

No. _____

In the Supreme Court of the United States

CHRISTOPHER L. WILSON,

Petitioner,

v.

STATE OF HAWAII,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE HAWAII SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

JON N. IKENAGA

BENJAMIN E. LOWENTHAL

Counsel of Record

SARA K. HALEY

SARAH M. NISHIOKA

The Office of the Public Defender

1130 North Nimitz Highway, Suite A-254

Honolulu, Hawaii 96817

(808) 586-2080

benjamin.e.lowenthal@hawaii.gov

Counsel for Petitioner

QUESTION PRESENTED

The right to “bear and keep Arms” is protected by the Second Amendment to the United States Constitution and incorporated under the Fourteenth. In *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), this Court put forth the test lower courts must use to determine when Government regulations infringe upon a person’s Second Amendment rights.

The State of Hawai‘i is prosecuting Christopher L. Wilson for carrying a handgun without a license. When he asserted that his conduct was protected by the Second Amendment, the State neither contested his assertion nor attempted to “affirmatively prove that its firearm regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.” *Bruen*, 597 U.S. at 19.

The Hawai‘i Supreme Court ruled for the State. It accused this Court of “handpick[ing] history to make its own rules” and declared that the *Bruen* test is “fuzzy,” “backward-looking,” and “unravels durable law.” It held that the mere existence of a licensing scheme allows the State to prosecute. The State is now free to disregard *Bruen* and regulate protected conduct by criminally enforcing an unconstitutional licensing scheme. The holding sharply conflicts with this Court’s decisions on the Second Amendment.

The question presented is:

Whether the *Bruen* test determines when a State’s criminal prosecution for carrying a handgun without a license violates the Second Amendment?

RELATED PROCEEDINGS

The Hawai'i Supreme Court

State of Hawai'i v. Christopher L. Wilson, SCAP 23-561, published opinion issued on February 7, 2024, and judgment on appeal issued on March 8, 2024.

The Intermediate Court of Appeals, State of Hawai'i

State of Hawai'i v. Christopher L. Wilson, CAAP-23-561, transferred to the Hawai'i Supreme Court on December 21, 2022.

The Circuit Court of the Second Circuit, Maui County, State of Hawai'i

State of Hawai'i v. Christopher L. Wilson, 2CPC-17-964, order dismissing Counts 1 and 2 with prejudice entered on August 30, 2022.

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INTRODUCTION

The Hawai‘i Supreme Court has shown open hostility to the individual rights protected by the Second Amendment. After calling the *Bruen* decision “backward-looking” and “fuzzy,” it refused to apply the Court’s test. The conduct here—carrying a handgun in self-defense—is plainly covered by the Second Amendment. Criminal enforcement of the State’s licensing scheme is a government “regulation” that must submit to the *Bruen* test. The State must “affirmatively prove that its firearm regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.” *Bruen*, 597 U.S. at 19.

Refusing to apply *Bruen* upends the constitutional order between the States and the national government. When constitutional rights are incorporated under the Fourteenth Amendment, the States must recognize them. This Court should grant certiorari, vacate the judgment below, and remand for further proceedings to right the course.

OPINIONS BELOW

The opinion of the Hawai‘i Supreme Court is reported in the *Hawai‘i Reports* in volume 154 on page 8, and the *Pacific Reports Third Edition* in volume 543 on page 440. It may be found in the Appendix at A at page 3a. The trial court’s dismissal order entered on August 30, 2022, is unreported and may be found in the Appendix at D at page 85a.

JURISDICTION

The Hawai'i Supreme Court is the court of last resort in the State of Hawai'i. Its published opinion was issued on February 7, 2024, and it entered the judgment of appeal on March 8, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article VI, Clause 2 of the United States Constitution, the Second and Fourteenth Amendments to the Constitution, and the relevant statutes are reproduced in the Appendix. App. C at 59a.

STATEMENT OF THE CASE

A. The Statutory Scheme in Hawai'i

It is a crime in Hawai'i for any person to be “carrying or possessing” a handgun or ammunition outside one’s home, business, or “sojourn” without a license to carry. Hawai'i Revised Statutes §§ 134-25(b), 134-27(b), and 134-9. People violating these statutes—even when they carry a handgun in self-defense—are subject to ten years imprisonment. HRS § 706-660(1)(a).

Before the statutory scheme was amended in 2023, applicants for a concealed carry license had to prove to the police chief in their county they were “an exceptional case” with “reason to fear injury” to their person or property. HRS § 134-9(a). Applicants for an open carry license needed to show an “urgency or need,” good moral character, and were “engaged in the protection of life and property.” *Id.* They had to be at least twenty-one years old and were United States

citizens or a “duly accredited” representative of another country’s diplomatic delegation. *Id.*

Even if an applicant met these requirements, police departments still had the discretion to deny the license. The police were free to determine if an applicant was not “qualified” to use the firearm safely, was not “a suitable person,” and appeared “mentally deranged.” HRS § 134-9(b). The statute gave no further guidance.

B. Factual Background¹

On the night of December 7, 2017, Duane Ting called the police to report that he saw through a surveillance system a group of people hiking on a trail running through his property into the West Maui Mountains. Armed with an AR-15 rifle and accompanied with other men, Mr. Ting pursued the hikers, detained them, and brought them to the highway, where the police were waiting. Mr. Wilson was one of the hikers.

The hikers told the police they were going into the mountains to look at the moon and indigenous plants. They did not see “no trespassing” signs posted on the property. As the officers patted down Mr. Wilson, he told them he had “a weapon.” The police seized a loaded pistol from his waistband.

¹ The facts were not contested in the moving papers or at the hearing on the motion to dismiss the charges. *See* Appendix D at 77a and 95a-101a. Moreover, the Hawai‘i Supreme Court based its ruling on the factual record and did not dispute that Mr. Wilson carried the handgun for “self-defense purposes.” App. A at 7a-10a.

Mr. Wilson did not have a license to carry his pistol. That year county police chiefs throughout Hawai'i issued licenses to carry to 225 employees at private security firms. *Firearm Registrations in Hawai'i*, attached as Exhibit A in Memorandum in Opposition to Motion for Reconsideration of the Court's Oral Ruling Granting Defendant's Motion to Dismiss Counts 1 & 2 filed in *State of Hawai'i v. Wilson*, 2CPC-17-964 Dkt. No. 185. Fourteen "private citizens" applied for a concealed carry license and the police chiefs in every county denied them all. *Id.*

C. Procedural History

The day after his arrest, Respondent brought criminal charges against Mr. Wilson. App. A at 46. The prosecution averred that Mr. Wilson violated Hawai'i Revised Statutes §§ 134-25(a) and 134-27(a) by carrying or possessing the handgun. *Id.* at 6a-7a.

On May 14, 2022, Mr. Wilson moved to dismiss these charges because they infringed on his Second Amendment rights pursuant to *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010). App. A at 7a-8a. The motion was denied. *Id.* at 8a. Less than a month after that, this Court issued its decision in *Bruen* and handed down the test courts use to determine when the Government infringes on an individual's Second Amendment right.

This Court also granted a petition to review the United States Court of Appeals decision upholding the constitutionality of the State's licensing scheme.

Young v. Hawai'i, 142 S.Ct. 2895 (2022). This Court vacated the United States Court of Appeals' decision in light of *Bruen* and remanded the case.

On July 29, 2022, Mr. Wilson filed another motion to dismiss. App. D at 67a. He asserted that under *Bruen*, his conduct—carrying a firearm for self-defense—was protected by the Second Amendment and the State had to justify its application of HRS §§ 134-25 and 134-27. App. D at 71a-72a. The State did not contest Mr. Wilson's assertion of self-defense and made no attempt to meet its burden. *Id.* at 75a. Instead, it argued that because Mr. Wilson did not have a license, he could not challenge the constitutionality of the permit scheme in HRS § 134-9 and the State could prosecute him regardless of his constitutionally protected conduct. *Id.* at 78a-79a. The trial court disagreed, found that the State did not meet its burden under *Bruen*, and dismissed the charges. *Id.* at 87a and 101a-102a.

The State appealed to the Hawai'i Supreme Court, where it repeated its argument that *Bruen* did not apply to Mr. Wilson's prosecution. *See* App. E at 115a and 122a. Mr. Wilson argued that because the State made no effort to justify its application of HRS §§ 134-25 and 27 under *Bruen*, the dismissal should be upheld. *Id.* at 122a. In a published opinion, the Hawai'i Supreme Court vacated the dismissal order. App. A at 56a.

First, it held that although Mr. Wilson could challenge the constitutionality of the criminal prosecution of carrying a firearm in violation of HRS §§ 134-25 and 27, he could not challenge the discretionary licensing scheme under HRS § 134-9. *Id.* at 14a. The Hawai'i Supreme Court next examined if the right to carry the

firearm in self-defense existed under a provision in the State constitution with language nearly identical to the Second Amendment. *Id.* at 22a.

The Hawai'i Supreme Court acknowledged the similarity but believed that only "[u]ntil recently," the Second Amendment had been understood to guarantee a collective right to bear arms through State militias. *Id.* at 35a. It took aim at *Heller*, and asserted that this Court "flipped the nation's textual and historical understanding of the Second Amendment" by recognizing the individual right to bear and keep arms. *Id.* at 37a-38a. It criticized *Heller*'s analysis of the historical underpinnings of the Second Amendment. *Id.* at 38a. ("History is prone to misuse. In Second Amendment cases, the Court distorts and cherry-picks historical evidence. It shrinks, alters, and discards historical facts that don't fit."). The Hawai'i Supreme Court suggested that the change came about because "interest groups advanced an individual rights interpretation of the Second Amendment." *Id.* at 36a.

The Hawai'i Supreme Court next attacked the *Bruen* test and this Court. *Id.* at 38a. ("*Bruen* unravels durable law. No longer are there the levels of scrutiny and public safety balancing tests long-used by our nation's courts to evaluate firearm laws. Instead, the Court ad-libs a 'history-only' standard."). According to the Hawai'i Supreme Court, *Bruen* forced it to "use a fuzzy 'history and traditions' test" and "scraps the traditional techniques used by federal and state courts to review laws passed by the People to protect people." *Id.* at 39a. The *Bruen* test, it claimed,

“dismantles workable methods to interpret firearm laws. All to advance a chosen interpretive modality.” *Id.*

It claimed that originalism’s “liberty-reducing tendencies” should “not control contemporary American life.” *Id.* The Hawai’i Supreme Court asserted *Bruen*, *McDonald*, and *Heller* “show how the Court handpicks history to make its own rules” and that the *Bruen* decision “undercuts the other branches’ responsibility . . . to preserve public order and solve today’s problems.” *Id.* at 40a and 41a. It charged that “*Bruen* snubs federalism principles.” *Id.* at 6a.

The Hawai’i Supreme Court then rebuked the Government’s burden in *Bruen* as unreasonable and unsafe. *Id.* at 41a (“Time-traveling to 1791 or 1868 to collar how a state regulates lethal weapons . . . is a dangerous way to look at the federal constitution.”).

We believe it is a misplaced view to think that today’s public safety laws must look like laws passed long ago. Smoothbore, muzzle-loaded, and powder-and-ramrod muskets were not exactly useful to colonial era mass murderers. And life is a bit different now, in a nation with a lot more people, stretching to islands in the Pacific Ocean.

Id. The Hawai’i Supreme Court called the *Bruen* test a “backward-looking approach” that “ignores today’s realities.” *Id.* at 42a.

It accused this Court of “disabl[ing] the states’ responsibility to protect public safety, reduce gun violence, and safeguard peaceful public movement.” *Id.* at 43a. For the Hawai’i Supreme Court, “it [made] no sense for contemporary society to

pledge allegiance to the founding era's culture, realities, laws, and understanding of the Constitution." *Id.*

Ultimately, after a lengthy examination of the history and the traditions relating to firearm and weapons regulations throughout the Hawaiian Kingdom, Republic, Territory, and State, the Hawai'i Supreme Court held that unlike the Second Amendment, the Hawai'i Constitution does not protect an individual right to bear arms. *Id.* at 54a.

When it came to Mr. Wilson's Second Amendment claims, the Court was dismissive. *Id.* at 55a. In four paragraphs, it held that prosecuting Mr. Wilson for carrying a handgun in self-defense did not violate the Second Amendment. *Id.* at 55a-56a. Because the States have a generalized police power to regulate firearms through licensing schemes, and because Mr. Wilson did not have a license regardless of its constitutionality, the Hawai'i Supreme Court held that the *Bruen* test did not apply. *Id.*

Mr. Wilson's uncontested assertion that his conduct was covered by the plain text of the Second Amendment did not matter, and the State did not have to affirmatively prove that regulating his conduct through a criminal enforcement of the licensing scheme was consistent with the Nation's tradition of firearm regulation. *Id.* at 56a. The Hawai'i Supreme Court vacated the dismissal order and remanded the case to the trial court. *Id.* The judgment on appeal issued on March 7, 2024. App. B at 58a. This petition followed.

REASONS FOR GRANTING THE PETITION

A. The Hawai'i Supreme Court's refusal to apply the *Bruen* test to the criminal prosecution for carrying and possessing a handgun in self-defense conflicts with this Court's decisions about the Second Amendment.

The Hawai'i Supreme Court held that *Bruen* did not apply to Mr. Wilson's prosecution for carrying a handgun in self-defense. Thus, Mr. Wilson's unchallenged assertion that his conduct was covered by the plain text of the Second Amendment was irrelevant, and the State did not have to "affirmatively prove" that criminal enforcement of the licensing scheme was justified under *Bruen*. The ruling conflicts with *Heller*, *McDonald*, *Bruen*, and *Young*.

The Second Amendment protects a person's right to "possess and carry weapons in case of confrontation." *Heller*, 554 U.S. at 592. The "right of self-defense has been central" to the Second Amendment. *Id.* at 628. The Due Process Clause of the Fourteenth Amendment incorporates these rights and applies them "equally to the Federal Government and the States." *McDonald v. City of Chicago*, 561 U.S. at 791.

In *Bruen* this Court fashioned the test to determine when a "firearm regulation"—State or federal—infringes on conduct protected by the Second Amendment. The Court rejected the tests lower courts used to analyze Second Amendment claims raised by criminal defendants. *Id.*, 597 U.S. at 18-19. The test had to be "rooted in the Second Amendment's text, as informed by history" and the lower courts' additional evaluation of the means and ends of firearm regulation akin to strict or intermediate scrutiny was "one step too many." *Id.* at 19.

Accordingly, when the “plain text” of the Amendment “covers an individual’s conduct, the Constitution presumptively protects that conduct” and the burden shifts to the Government to “justify its regulation” by showing that “the regulation is consistent with this Nation’s historical tradition of firearm regulation.” *Id.*, at 17. That is the only way “a court [may] conclude that the individual’s conduct falls outside the Second Amendment’s unqualified command.” *Id.*

Mr. Wilson asserted that his conduct—carrying a handgun to avoid confrontation—was covered by the plain text of the Second Amendment and was presumptively protected. The State did not contest Mr. Wilson’s assertion in the trial court and made no attempt to show how enforcing the license scheme through HRS §§ 134-25 and 134-27 could be justified under *Bruen*. The Hawai’i Supreme Court nevertheless ruled that the criminal prosecution could proceed because Mr. Wilson did not apply for a license to carry under HRS § 134-9. This runs afoul of *Heller* and its progeny.

The Hawai’i Supreme Court voids the *Bruen* test on the grounds that the States have the general police power to “require that individuals have a license before carrying firearms in public.” App. A at 56a. The existence of a licensing scheme is not an alternative to the *Bruen* test. States may regulate firearms through a licensing scheme, but those schemes and the criminal prosecutions that arise from not complying with them are still subject to *Bruen*.

Personal self-defense “is the central component of the Second Amendment” and “citizens must be permitted to use handguns for the core lawful purpose of self-

defense.” *McDonald*, 561 U.S. at 767 (cleaned up). This right has been fully incorporated by the Due Process Clause and applies to the States. *Id.* at 791. That calls on State courts to ensure that the Government adheres to its burden under the *Bruen* test by justifying its “regulation” of conduct presumptively protected by the Second Amendment. *Bruen*, 597 U.S. at 17.

Moreover, the criminal charges in this case incorporate an unconstitutional licensing scheme. HRS §§ 134-25 and 134-27 require the State to prove that when Mr. Wilson carried the firearm and ammunition, he did not have a license issued at the discretion of the Maui County police chief under HRS § 134-9. At the time of Mr. Wilson’s prosecution, Hawai‘i was one of the “unusual discretionary license regimes” called into question by *Bruen*. *Id.*, 597 U.S. at 79 (Kavanaugh, J. concurring). This Court had vacated a lower court’s decision upholding the license scheme in *Young v. Hawai‘i*, 142 S.Ct. at 2895-96.

States are not free to set up a licensing scheme violative of the Second Amendment and then prosecute people engaged in constitutionally protected conduct for not complying with the scheme.

We know of no . . . constitutional right that an individual may exercise only after demonstrating to government officers some special need. That is not how the First Amendment works when it comes to unpopular speech or the free exercise of religion. It is not how the Sixth Amendment works when it comes to a defendant’s right to confront witnesses against him. And it is not how the Second Amendment works when it comes to public carry for self-defense.

Bruen, 597 U.S. at 70-71.

The Hawai'i Supreme Court ignored Mr. Wilson's uncontested assertion that his conduct was covered by the plain text of the Second Amendment. It refused to apply a test it deemed "fuzzy" and "backward-looking," and posited no alternative—not even the "traditional techniques used by federal and state courts to review laws." App. A at 39a. This cannot be condoned.

The *Bruen* test prevents lower courts from applying additional means-end scrutiny to Second Amendment claims. *Bruen*, 597 U.S. at 19. That includes criminal cases. *See id.* at 18 (citing *United States v. Greeno*, 679 F.3d 510 (CA6 2012); *United States v. Boyd*, 999 F.3d 171 (CA3 2021); and *Kanter v. Barr*, 919 F.3d 437 (CA7 2019)). Thus, the State's application of its criminal statute is a "regulation" no different than a licensing scheme. Both are subject to the test "rooted in the Second Amendment's text, as informed by history[.]" *Bruen*, 597 U.S. at 19. The Hawai'i Supreme Court's refusal to apply *Bruen* conflicts with this Court.

The Second Amendment is not a "second class-right, subject to an entirely different body of rules than the other Bill of Rights guarantees[.]" *McDonald*, 561 U.S. at 780. Mr. Wilson carried the handgun that night for self-defense purposes—conduct forming the "core protection" of the Second Amendment. *Heller*, 554 U.S. at 634. The assertion was uncontested before the trial court and put the burden on the State to show that its prosecution "is consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 17.

Limiting *Bruen* to determine the constitutionality of a licensing scheme—and not the criminal enforcement that arises from noncompliance with the scheme—

departs from the well-established decisions about the Second Amendment. Hawai'i is not free to ignore this Court, absolve the State of its burden, and expose people exercising their constitutional rights to a felony conviction and imprisonment. The four-paragraph analysis of Mr. Wilson's Second Amendment challenge warrants further review.

B. The Hawai'i Supreme Court's resistance to *Heller*, *McDonald*, and *Bruen* upends the supremacy of the Second Amendment.

The United States Constitution is the supreme law of the land and State judges "shall be bound" to "any Thing in the Constitution[.]" U.S. Const. Art. VI, Cl. 2. The Supremacy Clause "creates a rule of decision directing state courts that they must not give effect to state laws that conflict with federal law." *Espinoza v. Montana Dept. of Revenue*, 591 U.S. 464, 488 (2020) (quoting *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 324 (2015)) (cleaned up).

While the Hawai'i Supreme Court may hold that the Hawai'i Constitution confers no individual right to bear arms, it "share[s] with federal courts an equivalent responsibility for the enforcement of federal rights, a responsibility one must expect they will fulfill." *Schlesinger v. Councilman*, 420 U.S. 738, 756 (1975).

The Hawai'i Supreme Court must recognize that Mr. Wilson has a right to carry a weapon in self-defense protected by the Second Amendment pursuant to *Heller*, that it must protect his right through the Fourteenth Amendment by *McDonald*, and that State regulations—be it a licensing scheme or a criminal prosecution arising from carrying the firearm—are subject to the *Bruen* test. "No

state . . . judicial officer can war against the Constitution without violating his undertaking to support it.” *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

The Hawai‘i Supreme Court “snubs federalism principles.” App. A at 6a. By refusing to follow this Court’s decisions on the Second Amendment, it has upended the constitutional order imposed by the Supremacy Clause. When the State’s highest judicial tribunal “subvert[s] the very foundations of this Government, it seemed to be the duty of this court . . . to show plainly the grave errors into which the State court has fallen, and the consequences to which they would inevitably lead.” *Abelman v. Booth*, 21 How. 506, 525 (1858). The Hawai‘i Supreme Court has done just that. Further review is needed to correct this and ensure that the States adhere to *Heller* and its progeny.

C. Summary reversal is the appropriate remedy.

“[A] summary reversal does not decide any new or unanswered question of law, but simply corrects a lower court’s demonstrably erroneous application of federal law.” *Maryland v. Dyson*, 527 U.S. 465, 467 fn. (1999). *See also Gonzalez v. Thomas*, 547 U.S. 183, 185 (2006) (summary reversal warranted where lower court’s error is “obvious”). It is an appropriate remedy when the lower court is “not just wrong” but has “committed fundamental errors that this Court has repeatedly admonished courts to avoid.” *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2560 (2018).

Resistance to this Court’s decisions about the Second Amendment have been resolved with summary reversals. In *Caetano v. Massachusetts*, 577 U.S. 411 (2016), the Supreme Judicial Court of Massachusetts refused to apply the Second

Amendment, *Heller*, and *McDonald* to a criminal prosecution against a person carrying a stun gun for self-defense purposes. *Id.* at 411. This Court vacated the lower court's judgment and remanded the case by way of a summary disposition. *Id.* at 412.

This Court later vacated several lower court decisions from various federal judicial circuits after *Bruen* and directed the courts to apply its test by way of a summary reversal. *Young*, 142 S. Ct. at 2895; *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Bruck*, 142 S. Ct. 2894 (2022) (mem.); *Duncan v. Bonta*, 142 S. Ct. 2895 (2022) (mem.); *Bianchi v. Frosh*, 142 S. Ct. 2898 (2022) (mem.); *Morin v. Lyver*, 143 S. Ct. 69 (2022) (mem.).

Nor is this the first time the Court used a summary reversal order to correct Hawai'i courts. After the Hawai'i Supreme Court refused to apply *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and continued to let judges—not juries—find the facts needed to extend maximum terms of imprisonment, this Court was compelled to grant certiorari, vacate the judgment, and remanded the proceedings to comport with its decisions through a summary reversal in *Maugaotega v. Hawai'i*, 549 U.S. 1191, 127 S.Ct. 1210 (2007) (mem.). On remand, the Hawai'i Supreme Court complied and has faithfully applied *Apprendi*. See *State v. Maugaotega*, 115 Hawai'i 432, 168 P.3d 562, 576-77 (Haw. 2007). The same remedy is appropriate here.

The error below is so fundamental, clear, and out of step with this Court's decisions that further briefing is unnecessary. The *Bruen* test applies to the criminal prosecution of Mr. Wilson. Because Mr. Wilson's assertion that his conduct

was covered by the plain text of the Second Amendment went uncontested and because the State made no effort to meet its burden under *Bruen* in the trial court, the Hawai'i Supreme Court's judgment should be vacated and remanded to reinstate the dismissal order. *See, e.g., Lombardo v. City of St. Louis, Missouri*, 594 U.S. 464, 468 (2021) (vacating judgment and remanded case "to give the court opportunity" to correctly apply this Court's decision).

CONCLUSION

It is respectfully requested that this Court grant the petition for certiorari, vacate the decision, and remand for further proceedings to reinstate the trial court's dismissal order. Alternatively, the Petitioner requests the Court to grant his petition and set the case for briefing and argument on the merits.

Respectfully submitted,

JON N. IKENAGA
State of Hawai'i Public Defender



BENJAMIN E. LOWENTHAL

Counsel of Record

SARA K. HALEY

SARAH M. NISHIOKA

The Office of the Public Defender

1130 North Nimitz Highway, Suite A-254

Honolulu, Hawai'i 96817

Counsel for Petitioner

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