IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI,
Plaintiff-Appellee,

vs.

DAE HAN MOON,
Defendant-Appellant.

SCAP-19-0000714

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CAAP-19-0000714; CASE NO. 1PC161002007)

FEBRUARY 10, 2023

DISSENTING OPINION BY WILSON, J.

At issue in this case is the legal protection afforded those whose organs are harvested while they are still alive—albeit while they are kept alive by artificial means of support. Steve Feliciano ("Feliciano") did not receive that protection. His organs were harvested in violation of the law. Because he was never declared legally dead before his organs were harvested, the government could not prove that his death was caused by Dae Han Moon ("Moon") rather than by the harvesting of his organs.

The Hawai'i State Legislature specifically considered the procedure that must be followed before organs of a person who is kept alive through artificial life support can be harvested. In so doing the legislature addressed the likely scenario that a person being kept alive by artificial life support was rendered brain-dead by a criminal act. The State legislature—recognizing the complexity of death declarations, the dichotomy between advancing medical practice and common law legal standards, and the growing inconsistencies among courts considering the issue—enacted Hawai'i Revised Statutes ("HRS") § 327C-1 with the goal of creating a uniform definition of "death."

In 1976, the State Senate Judiciary Committee found that there was no statutory definition of death and "an unprecedented amount of litigation [had] occurred in the past year revolving about a legal definition of death applicable to human beings." S. Stand. Comm. Rep. No. 1029, in 1976 Senate Journal, at 1272. Thereafter, the legislature passed a resolution requesting a comprehensive study on the "legal, physiological, and medical factors [concerning] a statutory definition of death and the establishment of the time thereof[.]" S.R. 432, 8th Leg., Reg. Sess. (1976). This study was meant to culminate in the "submi[ssion] to the Legislature [of] one or more statutory amendments designed to resolve the

present void as completely as found to be possible[.]"[1] S. Stand. Comm. Rep. No. 1029, in 1976 Senate Journal, at 1272 (emphasis added).

The study, performed by the Legislative Reference Bureau ("LRB") and titled, "Towards a Definition of Death," was published in 1977. Christine Mukai et al., Towards a Definition of Death, Legislative Reference Bureau, 1 (1977) ("LRB Report"). In response to the question, "Should Hawaii adopt a definition of death?" the LRB Report answered a resounding "yes," finding that the "traditional standard of determining death" was "inadequate to meet present medical and legal needs[,]" that there was a "current lack of agreement between medical practice and law[,]" and that "[o]nly legislative action can assure a uniform law." LRB Report at 1-3.

In response to the LRB Report recommending a statutory definition of death, the legislature passed Act 248 (now codified as HRS § 327C-1), titled, "A Bill for an Act Relating to the Definition of Death." 1978 Haw. Sess. Laws Act 248, § 1 at 760-61. The stated purpose of the act was "to establish and

[1] The Senate Committee Report also stated that "a statutory definition of death must be applicable to a range of situations which will arise under the law" to enable legal officials and practitioners the ability "to apply the definition with legal certitude and to act with confidence thereupon[.]" S. Stand. Comm. Rep. No. 1029, in 1976 Senate Journal, at 1272. Such "situations" included "disappearance, posthumous dating and timing of a death for civil or criminal purposes, various forms of fetal demises, issues regarding the simultaneity of deaths, as well as the recently publicized varieties of alleged or apparent deaths, among others." Id.

provide a definition of the medical death of a human being." S. Stand. Comm. Rep. No. 617, in 1978 Senate Journal, at 1026; H. Stand. Comm. Rep. No. 687, in 1977 House Journal, at 1603. The Senate Committee on Judiciary and the House Committees on Health and Judiciary acknowledged the findings from the LRB Report, including that: "[s]tages of death are complex and difficult to distinguish"; "[t]raditional standards of determining death recognized by medicine and law are inadequate to meet present medical and legal needs"; and "[t]he current dichotomy between medical practice and traditional legal standards has created confusion in the judiciary and acquiescence in the brain death standard." S. Stand. Comm. Rep. No. 617, in 1978 Senate Journal, at 1026; H. Stand. Comm. Rep. No. 687, in 1977 House Journal, at 1603.

Thus, the Committee Reports show that HRS § 327C-1 was meant, predominantly, to align the medical and legal definitions of death to create uniformity and to eliminate confusion in the judiciary. The legislature's interest in increasing uniformity and decreasing confusion for both civil and criminal actions, was embedded in the clear statutory language in HRS § 327C-1 applying the statute to "all death determinations in the State . . . for all purposes," in "civil and criminal actions," HRS § 327C-1(d) (emphasis added). In summary, the legislature devised in HRS § 327C-1 a definition of death meant to apply

broadly to civil and criminal actions. A specific definition of death applying to those such as Feliciano—who are on artificial life support and are selected for organ harvesting—is contained in HRS § 327C-1(b). The process to be followed by those who wish to take the organs from a person kept alive on artificial means of support is to obtain the opinion of (1) a qualified attending physician and (2) a qualified consulting physician that the person has experienced irreversible cessation of all functions of the entire brain, including the brain stem. The opinions must be stated in a signed declaration.

Feliciano's organs were harvested without a declaration of death as required by HRS § 327C-1(b). He was on a ventilator with his heart "still beating" and "his blood still circulating" when he was taken to the emergency room and his organs were taken from his body. No declarations were made by any physicians that Feliciano "experienced irreversible cessation of all functions of the entire brain, including the brain stem". Without a valid declaration of death for Feliciano pursuant to HRS § 327C-1(b) the state cannot prove that Moon caused his death rather than those who removed his organs while he was alive by artificial means of support.

The Majority misinterprets the legislative history of HRS § 327C-1 to conclude that only doctors are protected by its provisions. Under the Majority's interpretation, all non-

physicians in Hawai'i, including Feliciano, are not meant by the legislature to have the same protection as doctors. On the contrary, the LRB Report expressly contemplated the application of a statutory definition of death to criminal prosecutions involving non-physician defendants. Specifically, in the context of death determinations using the brain death standard, the LRB Report discussed criminal cases wherein the defendant was the assailant who inflicted the original injury. In Regina v. Potter, (1963) A.C. (Ct. Crim. App.)(U.K.)(unreported), an English case, the court concluded that the decedent's death was caused by the removal of his respirator after transplantation of his kidney; accordingly, the original assailant's manslaughter charge was reduced to assault. LRB Report at 30-31, 55. In People v. Lyons, No. 56072 (Cal. Super. Ct., Alameda Co. 1974), the court rejected the argument that the decedent's death was caused, not by the defendant's gunshot, but by subsequent heart removal surgery, and instructed the jury that death could be proven by a showing of irreversible cessation of brain function. LRB Report at 32, 55. See also People v. Saldana, 121 Cal. Rptr. 243 (Cal. Ct. App. 1975), and State v. Brown, 491 P.2d 1193 (Or. Ct. App. 1971), discussing similar outcomes as in Lyons. LRB Report at 55. Thus, considering the criminal cases discussed within the LRB Report, the legislative history clearly

contemplates application of a statutory definition of death to criminal prosecutions involving non-physician defendants.

Moreover, if the legislature intended to add a statutory provision that broadly immunized physicians from civil and criminal liability, it could have done so.[2] H.B. 2111[3]—

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[2] Moreover, physicians performing organ transplantation are ostensibly afforded immunity under the Revised Uniform Anatomical Gift Act which provides that "[a] person that acts in accordance with [the Act] or with the applicable anatomical gift law of another state or attempts in good faith to do so is not liable for the act in a civil action, criminal prosecution, or administrative proceeding." HRS § 327-18(a) (2008) (emphasis added).

[3] H.B. 2111 also provided, in relevant part:

> Definition of death. A person shall be considered medically and legally dead if, in the opinion of the attending or treating physician, or if none, the physician who certifies death, and confirmed by two other physicians, based on ordinary standards of medical practice:
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> (1) There is the absence of spontaneous respiratory and cardiac function and, because of the disease or condition which caused, directly or indirectly, these functions to cease, or because of the passage of time since these functions ceased, attempts at resuscitation are considered hopeless. In this event, death shall have occurred at the time these functions ceased; or
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> (2) There is the absence of spontaneous brain function; and if based on ordinary standards of medical practice, during reasonable attempts to either maintain or restore spontaneous circulatory or respiratory function in the absence of aforesaid brain function, it appears that further attempts at resuscitation or supportive maintenance will not succeed, death shall have occurred at the time when these conditions first coincide.
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> Death shall be pronounced under this section before artificial means of supporting respiratory and circulatory function are terminated and before any vital organ is removed for purposes of transplantation.

H.B. 2111, 8th Leg., Reg. Sess. (1976).

which was similar in purpose and substance to Act 248—contained such a provision: "A physician making a determination of death under section - shall be immune from civil or criminal liability unless it is alleged and proved that his actions violated the standard of professional care and judgment under the circumstances."[4] H.B. 2111, 8th Leg., Reg. Sess. (1976). It died in committee.

The Majority also expresses concern that applying HRS § 327C-1 to criminal prosecutions would produce absurd and unjust results in certain cases, such as those involving missing persons, because a death determination in a missing person case is impossible under HRS § 327C-1. HRS § 327C-1(b) applies to death arising from cessation of life support by artificial means. A missing body would not therefore be subject to its provisions. Nonetheless, the Majority views the missing person scenario as justification for limiting the application of HRS § 327C-1 only to cases involving physician defendants. Missing persons cases are not inconsistent with HRS § 327C-1, but rather, fall within the category of cases that involve

[4] There is evidence that the House Committee on Judiciary opposed this provision, stating it "fe[lt] that immunity for physicians should not be granted in order to provide adequate safeguards against negligent medical decisions and to insure the highest standards of medical practice." H. Stand. Comm. Rep. No. 575, in 1976 House Journal, at 1541.

presumptive deaths under the Uniform Probate Code ("UPC"), which, according to subsection (d), are not "affected" by HRS § 327C-1. Under the UPC, "[a]n individual . . . who is absent for a continuous period of five years, during which the individual has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry, is presumed to be dead."[5] HRS § 5601-107(5) (1996). Thus, if a person is missing for five years, they may be presumed dead under the UPC without a death determination under HRS § 327C-1. Further, the five-year waiting period for a presumptive death declaration under the UPC does not preclude charges for murder, manslaughter, and other class A felonies.[6] This is not an absurd or an unjust result, and thus, does not justify contravening the plain language of HRS § 327C-1, which states that "[a]ll death determinations in the State shall be made pursuant to this section and shall apply to all purposes," including criminal prosecutions. HRS § 327C-1(d).

[5] HRS § 5601-107(5) continues, "The individual's death is presumed to have occurred at the end of the period unless there is sufficient evidence for determining that death occurred earlier[.]"

[6] There is no time limit on bringing a prosecution for murder, attempted murder, criminal conspiracy to commit murder, criminal solicitation to commit murder, sexual assault in the first and second degrees, and sex trafficking. HRS § 701-108(1). Non-vehicular manslaughter has a ten-year statute of limitations. HRS § 701-108(2)(a). All other class A felonies (except computer crimes within part IX of HRS chapter 708) have six-year statutes of limitations. HRS § 701-108(2)(b)-(c).

The plain language of HRS § 327C-1(d), the 1976 legislative resolution, the LRB Report, and the Committee Reports require HRS § 327C-1(d) to be applied broadly, including to all criminal prosecutions. Because I disagree with the Majority's opinion that HRS § 327C-1(d) only applies to criminal prosecutions involving physician defendants, I respectfully dissent.[7]

/s/ Michael D. Wilson

[7] The Majority infers that by choosing a motion for arrest of judgment to raise the issue of the failure of the government to prove the cause of death to the grand jury, Moon waived his opportunity to challenge the court's jurisdiction. I respectfully disagree. HRPP Rule 12(b) states that challenges to jurisdiction or charging an offense "shall be noticed by the court at any time during the pendency of the proceedings." HRPP Rule 12(b)(2) (emphasis added). The Majority's rationale for declining to consider Moon's challenge to the sufficiency of the indictment rests on the Majority's characterization of Moon's motion as "solely challeng[ing] the sufficiency of the evidence supporting probable cause[,]" before the grand jury. The Majority mischaracterizes Moon's motion.

Moon contends that the court lacked jurisdiction because there was no evidence upon which the grand jury could find probable cause to conclude he caused Feliciano's death. The individual alleged to have been murdered was, pursuant to the failure to comply with HRS § 327C-1(b), alive. In other words, the basis of Moon's argument is that the failure of the state to comply with HRS § 327C-1(b) rendered Mr. Feliciano legally alive when his organs were harvested. Those who harvested his organs caused his death. In this respect, Moon's challenge to the indictment, and thus to jurisdiction, is more analogous to a mixed question of law and fact, rather than a "sol[e] challenge [to] the sufficiency of the evidence supporting probable cause." Even if Moon were to be challenging the sufficiency of the evidence before the grand jury, the Majority concedes that HRPP Rule 12(f) provides ample authority for the court to consider the challenge to the indictment: "[f]ailure by a party to raise defenses or objections or to make requests which must be made prior to trial. . . .shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver." HRPP Rule 12(f) (emphasis added).

On these grounds, and because Moon's motion for arrest of judgment was timely, Moon did not waive his opportunity to have his challenge to jurisdiction and sufficiency of the evidence heard by this court.