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IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI, Petitioner/Plaintiff-Appellee

vs.

CEDRIC K. KIKUTA, Respondent/Defendant-Appellant

NO. 29445

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(FC-CR. NO. 07-1-0056)

JUNE 8, 2011

CONCURRING OPINION BY CIRCUIT JUDGE WILSON, IN PLACE OF MOON, C.J., RECUSED AND RETIRED

I agree with the opinion of Associate Justice Acoba and thus have signed it. I concur not to limit what is stated in that opinion, but to add to the justification for remand of the case for a new trial.

This case presents the question whether twelve citizens representing our community as jurors are barred as a matter of law from deciding whether a stepfather (Respondent/Defendant-Appellant Cedric K. Kikuta (Defendant)) exercised parental discipline when he pushed his fourteen-year-old stepson (Justin) into a glass door and struck him in the face. Trial judges are

rightfully adverse to the notion that judges should substitute their values for those of jurors by barring a defense requested by a defendant. It is beyond cavil that the right to a jury trial is paramount among those rights enjoyed by individual citizens. It is said that the individual citizen's right to a jury of peers is the greatest protection we have from unlawful government action:

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is guaranteed to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the higher authority. The framers of the constitutions strove to create and independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.

Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968).

In this case, the trial judge deprived Defendant of the right to present his defense and, thus, his right to a fair trial. A requested instruction is to be given where, as here, there is any evidence to support the defense. On cross examination the prosecutor established that Defendant acted as a father figure, who exercised discipline against Justin on the day of the incident because he did not clean up a rug stain from the dog, slammed the door in anger, did not listen, and gave attitude. The prosecutor's questioning established that the argument between Defendant and Justin was about discipline. Defendant threatened to ground Justin for a year. And he admitted he pushed Justin's shoulders while he was sitting on the ground watching the computer and eventually struck him because he

was teaching him not to stand up to "dad": "I was like, what makes you think you could stand up to dad, you know. Don't do that, you know."

Cases cited by the dissent support the proposition that Defendant should not have been stripped of his right to have the jury consider his defense. In State v Crouser, 81 Hawaiʻi 5, 911 P.2d 725 (1996), the defense asserted, and the court, as trier of fact, considered the parental discipline defense where the defendant hit her fourteen-year-old daughter twenty-five times on the buttocks and hands with a plastic bat so hard she was unable to sit, and hit her across both sides of the face with sufficient force to knock her to the floor. In State v. Miller, 105 Hawaiʻi 394, 98 P.3d 265 (App. 2004), the trier of fact considered the defendant uncle's asserted parental discipline defense where he hit his eleven-year-old nephew with fists five times, kicked him, pulled him up by the ear and hair and gave him sufficient injuries that he was taken to the hospital by ambulance. The defense was also considered by the trier of fact in State v Tanielu, 82 Hawaiʻi 373, 922 P.2d 986 (App. 1996), where the defendant father kicked his fourteen-year-old daughter in the face five to ten times, slapped her six or seven times and punched her one or two times. The parental discipline defense was asserted and considered by the trier of fact in all three cases, notwithstanding the force exercised by the defendants.[1]

Defendant's right to a fair trial was further compromised after the court denied his request for a parental

[1] Each case was a bench trial.

discipline instruction. Barred from asserting and having the jury consider his chosen defense, Defendant was limited to arguing only self defense to the jury. Yet, during closing argument the prosecutor advised the jury to reject Defendant's contention that he acted in self defense because his true intent was not to protect himself, but rather to discipline Justin. Specifically the prosecutor argued that Defendant exercised discipline when he became angry at Justin's attitude, particularly after Justin walked away and slammed the door. She emphasized that the incident took place because Defendant was going to "ground" Justin for a year, and the only way Defendant knew to "control" Justin was through anger. Her position was that Defendant did not act through self defense but as an angry father trying to control his son: "That person over there, his father, caused those injuries. He wasn't justified. There was no need for self-defense. He did it. He was angry and that's the only way he knew to control Justin." Legally barred from taking the very position argued by the prosecutor, Defendant's chosen defense was gutted.

/s/ Michael D. Wilson
Circuit Judge