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NO. CAAP-12-0000434

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

STATE OF HAWAII,

CR. NO. 11-1-0116

Plaintiff-Appellant,

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

vs.

KUI PALAMA.

FIFTH CIRCUIT COURT
STATE OF HAWAII

HONORABLE KATHLEEN N.A.
WATANABE, JUDGE PRESIDING

AMICUS CURIAE BRIEF OF THE
ATTORNEY GENERAL OF THE STATE OF HAWAII

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CERTIFICATE OF SERVICE

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AMICUS CURIAE BRIEF OF THE
ATTORNEY GENERAL OF THE STATE OF HAWAI'I

The Attorney General of the State of Hawai'i files this amicus curiae brief in support of the constitutionality of Hawai'i Revised Statutes ("HRS") §§ 708-815 and 183D-26, as applied in the present case. The principal issue in this case is whether a person engaging in the alleged native Hawaiian customary or traditional practice of pig hunting is immune from State laws even when those laws further important State interests, such as public safety. The Attorney General urges this court to uphold the State's interest in public safety when balancing the competing interests in this case.

This brief is filed pursuant to Rule 28(g) of the Hawai'i Rules of Appellate Procedure ("HRAP"), which provides in relevant part: "The attorney general may file an amicus curiae brief without order of the court in all cases where the constitutionality of any statute of the State of Hawai'i is drawn into question, provided that the attorney general shall file the brief within 30 days after the filing of the answering brief" In the present case, the Circuit Court of the Fifth Circuit dismissed with prejudice a prosecution for violations of HRS §§ 708-815 and 183D-26 on the ground that the defendant's conduct was constitutionally protected. Consequently, the constitutionality of HRS §§ 708-815 and 183D-26, *as applied* in the present case, was "drawn into question" and the Attorney General is authorized to file an amicus brief.

STATEMENT OF THE CASE

On January 17, 2011, Defendant-Appellee KUI PALAMA ("Defendant") was arrested while hunting pigs on Kupo Ridge in the Hanapēpē Valley on the island of Kaua'i. Record on Appeal ("ROA") at 13; Transcript ("Tr.") 4/5/12 at 45. The land he was hunting on was owned by Gay & Robinson, Inc. ("the Robinson Family"). Tr. 4/5/12 at 38-39, 45. Defendant was hunting using dogs and a knife and was caught by Robinson Family employees in the possession

of two dead pigs. Tr. 4/5/12 at 42, 46. Defendant did not obtain the permission of the Robinson Family before hunting on the land. Tr. 4/5/12 at 47. Defendant was subsequently charged by the Kaua‘i Prosecuting Attorney’s Office (“the Kaua‘i Prosecutors”) with Simple Trespass, in violation of HRS § 708-815 (1993), and Hunting on Private Lands Prohibited, in violation of HRS § 183D-26 (2007).¹ ROA at 13-14.

On February 9, 2012, Defendant filed a Motion to Dismiss based on principles of native Hawaiian rights. ROA at 50-93. He argued that pig hunting was constitutionally protected as a customary or traditional native Hawaiian practice. ROA at 50-93. Hearings were held before the Circuit Court on March 13, 2012 and April 5, 2012. Tr. 3/13/12 at 1-83; Tr. 4/5/12 at 1-75. The Circuit Court ultimately granted the motion and dismissed the charges with prejudice. On April 26, 2012, the Circuit Court entered its Findings of Fact, Conclusions of Law, and Order Granting Defendant’s Motion to Dismiss. ROA at 146-51.

On May 1, 2012, the Kaua‘i Prosecutors filed their Notice of Appeal with the Intermediate Court of Appeals (“ICA”).

On September 12, 2012, the Kaua‘i Prosecutors filed their Opening Brief (“O.B.”).

¹ HRS § 708-815 provides in relevant part:

Simple trespass. (1) A person commits the offense of simple trespass if the person knowingly enters or remains unlawfully in or upon premises.

HRS § 183D-26 provides in relevant part:

Hunting on private lands prohibited. (a) No person shall enter upon any land or premises belonging to, held, or occupied by another, for the purpose of hunting or to take any kind of wildlife including game without first having obtained permission from the owner or duly appointed agent, if the owner is the occupier or holder, or if the owner has let another occupy or hold the same, without having first obtained the permission of the occupier or holder thereof, or the duly appointed agent of the occupier or holder.

On September 27, 2012, the Robinson Family filed a Motion for Leave to File an Amicus Curiae Brief. On October 23, 2012, the ICA granted the Robinson Family leave to file an amicus brief.

On November 12, 2012, Defendant filed his Answering Brief ("A.B.").

ISSUES PRESENTED

1. Whether the Circuit Court Failed to Adequately Consider the State's Interest in Public Safety When it Balanced the Competing Interests in this Case.
2. Whether the Circuit Court Erred by Applying the Actual Harm Test Rather Than the Totality of the Circumstances Test When it Balanced the Competing Interests in this Case.

ARGUMENT

It is well established that Hawai'i law protects the exercise of certain native Hawaiian customary or traditional practices. Such rights are based on Article XII, Section 7 of the Hawai'i Constitution and HRS §§ 7-1 and 1-1 (2009).² These rights were developed in several landmark

² Article XII, Section 7 of the Hawai'i Constitution provides:

The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, *subject to the right of the State to regulate such rights.*

(Emphasis added.) HRS § 7-1 provides:

Building materials, water, etc.; landlords' title subject to tenants' use. Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided, that this shall not be applicable to wells and water-courses, which individuals have made for their own use.

cases, including *Kalipi v. Hawaiian Trust Co., Ltd.*, 66 Haw. 1, 656 P.2d 745 (1982); *Pele Defense Fund v. Paty*, 73 Haw. 578, 837 P.2d 1247 (1992); and *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission*, 79 Hawai'i 425, 903 P.2d 1246 (1995) (hereinafter "PASH"). In *State v. Hanapi*, 89 Hawai'i 177, 970 P.2d 485 (1998), the Hawai'i Supreme Court addressed traditional native Hawaiian rights as a defense to criminal charges. The court established a three-part test requiring a criminal defendant to prove the following: (1) that the defendant is a "native Hawaiian" according to the criteria established in PASH;³ (2) that the claimed right is constitutionally protected as a customary or traditional native Hawaiian practice; and (3) that the conduct occurred on undeveloped land. *Id.* at 186, 970 P.2d at 494. In *State v. Pratt*, 127 Hawai'i 206, 277 P.3d 300 (2012) (hereinafter "Pratt II"), the Hawai'i Supreme Court further explained that even if a criminal defendant satisfies the three-part test, a court must then look at the totality of the circumstances in balancing the interests of native Hawaiians in the claimed rights and the interests of the State in regulating those rights. *Id.* at 216, 277 P.3d at 310.

HRS § 1-1 provides:

Common law of the State; exceptions. The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, *or established by Hawaiian usage*; provided that no person shall be subject to criminal prosecution except as provided by the written laws of the United States or of the State.

(Emphasis added.)

³ PASH defined "native Hawaiians" as "descendants of native Hawaiians who inhabited the islands prior to 1778 . . ." PASH, 79 Hawai'i at 449, 903 P.2d at 1270.

It should be noted that, in the present case, the Attorney General takes no position on whether the three *Hanapi* factors were satisfied. That issue is one that the Kaua‘i Prosecutors, Defendant, and Amicus Curiae Robinson Family are likely to address fully. The Attorney General recognizes that traditional native Hawaiian rights are enshrined in our State Constitution and, as a result, are entitled to great respect.⁴ However, whether a specific individual qualifies as a native Hawaiian or a specific practice qualifies as a customary or traditional practice are matters that the Attorney General leaves for the other participants in this case, who may have a more direct stake in those matters.

On the other hand, the balancing of competing interests (particularly the State's interests served by the criminal statutes in this case) involves matters upon which the Attorney General has a significant stake. The Attorney General is authorized by common law and statute to act for the protection of the public interest. *Chun v. Board of Trustees of Employees' Retirement System*, 87 Hawai‘i 152, 170, 952 P.2d 1215, 1233 (1998) (citing *D'Amico v. Board of Med. Exam'rs*, 11 Cal.3d 1, 112 Cal.Rptr. 786, 800, 520 P.2d 10, 20 (1974) ("The Attorney General is the chief law officer of the state. As such, []he possesses not only extensive statutory powers but also broad powers derived from the common law relative to the protection of the public interest.") (brackets and ellipses omitted)). Furthermore, the Attorney General is the "chief law enforcement officer" of the State and has "ultimate responsibility for enforcing penal laws of statewide application." *Amemiya v. Sapienza*, 63 Haw. 424, 427, 629 P.2d 1126, 1129 (1981). Therefore, the Attorney General's opinion as to State or public interests, particularly in criminal matters, warrants serious consideration.

⁴ The Attorney General does not agree with certain comments made by the Kaua‘i Prosecutors in their Opening Brief to the extent that those comments might be interpreted as criticizing the existence of traditional native Hawaiian rights in general. *See, e.g.*, O.B. at 8.

As noted above, in the present case, the Attorney General takes no position as to whether Defendant satisfied the three-part *Hanapi* test. However, even *assuming for the sake of argument* that the three *Hanapi* factors were satisfied, the Attorney General asserts that, in balancing the competing interest in this case, the State's interests are substantial and outweigh the Defendant's interests. Consequently, the Circuit Court's decision should be reversed and the charges reinstated.

1. The Circuit Court Failed to Adequately Consider the State's Interest in Public Safety When it Balanced the Competing Interests in this Case.

A. Public safety is an important State interest in this case.

In its Findings of Fact, Conclusions of Law, and Order Granting Defendant's Motion to Dismiss, the Circuit Court claimed that it "reconciled the competing interests[.]" Conclusion of Law ("COL") No. 8. However, the only interests that the Circuit Court explicitly balanced native Hawaiian rights against were "the western doctrine of 'property[]'" and "our modern system of land tenure[.]" COL No. 9. The Circuit Court stated:

8. Because Defendant satisfied his burden through evidence and testimony, the Court *reconciled the competing interests* and upheld Defendant's privilege because it was reasonably exercised to the extent feasible.
9. The regulatory power provided in article XII, section 7 does not justify summary extinguishment of such rights by the State merely because they are deemed inconsistent with generally understood elements of *the western doctrine of "property."* PASH at 442. Extinguishing traditional rights based simply upon the possible inconsistency of purported native rights with *our modern system of land tenure* must fail; the Court's obligation to preserve and enforce such traditional rights is part of the Hawaii State Constitution, Kalipi v. Hawaiian Trust Co., Ltd., at 748. Here, the State's attempt to regulated [sic] Defendant's [sic] traditional right, through criminal prosecution, amounts to a blanket prohibition or extinguishment of Defendant's protected practice of hunting pig on the subject property.

ROA at 150 (emphases added). The Circuit Court mentioned *no other* State interests. Consequently, it appears that the Circuit Court overlooked an extremely important State interest in this case – public safety.

Separate and apart from Western concepts of property or our modern system of land tenure, the State has a very clear and very strong interest in ensuring public safety. Hunting is a potentially dangerous activity. Applying traditional native Hawaiian rights so as to invalidate HRS § 183D-26 in the present case creates an unacceptable risk of an accident occurring. Imagine that a native Hawaiian engaging in his or her alleged customary or traditional native Hawaiian practices goes pig hunting on private land using (as in the present case) dogs and knives. Because the hunter believes that he or she is exercising traditional native Hawaiian rights, the hunter does not seek permission from the owner, occupier, or holder of the land. Consequently, the owner/occupier/holder of the land will not know that the hunter is there. If the owner/occupier/holder, or his or her invited friends or relatives, visits the land to go hiking or fishing or to engage in any other activities, those persons could run into the hunter and the hunter's dogs. The dogs, in their excited state due to chasing pigs, could very well attack the people who are present. If the owner/occupier/holder or his or her friends or relatives are there with their own pet dogs or with small children, those pet dogs or small children would be particularly vulnerable to attack. Or if the hunter and the hunter's dogs have injured the pig but not killed it, the pig could attack the owner/occupier/holder or his or her friends or relatives. A feral pig is a wild animal and could behave very dangerously when injured. There is also the risk of emotional distress being inflicted upon children or adults who unexpectedly witness a pig being torn to shreds by dogs and stabbed to death in front of them. HRS § 183D-26 prevents these kinds of situations because the owner/occupier/holder would know that the hunter is there

— since he or she would have given the hunter permission to be there — and the owner/occupier/holder or his or her friends or relatives could simply avoid entering the land that day. Or imagine that more than one native Hawaiian wants to go hunting on the land on the very same day. If HRS § 183D-26 is invalidated, then two or more groups of native Hawaiians and their hunting dogs could run into each other. Multiple groups of hunting dogs, already in an excited state due to chasing pigs, could end up fighting with each other. However, if HRS § 183D-26 is not invalidated, the owner/occupier/holder could simply give permission to each group of hunters to hunt on a different day.

The risk becomes even greater if the native Hawaiian custom or tradition is more broadly defined to include pig hunting *with firearms*. Dr. Osorio, Defendant's expert witness, testified that although methods and techniques of utilizing natural resources might have changed over time, that does not detract from the fact that practitioners are guided by traditional knowledge and values and are motivated by traditional subsistence, religious, or cultural purposes. Tr. 3/13/12 at 59. For example, Hawaiian fishermen may use motor boats rather than canoes to get to their ancestral fishing grounds, and Hawaiian hunters may drive trucks on dirt roads rather than walk along trails to reach the area of forest where the pigs roam. Tr. 3/13/12 at 59. Dr. Osorio further testified: "I would say that the hunting of pigs, *regardless of what sort of tools he was using*, would be traditional because it's – essentially, it's the cultural practice of understanding that the pig is a competitor for the resources; the pig must be managed, and the pig is food, and it has been that way for more than a thousand years." Tr. 3/13/12 at 33-34 (emphasis added). Furthermore, according to *PASH*, the key date in determining whether something is a customary or traditional practice is 1892. *PASH*, 79 Hawai'i at 447, 903 P.2d at 1268. Firearms were clearly in existence in 1892 and it is possible that native Hawaiians hunted

with them. Consequently, the native Hawaiian customary or traditional practice of pig hunting (if one is so recognized) might include not just hunting with dogs and knives but also hunting *with firearms*. Hunting on private land with dogs and knives without the knowledge or permission of the owner/occupier/holder of the land is dangerous enough, but such hunting *with firearms* is even worse. Such activity carries a very real risk that someone might be accidentally shot and seriously injured or even killed.

It is important to note that the danger presented here is not just a private matter limited to the particular parties in this case. The safety issue applies to *all* privately-owned undeveloped land in Hawai‘i, not just to Robinson Family land. It also applies to *anyone* who might be visiting privately-owned undeveloped land, not just the landowners.⁵ Consequently, this case presents a serious public safety issue.

HRS § 183D-26 essentially serves a public safety purpose by making the owner/occupier/holder of private land a *de facto* safety official. Because HRS § 183D-26 requires the permission of the owner/occupier/holder of the land before anyone else can enter, the owner/occupier/holder can serve as a central clearinghouse for information on the land, can serve as a gatekeeper to regulate the number of persons entering the land, and can specify or limit the methods of hunting to be used, in order to ensure the safety of persons entering the land. This is consistent with the regulatory scheme established by Hawai‘i law that seems to rely heavily on the owner/occupier/holder to regulate hunting on private land.

Hunting on *public* land is governed by several statutes and administrative rules. These statutes and rules include general licensing and education requirements for hunters. But they also include very detailed requirements establishing specific public hunting areas, safety zones

⁵ Furthermore, since flying bullets and injured wild pigs do not respect property boundaries, the danger at issue here could also apply to persons who might be present on *adjacent* land.

where hunting is prohibited, seasons and days of the week when hunting is allowed, bag limits on the number of animals that can be taken, and specific methods of hunting (such as by rifles, muzzleloaders, handguns, bow and arrow, or dogs and knives). *See HRS Chapter 183D; Hawai‘i Administrative Rules ("HAR") Title 13, Chapter 123.* In contrast, there are relatively few regulations applicable to hunting on *private* land. The primary formal requirements for hunting on private land appear to be: (1) a valid hunting license; (2) permission of the owner/occupier/holder; (3) no hunting at night; and (4) no hunting of certain specified animals (brush-tailed rock-wallabies and wild cattle). *See HRS §§ 183D-21, 183D-26, 183D-27; HAR §§ 13-123-8, 13-123-12.* *Any other requirements are established by individual landowners.*

As noted on the Department of Land and Natural Resources' website:

Hunting on Private Land Game mammals may be hunted year-round on private land. Hunters must possess a valid State of Hawaii hunting license *and have the permission of the landowner. Hunting fees, permitted hunting weapons and methods and other prohibitions and requirements for hunting game mammals on private land are established by the landowner.* This is different from game bird hunting, where the State regulates the hunting season and bag limits on both public and private lands. The wearing of blaze orange is not a requirement on private lands unless the landowner deems it to be one.

Department of Land and Natural Resources, *Game Mammal Hunting (summary)*, http://hawaii.gov/dlnr/dofaw/hunting/game_summary (last visited Oct. 16, 2012) (emphasis added). *See Appendix "A."* Therefore, Hawai‘i law delegates to the owner/occupier/holder of private land the responsibility for regulating safety involving hunting on that land. The source of that authority is clearly HRS § 183D-26. As a practical matter, a hunter has to agree to follow the owner/occupier/holder's safety requirements before he or she receives permission to hunt on that land, otherwise the owner/occupier/holder of the land will simply deny the hunter permission. Consequently, if native Hawaiian hunters are allowed to ignore the owner/occupier/holder's authority under HRS § 183D-26, then there will effectively be *no safety*

rules for native Hawaiians hunting pigs on private land (except, of course, for the minimal requirements of having a valid hunting license and not hunting at night). In other words, virtually "anything goes."

It should also be noted that the plain meaning of HRS § 183D-26 indicates that it has a public safety purpose. HRS § 183D-26(a) provides in relevant part:

No person shall enter upon any land or premises belonging to, held, or occupied by another, for the purpose of hunting or to take any kind of wildlife including game without first having obtained permission from *the owner* or duly appointed agent, *if the owner is the occupier or holder, or if the owner has let another occupy or hold the same*, without having first obtained the permission of *the occupier or holder* thereof, or the duly appointed agent of the occupier or holder.

(Emphasis added.) Notice that the person giving permission under this statute is not just the person who holds title to the land. It is the "occupier or holder" of the land. The "owner" can give permission if he or she is also the "occupier or holder." If the owner is not, and someone else is occupying or holding the land, then it is the "occupier or holder" who gives permission. In other words, it is the person who is actually nearby, occupying or managing the land, who can grant or deny permission, not an absentee landlord. This makes sense if the provision is serving a public safety purpose. The occupier or holder is better placed to monitor safety on the land and to ensure the safety of himself (or herself) and invited friends or relatives. It does not make sense if the purpose of this statute is merely to uphold Western concepts of property. If the purpose of the statute were merely to uphold Western concepts of property, all decision-making power would be placed in the hands of the owner holding title, not the occupier or holder of the land.

In addition, HRS § 183D-26 is located within HRS Chapter 183D along with other wildlife regulatory laws, such as laws relating to hunting licenses (HRS § 183D-21), hunting

guides (HRS § 183-25.5), and the hunter education program (HRS § 183D-28). HRS § 183D-27, the section immediately after HRS § 183D-26, prohibits hunting at night on private lands. Clearly, prohibiting hunting at night is a safety measure, since hunting at night is so obviously dangerous. Since HRS § 183D-26 is placed in the same chapter as all these other hunting regulations, most of which have a public safety purpose, that is an additional reason HRS § 183D-26 should be interpreted as having a public safety purpose too.⁶

Recognizing the importance of the State's public safety interest will *not* result in the wholesale nullification of traditional native Hawaiian rights. Not all customary or traditional native Hawaiian practices will implicate public safety concerns. For example, the collection of ti (ki) leaves, firewood, or house-timber, which is expressly permitted under HRS § 7-1, will not ordinarily present any public safety issues. Such practices are clearly distinguishable from activities involving hunting, firearms, and wild animals, which are at issue in the present case. Tr. 4/5/12 at 69. Most customary or traditional practices will *not* be potentially dangerous. Therefore, even if this court recognizes the importance of public safety, there will still be ample room for traditional native Hawaiian rights to be exercised.

For all of these reasons, public safety is a very strong and important State interest that the Circuit Court failed to adequately consider.

⁶ Although Simple Trespass, HRS § 708-815, does not always advance a public safety purpose, it does *under the particular circumstances of this case*. If a person receives the permission of the owner/occupier/holder of private land, then he or she necessarily would not be guilty of Simple Trespass because he or she would not be "unlawfully" on the premises. Therefore, the charge of Simple Trespass *as applied in the present case* also diminishes the risk of injury occurring and thus reinforces HRS § 183D-26 and should not be dismissed either.

B. The State's interest in public safety outweighs the Defendant's interest in engaging in his alleged native Hawaiian customary or traditional practice.

In conducting the balancing of interests required by *Pratt II*, 127 Hawai'i at 216-18, 277 P.3d at 310-12, the State's interest in public safety outweighs the Defendant's interest in engaging in his alleged native Hawaiian customary or traditional practice of pig hunting.

State v. Pratt involved a native Hawaiian who was living in the Kalalau Valley on Kaua'i, which is in the Nā Pali Coast State Wilderness Park. *Pratt II*, 127 Hawai'i at 208, 277 P.3d at 302. The defendant was prosecuted for remaining in a closed area in violation of administrative rules. *Id.* Defendant claimed he was engaging in native Hawaiian customary or traditional practices. *Id.* The Hawai'i Supreme Court balanced the interests based on the totality of the circumstances and held that the State's interests outweighed the defendant's interests. *Id.* at 218, 277 P.2d at 312. The court noted that visitors to the Kalalau Valley are limited for health and safety reasons and to protect park resources. *Id.* The park is supposed to provide people with a "wilderness type of experience," has "one of the most scenic areas," and is "rich in cultural resources," including native plants and sea birds. *Id.* Also, the self-composting toilets fail when they are overused. *Id.* Therefore, it is important to keep the area "low density" to protect the fragile ecosystem. *Id.*

If preservation of resources and health and safety were sufficient State interests to prevail over native Hawaiian rights in *Pratt II*, surely public safety should be a sufficient State interest to prevail in the present case. In *Pratt II*, the primary risk was that the resources of the park might be overburdened. But the only real immediate risk to health and safety was that the self-composting toilets might break down, thereby creating a minor health hazard. In contrast, the risk in the present case is that someone might be physically attacked by hunting dogs or by injured wild pigs or might suffer emotional trauma witnessing a pig being torn to shreds or

stabbed to death. There is also a risk that someone might be accidentally shot. Therefore, hunting presents an immediate risk that persons could be seriously injured or even killed. Clearly, the risk to public safety presented by hunting constitutes an extremely strong State interest. When balanced against Defendant's interest in hunting pigs without landowner permission, the State's interest should prevail as a matter of law. Even if pig hunting is part of a cultural tradition, it should not take precedence over preventing serious injury or death. Indeed, authorizing the unlimited exercise of traditional native Hawaiian practices to such an unreasonable extreme could lead to a backlash against such rights.

In addition, one of the circumstances that the *Pratt II* court considered in applying the totality of the circumstances test was the fact that the defendant "did not show any attempts to engage in his native Hawaiian practice within the limits of state law" and "he did not attempt to [act] in accordance with the laws of the State." *Id.* The court pointed out that the defendant could have camped overnight in Kalalau Valley if he had gotten a permit. *Id.* Similarly, in the present case, Defendant could have hunted pigs consistent with State law if he had obtained the permission of the owner/occupier/holder of the land. However, Defendant "did not show any attempts to engage in his native Hawaiian practice within the limits of state law[.]" *Id.* The evidence in the record suggests that Defendant didn't even bother to ask the Robinson Family for permission because he was contemptuous of the idea that he needed their permission:

Q. [Prosecutor:] Okay. And at any time did you attempt to get permission of anyone who owned that property –

A. [Defendant:] Um.

Q. – before you went onto it and hunted and killed two pigs?

A. *We never needed permission our whole lives. What we need permission, to go in our backyard to go catch couple of pigs so we can go down and make – make some kalua pig and lau lau's and sausage? We gonna get permission to survive here? So no, I didn't – we didn't get permission. I didn't go get permission.*

Tr. 4/5/12 at 47 (emphasis added).

Consequently, *Pratt II* is directly on point and governs the present case. The State interests and circumstances in the present case provide an even *stronger* argument in favor of the State than those in *Pratt II*. Based on *Pratt II*, the Circuit Court's decision should be reversed.

The express language of Article XII, Section 7 of the Hawai'i Constitution states that the customary and traditional native Hawaiian rights protected by that provision are "subject to the right of the State to regulate such rights." It is hard to imagine a State interest presenting a stronger justification for State regulation than public safety. Conversely, if it is held that Defendant is not subject to State law in the present case, it is hard to imagine what limits would exist on traditional Hawaiian practices if public safety is an inadequate justification.

Because the State has an extremely strong interest in protecting public safety in the present case, this court should hold that the balancing of interests weighs in favor of the State as a matter of law. The Circuit Court's decision should be reversed and the charges reinstated.

C. Defendant's arguments are without merit and do not overcome the State's public safety interest.

Defendant argues that HRS § 183D-26 acts as a *blanket prohibition* on the exercise of his customary or traditional native Hawaiian practice of hunting pigs. A.B. at 17-18. Defendant appears to be arguing that even if the State has an interest in regulating pig hunting to some extent, it cannot impose a *blanket prohibition*. However, contrary to Defendant's claim, HRS § 183D-26 does *not* in fact impose a blanket prohibition on pig hunting. The statute merely provides that persons hunting on private land must have the permission of the owner/occupier/holder of the land. Pig hunting is still allowed if permission is obtained.

Many private landowners would likely grant native Hawaiians permission to hunt pigs on private land *if they were asked*. It is well known that wild pigs cause great damage to the

environment. *See* Department of Land and Natural Resources, *Hawaii's Comprehensive Wildlife Conservation Strategy*, Chapter 4, 4-4 to 4-7 (Oct. 1, 2005), *available at* http://www.state.hi.us/dlnr/dofaw/cwcs/process_strategy.htm [click on Chapter 4: Statewide Conservation Needs]. Wild pigs damage native plants by grazing and browsing, they aid the spread of alien plants, they disturb soil, increase erosion, and decrease water quality. *Id.* at 4-5. Wild pigs also destroy the nests of ground-nesting native birds, such as the nēnē. *Id.* Their behavior in creating pig wallows leaves standing water, which promotes mosquitoes, which in turn spreads mosquito-borne avian diseases (such as avian malaria) that reduce native bird populations. *Id.* In light of the detrimental impact of wild pigs on the land, it is likely that many landowners would welcome pig hunters on their property to help reduce the wild pig population. However, for the safety reasons discussed above, most landowners probably would also want to be asked first.

Therefore, there is no reason to believe that a *blanket prohibition* exists to prevent native Hawaiians from engaging in the alleged customary or traditional practice of hunting pigs. Reduction of the wild pig population actually benefits the land, and provided they are asked first, many landowners would likely grant permission to native Hawaiians seeking to hunt pigs on private land. There is no evidence that the Robinson Family in particular has a policy of denying permission to native Hawaiians to hunt pigs when they are asked.⁷ In the present case, Defendant did not even ask. Tr. 4/5/12 at 47. However, given the clear benefits to the land and to their relations with their neighbors, it is likely that the Robinson Family at least occasionally

⁷ It was Defendant's burden to prove that the native Hawaiian right he was asserting was constitutionally protected. *Hanapi*, 89 Hawai'i at 184, 970 P.2d at 492. Therefore, it was up to Defendant to produce evidence of any claim that the Robinson Family has a policy of denying permission when asked. Defendant produced no such evidence.

grants permission on a discretionary basis. But even if the Robinson Family had a policy of *never* granting permission, native Hawaiians could still hunt pigs on the land of other private landowners who *are* willing to grant permission. In addition, native Hawaiians could hunt pigs on *public* land. Hunting on public land is more heavily regulated than hunting on private land. But as long as they comply with the applicable regulations, there is no reason why native Hawaiians could not hunt pigs on public land.⁸ Just as the defendant in *Pratt II* could still visit the Kalalau Valley with a permit, native Hawaiians could still hunt pigs on private land if they do so with the permission of the owner/occupier/holder of the land or on public land if they do so in compliance with the necessary location, permitting, season, day of the week, bag limit, and weapons regulations. Thus, contrary to Defendant's argument, there is no *blanket prohibition* preventing native Hawaiians from engaging in their alleged customary or traditional practice of pig hunting.

Defendant also argues that the Kaua'i Prosecutors failed to present evidence of the potential dangers of pig hunting in the Circuit Court. A.B. at 14, 15, 16, 19. Defendant apparently believes that, as a result, this court cannot consider the potential risks created by pig hunting. Defendant's argument is without merit because it overlooks the distinction between adjudicative facts and legislative facts.

Professor Kenneth Culp Davis described the difference between adjudicative facts and legislative facts as follows:

⁸ The issue of native Hawaiians hunting on public land provides another reason why the Circuit Court's decision should be reversed. If the Defendant prevails in the present case (which involves hunting on private land), the next case will likely involve hunting on public land. If traditional native Hawaiian rights are allowed to invalidate HRS § 183D-26, then other State laws applicable to *public* lands (specifically, the rest of HRS Chapter 183D and HAR Title 13, Chapter 123) could be invalidated too when native Hawaiians are involved. As applied to native Hawaiian hunters, pig hunting may end up almost completely *deregulated*, and undeveloped land (whether private or public) would become much more *dangerous* for everyone else.

When a court or an agency finds facts concerning the immediate parties — who did what, where, when, how, and with what motive or intent — the court or agency is performing an adjudicative function, and the facts so determined are conveniently called adjudicative facts. *When a court or an agency develops law or policy, it is acting legislatively; the courts have created the common law through judicial legislation, and the facts which inform the tribunal's legislative judgment are called legislative facts.*

Stated in other terms, the adjudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury in a jury case. They relate to the parties, their activities, their properties, their businesses. *Legislative facts are those which help the tribunal to determine the content of law and policy and to exercise its judgment or discretion in determining what course of action to take. Legislative facts are ordinarily general and do not concern the immediate parties. . . .*

The exceedingly practical difference between legislative and adjudicative facts is that, *apart from facts properly [judicially] noticed, the tribunal's findings of adjudicative facts must be supported by evidence, but findings or assumptions of legislative facts need not, frequently are not, and sometimes cannot be supported by evidence.*

Kenneth Culp Davis, *Judicial Notice*, 55 Colum. L. Rev. 945, 952-53 (Nov. 1955) (emphases added). Since Prof. Davis originally described this distinction, it has been generally accepted. See *Castillo-Villagra v. I.N.S.*, 972 F.2d 1017, 1026 (9th Cir. 1992); *Marshall v. Sawyer*, 365 F.2d 105, 111 (9th Cir. 1966); Fed. R. Evid. 201, Advisory Committee's Notes on 1972 Proposed Rules. Regarding legislative facts, "[a]n appellate court, in its decisionmaking, is not confined to the record of evidence presented to the trial court. It may consider additional sources referred to in appellate briefs, and may even resort to independent library research." *Mass. Med. Soc. v. Dukakis*, 637 F. Supp. 684, 690 (D. Mass. 1986). Hawai'i law also recognizes this distinction. The Commentary to Rule 201 of the Hawai'i Rules of Evidence ("HRE") notes that legislative facts are at issue:

[W]hen a judge is faced with the task of creating law, by deciding upon the constitutional validity of a statute, or the interpretation of a statute, or the extension or restriction of a common law rule, upon grounds of policy, and the policy is thought to hinge upon social, economic, political, or scientific facts[.]"

In the present case, when this court weighs the competing interests, it is addressing matters of law and policy. It is dealing with the scope of constitutionally-protected traditional Hawaiian rights and serious issues of public safety, which have a significant state-wide impact beyond the immediate parties in this case. Consequently, in deciding this case, this court must consider legislative facts. Such facts as whether hunting is a potentially dangerous activity, whether firearms are potentially dangerous, and whether wild animals are potentially dangerous all involve general facts that do not require trial court testimony.

Defendant argues that there was no evidence in the trial court record that Defendant's dogs "had the disposition" to attack people. A.B. at 15. However, whether *Defendant's* dogs *in particular* were predisposed to attacking people is entirely beside the point. The real question is whether, *in general*, there are safety *risks* associated with hunting, firearms, and wild animals that justify some kind of regulation. These are legislative facts, not adjudicative facts, and it is entirely appropriate for an appellate court to consider them. This case involves questions of law and policy upon which an appellate court should be able to exercise its judgment and discretion without being limited to the trial court record. Limiting this court to evidence specifically submitted by the Kaua'i Prosecutors would not only be unwise, but, as demonstrated by the authorities mentioned above, would also be completely *unnecessary*.

In the alternative, assuming for the sake of argument that public safety issues are adjudicative facts, this court can also take judicial notice of the fact that hunting (including pig hunting) is a potentially dangerous activity. Judicial notice of adjudicative facts can be taken when the fact is "not subject to reasonable dispute[.]" HRE Rule 201(b). Contrary to anything that Defendant might try to argue, the fact that hunting is a *potentially* dangerous activity (particularly when it includes hunting with dogs, knives, or firearms and hunting large, wild

animals such as pigs) cannot reasonably be disputed. Therefore, even if this court does not recognize this matter as involving legislative facts, it can take judicial notice of these facts as adjudicative facts because they are self-evident and indisputable. Judicial notice can be taken "at any stage in a judicial proceeding, including the appellate level." Commentary to HRE Rule 201.

Defendant's arguments are without merit and do not overcome the State's strong interest in protecting public safety.

2. The Circuit Court Erred by Applying the Actual Harm Test Rather Than the Totality of the Circumstances Test When it Balanced the Competing Interests in this Case.

Even if this court were to disagree with the Attorney General's position that the State's interest in public safety outweighs the Defendant's interests in this case *as a matter of law*, this court should nevertheless vacate the Circuit Court's decision and remand for further proceedings because the Circuit Court applied the wrong legal standard.

In balancing the competing interests, the Circuit Court applied a test that focused on whether the defendant's conduct caused "actual harm." The Circuit Court held in COL Nos. 6 and 10:

6. Rights of native Hawaiian to enter undeveloped lands owned by others to practice continuously exercised access and gathering rights necessary for subsistence, cultural or religious purposes may be upheld [sic] as long as no *actual harm* was done by the practice. *Id.* The evidence presented to the Court evidenced that there was no *actual harm* caused by Defendant hunting pig on the subject property.
...
10. The government must protect the privilege of Defendant to enter the subject property to practice continuously exercised access and gathering rights necessary for subsistence and cultural purposes because no *actual harm* was done by Defendant. Pele Defense Fund v. Paty, 73 Haw. 578, 619 P.2d 1247 (1992).

ROA at 150-51 (emphases added).

This actual harm test was most clearly advocated in the concurring and dissenting opinion by ICA Chief Judge Nakamura in *State v. Pratt*, 124 Hawai‘i 329, 358-64, 243 P.3d 289, 318-24 (App. 2010) (hereinafter "Pratt I") (Nakamura, C.J., concurring and dissenting). However, it is important to note that the actual harm test is found in the *dissenting* portion of Chief Judge Nakamura's opinion. *Id.* at 364, 243 P.3d at 324. Neither the Opinion of the Court written by Judge Leonard, *id.* at 355-56, 243 P.3d at 315-16, nor the concurring opinion by Judge Fujise, *id.* at 357, 243 P.3d at 317 (Fujise, J., concurring), supported the actual harm test. Moreover, in *Pratt II*, the Hawai‘i Supreme Court explicitly rejected the actual harm test and instead adopted the totality of the circumstances test. *Pratt II*, 127 Hawai‘i at 216, 277 P.3d at 310 ("We respectfully decline Chief Judge Nakamura's articulation of the test, finding the [actual harm] test to be too narrow."). Indeed, *Pratt II* upheld the state law challenged in that case even though there was no showing of actual harm caused by the defendant living in the Kalalau Valley. *Id.* Therefore, the actual harm test is not valid and should not have been relied upon by the Circuit Court.

Regardless of whether this court agrees that the State's public safety interest outweighs the Defendant's interests in this case as a matter of law, the Circuit Court's decision must at least be vacated and remanded for further proceedings because the Circuit Court erroneously applied an "actual harm" standard that was rejected by both a majority of the ICA panel in *Pratt I* and by the Hawai‘i Supreme Court in *Pratt II*. The Circuit Court would then, on remand, balance the competing interests using the correct standard – the totality of the circumstances test – as set forth in *Pratt II*.

CONCLUSION

Because the State has an extremely strong interest in protecting public safety and the balancing of interests weighs in favor of the State as a matter of law, the Attorney General urges this court to reverse the Circuit Court's Findings of Fact, Conclusions of Law, and Order Granting Defendant's Motion to Dismiss and reinstate the charges against Defendant. In the alternative, the Circuit Court's decision must at least be vacated and remanded for further proceedings so that the Circuit Court can apply the correct legal standard in balancing the competing interests.

DATED: Honolulu, Hawai'i, December 11, 2012.

Respectfully Submitted,

/s/ Robert T. Nakatsuji
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Deputy Solicitor General

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Attorney General of the State of Hawai'i

APPENDIX "A"

Game Mammal Hunting (summary)

A summary of game mammal hunting in Hawaii.

Game Mammal Hunting Guide

Version October 30, 2001

General Hunting Information Game mammal hunting opportunities are offered on the six major islands in the State of Hawaii: (Kauai, Oahu, Maui, Molokai, Lanai and the big island of Hawaii). Each of these islands has one or more State-designated public hunting areas (called Hunting Units), which are open for hunting at certain times during each year. Game mammal hunting opportunities are also available on private lands as well. Occasionally, the Division of Forestry & Wildlife (DOFAW) may modify or cancel a hunting season in a particular area to adjust for changes in weather conditions or animal populations. THIS DOCUMENT SHOULD THEREFORE ONLY BE USED AS A GENERAL GUIDE. The following cited reference should be consulted when legal wording or intent is concerned: "Title 13, Chapter 123, Rules Regulating Game Mammal Hunting, Hawaii Revised Statutes".

Please contact the local DOFAW office on the island where you are planning to hunt prior to your arrival. They will provide you with the most current information on hunting seasons, hunting areas the local conditions. In addition, certain hunting opportunities require special permits or tags that are only available by lottery.

Island of Kauai 3060 Eiwa Street, Room 306 Lihue, HI 96766 -1875 tel (808) 274-3433 fax (808) 274-3438

Island of Maui 54 High Street, Room 101 Wailuku, HI 96793-0330 tel (808) 984-8100 fax (808) 984-8111

Island of Lanai P. O. Box 630732 Lanai City, HI 96763 tel (808) 565-7916 fax (808) 565-7917

Island of Oahu 1151 Punchbowl Street, Room 325 Honolulu, HI 96813 tel (808) 587-0166 fax (808) 587-0160

Island of Molokai P. O. Box 347 Kaunakakai, HI 96748 tel (808) 553-1745 fax (808) 553-1746

Island of Hawaii 19 E. Kawili Street (or) P.O. Box 4849 Hilo, HI 96720 tel (808) 974-4221 fax (808) 974-4226

Hunting License Requirements All persons are required to have a valid Hawaii hunting license on their person to hunt or have a bagged game mammal in their possession. Resident hunting licenses cost \$10.00 and non-resident licenses are \$95.00. A license may be obtained via the internet at <http://www.ehawaii.gov/DLNR/hunting/>, from any Division of Forestry and Wildlife Office (DOFAW) or from any registered hunting license vendor. A list of registered hunting license vendors is available at any DOFAW Office. A current-year, \$5.00 Hawaii Wildlife Conservation Stamp is also required to hunt. The stamp must be endorsed across the front by the hunter and affixed to their hunting license in the space provided.

All hunting license applicants must show proof of having successfully completed a hunter education course that is recognized by the National Hunter Education Association. The only exception to this requirement is if a person was born before January 1, 1972, and can show proof of having been issued a Hawaii hunting license before July 1, 1990. However, completion of a hunter education course is still recommended. A person is considered to be a resident of Hawaii if they have resided in the State of Hawaii for at least one year. Active duty military personnel and their dependents stationed in Hawaii are also considered to be residents for the purposes of obtaining a hunting license.

The following offices may also be contacted for additional requirements and information related to hunting in Hawaii: Hawaii Division of Conservation And Resources Enforcement (DOCARE) 1151 Punchbowl Street, Room 311 Honolulu, HI 96813 Tel (808) 587-0077 Fax (808) 587-0080 <http://www.hawaii.gov/dlnr/dcre/> Hawaii Hunter Education Program 1130 North Nimitz Highway #212-A Honolulu, HI 96817 (808) 587-0200 Fax (808) 587-0205 <http://www.hawaii.gov/dlnr/dcre/>

| | Island | | | | | |
|----------------------------|--------|------|---------|-------|------|-------|
| | Hawaii | Maui | Molokai | Lanai | Oahu | Kauai |
| Feral Pig | X | X | X | . | X | X |
| Mouflon Sheep | X | . | . | PX | . | . |
| Feral Sheep | PX | . | . | . | . | . |
| Mouflon-feral hybrid sheep | PX | . | . | . | . | . |
| Axis Deer | . | X | PX | PX | . | . |
| Black-tail Deer | . | . | . | . | . | PX |

Appendix A

| | | | | | | |
|------------|---|---|---|---|---|---|
| Feral Goat | X | X | X | . | X | . |
|------------|---|---|---|---|---|---|

P = ONLY BY LOTTERY DRAWING ON DESIGNATED PUBLIC HUNTING AREAS – Tags or Permits Required

X = DURING LEGAL HUNTING SEASON ON PUBLIC HUNTING AREAS

Protected Game Mammals: Brush-tailed wallabies and wild cattle are protected in Hawaii and may not be hunted unless authorized by the Division of Forestry and Wildlife.

Requirements in Public Hunting Areas: The Division of Forestry and Wildlife maintains public hunting areas on each of the six major islands, where game mammal hunting is available to the public at various times during the year. Rules, based on hunter safety considerations and the environmental considerations have been established in these areas. **Any person who hunts, serves as a guide, accompanies or assists a hunter on public hunting area is required to wear an exterior blaze orange garment** which may be a shirt, vest, coat or jacket while they are engaged in those activities. The blaze orange material must be commercially manufactured and may be either solid or mesh with a maximum mesh size of one-eighth inch. The use of camouflage orange is prohibited. Blaze orange garments are not required on designated archery only public hunting areas.

Hunting Hours Game mammals may be hunted from one-half hour before sunrise until one-half hour after sunset, year-round. It is illegal to hunt during the period between one-half hour after sunset and one-half hour before sunrise or to hunt utilizing any form of artificial light. Legal hunting hours on private land are the same as on public hunting areas.

Legal Hunting Animals and Weapons When **hunting with dogs where permitted**, hunters may use any muzzleloading rifle with a minimum of 0.45 caliber bore diameter; any rifle using at least a 0.22 caliber magnum load or center fire cartridge; shotguns loaded with slugs or 00 or larger buckshot or spears or knives. When **hunting without dogs**, hunters may use any rifle with a muzzle energy rating of 1,200 foot pounds or more; shotguns loaded with 00 or larger buckshot and muzzleloader rifles with a minimum of 0.45 caliber bore diameter (Breech loaders may not be used during muzzleloader only designated hunts). When **hunting with a bow**, the following drawing tension requirements are applicable: Long bows must have a minimum of 40 pounds at a 28-inch draw; Recurved bows must have a minimum of 35 pounds; Compound bows must have a minimum of 30 pounds

Hunting on Private Land Game mammals may be hunted year-round on private land. Hunters must possess a valid State of Hawaii hunting license and have the permission of the landowner. Hunting fees, permitted hunting weapons and methods and other prohibitions and requirements for hunting game mammals on private land are established by the landowner. This is different from game bird hunting, where the State regulates the hunting season and bag limits on both public and private lands. The wearing of blaze orange is not a requirement on private lands unless the landowner deems it to be one.

Registering Firearms and Ammunition Firearms and ammunition brought into the State from outside must be registered within 48 hours after their arrival with the Chief of Police of the county of one's residence, business or sojourn. Contact the district police station on the appropriate island or an office of the Division of Conservation and Resources Enforcement. Minors (15 years of age and younger) who hunt using a firearm are required to obtain a permit from the county police department.

Thank you for your interest in hunting in Hawaii. While you are hunting in our state, please be respectful of the landowners, the land, other people, and the plants and animals that make Hawaii unique. If we all do so, then generations to come will have the same opportunities and abundant resources that we enjoy today. We wish you a safe, fun and productive experience while hunting in Hawaii. Malama pono.

Affirmative Action Statement The Department of Land and Natural Resources receives financial support under a variety of federal programs. Under Title VI of the Civil Rights Act of 1964; Section 504 of The Rehabilitation Act of 1973; Title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, Title II of the Americans with Disabilities Act of 1990, and the laws of the State of Hawaii, the U.S. Government and the State of Hawaii prohibit discrimination on the basis of race, color, religion, sex, national origin, age, and disability. If you believe that you have been discriminated against in any program, activity or facility, or if you desire further information please write to: Affirmative Action Officer

Department of Land and Natural Resources Personnel Office 1151 Punchbowl St., Rm. 321 Honolulu, Hawaii 96813

NO. CAAP-12-0000434

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI'I

STATE OF HAWAI'I,

Plaintiff-Appellant,

vs.

KUI PALAMA,

Defendant-Appellee.

CR. NO. 11-1-0116

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

FIFTH CIRCUIT COURT
STATE OF HAWAI'I

HONORABLE KATHLEEN N.A.
WATANABE, JUDGE PRESIDING

CERTIFICATE OF SERVICE

I certify that the amicus curiae brief of the Attorney General of the State of Hawai'i was either served electronically (through the Court's JEFS system), or conventionally (by mailing a copy via USPS, first class, postage prepaid), upon the following on December 11, 2012:

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