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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I,
Plaintiff-Appellee,

vs.

RICHARD OBRERO,
Defendant-Appellant.

SCAP-21-0000576

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CAAP-21-0000576; CASE NO. 1CPC-19-0001669)

SEPTEMBER 8, 2022

CONCURRING AND DISSENTING OPINION BY NAKAYAMA, J.,
IN WHICH MCKENNA, J., JOINS AS TO SECTIONS II AND III

For the reasons discussed in the Chief Justice's
Dissent, I agree that the 1982 amendment to article I, section
10 of the Hawai'i Constitution invalidated Hawai'i Revised
Statutes (HRS) § 801-1. I join wholeheartedly in his Dissent.

I nevertheless concur in the result of the Majority's
opinion because Plaintiff-Appellee the State of Hawai'i's (the
State) complaint against Defendant-Appellant Richard Obrero

(Obrero) is unconstitutional. In 1982, the Legislature and Hawai'i voters amended article I, section 10 of the Hawai'i Constitution to authorize prosecutors to initiate a prosecution upon a judge's finding of probable cause after a preliminary hearing. In this case, the State has seized upon this authority to initiate a prosecution via a preliminary hearing even after a grand jury declined to return a true bill. This violates the purpose of the 1982 amendment, which was to create an alternative – not sequential – method by which the State could initiate a prosecution.

I. BACKGROUND

On November 7, 2019, Obrero fired a gun at several individuals, which led to the death of a minor. That same day, the State arrested Obrero for the minor's death.

On November 12, 2019, the State filed six single-count complaints against Obrero. The District Court of the First Circuit¹ (district court) scheduled Obrero's preliminary hearing for the afternoon of November 14, 2019.

On the morning of November 14, 2019, the State sought a grand jury indictment against Obrero for the offenses included in the complaint, as well as three additional offenses.

¹ The Honorable Melanie M. May presided.

However, the grand jury refused to return a true bill on all of the offenses.

That afternoon, the State proceeded with the preliminary hearing. At the end of the hearing, the district court found probable cause on the six offenses included in the initial complaints and committed the matter to the Circuit Court of the First Circuit² (circuit court).

Obrero moved to dismiss the complaint against him on two grounds. First, Obrero contended that HRS § 801-1 requires the State to prosecute class-A felonies by indictment. Second, Obrero asserted that "the Hawaii Constitution precludes the State's attempt to circumvent the grand jury's 'No Bill' determination by way of a complaint and preliminary hearing." Obrero reasoned that the State's act of seeking a preliminary hearing after a grand jury has declined to return a true bill improperly invalidates the province of the grand jury and induces an action deemed unwarranted by the grand jury.

The circuit court denied Obrero's constitutional argument, explaining that

By its plain language, Article I section 10 of the Hawaii Constitution clearly authorizes the prosecution of a person for a "capital or otherwise infamous crime," in one of three ways: (1) upon indictment of a grand jury, (2) upon a finding of probable cause after a preliminary hearing, or (3) upon an information in writing signed by a legal prosecuting officer, where permitted by law.

² The Honorable Kevin A. Souza presided.

The circuit court thus concluded that "Defendant was permissibly charged via complaint after a preliminary hearing in this matter, regardless of whether or not there was an indictment attempt." The circuit court also rejected Obrero's statutory argument.

Obrero appealed the circuit court's decision to the Intermediate Court of Appeals, and timely sought transfer to this court. This court granted Obrero's transfer application.

II. STANDARD OF REVIEW

A. Constitutional Interpretation

"Issues of constitutional interpretation present questions of law that are reviewed de novo." Blair v. Harris, 98 Hawai'i 176, 178, 45 P.3d 798, 800 (2002) (citation omitted).

[W]e have long recognized that the Hawaii Constitution must be construed with due regard to the intent of the framers and the people adopting it, and the fundamental principle in interpreting a constitutional provision is to give effect to that intent. This intent is to be found in the instrument itself.

Hanabusa v. Lingle, 105 Hawai'i 28, 31, 93 P.3d 670, 673 (2004) (quoting Blair, 98 Hawai'i at 178-79, 45 P.3d at 800-01).

"However, if the text is ambiguous, extrinsic aids may be examined to determine the intent of the framers and the people adopting the proposed amendment." State v. Kahlbaun, 64 Haw. 197, 201-02, 638 P.2d 309, 314 (1981) (citations omitted).

III. DISCUSSION

A. The State's use of a probable cause hearing after receiving grand jury no-bills is unconstitutional.

1. The language of article I, section 10 is ambiguous.

Article I, section 10 ("section 10") of the Hawai'i State Constitution presently provides:

No 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 writing signed by a legal prosecuting officer under conditions and in accordance with procedures that the legislature may provide, except in cases arising in the armed forces when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy; nor shall any person be compelled in any criminal case to be a witness against oneself.

Thus, section 10 articulates three methods by which a defendant may "be held to answer for a capital or otherwise infamous crime": (1) on a presentment or indictment of a grand jury; (2) upon a finding of probable cause after a preliminary hearing held as provided by law; or (3) upon information in writing signed by a legal prosecuting officer under conditions and in accordance with procedures that the legislature may provide. The State is therefore correct in arguing that the State may prosecute a defendant "via a district court complaint, upon a finding of probable cause after a preliminary hearing."

However, section 10 is silent on the question of whether the State may use multiple methods to initiate a single prosecution. See generally section 10. Under such

circumstances, the meaning of section 10 is ambiguous. See Gray v. Admin. Dir. of the Court, 84 Hawai'i 138, 148, 931 P.2d 580, 590 (1997) ("When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used . . . , an ambiguity exists."). Thus, it is this court's responsibility to determine whether the State's act was constitutional. League of Women Voters of Honolulu v. State, 150 Hawai'i 182, 192, 499 P.3d 382, 392 (2021).

2. The Legislature proposed amending section 10 to allow prosecution following a preliminary hearing as an alternative to grand jury indictments, not to supersede grand jury indictments.

An "established rule of [constitutional] construction is that a court may look to the object sought to be accomplished and the evils sought to be remedied by the amendment, along with the history of the times and the state of being when the constitutional provision was adopted." Kahlbaun, 64 Haw. at 202, 638 P.2d at 315 (citations omitted).

Following the 1978 Constitutional Convention, section 10 read in relevant part: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury" 1 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 1150 (1980). Based on this language, the State could only initiate a criminal prosecution after obtaining a grand jury indictment. Id.

In 1981, the State House of Representatives proposed H.B. No. 150 "to allow for the initiation of felony criminal prosecutions by way of a preliminary hearing as well as a grand jury indictment." H. Stand. Comm. Rep. 582, in 1981 House Journal at 1180. The House Judiciary Committee explained this was necessary because

The Hawaii State Constitution currently provides that no person may be tried or held to answer for a capital or infamous crime unless prosecution is initiated by a grand jury indictment. Thus, under the present procedure, a felony indictment must be returned by a grand jury, even in cases where probable cause has been established at a preliminary hearing. This procedure necessitates that witnesses must testify twice, once at the preliminary hearing, and again before the grand jury. The requirement for both a preliminary hearing and grand jury hearing serves no useful purpose and only results in additional cost to the government, hardship on witnesses, and needless duplication and delay in the prosecution of felony cases.

Your Committee feels that the passage of this bill removes this additional burden on witnesses without adversely affecting the defendant's rights. In addition, the removal of duplication within the criminal justice system will insure that the defendant receive a speedy trial.

Id. (emphasis added).

Around the same time, the State Senate proposed S.B. No. 142 - "which contain[ed] the same provisions as H.B. No. 150" - "to permit trial of a person for a felony after a preliminary hearing showing probable cause that said person committed the felony." S. Stand. Comm. Rep. No. 405, in 1981 Senate Journal at 1091; S. Stand. Comm. Rep. No. 702, in 1981 Senate Journal at 1212-13. The Senate Judiciary Committee recognized that "the finding of probable cause at a preliminary

hearing is a viable alternative to the grand jury indictment." S. Stand. Comm. Rep. No. 405, in 1981 Senate Journal at 1091 (emphasis added). The Senate Judiciary Committee also emphasized that "[t]he present bill does not eliminate the grand jury system, but simply allows an alternate method to grand jury indictment for trial of defendants charged with felonies." Id. (emphasis added). The word "alternative" meant "1. a. The choice between two mutually exclusive possibilities. b. Either of these possibilities. 2. One of a number of things from which one must be chosen." The American Heritage Dictionary 99 (2d. Coll. Ed. 1982).³ The Senate Judiciary Committee ultimately approved 1981 H.B. No. 150 for the same reasons for which it supported 1981 S.B. No. 142. S. Stand. Comm. Rep. No. 702, in 1981 Senate Journal at 1212-13.

In light of the foregoing, it appears that the House intended for 1981 H.B. No. 150 to eliminate inefficiencies imposed by sequential probable cause determination processes. See H. Stand. Comm. Rep. 582, in 1981 House Journal at 1180. The Senate's identification of the procedure as "an alternative method" also indicates that the Legislature intended for the State to use one procedure or the other — not both — to initiate

³ The 1979 Random House College Dictionary similarly defines "alternative" as "a choice limited to one of two or more possibilities." At 40 (emphasis added).

a prosecution. See S. Stand. Comm. Rep. No. 702, in 1981 Senate Journal at 1212-13.

3. Voters ratified 1981 H.B. No. 150 to provide an alternative procedure.

Once 1981 H.B. No. 150 passed the three readings requirement in both the House and Senate, the bill was put to voters as a ballot measure. Voters were asked:

House Bill No. 150 of the Eleventh Legislature, Regular Session of 1981, proposes that Article I, Section 10 of the Constitution of the State of Hawaii be amended to allow a person to be held to answer for a capital or otherwise infamous crime upon a finding of probable cause after a preliminary hearing is held as provided by law. This proposed procedure would be an alternative to the present procedure requiring a presentment or indictment of a grand jury.

Shall the amendment proposed by said House Bill No. 150 be adopted?

(Emphasis added.) Hawai'i voters approved the ballot measure.

The ballot measure's identification – and the voters' subsequent approval – of the preliminary hearing procedure as “an alternative” makes clear that the amendment was not intended to allow the State to utilize both procedures to initiate a single prosecution.

In turn, the State's initiation of the prosecution of Obrero after a grand jury declined to return a true bill violates section 10, and is unconstitutional. The circuit court therefore erred in denying Obrero's motion to dismiss.

4. The 1978 constitutional amendments indicate that the State may not override a grand jury's refusal to return a true bill of indictment by seeking a probable cause hearing.

It is also worth noting that, less than five years before the 1982 amendment to section 10, delegates to the 1978 Constitutional Convention and Hawai'i voters implemented article I, section 11 of the Hawai'i Constitution ("section 11")⁴ to protect grand juries from being dominated by prosecutors. As this court has recognized,

The grand jury functions as a barrier to reckless or unfounded charges and serves as a "shield against arbitrary or oppressive action, by insuring that serious criminal accusations will be brought only upon the considered judgment of a representative body of citizens acting under oath and under judicial instruction and guidance." United States v. Mandujano, 425 U.S. 564, 571 (1976); State v. Pacific Concrete & Rock Co., 57 Haw. 574, 560 P.2d 1309 (1977).

. . . .

However, [around that time], the grand jury system ha[d] come under severe criticism. 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. These criticisms were not unfounded; thus, a substantial movement developed to abolish the grand jury in total. Instead of completely abolishing the grand jury system in Hawaii, the 1978 Constitutional Convention sought to cure some of the ills by proposing the concept of the independent grand jury counsel. This proposal sought to relieve the prosecutor of the conflicting roles of

⁴ As adopted in 1979, Section 11 provided:

Whenever a grand jury is impaneled, there shall be an independent counsel appointed as provided by law to advise the members of the grand jury regarding matters brought before it. Independent counsel shall be selected from among those persons licensed to practice law by the supreme court of the State and shall not be a public employee. The term and compensation for independent counsel shall be as provided by law.

1 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 1150.

advising the grand jury and presenting sufficient evidence to sustain an indictment. Ultimately, this measure would ensure the independence of the grand jury from the domination of the prosecutor.

Kahlbaun, 64 Haw. at 203, 638 P.2d at 315-16 (emphasis added) (citation omitted).

In light of section 11's articulated purpose, it is unreasonable to think that the Legislature and voters amended section 10 to allow prosecutors to override a grand jury's decision. If the Legislature and voters had intended to permit prosecutors such unfettered authority, the Legislature and voters had the opportunity "to abolish the grand jury in total." See id. They did not. Id.

B. The State may return to the grand jury and obtain an indictment if it can present additional evidence.

Although the State may not prosecute Obrero via the constitutionally infirm complaint, the State is not without any further means to seek the prosecution of an individual after a return of no true bill of indictment. Obrero concedes that "a grand jury panel's return of a no bill [does not] automatically bring[] a criminal proceeding to an end." However, Obrero argues that "due process should require the State to demonstrate, once a grand jury returns a no bill, that any subsequent indictment . . . is based, at least in part, on additional evidence[.]" Obrero is correct.

Given the role of the grand jury and the intent behind the adoption of section 11, the Hawai'i Constitution does not allow prosecutors to turn to a different grand jury panel to obtain an indictment using identical evidence. Permitting prosecutors to present an identical case to different grand jury panels until one grants the desired indictment would undermine the purpose of and protections provided by the grand jury. Delegates and Hawai'i voters adopted section 11 as part of their efforts to prevent this very result. Id. As such, in my mind, the State may return to the grand jury to seek an indictment of Obrero, but prosecutors must present new evidence that was not presented to the prior panel that had not returned a true bill to obtain a constitutionally valid indictment.

IV. CONCLUSION

For the foregoing reasons, the State's act of filing charges before a grand jury and then initiating a prosecution through a probable cause hearing after a grand jury refused to return a true bill of indictment violates section 10. Therefore, the State's prosecution of Obrero is unconstitutional, and the complaint must be dismissed. Accordingly, I concur in the result of the Majority's opinion.

However, for the reasons discussed in the Chief Justice's Dissent, Obrero's statutory argument is unavailing. As the Chief Justice explains, the 1982 amendment to section 10

invalidated HRS § 801-1 and authorized the State to initiate prosecutions for all felonies by either a grand jury indictment or a probable cause hearing before a judge. I therefore join in the Dissent's analysis of HRS § 801-1.

/s/ Paula A. Nakayama



I join Justice Nakayama's Concurring and Dissenting Opinion as to sections II and III.

/s/ Sabrina S. McKenna