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NO. 25877

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.  
LEALIKI KOLI, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIFTH CIRCUIT  
(FC-Cr. NO. 02-1-0252)

MEMORANDUM OPINION

(By: Watanabe, Acting C.J., Lim and Fujise, JJ.)

Lealiki Koli (Father) appeals the May 16, 2003 judgment upon a bench trial in the family court of the fifth circuit, the Honorable Calvin K. Murashige, judge presiding, that convicted him of abuse of a family or household member, a violation of Hawaii Revised Statutes (HRS) § 709-906(1) (Supp. 2003),<sup>1</sup> and sentenced him to two years of probation upon terms and conditions

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<sup>1</sup> Hawaii Revised Statutes (HRS) § 709-906(1) (Supp. 2003) provides in pertinent part that, "It shall be unlawful for any person, singly or in concert, to physically abuse a family or household member . . . . For the purposes of this section, 'family or household member' means spouses or reciprocal beneficiaries, former spouses or reciprocal beneficiaries, persons who have a child in common, parents, children, persons related by consanguinity, and persons jointly residing or formerly residing in the same dwelling unit." See also HRS § 702-204 (1993) ("When the state of mind required to establish an element of an offense is not specified by the law, that element is established if, with respect thereto, a person acts intentionally, knowingly, or recklessly"); State v. Eastman, 81 Hawai'i 131, 140, 913 P.2d 57, 66 (1996) (pursuant to HRS § 702-204, "the requisite state of mind for a violation of HRS § 709-906(1) is that of acting intentionally, knowingly, or recklessly"); State v. Tomas, 84 Hawai'i 253, 257, 933 P.2d 90, 94 (App. 1997) ("to 'physically abuse' someone under HRS § 709-906(1) means to maltreat in such a manner as to cause injury, hurt or damage to that person's body" (citations and some internal quotation marks omitted)); State v. Nomura, 79 Hawai'i 413, 415-16, 903 P.2d 718, 720-21 (App. 1995) (in a prosecution for abuse of family or household members, jury instructions defining "physical abuse" as "causing bodily injury to another person[,]" and "bodily injury" as "physical pain, illness or any impairment of physical conditions [sic,]" were not incorrect (block quote format omitted)).

including forty-eight hours in jail, stayed pending appeal. Father contends the family court erred in rejecting his "parental discipline" defense. We agree, and reverse.

**I. Background.**

On October 25, 2002, a petition was filed against Father, alleging that on October 18, 2002, he had physically abused the sixteen-year-old complaining witness (the CW), who is his hanai daughter. The essential evidence presented at the February 21, 2003 jury-waived trial follows.<sup>2</sup>

The CW, who had lived with Father and Mother for the most part since she was a baby and who referred to them as "mom and dad,"<sup>3</sup> testified that on October 18, 2002, late in the evening, she "put stuff" in her bed and left her bedroom to go outside and sit on the front porch. At some point, her parents noticed her absence, so they woke her younger sister (Sister) and asked where the CW was, but Sister professed ignorance. Hearing all of this because her parents were yelling, the CW tried to get back in the house but discovered the door was locked, so she started pounding on the door.

Mother answered the door and grabbed the CW's hair, pulled her into the house and slapped her in the face a "[c]ouple

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<sup>2</sup> Mother was charged with the same crime, in FC-Cr. 02-1-0251. Her case was consolidated for trial with Father's. She was acquitted in the February 21, 2003 jury-waived trial.

<sup>3</sup> In 1998, Father and Mother were formally awarded custody of the CW and her sister after a family court tussle with the natural mother.

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of times." Father was also on hand, yelling at the CW. When Mother stopped slapping the CW, Father took over and hit the CW twice in the face with an open hand. All the while, the CW was backing up to her bed. When the CW reached the bed, Mother, then Father, started hitting her with a belt, "on my legs and on my arms." Mother belted her thrice. As for Father, "I think about four times he hit me." When was asked how it felt to be hit with the belt, the CW replied, "That didn't really hurt me because I got lickins before, so it's like -- wasn't really anything. It was like -- like the first time you get lickins, it hurts, it stings and everything. But couple times after that, it was like nothing."

Mother kept asking the CW who was outside with her. "And I told her nobody, and she was like stop lying. I know somebody's outside." Mother went and got a pair of scissors and threatened to cut off all of the CW's hair if she did not fess up to having company. The CW again denied the accusation, whereupon Mother, with Father holding the CW's arm, cut off a lock of hair. The CW ran out of the house down the road to her grandmother's house. The CW recalled that her head hurt, "Later on." She also had marks, "On my legs and on my arm. I had one on my shoulder and one behind my ear."

The CW related that she did not report the incident right away. "Because that night we went to sleep. The next morning we were just -- we were still living with them, and then

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the night -- that night, that Thursday I think it was -- that Friday night me and my sister ran away. . . . It was couple days about two days later that I went to the police."

Under cross-examination by Mother's counsel, the CW acknowledged that she had been suspended from school three times on account of drugs. The CW admitted that she had "snuck out at night" once earlier that October, and that she put blankets under her bedcovers on the night in question to simulate sleep, but maintained that she went out that night just to sit on the front porch. The CW did not know how the door got locked behind her.

Under cross-examination by Father's counsel, the CW denied that she had made illicit plans to have friends pick her up from the house that night. The CW reiterated that she left the door unlocked behind her, and at that point in her testimony claimed that Sister locked the door on her for some unknown reason. When Father's counsel asked her why her legs were wet that night, the CW admitted she was walking around the house in the yard, and explained that she slipped on the wet grass when she heard her parents yelling and started to run for the front stairs. The CW insisted that she put blankets under the bedcovers solely to cover her sojourn on the front porch, explaining that she had to hide any absence whatsoever, because her parents would accuse her of going out to meet someone and punish her for that, regardless of the actual circumstances. The CW allowed, however, that her parents had caught her lying about

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her whereabouts outside the home several times before the night of the incident. The CW acknowledged that living with her parents was "not fun" because she chafed under their oppressive restrictions.

Sister, who was fifteen years old, also testified for the State. She remembered that the CW "put things inside her bed to make like she was there, and she walked out of the house and locked the door behind her." Sister saw her parents slapping the CW and grabbing her hair. She also saw her parents hitting the CW with the belt. "My mom then my dad. They just kept going back and forth." When asked how many times her parents hit the CW with the belt, Sister replied, "Too much times to count." Under questioning by Mother's counsel, Sister denied locking the door behind the CW. Sister admitted that it was the first time she had ever seen the CW go out just to sit on the front porch. Sister denied seeing the CW push Mother during the incident, except to break free and run away. Sister did remember that at one point, the CW grabbed the belt and tried to pull it away. In response to questioning by Father's counsel, Sister confirmed that the CW had "snuck out" with her friends about five nights before the incident.

Police officer Clyde Caires (Officer Caires) was the State's last witness. Officer Caires testified that he interviewed the CW at the police station on October 20, 2002. He observed several marks on her. "There was some redness and

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bruises on her legs, her thighs, and on both arms." Officer Caires was shown some photo exhibits. On Exhibits P-1 and P-2, Officer Caires identified, on the CW's left thigh, a "long red mark that's from the belt that she said she was hit with." On Exhibit P-3, Officer Caires noted "a bruise right behind of her right calf." On Exhibit P-4, Officer Caires described a "couple of bruises on her left upper arm." On Exhibit P-5, Officer Caires counted "numerous bruises on her right arm from her forearm all the way up to her upper arm." And on Exhibit P-6, Officer Caries recognized "a bruise right behind of her left shoulder."

Mother was the only witness in her defense. She informed the family court that her household is run in the "Tongan way," which is based in large part upon respect for one's parents. However, in 2001, the CW started "getting really disrespectful." She began shirking her household chores. She was suspended from school three times for smoking marijuana. She became involved with crystal methamphetamine and was seen driving without a license. She ran away from home one night to attend the county fair. And she was "sleeping with boys[.]"

Mother remembered the night of the incident. Around midnight, Mother heard Sister talking to someone. Father told Mother that the sisters were whispering in the hallway. Later, Mother uncovered the CW's ruse. The CW was not in her bed. Instead, Mother found, "A bunch of clothes and towels folded up

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from the head of the bed all the way to the feet of the bed." Mother called Father, and together they confronted Sister. Sister pleaded ignorance, and claimed she had been sleeping. Then came a knock on the door. Father opened the door and found the CW there, "breathing hard." Father "grabbed her and pulled her in." Mother denied pulling the CW into the house by her hair. Father went outside to look for the suspected co-conspirators. Mother then told the CW to "get on the bed and sit down."

An interrogation ensued. Mother kept insisting that the CW own up to going outside to meet her boyfriend. The CW kept insisting that she went outside just to get some air. Then, Mother demanded that the CW stop lying, whereupon the CW jumped up from the bed and struck Mother. Mother raised her hand in a defensive reflex, and in doing so happened to hit the CW in the face. The CW remained in Mother's face, yelling at her, so Mother slapped the CW. Mother maintained that she did not hit the CW any more that night.

Mother acknowledged, however, that she did cut the CW's hair in order to discipline her. This was not the first time, for Mother had cut the CW's hair previously for lying about her activities outside the home. This time, Mother was only able to cut off a patch of the CW's hair, because the CW yanked her head away and ran off. Two days later, the CW and Sister ran away from home. Eventually, child protective services became

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involved, and the CW and Sister were placed elsewhere.

On cross-examination by Father's counsel, Mother testified that Father came back into the house at about the same time she was struck by the CW. Father yelled at the CW, rebuking her. The CW yelled back, so Father got the belt out and started chastising the CW with it. Mother remembered that Father hit the CW in the legs about four times. Mother denied that she took turns hitting the CW with the belt. Mother mentioned that she noticed the CW's legs were wet. Mother suspected that the CW got wet running through the bushes that separate their house from the road. Mother later learned that two boys came to the house three times that night looking for the CW, because "it was planned to pick her up."

Under cross-examination by the State, Mother estimated the CW's weight at about 120 pounds, and her own at about 345 pounds. Mother maintained that discipline in their home consisted of withholding of privileges and exclusion from family activities. Hitting played a part, too, but only by Father. Mother guessed that the bruises the CW suffered were inflicted by Father's blows with the belt.

Father did not testify and did not present any witnesses. After closing arguments, the family court announced its verdict:

Certainly the Court recognizes that parents have a duty. They have a responsibility to exercise control over the children, and this control includes use of discipline.

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The Court recognizes in this case that the complaining witness . . . was to a certain extent out of control at times; that methods were employed earlier to try and right her behavior in haircutting, taking away certain privileges, and the Court certainly understands the frustration that defendants may have encountered in trying to deal with someone such as [the CW and Sister], being exasperated by the child's use of drugs and being suspended from school, being exasperated by the child's disobedience of rules of the family, of their culture with regard to dating. And certain steps were taken -- and certainly it's not necessary for the Court to judge whether or not the cutting of hair, taking away of privileges was proper, improper, excessive, not excessive.

But listening to all the evidence, the Court comes away -- and certainly there is some statement made which were less than truthful by the complaining witness with regard to how events took place. But trying to look at the facts as they developed, certainly something was heard that caused [the CW] to want to get back to the house. Whether it was talking, whether it was yelling, something made her realize she needed to get back in the house, so she tried to do that.

The door was locked. Who locked it or whether she did or someone else did, that's not of concern to the Court. We know she was out of her room, though she had tried to make her bed look like she was still sleeping there.

The Court will make the following rulings: From what the Court has heard with regard to [Mother], the Court finds that her actions toward [the CW] were within her authority as a parent, and the Court will find her not guilty of the offense of abuse of family, household member.

With regard to [Father], in looking at the photographs, in hearing the testimony, both of the witnesses as well as [Mother], the Court understands that there's been nothing to dispute that he used a belt upon [the CW], and it was used at least four times.

And that his actions resulted in what has been depicted in Exhibits P-1 through 6. There comes a point in time where the Court would find that discipline would be excessive or beyond what we consider to be moderate forms of discipline.

And the Court would find that using the belt in an indiscriminate manner would be beyond a moderate form of discipline. And the Court will find [Father] guilty of the offense of abuse of family or household member.

### **II. The Question Presented.**

Father contends: "The Family Court erred in convicting [Father] of Abuse of Family and Household Member because the State failed to prove beyond a reasonable doubt that [Father] was

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not justified in using reasonable force to discipline [the] 16 year-old [CW] for sneaking out of the house." Opening Brief at 5-6.

**III. Standard of Review.**

In a case in which the trial judge found the defendant guilty of abuse of a family or household member and the defendant argued on appeal that the trial judge erred in rejecting his "parental discipline" defense, the supreme court stated:

Crouser argues that the trial court clearly erred in finding that the force used was not reasonably related to the purpose of safeguarding or promoting Minor's welfare, including the prevention or punishment of her misconduct, and that the use of force was designed to cause or known to create the risk of causing substantial bodily injury, extreme pain or mental distress. These are conclusions of law (COL), presenting mixed questions of fact and law. "[A] COL that presents mixed questions of fact and law is reviewed under the clearly erroneous standard because the court's conclusions are dependent upon the facts and circumstances of each case." State v. Furutani, 76 Hawai'i 172, 180, 873 P.2d 51, 59 (1994) (citation and internal quotation marks omitted). Under the clearly erroneous standard, a trial court's decision will not be reversed unless, based upon the entire evidence in the record, the appellate court is left with the definite and firm conviction that a mistake has been made. Id. at 179, 873 P.2d at 58.

State v. Crouser, 81 Hawai'i 5, 10, 911 P.2d 725, 730 (1996)

(brackets in the original). In the course of deciding that the trial judge did not err in rejecting the defense, the supreme court concluded,

There is nothing in the record that leads us to a "definite and firm conviction that a mistake has been made." Therefore, we hold that the trial court's conclusion that the force used was not reasonably related to protecting Minor's welfare was not clearly erroneous.

Id. at 12, 911 P.2d at 732.

**IV. The Relevant Law.**

Hawaii Revised Statutes (HRS) § 703-309(1) (1993)

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provides:

The use of force upon or toward the person of another is justifiable under the following circumstances:

- (1) The actor is the parent or guardian or other person similarly responsible for the general care and supervision of a minor, or a person acting at the request of the parent, guardian, or other responsible person, and:
  - (a) The force is employed with due regard for the age and size of the minor and is reasonably related to the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of the minor's misconduct; and
  - (b) The force used is not designed to cause or known to create a risk of causing substantial bodily injury, disfigurement, extreme pain or mental distress, or neurological damage.

In practice, the defense works like this:

Crouser was charged with abuse of a family or household member, in violation of HRS § 709-906. His conviction required proof beyond a reasonable doubt of each of the following three elements: (1) that he physically abused Minor; (2) that he did so intentionally, knowingly or recklessly; and (3) that Minor was a present or former family or household member of Crouser's. To invoke the defense of justification under HRS § 703-309, Crouser was required to make a showing that the record contained evidence supporting the following elements: (1) he was a parent, guardian, or other person as described in HRS § 703-309(1); (2) he used force against a minor for whose care and supervision he was responsible; (3) his use of force was with due regard to the age and size of the recipient and reasonably related to the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of misconduct; and (4) the force used was not designed to cause, or known to create a risk of causing, substantial bodily injury, disfigurement, extreme pain or mental distress, or neurological damage. See State v. Kaimimoku, 9 Haw. App. 345, 349-50, 841 P.2d 1076, 1079 (1992). In turn, the prosecution had the burden of disproving beyond a reasonable doubt the justification evidence that was adduced, or proving beyond a reasonable doubt facts negating the justification defense. Id. at 350, 841 P.2d at 1079. Because the requirements of HRS § 703-309(1) are set out in the conjunctive, rather than the disjunctive, the prosecution needed only to disprove one element beyond a reasonable doubt to defeat the justification defense.

Crouser, 81 Hawai'i at 10-11, 911 P.2d at 730-31 (footnotes omitted).

Observe that the "reasonably related" proviso of HRS

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§ 703-309(1) (a) "provides for objective review of the parent's judgment," Crouser, 81 Hawai'i at 12, 911 P.2d at 732, and that, as a gloss,

to be "reasonably related" to the purpose of punishing misconduct, use of force must be both reasonably proportional to the misconduct being punished and reasonably believed necessary to protect the welfare of the recipient. Subsection (b) of HRS § 703-309(1) defines the maximum degree of force that is justifiable under the statute. Subsection (a), as amended, makes clear that physical discipline may be so excessive that it is no longer reasonably related to safeguarding the welfare of the minor, even if it does not exceed the bounds set in subsection (b).

Crouser, 81 Hawai'i at 12, 911 P.2d at 732. See also State v. Stocker, 90 Hawai'i 85, 94-95, 976 P.2d 399, 408-409 (1999) (refusing to overrule the Crouser gloss).

Note also the definition of "substantial bodily injury" contained in HRS § 707-700 (Supp. 2003):

"Substantial bodily injury" means bodily injury which causes:

- (1) A major avulsion, laceration, or penetration of the skin;
- (2) A burn of at least second degree severity;
- (3) A bone fracture;
- (4) A serious concussion; or
- (5) A tearing, rupture, or corrosive damage to the esophagus, viscera, or other internal organs.

See Crouser, 81 Hawai'i at 13, 911 P.2d at 733 (the term "substantial bodily injury," as used in HRS § 703-309(1) (b), is "'defined in section 707-700 of the Hawaii Penal Code.'" Sen. Stand. Comm. Rep. No. 2208, in 1992 Senate Journal, at 1023"); State v. Tanielu, 82 Hawai'i 373, 378, 922 P.2d 986, 991 (App. 1996) (the same, citing Crouser).

Observe, as well, that the term "extreme pain" contained in HRS § 703-309(1) (b) can be interpreted "*noscitur a sociis* with substantial bodily injury[.]" Crouser, 81 Hawai'i at 13, 911 P.2d at 733 (citing State v. Deleon, 72 Haw. 241, 244, 813 P.2d 1382, 1383-84 (1991) (in order to define the term "extreme pain," contained in an earlier incarnation of the defense that referred to "death, serious bodily injury, disfigurement, extreme pain or mental distress, or gross degradation[,]'" HRS § 703-309(1) (b) (1985), we must "look to the other results arising from the use of force by a parent against a child which are forbidden by the statute").

#### V. Discussion.

On appeal, Father argues that,

The evidence adduced at trial . . . showed that [Father] fulfilled all of the requirements of the four-part test set forth in Crouser and Kaimimoku, and that these elements were not disproved by the State beyond a reasonable doubt. Thus, the court erred in finding [Father] guilty of abuse of family and household members.

Opening Brief at 12. The State answers that,

Upon [Father] making such a showing, the prosecution has the burden of disproving beyond a reasonable doubt one of those elements, in order to defeat the parental discipline defense.

Because the Court found that [Father's] use of force against [the CW] was excessive, the court implicitly found that [Father] failed to meet part four of the Crouser test. Thus, [Father's] use of force was designed to cause, or known to create a risk of causing substantial bodily injury, disfigurement, extreme pain or mental distress, or neurological damage.

Answering Brief at 6 (citations and footnotes omitted). We disagree with the State.

Father's use of force was clearly not "designed to

cause or known to create a risk of causing substantial bodily injury, disfigurement, . . . or neurological damage.” HRS § 703-309(1); Crouser, 81 Hawai‘i at 11, 911 P.2d at 731 (citation and some punctuation marks omitted). Such a finding would leave us “with the definite and firm conviction that a mistake has been made.” Id. at 10, 911 P.2d at 730 (citation omitted).

Nor was Father’s use of force “designed to cause or known to create a risk of causing . . . extreme pain or mental distress,” HRS § 703-309(1); Crouser, 81 Hawai‘i at 11, 911 P.2d at 731 (citation and some punctuation marks omitted), as interpreted “*noscitur a sociis* with substantial bodily injury,” id. at 13, 911 P.2d at 733, and in light of the degree of force, placement of force, and implement employed; the results revealed in the photo exhibits; and the CW’s own evaluation of the level of pain and mental distress engendered. Such a finding would also leave us “with the definite and firm conviction that a mistake has been made.” Id. at 10, 911 P.2d at 730 (citation omitted).

A review of the literature<sup>4</sup> points us to our ultimate conclusion. Compare Tanielu, 82 Hawai‘i at 377 n.3, 381,

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<sup>4</sup> We note that State v. Kaimimoku, 9 Haw. App. 345, 841 P.2d 1076 (1992), and State v. Deleon, 72 Haw. 241, 813 P.2d 1382 (1991), were decided before the 1992 legislature amended HRS § 703-309(1)(b) (1985), which referred to “serious bodily injury,” to reflect the lesser outer limit of “substantial bodily injury,” embodied in HRS § 703-309(1)(b) (1993). See State v. Crouser, 81 Hawai‘i 5, 13, 911 P.2d 725, 733 (1996). This does not, however, materially affect our analysis here. Cf. id. at 12-13, 911 P.2d at 732-33.

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922 P.2d at 990 n.3, 994 (appellant punished his fourteen-year-old daughter for her obdurate refusal to stop seeing her adult boyfriend by slapping, punching and kicking her in the face numerous times; stomping on her face; kicking her in the leg and back; and pulling her ears, resulting in numerous contusions and lacerations on her facial area and neck and bruises on her legs -- conviction affirmed) and Crouser, 81 Hawai'i at 8-9, 15, 911 P.2d at 728-29, 735 (in an ordeal lasting approximately thirty minutes, appellant punished the fourteen-year-old daughter of his girlfriend for making changes to her daily school progress report by hitting her across both sides of the face, knocking her to the floor; throwing her face down on the bed and putting his knee in her back; spanking her bare buttocks; and hitting her about twenty-five times with a plastic bat on the buttocks, arm, thighs and torso until the bat broke, resulting in dizziness, difficulty sitting, extreme pain that lasted for a couple of weeks and deep reddish-purple bruises which a school health aide described as the worst of the many such cases she had seen -- conviction affirmed) with Kaimimoku, 9 Haw. App. at 346-48, 353, 841 P.2d at 1077-78, 1080 (appellant punished his minor daughter for swearing at him, disobeying him and displaying a lack of respect for him by hitting her in the face with an open fist and punching her shoulders with a closed fist a number of times, resulting in pain in her back and chest area, a scratch, and a bruise in the shape of a hand inside her collar line --

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conviction reversed) and Deleon, 72 Haw. at 242-43, 245, 813 P.2d at 1383, 1384 (appellant punished his fourteen-year-old daughter for having undesirable friends over to the house by cutting her hair and hitting her six to ten times with a belt on her stretch pants above the knees, resulting in stinging and a little pain that made her cry for a half hour and lasted for an hour and a half, and manifesting in welts turning from red to darker grey or blue -- conviction reversed). We are thus led, ultimately, to a "definite and firm conviction that a mistake has been made." Crouser, 81 Hawai'i at 10, 911 P.2d at 730 (citation omitted). Hence, the family court's rejection of Father's "parental discipline" defense was "clearly erroneous[.]" Id.

**VI. Conclusion.**

Accordingly, the May 16, 2003 judgment of the family court is reversed.

DATED: Honolulu, Hawai'i, December 30, 2004.

On the briefs:

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Acting Chief Judge

Associate Judge

Tracy Murakami,  
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Associate Judge