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CAAP-12-0000434  
12-NOV-2012  
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S.C. NO. CAAP-12-0000434

IN THE INTERMEDIATE COURT OF APPEALS

STATE OF HAWAII

STATE OF HAWAII,

Plaintiff-Appellant,

vs.

KUI PALAMA,

Defendant-Appellee.

CR. NO. 11-1-0116

APPEAL FROM THE FINDINGS OF FACT,  
CONCLUSION OF LAW, AND ORDER  
GRANTING DEFENDANT'S MOTION TO  
DISMISS FILED APRIL 26, 2012

FIFTH CIRCUIT COURT  
STATE OF HAWAII

HONORABLE KATHLEEN N.A. WATANABE,  
JUDGE PRESIDING

ANSWERING BRIEF OF DEFENDANT-APPELLEE KUI PALAMA

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## I. Counter-Statement of the Case

### A. Nature of the Case.

The State alleges that on January 17, 2011, Kui Palama (hereinafter “Mr. Palama”) knowingly entered or remained unlawfully upon the premises of Kupo Ridge, situated at Hanapepe Valley (hereinafter “subject property”); furthermore, that Mr. Palama did so for the purpose of hunting without first having obtained permission from the subject property’s owner, occupier, holder, or duly appointed agent. [Docket #11, RA at 13.]

### B. The Course and Disposition of Proceedings in the Circuit Court.

Appellee agrees with Appellant’s reported course and disposition of proceedings in the Circuit Court.

### C. Facts Material to Consideration of the Questions and Points Presented.

Mr. Kui Palama has been hunting pig on Kauai—specifically on the subject property—since he was a child. [Docket #9, TT2 at 38]. Mr. Palama was taught how to hunt by his family. [Id.] Each generation of the Palama family has practiced pig hunting. [Id.] The State failed to controvert these facts, as the State did not present any evidence.

The subject property of the complaint is undeveloped. [Id. at 31 and 38.] The State failed to controvert this evidence.

Mr. Palama owns and maintains Kuleana land—taro patches located on the lower end of the Hanapepe ahupuaa. [Id. at 34 and 39-50.] The State failed to controvert this with any evidence, as the State did not present evidence.

Mr. Palama only drove his truck through his Kuleana land in Hanapepe valley. [Id. at 41.] Mr. Palama entered upon the private subject property with a mule, dogs, gear, clothing, bags, and a knife. [Id. at 42.] Mr. Palama let his dogs find and hold wild pigs; Mr. Palama then killed said

pigs with a knife. [Id.] This is the hunting technique taught to Mr. Palama by his family; Mr. Palama uses hunted pig meat to feed his family. [Id.] The State failed to controvert these facts, as the State did not present evidence.

On January 17, 2011, Mr. Palama had a hunting license. [Id. at 42-43.]

Mr. Palama testified that he is native Hawaiian; that his family has explained his native Hawaiian genealogy to him; Mr. Palama testified that he was born on Kauai and raised Hawaiian. [Id. at 37-38.]

Mr. Palama's Native Hawaiian bloodline was supported by defense witness Lavern Silva (hereinafter "Ms. Silva.") Ms. Silva testified that she was born on Kauai and has lived on Kauai for most of her life. She testified that her maternal family is from Kauai and that she has practiced genealogy on Kauai for forty-five plus years. [Docket #7, TT1 at 62.] Ms. Silva has taught genealogy at the Latter-Day Saints church in Kalaheo for thirty years. She has volunteered at the family history center in Lihue for twenty years. [Id. at 63.] Ms. Silva has gathered genealogical information from family members, public records, church records, and government records, as these are the best available records to consult. [Id. at 64.] Ms. Silva is a blood relative of Mr. Palama. She grew up across the street from Mr. Palama's grandfather and great grandfather. [Id. at 65.] None of these facts were controverted by the State.

Ms. Silva described Exhibit D-1 as a pedigree chart she personally prepared, which illustrates Mr. Palama's bloodline. [Id. at 66 and Exhibit D-1.] Ms. Silva accumulated the relevant information throughout her forty-five years on Kauai and printed the genealogy documents from her own records; she created her documents by reviewing church records and interviewing family members; she has regularly updated these records through the years. [Id. 66-67.] Ms. Silva's verbal testimony and her personally compiled genealogy records (Exhibits D-1

and D-2) collectively demonstrate that Mr. Palama is a descendant of native Hawaiians who inhabited Kauai prior to 1778—specifically that Mr. Palama’s paternal great-grandfather and beyond are pure Hawaiian. [Id. at 67 and 74; Exhibits D-1 and D-2.]

Defense witness Elvin Kaiakapu (hereinafter “Mr. Kaiakapu”) similarly testified that based on his lifetime experience on Kauai, he is familiar with Kui Palama, as Mr. Palama and his family are part of the same ohana; moreover, he testified that they share genealogical ties back to the Hawaiian monarchy. [Docket #9, TT2 at 8.] Defense witness Herbert Kauahi (hereinafter “Mr. Kauahi”) also testified that he is familiar with Mr. Palama and his family—knowing Mr. Palama’s family to be native Hawaiian. [Id. at 29.] The State did not present evidence regarding Mr. Palama’s blood quantum.

Mr. Kaiakapu was born November 11, 1931 in Hanapepe Valley; he has lived on Kauai his entire life except for five years in military service. [Id. at 5-6.] Mr. Kaiakapu and his ancestors practiced gathering rights in Hanapepe Valley by gathering herbs and hunting. [Id. at 7-8.]

Mr. Kaiakapu described for the Court the subject property and the Hanapepe ahupuaa boundaries. [Id. at 8-9.] Mr. Kaiakapu described the subject property as undeveloped. [Id. at 10.]

Mr. Kaiakapu last hunted in Hanapepe Valley in 1949. [Id. at 12.] Mr. Kaiakapu taught his ohana how to hunt. [Id.] Mr. Kaiakapu testified that when he hunts with dogs, he only uses a knife; he taught this same method to his grandchildren. [Id. at 13.]

Mr. Kaiakapu testified that hunting is a means of subsistence for his ohana. He explained that Mr. Palama is similarly hunting and growing taro on the subject property as part of the Ohana lifestyle and survival. [Id. at 12-16.]

Mr. Kaiakapu testified that part of the cultural importance of pig hunting is rooted in the Hawaiian word *lokahi*, which means to be independent; Mr. Kaiakapu expounded that it means relying on the *ahupuaa* system for a family's self-reliance and subsistence, as oppose to outside sources. [Id. at 16-17.]

In cross-examination of Mr. Kaiakapu, the State elicited that pig hunting is one of the native Hawaiian gathering rights. [Id. at 26.] The State did not controvert Mr. Kaiakapu's testimony with evidence.

Mr. Herbert Kauahi testified that he is from Kauai and has lived on Kauai most of his life. [Id. at 28.] Mr. Kauahi testified that he is familiar with the Hanapepe *ahupuaa*; furthermore, that he grew up in the Kekaha *ahupuaa* and would traverse across the Hanapepe *ahupuaa*. In addition, Mr. Kauahi testified that everyone has been traversing between these boundaries forever. [Id. at 29-30.] He testified that there has been lateral access in the *ahupuaa* system "since the beginning of time." [Id. at 33.] These facts were uncontroverted by the State, as the State did not present evidence.

Mr. Kauahi testified that the property is undeveloped; furthermore, that it has been used for hunting and gathering as far back as he remembers. [Id. at 31.]

Mr. Kauahi testified that an *ahupuaa* is an *ahupuaa* because of the pig, and that the pig has always been an innate part of the *ahupuaa* system. [Id. at 31-32.] He testified that pig hunting was necessary to survival in the *ahupuaa* system and continues to be important today. [Id. at 32.] Mr. Kauahi testified that pig hunting is important to the *ohana* for survival and that pig meat is shared within the *ohana*. [Id. at 34.] He further testified that Mr. Palama shares his pig meat with Mr. Palama's *ohana*. [Id.]

Mr. Kauahi testified that Mr. Palama's family grows taro in their Kuleana land in the Hanapepe ahupuaa to provide poi for the family. [Id.] Mr. Kauahi testified that hunting and gathering—specifically pig hunting—has been passed down generationally within Mr. Palama's family. [Id. at 35.]

Defense expert witness Dr. Jonathon Osorio (hereinafter "Dr. Osorio") testified unequivocally that based on his training, experience, and understanding of the instant facts, Mr. Palama's pig hunting is an established native Hawaiian custom or tradition practiced prior to 1892—specifically that it has been done "... for more than a thousand years." [Docket #7 TT1 at 8-59.]

Dr. Osorio testified that he is a full professor of Hawaiian Studies at the University of Hawaii at Manoa; he teaches courses in the field of Hawaiian history and Hawaiian culture; he wrote and taught a course entitled Law and Hawaiian Society with history dating back to January of 1777; Dr. Osorio participates in community outreach and does a fairly significant amount of publishing in his fields [Id. at 9-11.]

Dr. Osorio has a bachelor's degree, master's degree, and Ph.D. in History from the University of Hawaii Manoa. [Id. at 11.] Dr. Osorio is often hired to make presentations regarding Hawaiian studies and traditions and customs. [Id. at 12.] Dr. Osorio wrote a dissertation, which was a history of the Hawaiian Nation up until 1897. [Id. at 13.] Dr. Osorio has authored papers on Hawaiian history. [Id.]

Dr. Osorio testified that he is capable of making an analysis of whether an activity does or does not constitute a Hawaiian custom or tradition. [Id. at 14.] Dr. Osorio makes his analysis based on a factual comparison to his knowledge, studies, and review of written records dating back to the 1820's, as Hawaiians wrote copiously regarding cultural practices. Dr. Osorio uses



these Hawaiian language sources, as well as English sources, to consult and teach Hawaiian cultural practices. [Id.] Dr. Osorio additionally testified that, as a Hawaiian Studies professor, he is required to be able to speak knowledgeably about traditional Hawaiian practices going back thousands of years. [Id. at 15.]

In the State's *voire dire* of Dr. Osorio, Dr. Osorio explained that native Hawaiian practices can have subsistence, cultural, and religious purposes—none of them being mutually exclusive, and that they cannot easily be separated. [Id. at 19.] Dr. Osorio testified that mammal hunting is a subsistence activity and cannot rule out that it has cultural purpose. [Id. at 20.]

The State incorrectly argued that Dr. Osorio ruled out that mammal hunting is religious; this was not Dr. Osorio's testimony. [Id. at 20-22]

Over objection made by the State, the Circuit Court ruled that Dr. Osorio is an expert in Hawaiian studies, particularly in Native Hawaiian practices. [Id. at 22.]

Dr. Osorio testified to what he believed to be the factual elements of the case: that Mr. Palama went onto the subject property with a knife, hunting dogs, and a mule; and that Mr. Palama killed two pigs with a knife and gutted them. [Id. at 25.]

Dr. Osorio testified generally as to the ahupuaa political and economic land division system; he testified that ahupuaa gets its name from the fact that the seaside boundaries of the ahupuaa were marked by an altar of stones with the skull of a pig placed on top. [Id. at 25-26.] Dr. Osorio further explained that forests were part of the ahupuaa, and that they were heavily trafficked by human beings; he testified that the forests were also where wild pigs lived. Dr. Osorio explained that Polynesians brought pigs to Hawaii the same way that they brought taro to Hawaii—pigs were introduced as a subsistence kind of resource. Dr. Osorio further testified that pigs were killed occasionally for food. [Id. at 28.] Dr. Osorio testified that wild pigs were, and

still are a nuisance to the Native Hawaiian landscape; moreover, that part of the management of the ahupuaa is hunting wild pigs; this is important for the preservation of the forests and gardens, and also serves as a source of protein for Native Hawaiians. [Id. at 29.]

Dr. Osorio testified that this type of pig hunting was absolutely practiced prior to 1892. [Id. at 30.] Dr. Osorio testified that pigs played fairly significant roles in religious practice and ceremonies. [Id. at 31.]

Dr. Osorio testified that he understands that Mr. Palama was hunting in order to supplement his family's diet, and that Mr. Palama was doing this in the same way as his ancestors before him; furthermore, that hunting pigs is a time-honored tradition in many Hawaiian families. [Id. at 33.] Dr. Osorio further testified that pig hunting, regardless of what sort of tools Mr. Palama was using, is a Hawaiian tradition or custom because it lends to the cultural practice of understanding that the pig is a competitor for the resources, the pig must be managed, the pig is food, and it has been that way for more than a thousand years. [Id. at 33-34.]

In sum, Dr. Osorio opined that based on his training, experience, education, and mode of analysis (comparing Mr. Palama's activity to his expert review and knowledge of Hawaiian records and resources), he considers Mr. Palama's activity a traditional or customary native Hawaiian practiced by Hawaiians for more than a thousand years. [Id. at 34.]

In redirect examination, Dr. Osorio testified that modernization and industrialization may in some ways influence how people practice Hawaiian traditions and customs, but that this does not detract that practitioners are guided by traditional knowledge and values in conducting these activities and are motivated by purposes related to traditional substance, religion, or culture. [Id. at 56-59.]

## II. Standards of Review

Defendant agrees with State's reported standards of review.

## III. Argument

### A. Testimony and Exhibits Collectively Demonstrated that Defendant is Native Hawaiian.

The State complains that the Hawaii State Legislature and Hawaii Supreme Court's promulgation of the definition of Native Hawaiian is insensitive, illogical, and offensive.

[Opening Brief at 8.] This appears to be a personal opinion and should be disregarded by this Honorable Court.

The State then argues that Mr. Palama did not, and probably can never prove that he meets the legal definition of Native Hawaiian. [Opening Brief at 9.]

Defense submits that Defendant is Native Hawaiian, as testimony and exhibits collectively demonstrated that Defendant is a descendant of Native Hawaiians who inhabited Kauai prior to 1778, regardless of Defendant's specific blood quantum. See Public Access Shoreline Hawaii v. Hawai'i County Planning Comm'n, 79 Haw. 425, 442, 903 P.2d 1246, 1263 (1995) (hereinafter "PASH").

Mr. Palama's native Hawaiian ancestry is supported through the kamaaina testimony of Mr. Kaiakapu and Mr. Kauahi. [Docket #9, TT2 at 8 and 29.] The State did not make any objections to Mr. Kauahi's testimony that Mr. Palama is Native Hawaiian and part of the same Ohana as Mr. Kauahi. [Id. at 8.] The State also failed to make any objections to Mr. Kauakahi's testimony that Mr. Palama is Native Hawaiian. [Id. at 29.] Additionally, the State failed to present any evidence to controvert their respective testimony.

Ms. Silva testified that based on her personal knowledge of her own genealogy and being of blood relation to Mr. Palama, Mr. Palama is native Hawaiian. [Docket #7, TT1 at 64, 66, and

67.] In addition, based on her interviews with Mr. Palama's family members and consultation of the best available public, church and government records, she knows that Mr. Palama is Native Hawaiian. [Id. at 68 and 62-75.] Specifically, Mr. Palama's paternal great grandfather and beyond are of pure Hawaiian descent [Id. at 67.] The State did not present any evidence to controvert this testimony.

The State contends that it made timely objections to Ms. Silva's testimony. [Opening Brief at 9.] Docket #7, TT1 indicates that the State only objected to Exhibits D-1 and D-2. [Id. 65 and 75.] As such, Ms. Silva's verbal testimony should be completely admissible, as the State failed to timely object to her oral testimony.

The State made an improper general "foundation" objection to Defense counsel approaching the witness and asking questions about Exhibits D-1 and D-2. Defense counsel responded that defense would lay foundation for the exhibits before moving them into evidence [Id.] Upon moving Exhibit D-1 into evidence, the State objected because "... it's not admissible under hearsay and is a business record." [Id. at 69.] The State's objection in itself seems to stipulate, by calling it a business record, that the hearsay exceptions in Hawaii Rules of Evidence ("HRE") 803(6) and 803(8) are applicable. In addition, the State made a hearsay objection on the basis that Ms. Silva compiled information from interviews with other people. [Id.] These hearsay objections are overcome by several exceptions, including Hawaii Rules of Evidence ("HRE") Rule 803 (6) (8) (9) (10) (11) (12) (13) (16) (19) (23) and (24), as well as HRE Rule 804 (b) (4) and (b) (8). The Circuit Court agreed. [Id. at 70-71.]

By analogy, the State argues that Exhibit D-1 was prepared in anticipation of litigation and that Defense needs to bring in the custodian of records. It is important to note, however, that

there is no record or testimony that Exhibit D-1 was prepared in anticipation of litigation. As such, that argument should be disregarded; it incorrectly states the factual record on appeal.

Defense pointed out that Ms. Silva is the keeper of her own records, which she has contemporaneously kept over the years. [Id. at 65-67 and 70-71.] Ms. Silva accumulated the relevant data throughout her forty-five years (45) on Kauai and printed the genealogy documents from her own records, which she personally prepared through her review of church and government records, and interviews with family members of herself and Mr. Palama; she regularly updated her records through the years and merely printed her records one week before her testimony. [Id. 66-67.]

The State objected to Exhibit D-2 for the same reasons as stated for Exhibit D-1. The same exceptions and counter-argument apply; the Court noted the objection for the record and it was overruled. [Id. at 74.]

In sum, all of the appropriate foundational questions and responses were elicited from Ms. Silva before Defense moved Exhibits D-1 and D-2 into evidence. The State's contention that these documents were prepared in anticipation of litigation is without any factual support in the record. The State's general hearsay objections are overcome by several exceptions, including HRE 803 (6) (8) (9) (10) (11) (12) (13) (16) (19) (23) and (24), as well as Rule 804(b) (4) and (b) (8). Lastly, Exhibits D-1 and D-2 were primarily demonstrative to Ms. Silva's personal knowledge of Mr. Palama's genealogy.

Many of the above-referenced hearsay exceptions exist to prevent exactly what the State is attempting to argue—essentially that no one could ever possibly prove their Hawaiian family genealogy since generations of family members are now deceased and there is a limited number of records to authenticate one's exact Hawaiian bloodline to a mathematical certainty. [Opening

Brief at 9-10.] The reality is that the testimony of Mr. Palama's kamaaina witnesses is the best available evidence of Mr. Palama's genealogy. If the State had any reasonable basis or evidence to the contrary, it would have presented its own evidence on Mr. Palama's genealogy. Instead, the State now makes an unsolicited smearing that Native Hawaiian rights are elitist, illogical, condescending, and offensive. [Opening Brief at 8-10.]

B. Evidence Demonstrated that Defendant's Claim is Founded in Custom: He Has Kuleana Land in Hanapepe Valley, The Subject Property is Undeveloped, He Was Practicing a Traditional Right in a Reasonable Manner, and There Was No Evidence of Harm in His Practice.

The State contends that there is no evidence of an ahupuaa. (Opening Brief at 10.) In other words, any and all testimony is void of any showing of the existence of any land that may fall within an ahupuaa system. This argument is disingenuous and seems to suggest that the Native Hawaiian ahupuaa system is fictional.

The State then summarizes the "lawful occupant" definition as defined by the Court in Kalipi v. Hawaiian Trust Co., Ltd 66 Haw. 1, 8-9, 656 P.2d 745, 749-750 (1982). However, the State completely leaves out (and omits from its entire brief) the latter Court decisions that abolish the residence requirement for rights that have been customarily and traditionally exercised in the factual manner at issue. Pele Defense Fund v. Paty, 73 Haw. 578, 620, 837 P.2d 1247 (1992) (hereinafter "PDF").

As noted most recently in Pratt, **the Hawaii Supreme Court has since read Kalipi as merely informing us** that the balance of interests and harms clearly favors a exclusion against persons pursuing non-traditional practices or traditional rights in an unreasonable manner. State v. Pratt 127 Haw. 206, 207, 277 P.3d 300, 301 (2012). (Emphasis added).

In PDF, the Court summed up Kalipi as upholding, “rights of native Hawaiians to enter undeveloped lands owned by others to practice continuously exercised access and gathering rights necessary for subsistence, cultural or religious purposes so long as no actual harm was done by the practice.” PDF at 619.

PDF further held that the drafters “intended this provision to protect the broadest possible spectrum of native rights[.]” Id. Noting that Kalipi had based his claims on land ownership, while **PDF’s claims were based on custom and usage, the court held that “native Hawaiian rights protected by article XII, § 7 may extend beyond the ahupua’a in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner.”** Id. at 620. (Emphasis added.)

Mr. Palama is “on” the land. Mr. Palama owns and maintains Kuleana land—taro patches located on the lower end of the Hanapepe ahupuaa. [Docket #9, TT2 at 34 and 39-50.] Mr. Palama is not an absentee landlord. [Id.] The use of the Kuleana was not “spread” to Mr. Palama for purposes of an economic investment. Mr. Palama maintains taro patches on his Kuleana land, catches prawns, gathers fruits and herbs, checks the river water, and kills pigs by virtue of a cultural investment—a cultural investment that carries on his Hawaiian ohana tradition, a cultural investment that provides subsistence for his ohana, and a cultural investment that yields dividends for the native Kauai landscape and ahupuaa system. [Id.]

Here, Mr. Palama’s rights are based both on Kuleana ownership and customary usage in Hanapepe valley. Mr. Palama is a native Hawaiian Kuleana tenant of the Hanapepe ahupuaa who may—for the purposes of practicing native Hawaiian customs and traditions—enter the subject private property within the Hanapepe ahupuaa to hunt pig because it has been customarily and traditionally exercised in that same manner.

The testimony of Mr. Palama and his witnesses overwhelmingly established that the method and location of his pig hunting has been customarily and traditionally exercised in that way for over a thousand years.

Lastly, “Kuleana lands” means those lands granted to native tenants pursuant to L. 1850, p. 202, entitled “An Act Confirming Certain Resolutions of the King and Privy Council Passed on the 21st Day of December, A.D. 1849, Granting to the Common People **Allodial Titles for Their Own Lands and House Lots, and Certain Other Privileges**”, as originally enacted and as amended. Hawaii Revised Statutes § 183C-2 and 669-2. (Emphasis added).

The plain language does not state a requirement that a native tenant must literally sleep or erect housing on all Kuleana lands. In fact, there is a definitive distinction between “lands,” “house lots,” and “certain other privileges.” That distinction lends to the reality that certain Kuleana lands are suitable for farming taro, while others are more suitable for erecting housing, or hunting and gathering. Certainly it would not be the intention of the framers to simply let these Kuleana taro patches go to waste by virtue of a strict requirement that a house must be erected on the wetland in order to practice continuously exercised access and gathering rights necessary for subsistence and survival of an ohana. A crucial part of cultivating Mr. Palama’s taro gardens is to gather huli in the mountains, check on the water flow, and prevent the pig population from destroying the gardens.



C. Mr. Palama Established Through Kamaaina and Expert Testimony That His Pig Hunting on The Subject Property Is Constitutionally Protected as a Traditional Native Hawaiian Practice That Has Been Continuously Practiced and Passed Down Generationally.

The State complains that pig hunting is a dangerous activity. [Opening Brief at 11.] There is nothing in the record that supports this argument; moreover, there is no evidence that Mr. Palama's specific conduct caused harm. Whether or not Mr. Palama's activity is dangerous may be debatable in the State's eyes; however, the State should have presented evidence (as the State did in Pratt) regarding potential dangers or harms. Here, the Circuit Court was left to perform a balancing test with zero evidence presented by the State.

The State then contends that, "to hold that any person, or multiple groups of people, can go onto undeveloped private property with packs of violent lethal hunting dogs, lethal weapons, horses, mules, or vehicles for that matter, and roam around hunting on the property whenever and wherever they want is simply absurd." [Id. at 12.]

If those were the actual facts, the Court may have ruled that it is absurd. Unfortunately, the State argues facts not in evidence. The record before this Court is that Mr. Palama drove his truck through his own Kuleana land in Hanapepe valley. [Docket #9, TT2 at 41.] Mr. Palama then entered upon the private subject property with a mule, dogs, gear, clothing, bags, and a knife. [Id. at 42.] Mr. Palama let his dogs find and hold the pigs, and thereafter, Mr. Palama killed the pigs with a knife. [Id.] The State failed to controvert these facts with any testimony or evidence.

The Circuit Court did not rule on a factual scenario where there were multiple groups of people roaming whenever and wherever with packs of violent, lethal dogs, horses, and vehicles. The finding of facts, which accurately reflects the testimony, is that the Defendant entered upon

Kupo Ridge, situated at Hanapepe Valley; Defendant entered the subject property by foot accompanied by a mule and dogs; Mr. Palama used a knife to hunt, kill, and gut two wild pigs on the subject property. [RA at 140.] The Court ruled, based on these accurate facts, that there was nothing unreasonable about the way Defendant hunted. [RA at 142.]

The State next argues that one of the hunters, armed with a rifle, may shoot and kill an innocent landowner. [Opening Brief at 12.] This argument seems to pose a hypothetical of more than one hunter with guns; it should be ignored. The facts before this Honorable Court is that Mr. Palama entered upon the subject property with a mule, dogs, gear, clothing, bags, and a knife. [Docket #9, TT2 at 42.] Mr. Palama let his dogs find and hold the pigs; Mr. Palama then killed the pigs with a knife. [Id.]

The State next contends that a pack of those hunters' dogs could attack a group of children hiking. [Opening Brief at 12.] The record is void of any evidence that Mr. Palama's dogs had the disposition to do anything other than catch and hold wild pigs for Mr. Palama. The State failed to present any evidence or ask any questions in cross-examination about children or dogs attacking children.

The State then complains that the Circuit Court erred in finding that Mr. Palama's activities are established Native Hawaiian customs or traditions that require the Court's protection. (Opening Brief at 12.) The State goes on to explain generally that Hawaii regulates human sacrifice, homicide, and hunting.

Mr. Palama does not disagree. This is why Mr. Palama has a hunting license. [Docket #9, TT2 at 42-43.] In addition, the State's right to regulate non-traditional activity and traditional activity performed unreasonably is well rooted in the applicable case law. See PASH at 447.

Here, the Circuit Court ruled that Mr. Palama’s pig hunting was traditional and performed in a reasonable manner. This ruling should not be disturbed because the State failed to introduce any evidence that would indicate Mr. Palama’s activity was performed unreasonably, nor did the State present any evidence of potential danger.

Lastly, the State argues that looking at the plain meaning of the applicable statutes, that extending privileges to include pig hunting is absurd. [Opening Brief at 13-15.] The State is merely arguing against well-settled case law.

The relevant case law is clear: Defendant only needs to show that his claimed right is constitutionally protected as a customary or traditional native Hawaiian practice. The Court in Kalipi ruled that the “Hawaiian usage” clause may establish customary Hawaiian rights beyond those found in HRS § 7-1. Kalipi at 751.

The government is obligated to protect the privilege of Defendant to enter the subject property to practice continuously exercised access and gathering rights necessary for subsistence and cultural purposes when no actual harm is done. PDF at 619. There is no record before the Court of any harm done. The State is now simply arguing hypothetical harms after the fact.

Because Defendant satisfied his burden through evidence, the Circuit Court properly reconciled the competing interests and upheld Defendant’s privilege because his activity was reasonably exercised to the extent feasible. The Court noted several times in its findings, as the Court instructed this Counsel to include, the State failed to present evidence. [Docket #11, RA at 139-144.]

D. Appellant is Correct that the State Generally Regulates Hunting, However, The Factual Scenario Before the Court is Exceptional In That Native Hawaiian Custom Applies.

The State is correct that hunting in the State of Hawaii is regulated by licensure requirements. As the record reflects, Mr. Palama does have a hunting license, but obviously his Hawaii hunting license does not automatically impute permission from private property owners to allow him to hunt on their property. [Docket #9, TT2 at 42-43.] That becomes problematic when considering it is the Court's obligation is to preserve and enforce traditional native rights as part of the Hawaii State Constitution. Any argument for the extinguishment of traditional rights based simply upon the possible inconsistency of these purported native rights must fail because it is the Court's obligation to preserve and enforce such traditional rights. Kalipi at 748.

The only way for Mr. Palama to practice his Native Hawaiian tradition, is for Mr. Palama to operate under Native Hawaiian trespass privilege. As the Court ruled in Hanapi, one limitation of Hawaii property interest is that Constitutionally protected Native Hawaiian rights, when reasonably exercised, qualifies as a privilege for purposes of enforcing criminal trespass statutes. Hanapi at 492.

E. The State's Criminal Prosecution of Mr. Palama's Pig Hunting on the Subject Property Acts as a Blanket Prohibition Against His Firmly Rooted Constitutional Privilege.

The State suggests that all Mr. Palama has to do is ask the landowner for permission. [Opening Brief at 16-17.] This argument is disingenuous. The State's suggestion is fallacious because private property owners would then be delegated the absolute power to grant or deny Native Hawaiians their constitutional privileges. This Native Hawaiian trespass privilege carves out one exception to the western property concept of absolute exclusion—this is what makes

Hawaii land ownership unique in the United States. The constitutional native Hawaiian privilege, when applicable, obviates the need to seek permission from landowners before trespassing.

The State also contends that Mr. Palama can simply hunt somewhere else. For reasons stated above, this frustrates the very purpose of Mr. Palama's privileged activity in Hanapepe valley where his Kuleana taro gardens are located.

F. Defendant Established, Through Kamaaina and Expert Testimony, That His Pig Hunting on the Subject Property is Constitutionally Protected as a Traditional Native Hawaiian Practice.

Based on Dr. Jonathan Osorio's expert testimony, as well as the testimony of kamaaina witnesses, the Circuit Court correctly found that Defendant's pig hunting on the subject property constitutes an established Native Hawaiian custom or tradition.

G. Ahupuaa.

The State again generally contends that there is no evidence of an ahupuaa. (Opening Brief at 10 and 17.) In other words, any and all testimony is void of any showing of the existence of any land that may fall within an ahupuaa system. This argument is disingenuous and seems to suggest that the Native Hawaiian ahupuaa system is fictional. Defendant respectfully submits it should be ignored. The testimony of witnesses gave ample evidence of the ahupuaa system—particularly with regard to the Hanapepe ahupuaa, where the subject property and Mr. Palama's Kuleana land is located.

H. In Balancing Interests, The Court Must Consider the Totality of Circumstances.

The Court, when balancing the protections afforded to Native Hawaiian practices under the State Constitution with the State's countervailing interests, must consider the totality of the circumstances. Pratt at 217.

In Pratt, the Hawaii Supreme Court applied the totality of the circumstances test and ruled that the balancing of interests weighs in favor of permitting the park to regulate Pratt's activity. Id. at 218. The Court specifically noted the testimony of the State's witness. The DLNR agent testified as to the countervailing interests of the State. The Court also noted that Pratt did nothing to show attempts to engage in his Native Hawaiian practice within the limits of state law. The Court lastly explained that his rights are not extinguished because he can obtain the proper permit or apply to the curatorship program to work together with the DLNR. Id.

In the case at bar, as stated repeatedly in the body of this brief, the State failed to present any evidence of a countervailing State interest, which left the scale tilted heavily in favor of the Defendant. This case is further distinguishable from Pratt because Mr. Palama engaged in hunting within the limits of state law by obtaining a hunting license.

Unlike Pratt, a favorable ruling to the State would lead to an absolute extinguishment of Mr. Palama's privileged customary right. There is no other permitting or application avenue for Mr. Palama to pursue. The private property owners would then be delegated absolute control over the Native Hawaiian privilege. By simply saying no to Native Hawaiian gatherers, the privilege in Hanapepe will cease to exist.

The State now argues, after the fact, dangers of hunting. It is interesting to note that the State cannot cite in the record one harm or damage caused by Mr. Palama's activity. If the State wanted to educate the Circuit Court about the factual harms and dangers of Mr. Palama's specific activity, it should have called a witness to explain the dangers. Instead the State simply argued in closing that going onto someone's private property and hunting without permission "is a bad thing." [Docket #9, TT2 at 68.] The State then argued that another way to hunt is with a bow and arrow or rifle; again, these facts are not before the Court. [Id. at 69.]

The State might take opportunity in future cases to present evidence regarding government interests, as well as harms and dangers of Mr. Palama's specific practice.

In the case at bar, there is nothing unreasonable about Mr. Palama's activity; he was not a hindrance, nor did he act unreasonable. Mr. Palama practiced his gathering rights in the least intrusive manner possible—no vehicle on the subject property, no guns, and no damage to property. If anything, Mr. Palama's activity was helpful to the maintenance, protection, and preservation of overall land quality in the Hanapepe ahupuaa and to his taro gardens.

#### V. Relevant Statutes, Court Rules and Constitutional Provisions

The sections were provided in the body of this brief.

#### VI. Conclusion

Based on the foregoing arguments and authorities, Defendant-Appellee, by and through counsel undersigned, hereby respectfully requests that this Honorable Court affirm the Findings of Fact, Conclusions of Law, and Order Granting Defendant's Motion to Dismiss dated April 25, 2012.

DATED: Lihue, Kauai, Hawaii: November 12, 2012

/s/ Timothy J. Tobin

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TIMOTHY J. TOBIN  
Court-Appointed Attorney for Defendant-Appellee

Statement of Related Cases

The State of Hawaii is unaware of any related cases pending before any Hawaii court or agency.



S.C. NO. CAAP-12-0000434

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

STATE OF HAWAII,

Plaintiff-Appellant,

vs.

KUI PALAMA,

Defendant-Appellee.

CR. NO. 11-1-0116

CERTIFICATE OF SERVICE

I hereby certify that, on November 12, 2012, by the method of service noted below, a true and correct copy of the foregoing was served on the following:

Served Electronically through CM/ECF:

John H. Murphy  
Attorney for Plaintiff-Appellant

State of Hawaii-Criminal Fifth Circuit Prosecutor  
Attorney for Plaintiff-Appellant

Eric A. James  
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Mitchell Doron Webber  
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DATED: Lihue, Kauai, Hawaii: November 12, 2012

/s/ Timothy J. Tobin

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