally protected as a native Hawaiian right. Id. Presumably, in all cases the courts will exercise their functions judiciously and thus use "careful judgment." Balancing contending interests, such as the protections afforded to native Hawaiians against the interests of the State is standard fare for the courts. Respectfully, like the totality of the circumstances gloss, a "careful judgment" standard adds little elucidation or guidance in applying the Hanapi test. More appropriately, in Hanapi, this court reviewed the questions at issue, whether the defendant was exercising a constitutionally protected right at the time of his arrest, and whether the defendant had adduced sufficient evidence to establish the constitutional defense, under the right/wrong

standard and the substantial evidence standard, respectively.[12] Hanapi, 89 Hawaiʻi at 182, 970 P.2d at 490.

Lastly, the majority contends that it is necessary to adopt the totality of the circumstances test because it is "flexib[le]" and will allow the court to take into account "varied [] scenarios." Majority opinion at 29. However, what matters is not whether the test is "flexib[le]" or whether it fits many scenarios, but whether it establishes rational criteria that allow the court to apply the law governing the constitutional defense to the facts of a particular case.[13]

Respectfully, the majority's own analysis illustrates that the totality of the circumstances test is both unnecessary and confusing. The majority purports to apply the totality of the circumstances test to the facts of this case, but, in reality, all it does is to approve of the court's "consider[ation

[12] In Hanapi, this court also explained that to establish the existence of a traditional or customary native Hawaiian practice, there must be an adequate foundation in the record connecting the claimed right to a firmly rooted traditional or customary native Hawaiian practice. 89 Hawaiʻi at 187, 970 P.2d at 495. The determination of whether a proper foundation has been laid is discretionary with the court. See State v. Loa, 83 Hawaiʻi 335, 348, 926 P.2d 1258, 1271 (1996) ("'When a question arises regarding necessary foundation for introduction of evidence, determination of whether proper foundation has been established lies within discretion of trial court, and its determination will not be overturned absent showing of clear abuse.'" (Quoting State v. Joseph, 77 Hawaiʻi 235, 239, 883 P.2d 657, 661 (App. 1994).)) However, the dispute in this case does not concern whether Petitioner laid the proper foundation, but rather whether the court was correct to balance Petitioner's interests against those of the State.

[13] Similarly, although the majority suggests that if we do not adopt its totality of the circumstances test, courts will be precluded from considering "important factors," see majority opinion at 29, the majority does not articulate which "important" factors will be missed or overlooked.

of] all of the facts and circumstances surrounding [Petitioner's] activities, and [its] balanc[ing of] the parties' interests," see majority opinion at 30-31. How injecting the totality of the circumstances test into the analysis would assist the court is not apparent.

V.

Regarding the third reason, as noted, supra, the second question raised by Petitioner is whether the ICA could review Respondent's concession[14] that Petitioner had engaged in traditional and customary Native Hawaiian practices. Because I would vacate and remand the case for a new trial, this question is addressed.

As noted, Respondent conceded in its brief that Petitioner had engaged in traditional and customary native Hawaiian activities. However, concessions do not bind the parties. Cf. State v. Line, 121 Hawaiʻi 74, 79, 214 P.3d 613, 618 (2009) ("[A] confession of error by the prosecution is not binding upon an appellate court"). Nevertheless, the court

[14] Respondent made the following concession in its "Post-Hearing Memorandum in Opposition to Defendant's Motion to Dismiss," filed on January 4, 2006, after the court held its November 4, 2005 hearing to determine whether Petitioner's activities were constitutionally protected: "In this case, based on Dr. Davianna Pomaikai McGregor's testimony, the State does not dispute that the activities described are traditional and customary Native Hawaiian practices."

incorporated the terms of the concession into finding 13[15] and conclusion 8[16], concluding that Petitioner satisfied the three Hanapi factors. On appeal, Judge Leonard, in the lead opinion of the ICA, reviewed whether Petitioner met the three Hanapi factors even though that issue was not contested by the parties. Judge Leonard reasoned that Respondent's concession did not relieve the ICA from its obligation to exercise its own independent judgment on the constitutional question of whether Petitioner satisfied the test in Hanapi. Pratt, 124 Hawaiʻi at 349 n.19, 243 P.3d at 309 n.19. The two other judges on the panel disagreed and would not have reviewed the court's ruling that Petitioner satisfied the three Hanapi prongs. Id. at 357, 243 P.3d at 317 (Fujise, J., concurring); id. at 358, 243 P.3d at 318 (Nakamura, C.J., concurring and dissenting). Petitioner contends that it was improper for Judge Leonard to review whether Petitioner satisfied the three Hanapi factors because Respondent had conceded that

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[15] Finding 13 provides:

> Based on the testimony elicited at the November 4 hearing and concessions made by [Respondent] in its brief, the Court finds that Petitioner is [(1)] a native Hawaiian, [(2)] that he carried out customary or traditional native Hawaiʻi practices in Kalalau at the time of the camping, and [(3)] that his exercise of rights occurred on undeveloped or less than fully developed land.
>
> (Emphasis added.)

[16] Conclusion 8 provides:

> [Petitioner] satisfied all three prongs of the affirmative defense as set forth in [Hanapi].

point and Petitioner was not given notice or an opportunity to brief the question.

Nevertheless, it is axiomatic that, if challenged, an appellate court may review findings of fact under the clearly erroneous standard and conclusions of law de novo. State v. Okumura, 78 Hawaiʻi 383, 391-92, 894 P.2d 80, 88-89 (1995).[17] In this case, finding 13 and conclusion 8 were not challenged. Ordinarily, an error not objected to in a criminal case will be deemed waived on appeal, unless the defendant's substantial rights are affected, in which case the error may be noticed on

[17] Insofar as finding 13 may be viewed as a mixed question of law and fact, there does not appear to be universal agreement among jurisdictions as to what standard should apply. See 9C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2589 at 27400-01 (2011) (Wright & Miller) ("There is no uniform standard for reviewing mixed questions of law and fact."). It is apparent that this jurisdiction employs the clearly erroneous standard when reviewing mixed questions. However, reviewing the factual portion of a mixed question for clear error and the legal portion de novo is more consistent with our jurisprudence, see Okumura, 78 Hawaiʻi at 391-92, 894 P.2d at 88-89. This standard would respect the comparative advantages of trial courts and appellate courts, for it is axiomatic that "appellate courts must constantly have in mind that their function is not to decide factual issues de novo[,]" Anderson v. Bessemer City, 470 U.S. 564, 573 (1985); Briones, 74 Haw. at 465, 848 P.2d at 977 ("Appellate courts neither find facts . . . nor judge credibility, nor weigh the evidence."); whereas it is for appellate courts to "hear and determine all questions of law, or of mixed law and fact," HRS § 602-5(1).

Many jurisdictions review mixed questions by evaluating the factual portion under the clearly erroneous standard and the legal portion of the question de novo. See In re Omega Protein, Inc., 548 F.3d 361, 368 (5th Cir. 2008) (in context of mixed questions of law and fact, the court of appeals should reverse only if "findings are based on a misunderstanding of the law or a clearly erroneous view of the facts); Nelson-Salabes, Inc. v. Morningside Dev., LLC, 284 F.3d 505, 512 (4th Cir. 2002) ("[I]n considering mixed questions of law and fact, we review the factual portion of the inquiry for clear error and the legal conclusions de novo."); Reich v. Lancaster, 55 F.3d 1034, 1044 (5th Cir. 1995) (reviewing "factual conclusions for clear error [] and examining de novo the court's legal conclusion drawn from the facts"). This approach would be consistent with the division of functions between trial and appellate courts that underlie our present approach and therefore would cause less disruption to our system of judging.

appeal if it is plain. Miller, 122 Hawaiʻi at 100, 223 P.3d at 160; Hawaiʻi Rules of Penal Procedure (HRPP) Rule 52[18]. Here, however, the court's finding and conclusion benefitted Petitioner. Since Petitioner benefitted from the concession in this case, as set forth in finding 13 and conclusion 8, his substantial rights were not affected, and therefore there was no plain error to review.

Nevertheless, the question of whether Petitioner's activities were traditional and customary native Hawaiian practices, under article XII, section 7, as manifested in Respondent's concession and the court's finding 13 and conclusion 8, is of constitutional import. Hanapi, 89 Hawaiʻi at 184, 970 P.2d at 492. Appellate courts answer questions of constitutional law by exercising their own judgment. See id. at 182, 980 P.2d at 490 ("We answer questions of constitutional law by exercising our own independent constitutional judgment based on the facts of the case[.]") (Emphasis added.) Thus, it was proper for Judge Leonard to consider whether Petitioner's activities were traditional and native Hawaiian practices, if she chose to, because that issue was germane to the application of article XII, section 7.

[18] Rule 52. HARMLESS ERROR AND PLAIN ERROR.

(a) Harmless error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

Further, an appellate court or judge is empowered to review constitutional questions if justice requires it, even if the issue is not raised by the parties. Fujioka v. Kam, 55 Haw. 7, 9, 514 P.2d 568, 570 (1973) (considering argument not raised before the circuit court that statute was unconstitutional because "an appellate court may . . . hear new legal arguments when justice so requires."); State v. Idelfonso, 72 Haw. 573, 584-85, 827 P.2d 648, 655 (1992) (declining to hear a constitutional challenge not raised but recognizing that this court has addressed issues raised for the first time on appeal where the constitutionality of the statute is of great public import and justice required consideration of the issue).[19] Thus, Judge Leonard was not required to accept what she deemed to be an erroneous proposition of law that was embodied in finding 13 and conclusion 8, inasmuch as that proposition was central to the question the ICA was asked to decide: whether Pratt's conduct was constitutionally protected and exempt from prosecution.

Judge Leonard was not joined by her colleagues in reviewing Respondent's concession. Nevertheless, it was her

[19] An appellate court's inherent power to do justice is also reflected in several statutory provisions. Specifically, HRS § 602-57 (1993) provides that the ICA "shall have concurrent jurisdiction with the supreme court on all matters set out in section 602-5(1) through (7) . . . ." HRS § 602-5(7) empowers this court and the ICA "[t]o make and award such judgments, decrees, orders and mandates . . . and do such other acts and take such other steps as may be necessary to carry into full effect the powers which are or shall be given to it by law or for the promotion of justice in matters pending before it." (Emphasis added.)

prerogative to review the concession in order to perform her judicial function as she saw fit. "[There is] no more appropriate avenue for the discharge of [] individual judicial obligations [] than [] the written opinion. The choice and wisdom of exercising that prerogative must rest with each [judge] and no [judge] should shirk from exercising that judicial prerogative or be deterred by any veiled attempt to muzzle such expression." In re Attorney's Fees of Mohr, 97 Hawaiʻi 1, 16, 32 P.3d 647, 662 (2001) (Acoba, J., concurring in part and dissenting in part) (emphasis in original). The independence of a judge on each court must be preserved, as must the independence of the judiciary in general.

VI.

For these reasons, I respectfully dissent in part.

/s/ Simeon R. Acoba, Jr.

/s/ Sabrina S. McKenna