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

DISSENTING OPINION BY RECKTENWALD, C.J.,
IN WHICH NAKAYAMA, J., JOINS

I. INTRODUCTION

In 1982, the citizens of the State of Hawai'i voted to ratify an amendment to the Hawai'i Constitution to allow prosecutors to charge felonies by preliminary hearing. Its purpose and effect, until today, were never disputed: it granted prosecutors discretion to initiate criminal proceedings by

either a grand jury indictment or upon a finding of probable cause by a judge at a preliminary hearing. The Majority's novel interpretation of the constitution departs from forty years of settled law and needlessly frustrates the framers' intent.

This case requires us to consider whether the 1982 amendment of article I, section 10 invalidated Hawai'i Revised Statutes (HRS) § 801-1 (2014), unchanged in its current form at least since 1905. Whereas article I, section 10, as amended, allows a defendant to be charged by preliminary hearing, HRS § 801-1, when read in conjunction with other statutes, requires the State to procure a grand jury indictment in order to prosecute defendants accused of certain felonies.

The text and purpose of the 1982 amendment make clear that it was designed to abrogate the grand jury requirement previously recognized in article I, section 10 and HRS § 801-1. Because effect cannot reasonably be given to both HRS § 801-1 and article I, section 10 of the constitution, the statute must fail. Accordingly, I respectfully dissent.

II. DISCUSSION

The Majority reads HRS § 801-1 as creating a right to grand jury indictment for criminal defendants charged with

certain felonies.[1] Majority at 2. In its view, article I, section 10 merely sets the baseline for criminal-charging practices: "The legislature is free to augment or duplicate the rights afforded by the constitution with statutory entitlements. And it has done just that with HRS § 801-1." Majority at 18 n.18.

Respectfully, the Majority fails to account for the fact that HRS § 801-1 was passed more than 100 years before the constitution even allowed felonies to be charged by preliminary hearing – so the legislature could not possibly have intended to exceed the constitution's protections. Moreover, the text, purpose, and legislative history of article I, section 10 underscore that the framers aimed to provide for preliminary hearings as a substitute for the grand jury process, superseding any law to the contrary. It is impossible to give this provision its intended effect without abrogating HRS § 801-1.

First, the text of the 1982 amendment is clear on its own terms. Article I, section 10 now reads in relevant part,

[1] HRS § 801-1 states: "No person shall be subject to be tried and sentenced to be punished in any court, for an alleged offense, unless upon indictment or information, except for offenses within the jurisdiction of a district court or in summary proceedings for contempt." Thus, it mandates grand jury indictment for all offenses other than contempt and those chargeable by information or within the jurisdiction of a district court. As district courts have jurisdiction over only misdemeanors, HRS § 604-8(a) (2016); HRS § 701-107 (2014), and only certain class B and C felonies may be charged by information, see HRS § 806-82 (2014); HRS § 806-83 (Supp. 2017), under the Majority's view, any other felony must be charged by indictment. Majority at 2.

with the 1982 addition emphasized: "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[.]"[2] See 1981 Haw. Sess. Laws, at 475. The text makes plain that a grand jury and a preliminary hearing are equally valid means to prosecute an infamous crime. It places no limits on preliminary hearings other than that they must be "held as provided by law." Its clear import is that wherever a grand jury was previously appropriate, a preliminary hearing, held as provided by law, may be used instead. See Hawai'i State AFL-CIO v. Yoshina, 84 Hawai'i 374, 376, 935 P.2d 89, 91 (1997) ("[I]n the construction of a constitutional provision the words are presumed to be used in their natural sense unless the context furnishes some ground to control, qualify, or enlarge them." (quoting Pray v. Jud. Selection Comm'n, 75 Haw. 333, 341, 861

[2] The full text of article I, section 10 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.

P.2d 723, 727 (1993))). The context of the amendment – prior to its passage or thereafter – does not furnish any grounds to control or qualify the text. To the contrary, for forty years, prosecutors and defense lawyers alike have apparently assumed that any felony may be prosecuted using a preliminary hearing. By its own terms, then, the 1982 amendment is directly contrary to HRS § 801-1 and superseded the statute on the day it was passed. See State v. Casugay-Badiang, 130 Hawai'i 21, 34, 305 P.3d 437, 450 (2013) (Recktenwald, C.J., dissenting) (arguing that where "it is not possible to give effect" to two statutes, and one's language was "clear and sweeping," it impliedly repealed the other).

Even if the text was somehow ambiguous as to the effect of the amendment, the purpose clause of the bill that proposed it, H.B. 150, resolves any ambiguity: "The purpose of this Act is to . . . permit a person to be tried for a felony after a preliminary hearing has been held[.]" 1981 Haw. Sess. Laws, at 475 (emphasis added).[3] HRS § 801-1, which prevents those accused of certain felonies from being tried except upon grand jury indictment, is plainly contrary to the amendment's purpose. Nowhere does the bill propose to limit which felonies

[3] The title of the bill is also indicative of its purpose: "A Bill for an Act Proposing an Amendment to Article I, Section 10, of the Constitution of the State of Hawai'i to Permit Felony Trials After Preliminary Hearings." 1981 Haw. Sess. Laws, at 475.

may be prosecuted by preliminary hearing. More than a committee report or the stray remarks of a legislator, this statement of the amendment's purpose was considered and passed by both houses of the legislature. See Kevin M. Stack, The Enacted Purposes Canon, 105 Iowa L. Rev. 283, 287 (2019) (noting that purpose clauses provide "authoritative context" since they "are enacted into law as part of the statute" (quoting William N. Eskridge, Interpreting Law 105-06 (2016))); cf. N.Y. State Dep't of Soc. Servs. v. Dublino, 413 U.S. 405, 419–20 (1973) ("We cannot interpret federal statutes to negate their own stated purposes." (emphasis added)). Accordingly, there can be no doubt that the intended effect of the 1982 amendment was to allow complaint charging for all felonies, superseding HRS § 801-1.

H.B. 150's legislative history further dispels any doubt about the intended effect of the amendment. Like the purpose clause and the amendment itself, the Senate Judiciary Committee report did not qualify the offenses for which a preliminary hearing may be used. S. Stand. Comm. Rep. No. 702, in 1981 Senate Journal, at 1212-13; see also S. Stand Comm. Rep. No. 405, in 1981 Senate Journal, at 1091 (providing, with no qualifying language, that the amendment's purpose was "to permit trial of a person for a felony after a preliminary hearing showing probable cause that said person committed the felony" (emphasis added)). Instead, the Committee noted 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." S. Stand. Comm. Rep. No. 702, in 1981 Senate Journal, at 1213 (emphasis added). Likewise, the House Judiciary Committee indicated that the bill's purpose was "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. No. 582, in 1981 House Journal, at 1180 (emphasis added). No language appears qualifying the reach of the provision or limiting the felonies that could be charged after a preliminary hearing.

The Majority argues that the 1982 amendment should not be read as negating HRS § 801-1 because the two are not "plainly irreconcilable." Majority at 15. "Repeal by implication is disfavored . . . . '[I]f effect can reasonably be given to two statutes, it is proper to presume that the earlier statute is intended to remain in force[.]'" Id. at 16 (quoting State v. Pacariem, 67 Haw. 46, 47, 677 P.2d 463, 465 (1984) (per curiam)). Because article I, section 10 "does not limit the legislature's ability to place checks on the government's power to prosecute beyond those imposed by the constitution," effect can be given to both HRS § 801-1 and the constitution. Id. at 18 n.18.

Respectfully, the Majority errs by concluding that both enactments can reasonably be given effect. Under the Majority's view, a preliminary hearing suffices to hold a felony defendant, while a grand jury is required to try them. Majority at 14-15 & n.13. But this was already the case before the 1982 amendment. See, e.g., H. Stand. Comm. Rep. No. 582, in 1981 House Journal, at 1180 (describing preliminary hearings as part of "the present procedure" in charging felonies and stating that allowing the State to proceed by preliminary hearing alone would remove "needless duplication and delay in the prosecution of felony cases"). The Majority thus holds that the 1982 amendment merely continued the pre-1982 status quo, at least until the legislature sees fit to repeal HRS § 801-1. This interpretation cannot be said to give the amendment reasonable effect.

The Majority's argument amounts to the proposition that in order to have any effect at all, article I, section 10 depends entirely on the legislature to act. Majority at 19-22. Article I, section 10 is "no substitute for the tangle of laws that came before it concerning the initiation of felony prosecutions." Id. at 19-20. So, until the legislature chooses to amend or repeal HRS § 801-1, article I, section 10 is entirely inoperative.

Our constitution is not as tentative in its execution as the Majority's view suggests. To the contrary, the text of

the constitution itself makes clear that "[t]he provisions of this constitution shall be self-executing to the fullest extent that their respective natures permit." Haw. Const. art. XVI, § 16. The test for whether a provision is self-executing centers on whether its text "indicates that the adoption of implementing legislation is necessary." Cnty. of Hawai'i v. Ala Loop Homeowners, 123 Hawai'i 391, 412, 235 P.3d 1103, 1124 (2010), abrogated on other grounds, Tax Found. of Hawai'i v. State, 144 Hawai'i 175, 439 P.3d 127 (2019).

Here, nothing about the language of article I, section 10 indicates that implementing legislation was anticipated before the amendment could take effect.[4] The operative language – "[n]o person shall be held to answer . . . unless on a presentment or indictment of a grand jury or upon a finding of probable cause after preliminary hearing held as provided by law" - does not "merely indicate[] principles, without laying down rules." Ala Loop, 123 Hawai'i at 410, 235 P.3d at 1122

[4] This is true notwithstanding that article I, section 10 contains the words "as provided by law." While the words "as provided by law" may "reflect an intent that implementing legislation is anticipated," they are not conclusive, as they may "simply refer[] to an existing body of statutory and other law on a particular subject." Ala Loop, 123 Hawai'i at 412, 235 P.3d at 1124. In the context of article I, section 10, the term "held as provided by law" refers to the well-developed body of law governing preliminary hearings. See, e.g., Hurtado v. California, 110 U.S. 516, 538 (1884) (describing the practice of charging by preliminary proceedings before a magistrate as "an ancient proceeding at common law"). In other words, it means just what it says: the preliminary hearing process must be "held" lawfully, in accordance with the statutes then in effect or passed later to govern its procedures.

(quoting State v. Rodrigues, 63 Haw. 412, 414, 629 P.2d 1111, 1113 (1981)). Rather, it provides a clear rule, namely that prosecutors may proceed by preliminary hearing without the "needless duplication" of the grand jury. See H. Stand. Comm. Rep. No. 582, in 1981 House Journal, at 1180. There was, in short, no need for "a comprehensive new procedural framework for charging felonies" in this manner. Majority at 20. Although the legislature was free to define the procedures and parameters of the preliminary-hearing process, the amendment's entire effect was not contingent on such implementation.[5]

[5] Even if further steps were needed to fully operationalize the preliminary-hearing procedure, this was accomplished by Hawai'i Rules of Penal Procedure (HRPP) Rule 5(c) (2014), governing preliminary hearings in felony proceedings, and HRPP Rule 7(b) (2012), providing that a felony "may be prosecuted by a complaint" if a district judge finds probable cause at a preliminary hearing. The Majority concedes that these provisions "flatly contradict HRS § 801-1" but argues that they cannot supersede the statute, or they would abridge the substantive rights of litigants in violation of HRS § 602-11 (2016). Majority at 16-17 & n.17.

However, HRS § 801-1 does not confer a substantive right. As a preliminary matter, given that the 1982 amendment removed the grand jury requirement from the constitution, HRS § 801-1 does not codify constitutional principles and needs not be interpreted to supersede subsequent court rules. See State v. Hernandez, 143 Hawai'i 501, 513, 431 P.3d 1274, 1286 (2018) ("[O]ur court rules must be construed to conform with the dictates of our constitution when such an interpretation is reasonably possible and to yield when there is irreconcilable conflict."). Moreover, HRS § 801-1 provides only procedural rights because it is not outcome determinative and does not produce rules of decision. See Cox v. Cox, 138 Hawai'i 476, 482-83, 382 P.3d 288, 294-95 (2016) (citing to Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 407 (2010), for the proposition that a statute that governs "the manner and the means" by which a right is enforced is not substantive, whereas a statute that "creates a decisional framework" is). The underlying substantive right is a defendant's entitlement to a finding of probable cause by a neutral arbiter prior to standing trial. Cf. Hurtado, 110 U.S. at 538 ("[W]e are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information after examination and commitment by a magistrate, certifying to the probable guilt of the defendant . . . is not due process of law."). HRPP Rules 5 and

To the contrary, the intended effect of the 1982 amendment – as evidenced by its plain text and legislative history – was to provide an alternative to the grand jury as the sole method to prosecute infamous crimes. This effect is plainly irreconcilable with HRS § 801-1's mandatory grand jury provision. To give any force at all to the will of the voters and legislature that enacted the amendment, we must hold that it repealed HRS § 801-1 by implication. See Macon v. Costa, 437 So. 2d 806, 810 (La. 1983) ("[W]hile repeals by implication are not favored, a constitutional amendment or provision operates to supersede or repeal all statutes that are inconsistent with the full operation of its provisions.").

The Majority's only answer is that HRS § 801-1 can be reconciled with the amendment because the statute permissibly exceeds the protections offered by the constitution. Majority at 18 n.18. The sole authority it cites for this proposition is State v. Maldonado, but Maldonado is inapt. In Maldonado, at issue was article I, section 7 of the Hawai'i Constitution, which required only that a search or seizure be reasonable, and HRS § 803-11 (1993), which provided more specific procedures that an arresting officer must employ upon entering a house. State v.

(. . . continued)
7 modify the manner and means by which this right is enforced, not the right itself.

Maldonado, 108 Hawai'i 436, 444, 121 P.3d 901, 909 (2005). We held that "where the legislature has enacted a valid statute that provides greater protection than the constitution, conformance to the statutory mandate . . . is required." Id.

Here, to begin with, no post-1982 legislature ever intended to "provide[] greater protection than the constitution";[6] rather, HRS § 801-1 was passed more than a century before the constitution allowed felony-complaint charging, and so could not possibly have been intended to bolster its protections.[7] Moreover, nothing about the nature of

[6] Indeed, it is not clear that the grand jury proceeding offers greater protections to defendants at all; the modern preliminary hearing, with all of its procedural safeguards absent at the grand jury – most notably, the defendant's right to be present and to cross-examine witnesses - may afford more protection for the accused. See 2 Proceedings of the Constitutional Convention of 1978 (1980), at 674 (statement of Del. Chu) (stating during discussion of a possible amendment to abolish or limit the grand jury that "the [grand jury] system has been ineffective as a prosecutorial tool, has been surrounded by a veil of secrecy and has often been justifiably called a rubber stamp for the prosecutor"); see also, Note, The Function of the Preliminary Hearing in Federal Pretrial Procedure, 83 Yale L.J. 771, 804 (1974) (noting that because a preliminary hearing is adversarial and has stricter standards for evidence, it "provide[s] a more accurate fact-finding mechanism than would the grand jury").

[7] The Majority also points to language in various statutes that it says indicates that the legislature saw HRS § 801-1 as continuing in effect, including HRS § 805-7 (2014), which refers to "offenses . . . that can be tried only on indictment by a grand jury," and HRS § 806-8 (2014), which refers to "criminal cases . . . in which the accused may be held to answer without an indictment by a grand jury." Majority at 18-19 & n.19. It suggests that these statutes "contemplate[] the possibility that indictments are, in some circumstances, essential for prosecution." Id. at 19. However, these provisions became law before the 1982 amendment. Therefore, they are not evidence that there are currently offenses that require a grand jury indictment; rather, they are evidence that such offenses existed at the time that the language in question became law. The fact remains that the Majority today reaches a result that neither the legislature nor the electorate ever intended.

the constitutional right at issue in that case – the right to be free from unreasonable search and seizure – was in conflict with the greater protections that the legislature sought to provide. By contrast, here, the legislature previously provided for grand juries as a mandatory step in felony prosecution, and the framers subsequently provided that a grand jury or a preliminary hearing would suffice. These enactments directly conflict. Therefore, Maldonado is inapposite.

In sum, the idea that article I, section 10 merely provides a "constitutional floor for prosecutions" that the legislature validly exceeded in HRS § 801-1, Majority at 19, defies the plain language and legislative history of article I, section 10. The 1982 amendment plainly intended to sweep away the grand jury requirement as the sole method to prosecute felonies. The fact that a defunct statute was left on the books should not frustrate the text of the constitutional amendment and the will of the voters and legislative supermajorities that passed it.

III. CONCLUSION

HRS § 801-1 is directly contrary to the text and purpose of article I, section 10. It was therefore superseded and rendered inoperative the day that the 1982 amendment went into effect. The fact that the legislature neglected to take an obsolete statute off the books should not be allowed to defeat

the intent of the framers. Accordingly, and for the reasons mentioned above, I respectfully dissent.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama