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NO. CAAP-20-0000175

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

STATE OF HAWAI`I, Plaintiff-Appellee, vs. BRANDON FETU LAFOGA, Defendant-Appellant, and RANIER INES, also known as Schizo, Defendant.	Case No. 1PC161001176 APPEAL FROM THE JUDGMENT OF CONVICTION AND SENTENCE, NOTICE OF ENTRY, entered on February 20, 2020 CIRCUIT COURT OF THE FIRST CIRCUIT THE HONORABLE PAUL B.K. WONG, Judge

OPENING BRIEF OF DEFENDANT-APPELLANT; APPENDICES "A" – "E";

and CERTIFICATE OF SERVICE

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OPENING BRIEF OF DEFENDANT-APPELLANT

I. STATEMENT OF THE CASE

On July 20, 2016, an Indictment was filed, charging Defendant-Appellant BRANDON FETU LAFOGA ("Lafoga") with: Count 2, Attempted Murder in the Second Degree, Hawai`i Revised Statutes ("H.R.S.") §§ 705-500, 707-701.5, and 706-656; Count 3, Criminal Conspiracy to Commit Murder in the Second Degree, H.R.S. §§ 705-520 and 707-701.5; Count 4, Carrying or Use of Firearm in the Commission of a Separate Felony, H.R.S. § 134-21; Count 6, Kidnapping, H.R.S. § 707-720(1)(e); and Count 8, Ownership or Possession Prohibited of any Firearm or Ammunition by a Person Convicted of Certain Crimes, H.R.S. § 134-7(b) and (h). (1PC161001176 Dkt #1).[1] Co-Defendant Ranier Ines ("Ines") was charged in Count 1, Accomplice to Attempted Murder in the Second Degree, H.R.S. §§ 702-221(2)(c), 702-222(1)(b), 705-500, 707-701.5, and 706-656; jointly charged with Lafoga in Count 3; Count 5,

[1] Citations to documents filed in the JEFS record for 1PC161001176 will be cited as "1PC161001176 Dkt # __" herein. Citations to documents filed in the JEFS record for the instant appeal, CAAP-20-0000175, will be cited as "Dkt # __" herein.

Kidnapping, H.R.S. § 707-720(1)(e); and Count 7, Robbery in the First Degree, H.R.S. § 708-840(1)(b)(i) and/or 708-840(1)(b)(ii). (1PC161001176 Dkt #1).

Jury trial commenced on November 18, 2019. (Dkt # 60 at 43; Dkt # 67 [11/18/19]). At trial, the following evidence was adduced:

Christopher Miranda ("Miranda") is a registered nurse at Waianae Coast Comprehensive Health Center. (Dkt # 70 [11/22/19] at 50-51). On September 16, 2015, Miranda received a radio transmission that said a person had parked at the former emergency room ("ER") and told security that he had been shot. (Id. at 52). Miranda and another nurse proceeded to the old ER. (Id. at 53). Miranda saw a white Ford van there. (Id. at 54). Kele Stout ("Stout") was in the driver's seat with his head and arms hanging out the window. (Id. at 54-55). Miranda observed a blood clot dripping from his head and that he had wounds to his face and on the back of his head. (Id. at 54-55).

Miranda drove Stout in the van to the new ER, where Stout got onto a gurney and was taken into the ER. (Id. at 56-57). Miranda observed multiple gunshot wounds on Stout and ligature marks on his wrist (Id. at 58-60). Stout was intubated, sedated, and then transported to The Queen's Medical Center for further treatment. (Id. at 61).

Officer Dustin Hao ("Officer Hao") was dispatched to the Waianae Coast Comprehensive Health Center on September 16, 2015. (Id. at 77-78). Officer Hao cleared the van for suspects and weapons. (Id. at 79). Officer Hao secured the van and only let a police evidence specialist enter it. (Id. at 80). Officer Hao escorted the van as it was towed to Kapolei Police Station and parked in a secure parking lot. (Id. at 81).

Richard Perron ("Perron") is an evidence specialist with the Honolulu Police Department ("HPD"). (Id. at 87). On September 17, 2015, Perron went to The Queen's Medical Center to take photographs of Stout's injuries. (Id. at 88-92).

Eric Campos ("Campos") is a security guard at Bishop Place Building, 1132 Bishop Street. (Id. at 94). Bishop Place has a video surveillance system. (Id. at 95, 97).

Kele Stout ("Stout") was a lead countertop installer for Aloha State Sales, a custom countertop business. (Dkt # 70 [11/22/19] at 118-19). In September 2015, Stout had a helper, Ines, who had been with Aloha State Sales for a few months. (Id. at 124). They were an installation team and took a work van to job sites. (Id. at 125-26). For about a month, Ines' performance began to deteriorate because he was smoking or on

his phone instead of helping Stout. (Id. at 128-29). Stout spoke with Ines about his work performance and Ines wanted Stout to give him more responsibilities. (Id. at 130-32).

On September 16, 2015, Stout and Ines had an assignment to install counters at Net Enterprises in Bishop Place. (Id. at 133-34). Ines argued with Stout there because Stout would not teach him how to seam counters together. (Id. at 134). Ines yelled at Stout and Stout instructed him to gather the tools. (Id. at 135). Stout finished the job and they returned to the work van in the parking garage. (Id. at 135-36). Stout told Ines to return his visitor badge to building security. (Id. at 136). When Ines left to return the badge, Stout changed his shoes, moving Ines' backpack in the process. (Id. at 136-37). When Ines returned, he accused Stout of going into his backpack. (Id. at 137-38).

After the van exited the parking garage onto Bishop Street, Ines grabbed Stout's right hand from the steering wheel, took out a gun from his backpack, and pistol-whipped Stout in his eyebrow area. (Id. at 138-39). Ines accused Stout of disrespecting him and ordered him to drive to Waianae. (Id. at 139-40). Ines threatened to shoot Stout. (Id. at 140). While holding Stout's right wrist, Ines made phone calls, telling one person that he had rent money. (Id. at 141). Ines took Stout's debit card out of his wallet and ordered Stout to give him his Personal Identification Number, which Stout did. (Id. at 142-43). Ines then destroyed Stout's phone. (Id. at 143).

In the Sea Country area of Maili, Ines directed Stout to park at a house with a Polynesian male, holding a bat, in the garage. (Id. at 144-45). The two men took Stout into the garage and closed the garage door. (Id.) The Polynesian male tied Stout's hands behind his back. (Id. at 146). Ines and the Polynesian male then beat Stout, Ines with his fists and the Polynesian male with the bat. (Id.). When Stout started to bleed from a head wound, one of the males put a towel over his head and they continued to beat him. (Id. at 147). When Ines and the Polynesian male got tired, they went into the house. (Id. at 148-49). Stout could overhear Ines order someone to take care of the body. (Id. at 149). When Stout fidgeted, Ines and the Polynesian male beat him again. (Id. at 150). Stout was then thrown into the back of the work van. (Id. at 151). Ines closed the van doors and the Polynesian male got into the driver's seat and started to drive, without Ines but with Stout in the back. (Id. at 151-52).

The Polynesian male drove around and eventually stopped to speak with someone. (Id. at 153-54). The other person looked in the van's back window but Stout did not get a good look at that person. (Id. at 154). The Polynesian male continued driving and told Stout that he would be the first person he would kill, which Stout took as an expression of regret. (Id. at 155). The Polynesian male found a place to pull over and went between the front seats to approach the back of the van. (Id. at 155-56). Stout closed his eyes and the Polynesian male shot him in the face. (Id. at 156-57). Stout experienced pain, where his blood felt like lava. (Id. at 157). To cope with inhaling and swallowing blood, Stout rolled onto his stomach. (Id. at 157). The Polynesian male continued to drive. (Id. at 158). When Stout made coughing noises, the Polynesian male turned back, while driving, and shot him again, once in his torso and once in his buttocks. (Id. at 158-59). The Polynesian male then made phone calls, looking for someone to give him a ride. (Id. at 160). On one phone call, the Polynesian male told someone that he was trying to burn the van with Stout's body in it. (Id. at 160).

The driver eventually stopped and got out of the van, leaving it running. (Id. at 160). When Stout could not hear any more footsteps, he got into the driver's seat. (Id. at 160). Stout drove to Waianae Coast Comprehensive Health Center. (Id. at 161-62). Stout told a security guard that he had been shot and he was taken inside. (Id. at 163). He then lost consciousness and woke up a week later. (Id. at 163-64).

Stout was later shown a photographic lineup by HPD detectives. (Id. at 170). Stout did not positively identify one of them as the shooter, but one photo stood out to him as looking similar, except the skin complexion was different. (Id. at 170-71).

Leslie Murakami ("Murakami") is an evidence specialist with HPD. (Dkt # 71 [11/25/19] at 76). Murakami responded to Waianae Coast Comprehensive Health Center. (Id. at 81). She took photographs of the van, the exterior as well as interior. (Id. at 82-89). She processed the van for latent fingerprints, recovering four from the driver and passenger doors. (Id. at 90-91). She recovered swabs of biological evidence. (Id. at 91-92). She also recovered physical evidence, including clothing, coins, and a towel. (Id. at 93-96). Months later, Murakami processed a FedEx package with a DNA reference sample sent by the Alaska Department of Public Safety. (Id. at 96-98).

Damien Desa ("Desa") is a detective with HPD. (Dkt # 71 [11/25/19] at 114). On September 17, 2015, Desa and another detective interviewed Ines. (Id. at 115-16). Desa did not regard Ines as a suspect because Stout had not yet provided a statement. (Id. at 116-17). A CD with Ines' statement was admitted into evidence. (Id. at 117-19).

Kristin Ka`anoi ("Ka`anoi") was a Vice-President of Operations at Aloha State Sales. (Dkt # 72 [11/26/19] at 13). Ka`anoi confirmed that Stout was a lead installer, Ines was a helper, and that Stout had permission to operate an Aloha State Sales work van. (Id. at 13-17). As for the work relationship between Stout and Ines, Ka`anoi had encouraged Stout to work it out with Ines before getting her involved. (Id. at 17-18). Ka`anoi confirmed that on September 16, 2015, Stout and Ines were assigned to a job at Net Enterprises. (Id. at 18-19). Neither Stout nor Ines returned to the office that day. (Id. at 19). The next day, September 17, 2015, Stout did not report to work but Ines did. (Id. at 19-20). When Ka`anoi asked Ines if he had seen Stout, Ines said no. (Id. at 20).

Toy Stech ("Stech") is an evidence specialist with HPD. (Dkt # 72 [11/26/19] at 26). Stech processed the Aloha State Sales van at the Kapolei police station. (Id. at 30-31). She took photos. (Id. at 31-37). Stech recovered evidence from within the van: a T-shirt with a pistol wrapped in it (Id. at 39-44), a cartridge from the floor (Id. at 44-45), a cartridge case (Id. at 45-46), and a bullet (Id. at 46-47). Stech also recovered latent fingerprints and swabbed for biological evidence. (Id. at 48-51). On September 25, 2015, Stech swabbed Stout for a buccal sample. (Id. at 53-54).

Doctor Susan Steinemann ("Steinemann") is a trauma surgeon at The Queens Medical Center. (Dkt # 72 [11/26/19] at 69). Steinemann testified that Stout had wounds that indicated four gunshots, one in his jaw where the bullet had lodged in his neck (Id. at 79-80), one in his torso where the bullet had lodged in his chest (Id. at 80-82), one that traversed his buttock and pelvis and damaged his rectum (Id. at 82 & 88), and one that fractured his femur (Id. at 82 & 87). Two of the gunshots were potentially fatal, if left untreated: the one that damaged Stout's rectum, due to potential fecal buildup, and the one in his jaw. (Id. at 85).

Kathryn Gasilos ("Gasilos") is a pathology assistant at The Queen's Medical Center. (Dkt # 72 [11/26/19] at 93). Gasilos retrieved and stored a bullet, removed from Stout, from the operating room. (Id. at 94-95).

Garrick Baligad ("Baligad") is an evidence specialist with HPD. (Dkt # 72 [11/26/19] at 98). Baligad retrieved a bullet from The Queen's Medical Center pathology department and submitted it to the HPD evidence room. (Id. at 99).

Curtis Kubo ("Kubo") is a criminalist with the firearm and tool mark section of the HPD crime lab. (Dkt # 72 [11/26/19] at 101). Kubo examined a recovered firearm and determined that it was a Kimber model .45 caliber semiautomatic pistol. (Id. at 109). Kubo test-fired the pistol and had six cartridges and six bullets as exemplars. (Id. at 111). A cartridge was determined to be functional and qualified as ammunition. (Id. at 111-12). Kubo testified that a cartridge case and a bullet had been fired from the Kimber pistol. (Id. at 114). On December 10, 2015, Kubo examined another bullet recovered and determined that it had been fired from the Kimber pistol. (Id. at 115-17).

Ricol Arakaki ("Arakaki") knows Lafoga through family. (Dkt # 73 [11/27/19] at 19). In September 2015, Arakaki was friends with Lafoga and visited him at his home. (Id. at 24). She had also met Ines once through Lafoga. (Id. at 24-25). In late September 2015, Lafoga informed Arakaki that he was moving to Alaska. (Id. at 27-28). Arakaki thought a composite sketch of the shooter that was on the news looked like Lafoga. (Id. at 28). In a phone conversation after Lafoga had moved to Alaska, he told Arakaki that he had pulled a man out of a vehicle, beat him up, and shot him in that vehicle. (Id. at 29-30). Lafoga told Arakaki that he was going to burn the van. (Id. at 31).

Sergeant Michael Henry ("Henry") is an Alaska State Trooper. (Dkt # 54 [12/3/19] at 5). Henry received an agency request from HPD and a copy of a search warrant. (Id. at 8). Henry applied for a matching warrant from an Alaska court. (Id.). Henry then conducted buccal swabs of Lafoga and shipped one set to HPD. (Id. at 8-9).

Randi DeCosta ("DeCosta") was Lafoga's girlfriend in 2015. (Dkt # 54 [12/3/19] at 15). On September 16, 2015, DeCosta received a phone call from Lafoga where he told her that he had to "handle stuff." (Id. at 20). With his next phone call, Lafoga told DeCosta that he had beat up a man with a baseball bat, that he had shot the man, and that he was going to burn the van. (Id. at 20-22). With a third phone call, Lafoga told DeCosta that the van was gone and that a friend named "Tonez" was supposed to watch the van. (Id. at 22-23). Lafoga subsequently moved to Alaska. (Id. at 24). Lafoga told DeCosta over the phone that a composite sketch looked like him. (Id. at 25-26).

Lafoga also told DeCosta that "Tonez" had shot the man. (Id. at 27). DeCosta testified that a T-shirt, which had been recovered from the van, was Lafoga's. (Id. at 28).

Gavin Yuasa ("Yuasa") is a criminalist with HPD. (Dkt # 54 [12/3/19] at 81). Yuasa determined that DNA recovered from swabs of the grip, trigger, and body of a gun matched the profile of Stout. (Id. at 109-10). DNA from a bullet also matched Stout. (Id. at 111-12). Testing on a T-shirt found in the van indicated human blood and the DNA matched Stout. (Id. at 117-18). DNA from the van's steering wheel and radio knobs and buttons matched Stout. (Id. at 119-20). When Yuasa subsequently obtained Lafoga's buccal swabs, he developed a DNA profile for him. (Id. at 121). Yuasa excluded Lafoga as a contributor to DNA recovered from the body of the gun. (Id. at 122 & 132). Lafoga could not be excluded as a possible contributor to DNA recovered from the T-shirt's collar area. (Id. at 123-24). Lafoga was excluded as a possible contributor to DNA recovered from the van's steering wheel. (Id. at 125 & 133).

As to Lafoga, the jury found him guilty as charged in Count 2, Attempted Murder in the Second Degree, Count 4, Carrying or Use of Firearm in the Commission of a Separate Felony, Count 6, Kidnapping, and Count 8, Ownership or Possession Prohibited of any Firearm or Ammunition by a Person Convicted of Certain Crimes (1PC161001176 Dkt # 308 at 2, 3, 5, 7; Dkt # 55 [12/4/19] at 108-12). Due to the jury's responses to a Special Interrogatory for Counts 2 and 6, Count 6 merged into Count 2 at sentencing. (1PC161001176 Dkt # 308 at 9; Dkt # 74 [2/20/20] at 3).

After a further trial on the State's requests to impose extended terms of imprisonment on the basis of persistent offender and multiple offender, the jury determined that, in Counts 2, 4, 6, and 8, Lafoga was a persistent offender and a multiple offender and that extended terms of imprisonment were necessary for the protection of the public. (1PC161001176 Dkt # 338 at 3, 4, 6, and 8).

In Count 2, the trial court sentenced Lafoga to an extended term of life imprisonment without the possibility of parole and with a mandatory minimum term of twenty years.[2] (Dkt # 74 [2/20/20] at 15). In Count 4, the trial court sentenced Lafoga to

[2] The mandatory minimum term of twenty years resulted from the jury's finding that Lafoga had on his person, or threatened the use of, a semiautomatic firearm during the

an extended term of life imprisonment with the possibility of parole. (Dkt # 74 [2/20/20] at 13). In Count 8, the trial court sentenced Lafoga to an extended term of an indeterminate twenty years imprisonment. (Dkt # 74 [2/20/20] at 13). The trial court imposed the prison terms in Counts 2, 4, and 8 consecutively. (Dkt # 74 [2/20/20] at 15-17). The trial court filed a Judgment of Conviction and Sentence on February 20, 2020. (1PC161001176 Dkt # 352; a copy of the Judgment of Conviction and Sentence is attached hereto as Appendix A).

Lafoga timely filed a Notice of Appeal on March 20, 2020. (Dkt # 1). Lafoga is currently incarcerated with Department of Public Safety. (1PC161001176 Dkt # 354).

II. STATEMENT OF THE POINTS OF ERROR

A. The trial court erred when it ordered that the jury would be partially anonymous, with jurors being referred to by number rather than by name, without determining that there was a strong reason to believe that the jury would need the protection of anonymity and without taking sufficient precautions to minimize any prejudicial effects on Lafoga's presumption of innocence.

In a hearing on motions *in limine*, the trial court initially indicated that the jury would be completely anonymous (with the parties not receiving juror names) but then agreed that counsel would have juror names but, on the record, jurors were to be referred to by number rather than by name. (See Appendix B, partial transcript of Dkt # 58 [11/1/19]). Counsel for Ines did not object. (Dkt # 58 [11/1/19] at 41). The State retracted its initial objection. (Id. at 40-42). Counsel for Lafoga expressed an interest in having the juror names so that he could conduct research into them. (Id. at 43-44).

When the trial court initially addressed the jury pool, it explained that jurors would be referred to by number rather than by name:

> Ladies and gentlemen, when Ms. Coburn did the initial roll call for this jury panel, each of you were given a card with your name on it along with your number. Please remember that number, that is your number, and for the rest of the proceedings in this case you will be addressed by that number. Your actual names are known to the Court and to

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commission of that offense. (1PC161001176 Dkt # 308 at 2). See H.R.S. § 706-660.1(3)(a).

> the attorneys, and other than a sealed list that will be kept for court records, no one else will know your actual names, so the public can't get your names and they cannot get your contact information, so only court and counsel will have your names. For the rest of the proceedings you'll be addressed by your number.

(Dkt # 67 [11/18/19] at 44). Thereafter, individual *voir dire* was conducted with each juror being addressed by number instead of name. (Dkt # 68 [11/20/10] at 3-152).

When the trial court addressed the jury pool, it again discussed juror anonymity:

> If it seems like we have some information about you, it's because we have copies of your juror summons cards. Your personal identifying information has been redacted or blacked out, so we don't have your telephone numbers, we don't have your street addresses. And as I told you on Monday, only the attorneys and the Court have your actual names. For the rest of the public that do not have access to the sealed court records, all they will know about the jurors that serve in this case are the numbers that we call here in court. So you'll forever now, in this case, be known by your number. Don't be surprised though that we still have some information about what kind of work history you have and whether or not you served as a juror before, because we do have that information, so don't be surprised.

(Dkt # 68 [11/20/19] at 168-69). With this portion of the *voir dire*, jurors were also addressed by number and not by name. (Dkt # 68 [11/20/19] at 165-219; Dkt # 69 [11/21/19] at 6-229).

Finally, before opening statements, the trial court pointed out the presence of media and reminded the jury of its anonymity:

> Ladies and gentlemen, also, as we continue through this trial, you are going to be referred to by your juror number as well as your chair number. Your names are not made part of the public record of this case. You already see that there is a camera here in the courtroom. While they are permitted to cover the proceedings, the press is not allowed to have any likeness of yours, so they can't take any pictures of you, they cannot take any video of you, they cannot depict the jury in this case. So in addition to your names, your likeness will not be made part of the public record or available to the public in any way in this case.

(Dkt # 70 [11/22/19] at 9-10).

Because the trial court did not adequately determine that the jury needed the protection of anonymity, and because the precautions taken to minimize any prejudicial effects on Lafoga's presumption of innocence were insufficient, Lafoga's presumption of innocence and his right to a fair trial were adversely affected by the partial jury anonymity. His convictions should be vacated and remanded for a retrial.

B. Lafoga was prejudiced by ineffective assistance of trial counsel when counsel failed to object to the trial court's proposal of jury anonymity.

In the event this Court finds that trial counsel for Lafoga had waived any right to assert the above-stated error on appeal, due to an inadequate objection (see Dkt # 58 [11/1/19] at 43-44), and that any error with the empanelment of a partially anonymous jury was not plain error, then Lafoga has suffered from ineffective assistance of counsel. Trial counsel should have objected to the proposal to refer to jurors by number and not by name. Counsel should have argued that the trial court did not have a strong reason to believe that the jury needed the protection of anonymity. Due to ineffective assistance of trial counsel, Lafoga's convictions should be vacated and remanded for retrial.

C. As to Count 2, the trial court erred when it refused to instruct the jury on the lesser-included offenses of Assault in the First Degree and Assault in the Second Degree.

Ines had proposed jury instructions for Criminal Conspiracy Assault in the First Degree, Criminal Conspiracy Assault in the Second Degree, and Criminal Conspiracy Assault in the Third Degree as purported lesser-included offenses of Accomplice to Attempted Murder in the Second Degree (Count 1) and/or Criminal Conspiracy to Commit Murder in the Second Degree (Count 3). (1PC161001176 Dkt # 302 at 9-10, 12-13, and 15-16). Lafoga joined in with Ines on these proposed lesser-included offenses. (Dkt # 54 [12/3/19] at 151).

The trial court refused to instruct the jury on these lesser-included offenses. (See Appendix C, partial transcript of Dkt # 54 [12/3/19]). The verdict form did not offer any

lesser-included offense, as to Count 2, as an alternative to Attempted Murder in the Second Degree. (1PC161001176 Dkt # 308 at 2). In Count 2, Lafoga was then found guilty of Attempted Murder in the Second Degree. (Id.).

Because the jury could have considered the theory of a second shooter, and that not all of the shots might have been attributable to Lafoga, there was a rational basis in the evidence for the jury to acquit Lafoga of Attempted Murder in the Second Degree and convict him of a lesser-included offense, such as Assault in the First Degree or Assault in the Second Degree. The trial court's refusal to instruct the jury on these lesser-included offenses was not a harmless error and Lafoga's conviction for Attempted Murder in the Second Degree should be vacated and remanded for retrial.

D. The trial erred when it denied Lafoga's Motion to Dismiss for Violation of HRPP Rule 48.

On November 12, 2019, Lafoga filed a Motion to Dismiss for Violation of HRPP Rule 48. (1PC161001176 Dkt # 264). Along with a similar motion filed by Ines ((1PC161001176 Dkt # 258), Lafoga's motion was heard on November 18, 2019. (Dkt # 67 [11/18/19]). The trial court denied Lafoga's motion to dismiss. (Dkt # 67 [11/18/19] at 19-20). A Findings of Fact, Conclusions of Law, and Order denying Lafoga's motion was filed on January 15, 2020. (1PC161001176 Dkt # 342).

The following is a chronology of the relevant facts: On July 15, 2016, Lafoga was arrested in connection with this case and bail was set. (1PC161001176 Dkt # 342 at 3). Trial was set for September 26, 2016. (Dkt # 60 [Record on Appeal "ROA"] at 7-8; Dkt # 78 [7/25/16] at 7). On September 14, 2016, Lafoga consented to a continuance of trial, which was continued to January 9, 2017, and waived his Rule 48 rights for that period. (Dkt # 60 [ROA] at 8-9). On December 14, 2016, Lafoga consented to another continuance of trial, which was continued to June 13, 2017. (Id. at 10). On May 24, 2017, Ines requested a continuance of trial but Lafoga objected. (Id. at 14-15). Over the objections of Lafoga and the State, the trial court continued trial to September 18, 2017, and excluded the Rule 48 time. (Id. at 15-16). On September 13, 2017, due to the withdrawal of counsel for Ines, the trial court continued trial to November 13, 2017, over Lafoga's objection and excluded the Rule 48 time. (Id. at 20-21).

On October 18, 2017, new counsel for Ines moved to continue trial. (Id. at 21). The trial court continued trial to January 1, 2018, over Lafoga's objection. (Id.). On December 13, 2017, Ines moved for another continuance of trial. (Id. at 22). Over Lafoga's objection, the trial court continued trial to May 21, 2018, and excluded the Rule 48 time. (Id.). On April 2, 2018, Lafoga had no objection to a continuance of trial to August 27, 2018. (Id. at 25). On July 16, 2018, Ines moved for another continuance of trial. (Id. at 26). Over the objections of Lafoga and the State, the trial court continued trial to January 21, 2019. (Id.). During an off-the-record status conference on December 17, 2018, trial was continued to May 6, 2019. (Id. at 27). Lafoga objected to the continuance. (1PC161001176 Dkt # 342 at 6). On April 12, 2019, Lafoga entered a guilty plea. (1PC161001176 Dkt # 184). Lafoga then filed a motion to withdraw his guilty plea. (1PC161001176 Dkt # 200). The trial court granted Lafoga's motion to withdraw his guilty plea and reset his trial for July 1, 2019. (Dkt # 90 [5/20/19] at 3-4). On June 17, 2019, trial was continued, upon request of both defendants, to August 19, 2019. (Dkt # 60 [ROA] at 31). On July 11, 2019, a joint request to continue trial was granted and the trial court set trial for September 30, 2019. (Id. at 32). On September 3, 2019, the State moved for a continuance of trial. (Id. at 34-35). Over the objections of Ines and Lafoga, the trial court granted the continuance and set trial for November 18, 2019. (Id.). On November 12, 2019, Lafoga filed his Motion to Dismiss for Violation of HRPP Rule 48. (1PC161001176 Dkt # 264).

The trial court erred when it determined that the time period from June 13, 2017, to May 21, 2018, was excludable as to Lafoga, notwithstanding his objections. (See FOF/COL # 18 at 1PC161001176 Dkt # 342 at 4-5). Furthermore, the trial court erred when it determined that the time period from August 27, 2018, to January 21, 2019, was excludable as to Lafoga, despite his objection. (See FOF/COL # 24 at 1PC161001176 Dkt # 342 at 5). The trial court erred when it determined that the time period from January 21, 2019, to May 6, 2019, was excludable as to Lafoga, despite his objection. (See FOF/COL # 28 at 1PC161001176 Dkt # 342 at 6).

The trial court erred when it concluded that Lafoga's withdrawal of his guilty plea reset the starting date of his Rule 48 calculation to May 20, 2019. (See FOF/COL # 39 at 1PC161001176 Dkt # 342 at 8). Even assuming that Lafoga's Rule 48 starting date of

his arrest on July 15, 2016, was unaffected by his guilty plea and subsequent withdrawal of plea, the trial court erred in concluding that 1063 days were excludable as to him and that only 153 days elapsed as to him. (See FOF/COL # 40 at 1PC161001176 Dkt # 342 at 8).

At least 180 days have elapsed. The trial court erred when it denied Lafoga's motion (1PC161001176 Dkt # 342 at 9) and should have dismissed the case as to him.

E. The trial erred when its instructions to the jury characterized a non-extended sentence in Count 2 as a "possible life term of imprisonment" and an extended sentence as a "definite life term of imprisonment."

Prior to the jury reconvening to take evidence pertaining to extended sentencing, the trial court proposed an instruction that states:

> In Counts 2, 4, 6, and 8, the prosecution has alleged that Defendant BRANDON FETU LAFOGA is a persistent offender, a multiple offender, and that extended terms of imprisonment are necessary for the protection of the public. The prosecution has the burden of proving these allegations beyond a reasonable doubt. It is your duty to decide, in each count, whether the prosecution has done so by answering the following three essential questions on special interrogatory forms that will be provided to you:
>
> 1. Has the prosecution proved beyond a reasonable doubt that Defendant BRANDON FETU LAFOGA is a persistent offender in that he has previously been convicted of two or more felonies committed at different times when he was eighteen years of age or older?
> 2. Has the prosecution proved beyond a reasonable doubt that Defendant BRANDON FETU LAFOGA is a multiple offender in that he is being sentenced for two or more felonies?
> 3. Has the prosecution proved beyond a reasonable doubt that it is necessary for the protection of the public to extend the sentences for Defendant BRANDON FETU LAFOGA in Count 2 from a <u>possible life term of imprisonment to a definite life term of imprisonment</u>, in Counts 4 and 6 from a possible twenty year term of imprisonment to a possible life term of imprisonment, and in Count 8 from a possible ten year term of imprisonment to a possible twenty year term of imprisonment?
>
> You must answer each of these questions separately on a special interrogatory form for each count. Your answers

must be unanimous.

(1PC161001176 Dkt # 330 at 25-26) (emphasis added). Lafoga objected to this instruction:

> Judge, we would be objecting to the Court's instruction on page 30 and 31. And our specific objection is that in paragraph 3, line 3, the Court discusses and uses the phrase or the words possible life term of imprisonment. And we would argue at this point in time that a possible life term of imprisonment would lead or could lead one or more of the jurors to think that there was not going to be a life term of imprisonment here. In other words, when you use the word possible, it means it's -- it can be interpreted as being, oh, there may be a life term of imprisonment or there may not be a life term of imprisonment. So we object to the -- to the phrase possible term of imprisonment.
>
> And so that's why I -- this kind of melds in to some of the instructions I submitted to the Court where it clearly states -- some of the proposed instructions I've submitted clearly state life with the possibility of parole and life without the possibility of parole. I think that's crystal clear that there's going to be a life sentence and that the only question is whether or not there's ever going to be a chance for parole. And that's why I submitted the – the instructions regarding what parole is also.
>
> So we would argue that long story short is that the phrase possible life term of imprisonment could leave the jury to think that there's not going to be a life term of imprisonment. If the jury is led to believe that there's not going to be a life term of imprisonment, then it's -- it's more likely that they will say that an extended term is necessary for the protection of the public. And for that reason, we object, Judge.

(Dkt # 56 [12/6/19] at 16-17). The trial court decided to give the instruction. (Dkt # 56 [12/6/19] at 17). The instruction was read to the jury. (1PC161001176 Dkt # 332 at 17; Dkt # 56 [12/6/19] at 82-83). The Special Interrogatory Form for Count 2 tracked the language of the instruction. (1PC161001176 Dkt # 338 at 3).

Because the trial court's characterization of a non-extended sentence for attempted murder in the second degree as a "possible life term of imprisonment" understated the penalty for that offense, its instruction increased the likelihood that the jury would find that an extended sentence in Count 2 would be necessary for the

protection of the public. The trial court's jury instruction prejudiced Lafoga and his extended sentence in Count 2 should be vacated.

F. The trial erred when it determined that H.R.S. § 706-661(1) applies to the offense of Attempted Murder in the Second Degree and imposing, in Count 2, an extended sentence of life imprisonment without the possibility of parole.

At sentencing, the State requested that the trial court impose, in Count 2: "life without the possibility of parole pursuant to 706-661, subsection 1" (Dkt # 74 [2/20/20] at 4). The trial court then broached the question of whether the extended sentencing statute applies to the offense of Attempted Murder in the Second Degree. (Dkt # 74 [2/20/20] at 6-8; attached hereto as Appendix D). Lafoga objected to an extended sentence. (Dkt # 74 [2/20/20] at 8).

In sentencing Lafoga for Attempted Murder in the Second Degree, the trial court ruled as follows:

> In Count No. 2, the Court also adopts the finding of the jury in the previous conclusions and does find, despite the language of the statute, that the extended term is applicable. And even though 706-661 only specifies Murder in the Second Degree, the Court is mindful, as pointed out by Mr. Unga, that limitation that excludes other A felonies such as Attempted Murder in the Second Degree as in this case, as well as Accomplice to Commit Murder in the Second Degree that's applicable to the co-defendant in this case. It would be an absurdity to have those serious offenses not be subject to extended terms, so the Court cannot conclude that the omission was purposeful by the legislature when the premise of extended terms are for the protection of the public.
>
> And the Court is mindful of interpretation rules pursuant to *State versus Tsujimura*, T-S-U-J-I-M-U-R-A, 140 Haw. 229 (sic), 2017, wherein the Court is obliged to construe statutes such that they do not lead and result in absurdity. This conclusion is also in pari materia with the Hawaii statutory scheme that treats murder and attempted murder, unless it manifests exception of depravity, to be the same severity for sentencing purposes. And this is HRS Section 706-656 and pursuant to *State versus Hussein*, H-U-S-S-E-I-N, 122 Haw. 495, 2010, where the supreme court has indicated that statutes that relate to sentencing should be construed in pari

> materia. And, accordingly, in Count No. 2, Mr. Lafoga, you are sentenced to the life term of imprisonment without the possibility of parole pursuant to HRS Sections 706-661, sub 1; 706-662, sub 2; and 706-662, sub 4, sub a, with the mandatory minimum term of incarceration of 20 years pursuant to HRS Section 706-660.1, sub 3, sub a.

(Dkt # 74 [2/20/20] at 13-15). As to Attempted Murder in the Second Degree, the Judgment of Conviction and Sentence states: "Count 2: Life Term of Imprisonment without the possibility of parole pursuant to Haw. Rev. Stat. §§ 706-661(1), 706-662(1), and 706-662(4)(a), with a mandatory minimum of 20 years pursuant to H.R.S. § 706-660.1(3)(a)." (1PC161001176 Dkt # 352; see also Appendix A).

However, based on the plain meaning of H.R.S. § 706-661(1), only Murder in the Second Degree, not Attempted Murder in the Second Degree, is eligible for the extended sentence of life imprisonment without the possibility of parole. The trial court lacked the statutory authority to impose life imprisonment without the possibility of parole in Count 2. Lafoga's extended sentence in Count 2 should be vacated.

III. STANDARDS OF REVIEW

Impaneling an anonymous jury

"[T]he decision whether or not to empanel an anonymous jury is left to the [trial] court's discretion." United States v. Paccione, 949 F.2d 1183, 1192 (2d Cir. 1991), cited in State v. Samonte, 83 Hawai`i 507, 520, 928 P.2d 1, 14 (Sup. 1996). "The trial court abuses its discretion when it clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant." State v. Furutani, 76 Hawai`i 172, 179, 873 P.2d 51, 58 (Sup. 1994).

Ineffective assistance of counsel

> When an ineffective assistance of counsel claim is raised, the question is: "When viewed as a whole, was the assistance provided to the defendant 'within the range of competence demanded of attorneys in criminal cases?'" Additionally, the defendant has the burden of establishing ineffective assistance of counsel and must meet the

> following two-part test: 1) that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence; and 2) that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense.

State v. Janto, 92 Hawai`i 19, 31, 986 P.2d 306, 318 (Sup. 1999) (citation omitted and internal block quote format changed).

Jury instructions

"When jury instructions or the omission thereof are at issue on appeal, the standard of review is whether, when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading." State v. Arceo, 84 Hawai`i 1, 11, 928 P.2d 843, 853 (Sup. 1996) (internal citations omitted).

Denial of an HRPP Rule 48 motion to dismiss

"When reviewing a trial court's denial of an HRPP Rule 48 motion to dismiss, [an appellate court applies] both the 'clearly erroneous' and 'right/wrong' tests:

> 'A trial court's findings of fact (FOFs) in deciding an HRPP 48(b) motion to dismiss are subject to the clearly erroneous standard of review. An FOF is clearly erroneous when, despite evidence to support the finding, the appellate court is left with the definite and firm conviction that a mistake has been committed. However, whether those facts fall within HRPP 48(b)'s exclusionary provisions is a question of law, the determination of which is freely reviewable pursuant to the 'right/wrong' test.

State v. Samonte, 83 Hawai`i 507, 514, 928 P.2d 1, 8 (Sup. 1996) (quoting State v. Hutch, 75 Haw. 307, 328-29, 861 P.2d 11, 22 (1993) (citations, internal quotation marks and brackets omitted).

Statutory construction

"The standard of review for statutory construction is well-established. The interpretation of a statute is a question of law which this court reviews *de novo.*" State v. Wells, 78 Hawai`i 373, 376, 894 P.2d 70, 73 (Sup. 1995) (citations omitted).

IV. ARGUMENT

A. THE TRIAL COURT ERRED WHEN IT IMPANELED A PARTIALLY ANONYMOUS JURY WITHOUT ADEQUATELY DETERMINING THAT THE JURY NEEDED THE PROTECTION OF ANONYMITY AND WITHOUT TAKING SUFFICIENT PRECAUTIONS TO MINIMIZE ANY PREJDUCIAL EFFECTS OF JURY ANONYMITY ON THE PRESUMPTION OF INNOCENCE.

The presumption of innocence is a fundamental principle of the criminal justice system. "The presumption of innocence, though nowhere articulated in the United States Constitution, is a basic component of a fair trial under our system of criminal justice, and its enforcement lies at the foundation of our administration of the criminal law." State v. Tanaka, 92 Hawai`i 675, 681, 994 P.2d 607, 613 (App. 1999) (footnote omitted). Jury anonymity has the potential to conflict with the presumption of innocence:

> Unquestionably, the empanelment of an anonymous jury is a drastic measure, one which should be undertaken only in limited and carefully delineated circumstances. An anonymous jury raises the specter that the defendant is a dangerous person from whom the jurors must be protected, thereby implicating the defendant's constitutional right to a presumption of innocence.

United States v. Ross, 33 F.3d 1507, 1519 (11th Cir. 1994).

The Hawai`i Supreme Court has stated: "In general, the court should not order the empaneling of an anonymous jury without (a) concluding that there is strong reason to believe that the jury needs protection, and (b) taking reasonable precautions to minimize any prejudicial effects on the defendant and to ensure that his fundamental rights are protected." State v. Samonte, 83 Hawai`i 507, 520, 928 P.2d 1, 14 (Sup. 1996) (citing Paccione, 949 F.2d at 1192).

1. The trial court did not have a strong reason to believe that the jury needed protection.

As to the first element of the anonymous jury test, the trial court did not have a strong reason to believe that the jury needed the protection of anonymity. A variety of factors can be relevant here:

> Sufficient reason for empaneling an anonymous jury has been found to exist upon a showing of some combination of several factors, including: (1) the defendant's involvement in organized crime, (2) the defendant's participation in a group with the capacity to harm jurors, (3) the defendant's past attempts to interfere with the judicial process, (4) the potential that, if convicted, the defendant will suffer a lengthy incarceration and substantial monetary penalties, and (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation or harassment.

Ross, 33 F.3d at 1520 (citation omitted).

In the present case, the first and second factors should not apply. There was a discussion in the hearing on motions *in limine* on evidence pertaining to a gang, in that Ines was affiliated with a gang and that Lafoga purportedly had the motive to commit the charged offenses to gain rank in a gang. (Dkt # 58 [11/1/19] at 18-21). However, the trial court, in contemplating jury anonymity, stated, "I'm trying to head off a juror in this panel saying, I'm afraid to serve." (Id. at 41). Gang affiliation did not clearly appear to be a factor in the trial court's decision to order jury anonymity. Also, the trial court's concern was based on speculation and not on actual evidence that jurors were hesitant to serve.

Since jury anonymity is a drastic measure, it should be reserved for those cases where one or more defendants have a certain degree of notoriety or dangerousness. For example, a former governor of Louisiana was once indicted for various federal crimes connected to a "sham settlement." United States v. Brown, 250 F.3d 907, 910 (5th Cir. 2001). Due to extensive media coverage of the prosecution of a "colorful ex-Governor," the trial court in that case impaneled an anonymous jury. Id. at 912. Also, an anonymous jury was impaneled in a case where the defendants were charged with violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Paccione, 949 F.2d at 1186. In another case, a trial court's decision to impanel an anonymous jury was upheld where the defendants "were alleged to be very dangerous individuals engaged in large-scale organized crime who had participated in several 'mob-style' killings" and "were alleged to be part of a group that possessed the means to harm jurors." United States v. Thomas, 757 F.2d 1359, 1364-65 (2d Cir. 1985). There was insufficient evidence that either Ines or Lafoga enjoys that level of notoriety.

The third factor, past attempts to interfere with the judicial process, does not apply because there was no evidence of any prior attempts from Lafoga or Ines to interfere with the judicial process. There was no prior trial in this case.

The fourth factor could weigh in favor of jury anonymity since Lafoga was facing, in Count 2, a potential extended sentence of life without the possibility of parole. However, the trial court did not cite the lengthy incarceration that Lafoga faced as a factor in impanelling an anonymous jury.

With the fifth factor, there was no evidence that pretrial publicity would publicize jurors' names and expose them to intimidation or harassment.

Considering these five factors, the trial court did not have a strong reason to believe that the jury needed protection.

2. The trial court did not take sufficient reasonable precautions to minimize any prejudicial effects on Lafoga and to ensure that his fundamental rights were protected.

Assuming *arguendo* that the trial court did have sufficient reason to believe that the jury needed protection, it still did not take sufficient reasonable precautions to minimize any prejudicial effects on Lafoga's presumption of innocence.

When the trial court initially addressed the jury pool, (Dkt # 67 [11/18/19] at 44), it explained that jurors would be referred to by number and not by name. However, the trial court did not provide a sufficient neutral, non-prejudicial, explanation for this process. The trial court did inform the jury that "the public can't get your names and they cannot get your contact information" (Id.), but a better practice would have been to inform the jury pool that the media could not obtain their names, thereby dispelling any suspicion that people associated with Ines or Lafoga would be seeking their names.

When the trial court addressed the jury pool after individual *voir dire*, (Dkt # 68 [11/20/19] at 168-69), it again explained that jurors would be referred to by number. The trial court said that the "rest of the public" would not have access to sealed court records. (Id. at 168). However, the trial court did not inform the jury of the media lacking access to sealed court records. At this point, the trial court still had not provided a sufficient neutral, non-prejudicial, explanation for the jurors being referred to by number.

Before opening statements, the trial court finally informed the jury of the media, pointing out the presence of a camera and noting that "the press is not allowed to have any likeness of yours, so they can't take any pictures of you, they cannot take any video of you, they cannot depict the jury in this case." (Dkt # 70 [11/22/19] at 10). While the trial court's statements about the press can mitigate prejudicial effects of juror anonymity on Lafoga's presumption of innocence, a better practice would have been to inform the jury at the beginning of *voir dire* that media access to their identities was restricted, rather than, or in addition to, at the end of *voir dire*. Ideally, any juror suspicion that jury anonymity was instituted to protect the jury from people associated with Ines and/or Lafoga should have been dispelled at the outset of *voir dire* so that any prejudicial assumptions are not allowed to fester for days. The trial court should have attributed jury anonymity to the media on November 18, 2019, rather than or in addition to doing so on November 22, 2019. If the trial court had done so, it would have protected Lafoga's presumption of innocence more effectively.

3. If Lafoga did not object to the trial court's impaneling of a partially anonymous jury, then this Court should recognize a plain error.

Admittedly, Lafoga's trial counsel did not unequivocally object to the trial court's proposal to refer to the jurors by number and not by name. Trial counsel was concerned about having the juror names so that he could research them for *voir dire*. (Dkt # 58 [11/1/19] at 43-44). Notwithstanding any inadequate objection, this Court may and should review the trial court's impaneling of a partially anonymous jury as a plain error.

"When necessary to serve the ends of justice, [an appellate] court will consider issues that have not been preserved below or raised on appeal." State v. Ui, 142 Hawai`i 287, 297, 418 P.3d 628, 638 (Sup. 2018) (citing State v. Kahalewai, 56 Haw. 481, 491, 541 P.2d 1020, 1027 (1975)). Hawai`i Rules of Penal Procedure (HRPP) Rule 52(b) states: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." A plain error may be obvious, or it may "… seriously affect the fairness, integrity or public reputation of judicial proceedings." State v. Fox, 70 Haw. 46, 56, 760 P.2d 670, 675-76 (1988) (quoting United States v. Atkinson, 297 U.S. 157, 160, 56 S. Ct. 391, 392, 80 L.Ed. 555 (1936)).

Lafoga's substantial rights were affected by the trial court's order to refer to the jurors by number and not by name. "[A] criminal defendant has a constitutional right to a presumption of innocence." Samonte, 83 Hawai`i at 518, 928 P.2d at 12. This Court has previously stated: "In general, it is difficult to overestimate the negative impact the absence of a presumption of innocence can have on the fairness of a trial." State v. Tanaka, 92 Hawai`i 675, 682, 994 P.2d 607, 614 (App. 1999) (footnote omitted). Since the presumption of innocence is essential to a fair trial, a court order that has an adverse effect on that constitutional right is one that affects a defendant's "substantial rights." Therefore, this Court is empowered to review as plain error the trial court's order to impanel a partially anonymous jury, notwithstanding trial counsel's failure to object.

Since the trial court abused its discretion in ordering that the jurors would be referred to by number and not by name, Lafoga's presumption of innocence was adversely affected and his convictions should be vacated and remanded for retrial.

B. TRIAL COUNSEL'S FAILURE TO OBJECT TO THE TRIAL COURT'S ORDER TO IMPANEL A PARTIALLY ANONYMOUS JURY WAS INEFFECTIVE ASSISTANCE OF COUNSEL.

In the event this Court finds Lafoga had waived Point of Error A, by failing to object to the trial court's order to refer to the jury by number and not by name, then this Court should consider whether Lafoga was denied effective assistance of counsel.

The United States Supreme Court has recognized that the right to counsel "plays a crucial role in the adversarial system embodied in the Sixth Amendment …" Strickland v. Washington, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). Furthermore, "[t]hat a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command." Id. Therefore, "the right to counsel is the right to the effective assistance of counsel." Id. at 686 (citation omitted). Hawai`i has adopted a two-part test that is essentially identical to Strickland. See Janto, 92 Hawai`i at 31, 986 P.2d at 318 ("1) that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence; and 2) that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense").

In the present case, there was specific errors or omissions that reflected a lack of skill, judgment, or diligence. Trial counsel expressed an interest in having the juror names so that he could conduct research into them, (Dkt # 58 [11/1/19] at 43-44), but did not object to the trial court's proposal to refer to the jurors by number and not by name. Trial counsel did not argue that juror anonymity could adversely affect Lafoga's presumption of innocence. Trial counsel did not argue that Lafoga lacked the notoriety of a politician or a mobster and that the trial court did not have a strong reason to believe that the jury needed the protection of anonymity. Before *voir dire* started, trial counsel did not ask the trial court to reconsider jury anonymity and did not request that the trial court inform the jury pool, at the outset of *voir dire*, that juror anonymity was to protect against media harassment. (Dkt # 67 [11/18/19]). After the trial, trial counsel did not file a motion for a new trial and argue that jury anonymity may have undermined Lafoga's presumption of innocence and contributed to his convictions.

These errors or omissions resulted in the substantial impairment of Lafoga's defense. Juror anonymity signaled to the jury that Lafoga is a dangerous person from whom the jury must be protected. Notwithstanding any neutral, non-prejudicial, explanation that the trial court provided to the jury, Lafoga underwent trial with a significant disadvantage. Jury anonymity contributed to Lafoga's convictions.

Due to ineffective assistance of trial counsel, this Court should vacate Lafoga's convictions and remand for retrial.

C. AS TO THE CHARGE OF ATTEMPTED MURDER IN THE SECOND DEGREE, THE TRIAL COURT ERRED WHEN IT REFUSED TO INSTRUCT THE JURY ON LESSER-INCLUDED OFFENSES, AS THERE WAS A RATIONAL BASIS FOR THE JURY TO ACQUIT LAFOGA OF THAT CHARGE AND FIND HIM GUILTY OF A LESSER OFFENSE.

In Count 2, the trial court had the duty to instruct the jury on any lesser-included offenses if there was a rational basis for the jury to acquit Lafoga of Attempted Murder in the Second Degree and convict him of a lesser-included offense. There was such a rational basis.

Under the former rule, the parties had some influence over the provision of lesser-included charges to a jury. The Hawai`i Supreme Court has previously stated:

> [W]here the prosecution has not sought included offense instructions and the defendant has *expressly* objected, for his or her own tactical reasons, to the submission of such instructions to the jury, we are unwilling to impose a *per se* obligation upon the trial court to give all possible included offense instructions supported by the evidence; as we have indicated, a defendant may also have a legitimate interest in seeking to avoid them.

State v. Kupau, 76 Hawai`i 387, 395, 879 P.2d 492, 500 (Sup. 1994) (italics in original).

The Court then held:

> The trial judge must bring all included offense instructions that are supported by the evidence to the attention of the parties. The trial judge must then give each such instruction to the jury unless (1) the prosecution does not request that included instructions be given and (2) the defendant specifically objects to the included offense instructions for tactical reasons. If the prosecution does not make a request and the defendant makes a tactical objection, the trial judge must then exercise his or her discretion as to whether the included offense instructions should be given. The trial judge's discretion should be guided by the nature of the evidence presented during the trial, as well as the extent to which the defendant appears to understand the risks involved.

Id. at 395-96, 879 P.2d at 500-01.

In State v. Haanio, the Hawai`i Supreme Court re-examined the Kupau rule and stated:

> We now hold that trial courts must instruct juries as to any included offenses when “there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense,” HRS § 701-109(5) (1993), and, to the extent that *Kupau* stands to the contrary, we overrule it.

State v. Haanio, 94 Hawai`i 405, 413, 16 P.3d 246, 254 (Sup. 2001). The Court determined that judicial objectives of assessing criminal liability and determining appropriate punishment outweigh the strategic considerations of an “all or nothing” strategy:

> Thus, elevating a "winner take all" approach over such a determination is detrimental to the broader interests served

> by the criminal justice system. We now conclude that the better rule is that trial courts must instruct juries on all lesser included offenses as specified by HRS § 701-109(5), despite any objection by the defense, and even in the absence of a request from the prosecution.

Id. at 414, 16 P.3d at 255. While the Court imposed a duty on trial courts to instruct juries on lesser-included offenses, as specified by § 701-109(5), it held that the error in that case was harmless because the jury convicted the defendant of the charged offense or of an included offense greater than the erroneously omitted lesser offense. Id. at 415-16, 16 P.3d at 256-57.

The Court would subsequently revisit Haanio's harmless error rule. State v. Flores, 131 Hawai`i 43, 314 P.3d 120 (Sup. 2013). The defendant in Flores was charged with Kidnapping and the trial court declined to instruct the jury on the defendant's requested lesser-included offense of Unlawful Imprisonment in the First Degree. Id. at 48-49, 314 P.3d at 125-26. The jury found the defendant guilty of Kidnapping. Id. at 49, 314 P.3d at 126. On appeal, the State invoked the harmless error rule of Haanio. Id. at 50, 314 P.3d at 127.

In evaluating the Haanio harmless error rule, the Court looked at two possible scenarios. In one, the jury may determine that a defendant was guilty of "something" but, faced with an "all or nothing" choice, may have preferred to find the defendant guilty as charged rather than acquit the defendant entirely. Id. at 57, 314 P.3d at 134. On the other hand, the jury may determine that a defendant was guilty of "something" but opt to acquit the defendant rather than find him or her guilty as charged. Id. The Court explained:

> In either of these scenarios, the jury's verdict would not reflect the actual criminal liability of the defendant. In one case, applying the harmless error holding from *Haanio* would render the former error harmless inasmuch as the defendant would be convicted of the charged offense, although in fact the defendant may be guilty of a lesser-included offense. In the other case, the error would go unreviewed, inasmuch as the defendant would have been acquitted, although the defendant may have been guilty of an offense lesser than that charged. Both errors could be prevented, and ultimately, the public interest in accurate outcomes would be served by the court completely instructing the jury on the law.

Id. (citations omitted). The Court overruled the Haanio harmless error rule. Id. The Court vacated the conviction for Kidnapping and remanded for retrial. Id. at 58, 314 P.3d at 135. "The failure to instruct the jury on a lesser included offense for which the evidence provides a rational basis warrants vacation of the defendant's conviction." Id., citing Haanio, 94 Hawai`i at 415, 16 P.3d at 246.

1. Assault in the First Degree and Assault in the Second Degree are lesser-included offenses of Attempted Murder in the Second Degree.

In a prosecution for one count of Attempted Murder in the First Degree, three counts of Attempted Murder in the Second Degree, and one count of Carrying Firearm on Person Without License, the defendant requested instructions on the lesser-included offenses of Assault in the First Degree, Assault in the Second Degree, and Reckless Endangering in the Second Degree. State v. Smith, 91 Hawai`i 450, 454, 984 P.2d 1276, 1280 (App. 1999). The trial court stated that it would give instructions on Attempted Assault in the First Degree and Attempted Assault in the Second Degree but refused the instructions on the completed assault offenses as well as Reckless Endangering in the Second Degree. Id.

This Court reviewed State v. Moore, 82 Hawai`i 202, 921 P.2d 122 (Sup. 1996), where the Hawaii Supreme Court "assumed 'without deciding, that assault in the first degree and assault in the second degree [were] lesser included offenses of attempted murder." Smith, 91 Hawai`i at 467, 984 P.2d 1293 (quoting Moore, 82 Hawai`i at 211, 921 P.2d at 131) (bracketed material in original). Based on Moore, this Court in Smith also assumed that Assault in the First Degree and Assault in the Second Degree are lesser-included offenses of attempted murder and held that the jury should have been instructed on the included offense of assault. Id. Based on Smith, there should be no question that Assault in the First Degree and Assault in the Second Degree are lesser-included offenses of Attempted Murder in the Second Degree.

2. There was a rational basis in the evidence for the jury to acquit Lafoga of Attempted Murder in the Second Degree and find him guilty of either Assault in the First Degree or Assault in the Second Degree.

The trial court's basis for refusing the requested instructions of Assault in the First Degree (H.R.S. § 707-710), Assault in the Second Degree (H.R.S. § 707-711), and Assault in the Third Degree boils down to the number of shots that it believed Lafoga had fired at Stout, Lafoga's statement to Stout, and the purported similarity of this case to Moore. (Dkt # 54 [12/3/19] at 152-53; attached hereto as Appendix C).

In Moore, the defendant shot his wife five times, with multiple bullets entering her torso and neck. Moore, 82 Hawai`i at 206, 921 P.2d at 126. On appeal, the defendant-appellant pointed out that the trial court had failed to address jury instructions for Assault in the First Degree and Assault in the Second Degree. Id. at 211, 921 P.2d at 131. The Court stated:

> The relevant distinction between attempted murder in the second degree, on the one hand, and assault in the first degree or assault in the second degree under HRS § 707-711(1)(a) or (d), on the other, is the result caused by Moore. Therefore, the only rational basis for a verdict acquitting Moore of attempted murder and convicting him of assault under HRS §§ 707-710, -711(1)(a), or -711(1)(d) would be evidence that it was not Moore's conscious object, *see* HRS § 702-206(1)(c) (1993), or that he was not aware that it was practically certain, *see* HRS § 702-206(2)(c) (1993), that his conduct would cause the death of Mrs. Moore, but, rather, that it was his conscious object or that he was aware that it was practically certain that his conduct would cause her only serious or substantial bodily injury.

Id. at 212, 921 P.2d at 132. Because the defendant had fired six shots at his wife, causing five gunshot wounds to her upper body, three of which were to vital areas, the Court concluded that there was no rational basis for a reasonable trier of fact to conclude that the defendant's conscious object was to cause only serious or substantial bodily injury to his wife and not her death. Id.

In Smith, this Court distinguished that case from Moore: the defendant had fired only one or two shots at each of the complaining witnesses and that a reasonable juror could infer that the defendant's "conscious object" was not to cause their deaths but to

inflict serious or substantial bodily injury. Smith, 91 Hawai`i at 467, 984 P.2d at 1293. This Court held that the jury should have been instructed on the offense of assault. Id.

In the present case, a theory that Lafoga did not fire all of the gunshots at Stout would have undercut the trial court's assessment of the evidence and its refusal to instruct the jury on assault. When Lafoga was driving the van with Stout in the back, he stopped somewhere, bragged about the beating to someone, and that third person then looked in the back window. (Dkt # 70 [11/22/19] at 154). Stout testified that he did not believe a third person had entered the van, but a juror might reasonably conclude that Stout simply did not detect such a person. A DPA asked Stout: "Could you also see the passenger side?" (Id. at 156). Stout testified: "I was directly behind the driver – I mean the passenger seat, so I could not." (Id.). The DPA asked him: "Do you know if – at that point in time if anybody else had gotten into the van?" (Id. at 194-95). Stout replied: "If they did, they were really silent, but I don't believe so." (Id. at 195). Stout testified that, in a previous statement, he had stated that the tools in the van had impeded his view of the person who had shot him. (Dkt # 71 [11/25/19] at 49-50). After Stout was shot in the face, assuming that Lafoga was one who did that, he rolled onto his stomach. (Dkt # 70 [11/22/19] at 157). This testimony, combined with Steinemann's testimony that Stout had gunshot wounds in his back, his buttocks, and his leg, (Dkt # 72 [11/26/19] at 80-88), could lead a reasonable juror to infer that Stout, while on the floor of the van, was facing the rear doors and did not see the shooter of the second, third, and fourth shots. With the van being driven by Lafoga during those subsequent shots, (Dkt # 70 [11/22/19] at 158), a reasonable juror could have inferred that an undetected passenger could have fired the second, third, and fourth shots, especially with tools in the van as obstacles. This passenger would have exited the van when Lafoga did so.

DeCosta testified about Anthony Riley, "Tonez," an acquaintance of Lafoga's. (Dkt # 54 [12/3/19] at 17-27). In a phone call with her, Lafoga told her "he and Tonez took him up the valley." (Id. at 21). In the next phone call, Lafoga told DeCosta that Tonez was supposed to stay by the van and watch it. (Id. at 23). After Lafoga moved to Alaska, he told DeCosta over the phone that Tonez also shot Stout. (Id. at 27).

As to Lafoga's statement that Stout would be the first person he would kill, Stout sensed regret in that statement. (Dkt # 70 [11/22/19] at 155). Lafoga also hesitated

before shooting Stout in the face. (Id. at 157). This hesitation could be seen as evidence that Lafoga did not actually want to kill him and, by the time he fired the first shot, he intended to only hurt him. When Lafoga subsequently told someone over the phone about burning the van, (Id. at 160), he may have believed that the second shooter had killed Stout and that burning the van was to destroy evidence, not to cause his death.

In closing arguments, counsel for Ines broached the idea of one additional person in the van. (Dkt # 55 [12/4/19] at 81). The jury had the prerogative to decide whether the evidence proved beyond a reasonable doubt that Lafoga had fired all four shots at Stout, or just the first one. If the jury decided that Lafoga had fired just the first shot at Stout, then there would have been a rational basis for a juror to conclude that Lafoga's conscious object was to cause serious or substantial injury to Stout, not to cause his death. In this scenario, this case is actually closer to Smith than to Moore. There was a rational basis for the jury to acquit Lafoga of Attempted Murder in the Second Degree and convict him of assault. The trial court erred in refusing the jury instructions for lesser-included offenses of assault.

D. THE TRIAL COURT ERRED WHEN IT DENIED LAFOGA'S HRPP RULE 48 MOTION TO DISMISS.

Due to Lafoga's objections to multiple continuances of trial, the trial court should have granted his HRPP Rule 48 motion to dismiss. (1PC161001176 Dkt # 264).

Rule 48 of the Hawai`i Rules of Penal Procedure requires that a criminal charge against a defendant be dismissed when trial is not had within six months from the date of arrest if bail is set or from the filing of the charge. The Rule states, in relevant part:

> … [T]he court shall, on motion of the defendant, dismiss the charge, with or without prejudice in its discretion, if trial is not commenced within 6 months: (1) from the date of arrest if bail is set or from the filing of the charge, whichever is sooner, on any offense based on the same conduct or arising from the same criminal episode for which the arrest or charge was made.

Rule 48(b)(1), H.R.P.P. Under Rule 48(b), a defendant's guilty plea and subsequent withdrawal of such plea does not re-set the Rule 48 starting date; on the other hand, a re-filing of the charge or an order granting a new trial does.

Although the defendant has the burden of making a *prima facie* case for dismissal by showing that a six-month period has elapsed from one of the "triggering" events, once such a showing has been made, the burden shifts to the prosecution to prove by a preponderance certain excluded time periods pursuant to H.R.P.P. Rule 48(c). See State v. Almeida, 54 Haw. 443, 509 P.2d 549 (1973).

In the present case, the Rule 48 "triggering" event for Lafoga was his arrest on July 15, 2016. Lafoga filed his Motion to Dismiss for Violation of HRPP Rule 48 on November 12, 2019. (1PC161001176 Dkt # 264). From July 15, 2016, to November 12, 2019, 1215 days have elapsed. The burden then shifts to the State to prove by a preponderance certain excluded time periods.

The time periods where Lafoga consented to a continuance (September 26, 2016, to January 9, 2017, January 9, 2017, to June 13, 2017, May 21, 2018, to August 27, 2018, July 1, 2019, to August 19, 2019, and August 19, 2019 to September 30, 2019) and where Lafoga's guilty plea and withdrawal of such plea delayed trial (May 6, 2019, to July 1, 2019) total 505 excludable days, leaving 710 days.

Then, there were six periods of time where continuances were granted at the request of Ines but objected to by Lafoga (June 13, 2017, to September 18, 2017, September 18, 2017, to November 13, 2017, November 13, 2017, to January 1, 2018, January 1, 2018, to May 21, 2018, August 27, 2018, to January 21, 2019, and January 21, 2019, to May 6, 2019) that total another 594 days. The trial court ruled that these time periods were excluded by HRPP Rule 48(c)(7). (See FOF/COL # 18 at 1PC161001176 Dkt # 342 at 4-5; FOF/COL # 24 at 1PC161001176 Dkt # 342 at 5; FOF/COL # 28 at 1PC161001176 Dkt # 342 at 6).

The particular exclusion states: "[t]he following periods shall be excluded in computing the time for trial commencement … a reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance …" Rule 48(c)(7), H.R.P.P. While the trial court did deny a motion to sever the two defendants, finding good cause (1PC161001176 Dkt # 108), the key word in Rule 48(c)(7) would be "reasonable." The Findings of Fact, Conclusions of Law, and Order Denying Ines' Motion to Dismiss Indictment for Violation of Haw. R. Penal P. Rule 48 and Defendant Lafoga's Motion to

Dismiss for Violation of HRPP Rule 48 (1PC161001176 Dkt # 342) makes no findings as to reasonableness of the continuances that were excluded under Rule 48(c)(7). Taking the August 27, 2018, to January 21, 2019, continuance, for example, that 147-day continuance sprung from an off-record status conference, with a minute order to reflect that the continuance was at Ines' request and granted over Lafoga's objection. (Dkt # 60 [ROA] at 26). The circumstances that may have compelled a 147-day continuance are unclear; FOF/COL # 24 does not indicate why this period was a "reasonable" delay. (1PC161001176 Dkt # 342 at 5). Similarly, the January 21, 2019, to May 6, 2019, continuance resulted from another status conference. (Dkt # 60 [ROA] at 27). FOF/COL # 28 does not indicate why this 105-day continuance was a "reasonable" period of delay. (1PC161001176 Dkt # 342 at 6). FOF/COL # 18 likewise does not indicate why those particular continuances, totaling 342 days, were "reasonable" periods of delay. (1PC161001176 Dkt # 342 at 4-5).

The State has the burden to prove that FOF/COL's # 18, 24, and 28 correctly applied the exclusion of Rule 48(c)(7) to those particular periods. Otherwise, the trial court's conclusion that, at most, 153 days elapsed for Lafoga is erroneous. (FOF/COL # 40 at 1PC161001176 Dkt # 342 at 8). With more than 180 days having elapsed, the trial court should have granted Lafoga's Rule 48 motion to dismiss.

E. THE TRIAL COURT'S JURY INSTRUCTION THAT CHARACTERIZED THE NON-EXTENDED SENTENCE FOR ATTEMPTED MURDER IN THE SECOND DEGREE AS A "POSSIBLE LIFE TERM OF IMPRISONMENT" UNDERSTATED THE PENALTY AND PREJUDICED LAFOGA.

In the sentencing phase, the trial court erred in giving the jury an instruction that characterized the non-extended sentence for attempted murder in the second degree as a "possible life term of imprisonment." This instruction was misleading and confusing and prejudiced Lafoga.

"When jury instructions or the omission thereof are at issue on appeal, the standard of review is whether, when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading." Arceo, 84 Hawai`i at 11, 928 P.2d at 853 (internal citations omitted).

As an initial matter, the non-extended sentence for attempted murder in the second degree is "life imprisonment with possibility of parole." H.R.S. § 706-656(2). Therefore, life imprisonment, as a sentence for attempted murder in the second degree, is the actual sentence; it is more than just possible. The possibility of parole does not make a life sentence any less of a life sentence:

> After the prisoner has served the minimum term provided by law or imposed by the sentence of the court he may be allowed to go on parole but he is still in the legal custody and control of the prison authorities and is deemed still to be serving out the sentence imposed upon him.

Territory v. Waiamau, 24 Haw. 247, 249 (Haw. Terr. 1918).

In this case, the trial court's characterization to the jury of the non-extended sentence for attempted murder in the second degree as a "possible life term of imprisonment" drew inordinate attention to the minimum term of imprisonment that Lafoga may have received from the Hawaii Paroling Authority, in the event he was sentenced to a non-extended sentence of life imprisonment with the possibility of parole. The uncertainty of this minimum term of imprisonment may have induced the jury to opt for the "definite life term of imprisonment" and find that it was necessary for the protection of the public. Characterizing the non-extended sentence of life imprisonment with the possibility of parole as a "possible life term of imprisonment" was prejudicial and his extended sentence in Count 2 should be vacated. Also, since the jury findings that extended sentences in Counts 4 and 8 were necessary for the protection of the public may have been unduly influenced by its consideration of an extended sentence in Count 2, the extended sentences in Counts 4 and 8 should be vacated too.

F. UNDER H.R.S. § 706-661(1), THE OFFENSE OF ATTEMPTED MURDER IN THE SECOND DEGREE IS NOT ELIGIBLE FOR THE EXTENDED SENTENCE OF LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE AND THE TRIAL COURT ERRED IN IMPOSING THE EXTENDED SENTENCE.

Assuming that the criteria of H.R.S. § 706-662 are satisfied, H.R.S. § 706-661(1) unambiguously provides for a possible extended sentence of life imprisonment without the possibility of parole for murder in the second degree but not for attempted murder in

the second degree. The trial court exceeded its lawful authority when it imposed the extended sentence of life imprisonment without the possibility of parole in Count 2.

"When construing a statute, [a court's] foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself." City and County of Honolulu v. Ing, 100 Hawai`i 182, 189, 58 P.3d 1229, 1236 (Sup. 2002). In interpreting statutes, "'where the statutory language is plain and unambiguous, [a court's] sole duty is to give effect to its plain and obvious meaning.'" State v. Kalama, 94 Hawai`i 60, 64, 8 P.3d 1224, 1228 (Sup. 2000) (quoting Citizens for Protection of North Kohala Coastline v. County of Hawai`i, 91 Hawai`i 94, 107, 979 P.2d 1120, 1133 (Sup. 1999)).

Section 706-661(1) states, in relevant part: "The court may sentence a person who satisfies the criteria for any of the categories set forth in section 706-662 to an extended term of imprisonment, which shall have a maximum length as follows … [f]or murder in the second degree--life without the possibility of parole …" This language of § 706-661(1) is plain and unambiguous; it applies to murder in the second degree and not to attempted murder in the second degree.

In multiple instances, Hawai`i's sentencing scheme does treat murder in the second degree and attempted murder in the second degree similarly for purposes of sentencing. However, these statutes unambiguously specify murder in the second degree and attempted murder in the second degree together. For example, "[e]xcept as provided in section 706-657, pertaining to enhanced sentence for second degree murder, persons convicted of second degree murder and attempted second degree murder shall be sentenced to life imprisonment with possibility of parole." H.R.S. § 706-656(2). In the repeat offender sentencing statute, a mandatory minimum term of imprisonment without the possibility of parole is imposed, pursuant to subsection (1), as follows: "[o]ne prior felony conviction … [w]here the instant conviction is for murder in the second degree or attempted murder in the second degree—ten years" (H.R.S. § 706-606.5(2)(a)(i)); "[t]wo prior felony convictions … [w]here the instant conviction is for murder in the second degree or attempted murder in the second degree—twenty years" (H.R.S. § 706-606.5(2)(b)(i)); and "[t]hree or more prior felony convictions … [w]here the instant conviction is for murder in the second degree or attempted murder in the second

degree—thirty years" (H.R.S. § 706-606.5(2)(c)(i)). The sentence enhancement for the use or possession of a semiautomatic firearm or automatic firearm in the commission of a felony, which was imposed on Lafoga in Count 2, provides for a mandatory minimum term of imprisonment without the possibility of parole for, in relevant part: "[f]or murder in the second degree and attempted murder in the second degree--twenty years." H.R.S. § 706-660.1(3)(a). Therefore, a comparison of § 706-661(1) to the rest of Hawai`i's statutory sentencing scheme indicates that the phrase "murder in the second degree" is not an umbrella term that encompasses both murder in the second degree and attempted murder in the second degree.

The trial court's ruling was based on its obligation to construe statutes to avoid absurdities. (Dkt # 74 [2/20/20] at 14). The trial court also concluded that the omission of attempted murder in the second degree from § 706-661(1) was not purposeful on the part of the Legislature. (Id.). As to the first point, a court's rejection of a construction of a law that leads to absurdity only applies when "the words of a law are ambiguous." H.R.S. § 1-15(3). As to the second point, the Legislature had amended § 706-661 in 2007 and had an occasion then to specify, in § 706-661(1), attempted murder in the second degree as another offense eligible for the extended sentence of life imprisonment without the possibility of parole; it did not do so. See State v. Cutsinger, 118 Hawai`i 68, 73-74, 185 P.3d 816, 821-22 (App. 2008) (detailing the Legislature's amendments of H.R.S. §§ 706-661, -662, and -664 to provide for a jury to make the findings of fact necessary for the imposition of an extended sentence). The Hawai`i Supreme Court once explained:

> We cannot change the language of the statute, supply a want, or enlarge upon it in order to make it suit a certain state of facts. We do not legislate or make laws. Even where the Court is convinced in its own mind that the Legislature really meant and intended something not expressed by the phraseology of the Act, it has no authority to depart from the plain meaning of the language used.

State v. Meyer, 61 Haw. 74, 77, 595 P.2d 288, 291 (1979) (quoting Queen v. San Tana, 9 Haw. 106, 108 (1893)). In this case, the trial court should not have concluded that the Legislature meant to include attempted murder in the second degree as an offense eligible for an extended sentence of life imprisonment without parole in § 706-661(1).

Based on the plain meaning of § 706-661(1), the trial court erred in concluding that Lafoga was eligible, in Count 2, to be sentenced to an extended sentence of life imprisonment without the possibility of parole. Lafoga's sentence in Count 2 should be vacated. Also, since the jury findings that extended sentences in Counts 4 and 8 were necessary for the protection of the public may have been unduly influenced by its consideration of an extended sentence in Count 2, the extended sentences in Counts 4 and 8 should be vacated too.

V. RELEVANT STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS

See Appendix "E."

VI. CONCLUSION

Based on the foregoing arguments and authorities cited, Defendant-Appellant BRANDON FETU LAFOGA respectfully requests this Honorable Court to: 1) vacate his convictions if it finds any of the errors specified in Points of Error A, B, C, and/or D (in the case of Points of Error A, B, and/or C, remand for re-trial; in the case of Point of Error D, remand for a hearing on whether to dismiss with or without prejudice pursuant to State v. Estencion, 63 Haw. 264, 625 P.2d 1040 (1981); and/or vacate his sentence and remand if it finds any of the errors specified in Points of Error E and/or F. In the event of retrial, this Court should still decide Points of Error E and/or F as its opinions on these points would provide guidance to the trial court.

DATED: Honolulu, Hawai`i, October 14, 2020.

Respectfully submitted,

WILLIAM K. LI
ATTORNEY AT LAW

BY: /s/ William K. Li
WILLIAM K. LI

ATTORNEY FOR DEFENDANT-APPELLANT

STATE v. LAFOGA and INES

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APPENDIX A

STATE OF HAWAII
CIRCUIT COURT
OF THE FIRST CIRCUIT

JUDGMENT
OF CONVICTION AND SENTENCE
NOTICE OF ENTRY

CASE NUMBER
1PC161001176 (2)

REPORT NUMBER(S)
Count 2: 15370046
Count 4: 16239208
Count 8: 16239207

STATE OF HAWAII vs. (DEFENDANT)
BRANDON FETU LAFOGA

Social Security Number: XXX-XX-0698
SID: A-6010601
DOB: XX-XX-1990

DEFENSE COUNSEL:
WALTER RODBY (Court Appointed Attorney)

DATE OF HEARING:
2/20/2020

DEFENDANT'S PLEA:
GUILTY

DISPOSITION:
JURY TRIAL

ORIGINAL CHARGE(S):
COUNT 2: ATTEMPTED MURDER IN THE SECOND DEGREE (§705-500, 707-701.5, 706-656 and 706-660.1, H.R.S.)
COUNT 3: CRIMINAL CONSPIRACY TO COMMIT MURDER IN THE SECOND DEGREE (§705-520 and 707-701.5, H.R.S.)
COUNT 4: CARRYING OR USE OF FIREARM IN THE COMMISSION OF A SEPARATE FELONY (§134-21, H.R.S.)
COUNT 6: KIDNAPPING (§707-720(1)(e), H.R.S.)
COUNT 8: OWNERSHIP OR POSSESSION PROHIBITED OF ANY FIREARM OR AMMUNITION BY A PERSON CONVICTED OF CERTAIN CRIMES (§134-7(b) and (h), H.R.S.)

CHARGE(S) TO WHICH DEFENDANT PLED:
COUNT 2: ATTEMPTED MURDER IN THE SECOND DEGREE (§705-500, 707-701.5, 706-656 and 706-660.1, H.R.S.)
COUNT 4: CARRYING OR USE OF FIREARM IN THE COMMISSION OF A SEPARATE FELONY (§134-21, H.R.S.)
COUNT 8: OWNERSHIP OR POSSESSION PROHIBITED OF ANY FIREARM OR AMMUNITION BY A PERSON CONVICTED OF CERTAIN CRIMES (§134-7(b) and (h), H.R.S.)

DEFENDANT IS CONVICTED AND FOUND GUILTY OF:
COUNT 2: ATTEMPTED MURDER IN THE SECOND DEGREE (§705-500, 707-701.5, 706-656 and 706-660.1, H.R.S.)
COUNT 4: CARRYING OR USE OF FIREARM IN THE COMMISSION OF A SEPARATE FELONY (§134-21, H.R.S.)
COUNT 8: OWNERSHIP OR POSSESSION PROHIBITED OF ANY FIREARM OR AMMUNITION BY A PERSON CONVICTED OF CERTAIN CRIMES (§134-7(b) and (h), H.R.S.)

FINAL JUDGMENT AND SENTENCE OF THE COURT:

Serve the following terms of imprisonment:

Count 2: Life Term of Imprisonment without the possibility of parole pursuant to Haw. Rev. Stat. §§706-661(1), 706-662(1), and 706-662(4)(a), with a mandatory minimum of 20 years pursuant to H.R.S. § 706-660.1(3)(a).
Count 4: Life Term of Imprisonment with the possibility of parole pursuant to Haw. Rev. Stat. §§706-661(2), 706-662(1), and 706-662(4)(a).
Count 8: Indeterminate term of imprisonment of 20 years pursuant to Haw. Rev. Stat. §§706-661(3), 706-662(1), and 706-662(4)(a).
Defendant to received credit for time served. All terms shall run consecutive to each other and any other terms served by Defendant.

Provide buccal swab samples and print impressions of each hand and, if required by the collecting agency's rules or internal regulations, blood specimens required for law enforcement identification analysis, and pay monetary assessment of $500 or the actual cost of the DNA analysis, whichever is less, to the DNA registry special fund;
Pay to the crime victim compensation fund $450 in the aggregate; All other fees and costs are waived for inability to pay.

Defendant shall provide specimen samples and print impressions as required by H.R.S. Chap. 844D

DATE	JUDGE	SIGNATURE
2/20/2020	Paul B.K. Wong	

NOTICE OF ENTRY

THIS ORDER HAS BEEN ENTERED AND COPIES MAILED OR DELIVERED TO ALL PARTIES

DATE	CLERK	SIGNATURE
2/20/2020	C. Valerio	

Form CC-CR-DIV-022

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APPENDIX B

TRIAL COURT: I do have one thing that I want to bring up. 250 juror questionnaires got sent out. A great number of them have already been returned, and a good number of them have indicated that they are willing to serve for a good four to five weeks of trial.

So, the Court anticipates issuing close to, if not over approximately 120 summons for actual jurors to be here, and most -- most will be the small exception of the English is a second language jurors. They have all indicated that they're able to serve.

What the Court will do is, because those jurors already have numbers to them, 1 through 250, they will retain those numbers as we go through jury selection and trial.

Once we get the full packet of jurors that will be summoned, Counsel, of course will get that packet, identifying information will get redacted: Phone numbers and street addresses, which will get their zip codes and their towns, but I'm also going to, and Court will redact their names as well.

So they will be referred to as juror No. 1, to and including juror No. 125, without saying Mr. Smith or Ms. Jones or Ms. Smith or Ms. Jones. Any objection to that, Mr. Van Acker?

COUNSEL FOR INES: Yeah, sorry, could you -- we're going to know the names from the list 'cause we're going to get them.

TRIAL COURT: No.

COUNSEL FOR INES: We're not going to know the names at all?

TRIAL COURT: No, you just have the numbers.

DPA: I would –

TRIAL COURT: When you do voir dire, it's juror No. 25 in chair No. 1.

COUNSEL FOR INES: So even the lawyers won't get the name?

DPA: I do object to that because I think it's incredibly – in

my respectful opinion, I think it's dehumanizing.

TRIAL COURT: Well –

DPA: And I think it's very important during voir dire to be able to get a juror's most candid and open answers.

I think calling them by number, I don't think that's conducive to creating an open environment.

COUNSEL FOR INES: I do agree with Mr. Van Acker's concern. But if -- my concern is, we need to know who they are for our research purposes and preparing voir dire.

In other words, is there a conflict of interest or potential conflict of interest? Do I know the juror, that's what I'm mainly concerned about.

But if the Court prefers that we not say the juror's name on the record, and the Court instructs the jury that the Court has instructed the lawyers to approach it that way, then I don't have an objection.

TRIAL COURT: How about that compromise, Mr. Van Acker?

DPA: I guess I just want to understand why.

TRIAL COURT: I'm trying to head off a juror in this panel saying, I'm afraid to serve.

COUNSEL FOR INES: I understand that concern.

So on the record, and this is what I suggest. The defense counsels – the attorneys will look at the list and review and prepare for jury selection, but we both will not provide the list to our clients, but they will be present with us when we do jury selection.

TRIAL COURT: Of course.

COUNSEL FOR INES: So I think that takes care of all the concerns.

DPA: I – I really appreciate – I understand why the Court is taking the step. I'm just not sure. I'm going to defer to the Court. I'm going to retract my objection.

COUNSEL FOR INES: It's a weird thing to say, Hey, juror No. 1, juror No. 5, but if the Court explains to the jury the reason why it's doing it, and that it's not meant to be offensive.

TRIAL COURT: I can explain that they're given numbers.

COUNSEL FOR INES: Yes, the fact that they're just given numbers.

TRIAL COURT: But I don't want to give them the Court's rationale as to why we're not referring to their names in court.

COUNSEL FOR INES: That's understood.

TRIAL COURT: I have, in the past, had to inform jurors to quell anxiety, that there's been no incidents whatsoever. I do believe that's the situation here, but I don't want it to be raised in the entire panel's consciousness at all because we want them to serve.

COUNSEL FOR INES: Yes. So as long as the Court explains to the jury that the Court has instructed the lawyers to refer to them as juror No. 1 or juror No. 2, et cetera, instead of using their names, I think both -- all of the parties' counsel will be protected in that way, in that the jury won't think that we're trying to, you know, take away their identity, I guess.

TRIAL COURT: Don't worry, because the Court is the first one that has to voir die saying, Juror No. 1 and juror No. 2.

COUNSEL FOR INES: So we'll all be doing it.

TRIAL COURT: Mr. Rodby, any other concerns you want to add to the record on this particular issue?

COUNSEL FOR LAFOGA: So, Judge, I'm not sure I understand the situation. So will we know the names of each juror?

TRIAL COURT: Ms. Kau wants that to happen, and that's fine, as long as their names are not used on the record.

COUNSEL FOR LAFOGA: Okay, 'cause that was my main concern was I think we should be entitled to know their names so that we can do proper research and look into people's background.

I know I've had cases with the prosecution before where they actually shoot over arrest and conviction information about jurors that -- I'm not saying you guys are going to do it, but I've had that happen in the past, and actually it comes in quite handy as far as jury selection and, you know, people's work with the Court.

So I would appreciate the chance to look a little more into the background of each juror, rather than just rely upon their sheet.

TRIAL COURT: I think that's – I think that's a fair request.

COUNSEL FOR LAFOGA: Thank you, Judge.

TRIAL COURT: And I think the proposal made by Ms. Kau is a reasonable and workable one.

COUNSEL FOR LAFOGA: Thank you.

TRIAL COURT: So the list will come out to you, street addresses and telephone numbers still redacted.

COUNSEL FOR LAFOGA: Yes.

TRIAL COURT: But they will have their names on them.

But when we address those individual jurors in the box, just their number will be used, not their name.

COUNSEL FOR LAFOGA: Yes. Thank you, Judge.

TRIAL COURT: So their name will not appear in the record. …

(Dkt # 58 [11/1/19] at 39-45).

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APPENDIX C

TRIAL COURT: The Court's going to refuse instructing on the included offenses in Count No. 2. The Court is mindful of the duty imposed on the Court under *State v. Haanio* to instruct on all the applicable offenses. But given the facts of this case, the Court concludes that Assaults in the First, Second, and Third Degree are not applicable pursuant to *State v. Moore*, 82 Hawaii 202, a 1996 case.

In *Moore*, it's a case where defendant husband shot complaining witness wife, and the Supreme Court reasoned that given the number of shots, proximity in which the shooting took place, that a reasonable jury would not be able to acquit on the Attempted Murder and find guilt on the included offenses of Assault.

In particular, the Supreme Court held that the evidence at trial established that Moore fired at least six shots at Mrs. Moore from point blank range with a .32 caliber revolver, causing five gunshot wounds through her upper body, three of which were to vital areas, and further holding that a rational basis in the evidence for a verdict acquitting Moore of Attempted Murder and convicting him of Assault in the Second Degree would require some evidence from which a reasonable juror could conclude that Moore was not at least aware that it was practically certain that shooting Ms. Moore six times from point blank with a .32 caliber revolver would cause her death, but that he merely consciously disregarded a substantial and justifiable risk that repeatedly shooting her in the upper body would cause her bodily injury.

On the basis of the evidence presented at that trial, we hold that as a matter of law, a reasonable trier of fact could not reasonably conclude. And that's *Moore* at page 212.

And the facts in this case that we're dealing with -- the shooting is very similar to that in *Moore*. Multiple shots to the body as well as the failure to render aid. What is distinguishable, however, is according to the testimony provided, is of Mr. Lafoga's stated intention to cause the complaining witness's death.

The Court is also mindful of *State v. Kaeo*, 132 Hawaii 451 (2014), where Assault 1 can be an included offense to Attempted Murder.

> Here the Court respectfully disagrees with the majority opinion in *Kaeo* in that if a defendant uses a dangerous instrument which by definition could cause death, the death is the result of defendant's conduct. The defendant's use of a dangerous instrument embodies a conscious disregard of the risk of death, i.e., manslaughter. As a consequence, even if the defendant or a defendant testified that it was the intent to hurt and not kill, the reckless causing of death would end the applicable included offenses at Manslaughter and the Court should not be required to instruct at Assault in the First Degree.
>
> In this case, the Court finds that the reasoning in *Kaeo* is not applicable because there is no evidence for the jury to find that Lafoga's intent was to only hurt the complaining witness. As stated, even if there was such testimony, the Court would nevertheless decline an instructing on included offenses. The evidence in this case includes the stated intent to kill, the initial shot to the face, and three more shots to the body where whenever the complaining witness showed any signs of life. And these facts prohibits a rational basis to find an alternate mens rea. Simply put, to conclude a state of mind other than the conscious object to cause the death of Kele Stout in this case would beggar belief.
>
> So for those reasons, the Court would refuse instructing on the included offenses of Assault 1, Assault 2, and Assault 3 for Count No. 2.

(Dkt # 54 [12/3/19] at 152-55).

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APPENDIX D

TRIAL COURT: Mr. Unga, I do have one question for you. Thank you for your argument. I'll preface my question, noting that there are already many possible appellate issues in this case, but in seeking the extended term of incarceration in Count No. 2, notwithstanding the jury's finding, is it applicable pursuant to Section 706-661, sub 1?

(Pause in proceedings.)

DPA: Yes, Your Honor.

TRIAL COURT: Even though the language of the statute does not account for Attempted Murder in the Second Degree?

DPA: Yes, Your Honor. And the basis of that is the defendant should not get the windfall benefit of the complaining witness surviving this incident. As the Court can recall from the facts of this case, it was nothing short of the miraculous determination by the complaining witness to stay alive that motivated him to drive himself, after being shot numerous times, from Hakimo Road to Waianae Coast Comprehensive. It was nothing short of a miracle that allowed the nurses, who were in a different location of the hospital and fortunately had a very good nurse who had experience treating emergency type of situations in the military, who had the type of skill that he had to quickly help stabilize the complaining witness and rush him to Queen's. The defendant does not get the benefit of all of those very miraculous circumstances. Accordingly -- and under the law, the attempted murder sentencing would still -- the -- excuse me -- sentencing that would apply to murder still applies to any attempted offense, and the State would therefore argue that extended in this case still applies.

(Dkt # 74 [2/20/20] at 6-8).

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APPENDIX E

RELEVANT STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS

Hawai`i Revised Statutes

Section 1-15 Construction of ambiguous context.

Where the words of a law are ambiguous:

(1) The meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning.

(2) The reason and spirit of the law, and the cause which induced the legislature to enact it, may be considered to discover its true meaning.

(3) Every construction which leads to an absurdity shall be rejected.

Section 134-7 Ownership or possession prohibited, when; penalty.

(a) No person who is a fugitive from justice or is a person prohibited from possessing firearms or ammunition under federal law shall own, possess, or control any firearm or ammunition therefor.

(b) No person who is under indictment for, or has waived indictment for, or has been bound over to the circuit court for, or has been convicted in this State or elsewhere of having committed a felony, or any crime of violence, or an illegal sale of any drug shall own, possess, or control any firearm or ammunition therefor.

(c) No person who:

(1) Is or has been under treatment or counseling for addiction to, abuse of, or dependence upon any dangerous, harmful, or detrimental drug, intoxicating compound as defined in section 712-1240, or intoxicating liquor;

(2) Has been acquitted of a crime on the grounds of mental disease, disorder, or defect pursuant to section 704-411; or

(3) Is or has been diagnosed as having a significant behavioral, emotional, or mental disorders as defined by the most current diagnostic manual of the American Psychiatric Association or for treatment for organic brain syndromes;

shall own, possess, or control any firearm or ammunition therefor, unless the person has been medically documented to be no longer adversely affected by the addiction, abuse, dependence, mental disease, disorder, or defect.

(d) No person who is less than twenty-five years old and has been adjudicated by the family court to have committed a felony, two or more crimes of violence, or an illegal sale of any drug shall own, possess or control any firearm or ammunition therefor.

(e) No minor who:

(1) Is or has been under treatment for addiction to any dangerous, harmful, or detrimental drug, intoxicating compound as defined in section 712-1240, or intoxicating liquor;

(2) Is a fugitive from justice; or

(3) Has been determined not to have been responsible for a criminal act or has been committed to any institution on account of a mental disease, disorder, or defect;

shall own, possess, or control any firearm or ammunition therefor, unless the minor has been medically documented to be no longer adversely affected by the addiction, mental disease, disorder, or defect.

For the purposes of enforcing this section, and notwithstanding section 571-84 or any other law to the contrary, any agency within the State shall make its records relating to family court adjudications available to law enforcement officials.

(f) No person who has been restrained pursuant to an order of any court, including a gun violence protective order issued pursuant to part IV, from contacting, threatening, or physically abusing any person, shall possess, control, or transfer ownership of any firearm or ammunition therefor, so long as the protective order, restraining order, or any extension is in effect, unless the order, for good cause shown, specifically permits the possession of a firearm and ammunition. The protective order or restraining order shall specifically include a statement that possession, control, or transfer of ownership of a firearm or ammunition by the person named in the order is prohibited. The person shall relinquish possession and control of any firearm and ammunition owned by that person to the police department of the appropriate county for safekeeping for the duration of the order or extension thereof. At the time of service of a protective order or restraining order involving firearms and ammunition issued by any court, a police officer may take custody of any and all firearms and ammunition in plain sight, those discovered pursuant to a consensual search, and those firearms surrendered by the person restrained. If the person restrained is the registered

owner of a firearm and knows the location of the firearm, but refuses to surrender the firearm or refuses to disclose the location of the firearm, the person restrained shall be guilty of a misdemeanor. In any case, when a police officer is unable to locate the firearms and ammunition either registered under this chapter or known to the person granted protection by the court, the police officer shall apply to the court for a search warrant pursuant to chapter 803 for the limited purpose of seizing the firearm and ammunition.

For the purposes of this subsection, good cause shall not be based solely upon the consideration that the person subject to restraint pursuant to an order of any court is required to possess or carry firearms or ammunition during the course of the person's employment. Good cause consideration may include but not be limited to the protection and safety of the person to whom a restraining order is granted.

(g) Any person disqualified from ownership, possession, control, or the right to transfer ownership of firearms and ammunition under this section shall surrender or dispose of all firearms and ammunition in compliance with section 134-7.3.

(h) Any person violating subsection (a) or (b) shall be guilty of a class C felony; provided that any felon violating subsection (b) shall be guilty of a class B felony. Any person violating subsection (c), (d), (e), (f), or (g) shall be guilty of a misdemeanor.

Section 134-21 Carrying or use of firearm in the commission of a separate felony; penalty

(a) It shall be unlawful for a person to knowingly carry on the person or have within the person’s immediate control or intentionally use or threaten to use a firearm while engaged in the commission of a separate felony, whether the firearm was loaded or not, and whether operable or not; provided that a person shall not be prosecuted under this subsection when the separate felony is:

(1) A felony offense otherwise defined by this chapter;

(2) The felony offense of reckless endangering in the first degree under section 707-713;

(3) The felony offense of terroristic threatening in the first degree under section 707-716(1)(a), 707-716(1)(b), or [707-716(1)(e)]; or

(4) The felony offenses of criminal property damage in the first degree under section 708-820 or criminal property damage in the second degree under section 708-821 and the firearm is the instrument or means by which the property damage is caused.

(b) A conviction and sentence under this section shall be in addition to and not in lieu of any conviction and sentence for the separate felony; provided that the sentence imposed under this section may run concurrently or consecutively with the sentence for the separate felony.

(c) Any person violating this section shall be guilty of a class A felony.

Section 701-109 Method of prosecution when conduct establishes an element of more than one offense.

(1) When the same conduct of a defendant may establish an element of more than one offense, the defendant may be prosecuted for each offense of which such conduct is an element. The defendant may not, however, be convicted of more than one offense if:

(a) One offense is included in the other, as defined in subsection (4) of this section;

(b) One offense consists only of a conspiracy or solicitation to commit the other;

(c) Inconsistent findings of fact are required to establish the commission of the offenses;

(d) The offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or

(e) The offense is defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of conduct constitute separate offenses.

(2) Except as provided in subsection (3) of this section, a defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction of a single court.

(3) When a defendant is charged with two or more offenses based on the same conduct or arising from the same episode, the court, on application of the prosecuting attorney or of the defendant, may order any such charge to be tried separately, if it is satisfied that justice so requires.

(4) A defendant may be convicted of an offense included in an offense charged in the felony complaint, indictment, or information. An offense is so included when:

(a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged;

(b) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or

(c) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a different state of mind indicating lesser degree of culpability suffices to establish its commission.

(5) The court is not obligated to charge the jury with respect to an included offense unless there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense.

Section 702-206 Definitions of states of mind.

(1) “Intentionally.”

(a) A person acts intentionally with respect to his conduct when it is his conscious object to engage in such conduct.

(b) A person acts intentionally with respect to attendant circumstances when he is aware of the existence of such circumstances or believes or hopes that they exist.

(c) A person acts intentionally with respect to a result of his conduct when it is his conscious object to cause such a result.

(2) “Knowingly.”

(a) A person acts knowingly with respect to his conduct when he is aware that his conduct is of that nature.

(b) A person acts knowingly with respect to attendant circumstances when he is aware that such circumstances exist.

(c) A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.

(3) “Recklessly.”

(a) A person acts recklessly with respect to his conduct when he consciously disregards a substantial and unjustifiable risk that the person's conduct is of the specified nature.

(b) A person acts recklessly with respect to attendant circumstances when he consciously disregards a substantial and unjustifiable risk that such circumstances exist.

(c) A person acts recklessly with respect to a result of his conduct when he consciously disregards a substantial and unjustifiable risk that his conduct will cause such a result.

(d) A risk is substantial and unjustifiable within the meaning of this section if, considering the nature and purpose of the person's conduct and the circumstances known to him, the disregard of the risk involves a gross deviation from the standard of conduct that a law-abiding person would observe in the same situation.

(4) “Negligently.”

(a) A person acts negligently with respect to his conduct when he should be aware of a substantial and unjustifiable risk taken that the person's conduct is of the specified nature.

(b) A person acts negligently with respect to attendant circumstances when he should be aware of a substantial and unjustifiable risk that such circumstances exist.

(c) A person acts negligently with respect to a result of his conduct when he should be aware of a substantial and unjustifiable risk that his conduct will cause such a result.

(d) A risk is substantial and unjustifiable within the meaning of this subsection if the person's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a law- abiding person would observe in the same situation.

Section 702-221 Liability for conduct of another.

(1) A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both.

(2) A person is legally accountable for the conduct of another person when:

(a) Acting with the state of mind that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct;

(b) He is made accountable for the conduct of such other person by this Code or by the law defining the offense; or

(c) He is an accomplice of such other person in the commission of the offense.

Section 702-222 Liability for conduct of another; complicity.

A person is an accomplice of another person in the commission of an offense if:

(1) With the intention of promoting or facilitating the commission of the offense, the person:

(a) Solicits the other person to commit it;

(b) Aids or agrees or attempts to aid the other person in planning or committing it; or

(c) Having a legal duty to prevent the commission of the offense, fails to make reasonable effort so to do; or

(2) The person's conduct is expressly declared by law to establish the person's complicity.

Section 705-500 Criminal attempt.

(1) A person is guilty of an attempt to commit a crime if the person:

(a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as the person believes them to be; or

(b) Intentionally engages in conduct which, under the circumstances as the person believes them to be, constitutes a substantial step in a course of conduct intended to culminate in the person's commission of the crime.

(2) When causing a particular result is an element of the crime, a person is guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, the person intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.

(3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent.

Section 705-520 Criminal conspiracy.

A person is guilty of criminal conspiracy if, with intent to promote or facilitate the commission of a crime:

(1) He agrees with one or more persons that they or one or more of them will engage in or solicit the conduct or will cause or solicit the result specified by the definition of the offense; and

(2) He or another person with whom he conspired commits an overt act in pursuance of the conspiracy.

Section 706-606.5 Sentencing of repeat offenders.

* * *

(2) A mandatory minimum period of imprisonment without possibility of parole during that period shall be imposed pursuant to subsection (1), as follows:

(a) One prior felony conviction:

(i) Where the instant conviction is for murder in the second degree or attempted murder in the second degree--ten years;

(ii) Where the instant conviction is for a class A felony--six years, eight months;

(iii) Where the instant conviction is for a class B felony--three years, four months; and

(iv) Where the instant conviction is for a class C felony offense enumerated above--one year, eight months;

(b) Two prior felony convictions:

(i) Where the instant conviction is for murder in the second degree or attempted murder in the second degree--twenty years;

(ii) Where the instant conviction is for a class A felony--thirteen years, four months;

(iii) Where the instant conviction is for a class B felony--six years, eight months; and

(iv) Where the instant conviction is for a class C felony offense enumerated above--three years, four months; and

(c) Three or more prior felony convictions:

(i) Where the instant conviction is for murder in the second degree or attempted murder in the second degree--thirty years;

(ii) Where the instant conviction is for a class A felony--twenty years;

(iii) Where the instant conviction is for a class B felony--ten years; and

(iv) Where the instant conviction is for a class C felony offense enumerated above--five years.

* * *

Section 706-656 Terms of imprisonment for first and second degree murder and attempted first and second degree murder.

(1) Persons eighteen years of age or over at the time of the offense who are convicted of first degree murder or first degree attempted murder shall be sentenced to life imprisonment without the possibility of parole.

As part of such sentence, the court shall order the director of public safety and the Hawaii paroling authority to prepare an application for the governor to commute the sentence to life imprisonment with parole at the end of twenty years of imprisonment; provided that persons who are repeat offenders under section 706-606.5 shall serve at least the applicable mandatory minimum term of imprisonment.

Persons under the age of eighteen years at the time of the offense who are convicted of first degree murder or first degree attempted murder shall be sentenced to life imprisonment with the possibility of parole.

(2) Except as provided in section 706-657, pertaining to enhanced sentence for second degree murder, persons convicted of second degree murder and attempted second degree murder shall be sentenced to life imprisonment with

possibility of parole. The minimum length of imprisonment shall be determined by the Hawaii paroling authority; provided that persons who are repeat offenders under section 706-606.5 shall serve at least the applicable mandatory minimum term of imprisonment.

If the court imposes a sentence of life imprisonment without possibility of parole pursuant to section 706-657, as part of that sentence, the court shall order the director of public safety and the Hawaii paroling authority to prepare an application for the governor to commute the sentence to life imprisonment with parole at the end of twenty years of imprisonment; provided that persons who are repeat offenders under section 706-606.5 shall serve at least the applicable mandatory minimum term of imprisonment.

Section 706-657 Enhanced sentence for second degree murder.

The court may sentence a person who was eighteen years of age or over at the time of the offense and who has been convicted of murder in the second degree to life imprisonment without the possibility of parole under section 706-656 if the court finds that the murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity or that the person was previously convicted of the offense of murder in the first degree or murder in the second degree in this State or was previously convicted in another jurisdiction of an offense that would constitute murder in the first degree or murder in the second degree in this State. As used in this section, the phrase “especially heinous, atrocious, or cruel, manifesting exceptional depravity” means a conscienceless or pitiless crime which is unnecessarily torturous to a victim and “previously convicted” means a sentence imposed at the same time or a sentence previously imposed which has not been set aside, reversed, or vacated.

Hearings to determine the grounds for imposing an enhanced sentence for second degree murder may be initiated by the prosecutor or by the court on its own motion. The court shall not impose an enhanced term unless the ground therefor has been established at a hearing after the conviction of the defendant and on written notice to the defendant of the ground proposed. Subject to the provision of section 706-604, the defendant shall have the right to hear and controvert the evidence against the defendant and to offer evidence upon the issue.

The provisions pertaining to commutation in section 706-656(2), shall apply to persons sentenced pursuant to this section.

Section 706-660.1 Sentence of imprisonment for use of a firearm, semiautomatic firearm, or automatic firearm in a felony.

(1) A person convicted of a felony, where the person had a firearm in the person's possession or threatened its use or used the firearm while engaged in the commission of the felony, whether the firearm was loaded or not, and whether operable or not, may in addition to the indeterminate term of imprisonment provided for the grade of offense be sentenced to a mandatory minimum term of imprisonment without possibility of parole or probation the length of which shall be as follows:

(a) For murder in the second degree and attempted murder in the second degree--up to fifteen years;

(b) For a class A felony--up to ten years;

(c) For a class B felony--up to five years; and

(d) For a class C felony--up to three years.

The sentence of imprisonment for a felony involving the use of a firearm as provided in this subsection shall not be subject to the procedure for determining minimum term of imprisonment prescribed under section 706-669; provided further that a person who is imprisoned in a correctional institution as provided in this subsection shall become subject to the parole procedure as prescribed in section 706-670 only upon the expiration of the term of mandatory imprisonment fixed under paragraph (a), (b), (c), or (d).

(2) A person convicted of a second firearm felony offense as provided in subsection (1) where the person had a firearm in the person's possession or threatened its use or used the firearm while engaged in the commission of the felony, whether the firearm was loaded or not, and whether operable or not, shall in addition to the indeterminate term of imprisonment provided for the grade of offense be sentenced to a mandatory minimum term of imprisonment without possibility of parole or probation the length of which shall be as follows:

(a) For murder in the second degree and attempted murder in the second degree--twenty years;

(b) For a class A felony--thirteen years, four months;

(c) For a class B felony--six years, eight months; and

(d) For a class C felony--three years, four months.

The sentence of imprisonment for a second felony offense involving the use of a firearm as provided in this subsection shall not be subject to the procedure for determining a minimum term of imprisonment prescribed under section 706-669; provided further that a person who is imprisoned in a correctional institution as provided in this subsection shall become subject to the parole procedure as prescribed in section 706-670 only upon expiration of the term of mandatory imprisonment fixed under paragraph (a), (b), (c), or (d).

(3) A person convicted of a felony, where the person had a semiautomatic firearm or automatic firearm in the person's possession or used or threatened its use while engaged in the commission of the felony, whether the semiautomatic firearm or automatic firearm was loaded or not, and whether operable or not, shall in addition to the indeterminate term of imprisonment provided for the grade of offense be sentenced to a mandatory minimum term of imprisonment without possibility of parole or probation the length of which shall be as follows:

(a) For murder in the second degree and attempted murder in the second degree--twenty years;

(b) For a class A felony--fifteen years;

(c) For a class B felony--ten years; and

(d) For a class C felony--five years.

The sentence of imprisonment for a felony involving the use of a semiautomatic firearm or automatic firearm as provided in this subsection shall not be subject to the procedure for determining a minimum term of imprisonment prescribed under section 706-669; provided further that a person who is imprisoned in a correctional institution as provided in this subsection shall become subject to the parole procedure as prescribed in section 706-670 only upon expiration of the term of mandatory imprisonment fixed under paragraph (a), (b), (c), or (d).

(4) In this section:

"Automatic firearm" has the same meaning defined in section 134-1.

"Firearm" has the same meaning defined in section 134-1 except that it does not include "semiautomatic firearm" or "automatic firearm".

"Semiautomatic firearm" means any firearm that uses the energy of the explosive in a fixed cartridge to extract a fired cartridge and chamber a fresh cartridge with each single pull of the trigger.

Section 706-661 Extended terms of imprisonment.

The court may sentence a person who satisfies the criteria for any of the categories set forth in section 706-662 to an extended term of imprisonment, which shall have a maximum length as follows:

(1) For murder in the second degree--life without the possibility of parole;

(2) For a class A felony--indeterminate life term of imprisonment;

(3) For a class B felony--indeterminate twenty-year term of imprisonment; and

(4) For a class C felony--indeterminate ten-year term of imprisonment.

When ordering an extended term sentence, the court shall impose the maximum length of imprisonment. The minimum length of imprisonment for an extended term sentence under paragraphs (2), (3), and (4) shall be determined by the Hawaii paroling authority in accordance with section 706-669.

Section 706-662 Criteria for extended terms of imprisonment.

A defendant who has been convicted of a felony may be subject to an extended term of imprisonment under section 706-661 if it is proven beyond a reasonable doubt that an extended term of imprisonment is necessary for the protection of the public and that the convicted defendant satisfies one or more of the following criteria:

(1) The defendant is a persistent offender in that the defendant has previously been convicted of two or more felonies committed at different times when the defendant was eighteen years of age or older;

(2) The defendant is a professional criminal in that:

(a) The circumstances of the crime show that the defendant has knowingly engaged in criminal activity as a major source of livelihood; or

(b) The defendant has substantial income or resources not explained to be derived from a source other than criminal activity;

(3) The defendant is a dangerous person in that the defendant has been subjected to a psychiatric or psychological evaluation that documents a significant history of dangerousness to others resulting in criminally violent conduct, and this history makes the defendant a serious danger to others. Nothing in this section precludes the introduction of victim-

related data to establish dangerousness in accord with the Hawaii rules of evidence;

(4) The defendant is a multiple offender in that:

(a) The defendant is being sentenced for two or more felonies or is already under sentence of imprisonment for any felony; or
(b) The maximum terms of imprisonment authorized for each of the defendant's crimes, if made to run consecutively, would equal or exceed in length the maximum of the extended term imposed or would equal or exceed forty years if the extended term imposed is for a class A felony;

(5) The defendant is an offender against the elderly, handicapped, or a minor eight years of age or younger in that:

(a) The defendant attempts or commits any of the following crimes: murder, manslaughter, a sexual offense that constitutes a felony under chapter 707, robbery, felonious assault, burglary, or kidnapping; and
(b) The defendant, in the course of committing or attempting to commit the crime, inflicts serious or substantial bodily injury upon a person who has the status of being:

(i) Sixty years of age or older;
(ii) Blind, a paraplegic, or a quadriplegic; or
(iii) Eight years of age or younger; and

the person's status is known or reasonably should be known to the defendant; or

(6) The defendant is a hate crime offender in that:

(a) The defendant is convicted of a crime under chapter 707, 708, or 711; and
(b) The defendant intentionally selected a victim or, in the case of a property crime, the property that was the object of a crime, because of hostility toward the actual or perceived race, religion, disability, ethnicity, national origin, gender identity or expression, or sexual orientation of any person. For purposes of this subsection, "gender identity or expression" includes a person's actual or perceived gender, as well as a person's gender identity, gender-related self-image, gender-related appearance, or gender-related expression, regardless of whether that gender identity, gender-related self-image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person's sex at birth.

Section 707-701.5 Murder in the second degree.

(1) Except as provided in section 707-701, a person commits the offense of murder in the second degree if the person intentionally or knowingly causes the death of another person; provided that this section shall not apply to actions taken under chapter 327L.

(2) Murder in the second degree is a felony for which the defendant shall be sentenced to imprisonment as provided in section 706-656.

Section 707-710 Assault in the first degree.

(1) A person commits the offense of assault in the first degree if the person intentionally or knowingly causes serious bodily injury to another person.

(2) Assault in the first degree is a class B felony.

Section 707-711 Assault in the second degree.

(1) A person commits the offense of assault in the second degree if:

(a) The person intentionally or knowingly causes substantial bodily injury to another;

(b) The person recklessly causes serious or substantial bodily injury to another;

(c) The person intentionally or knowingly causes bodily injury to a correctional worker, as defined in section 710-1031(2), who is engaged in the performance of duty or who is within a correctional facility;

(d) The person intentionally or knowingly causes bodily injury to another with a dangerous instrument;

(e) The person intentionally or knowingly causes bodily injury to an educational worker who is engaged in the performance of duty or who is within an educational facility. For the purposes of this paragraph, “educational worker” means any administrator, specialist, counselor, teacher, or employee of the department of education or an employee of a charter school; a person who is a volunteer, as defined in section 90-1, in a school program, activity, or function that is established, sanctioned, or approved by the department of education; or a

person hired by the department of education on a contractual basis and engaged in carrying out an educational function;

(f) The person intentionally or knowingly causes bodily injury to any emergency medical services provider who is engaged in the performance of duty. For the purposes of this paragraph, "emergency medical services provider" means emergency medical services personnel, as defined in section 321-222, and physicians, physician's assistants, nurses, nurse practitioners, certified registered nurse anesthetists, respiratory therapists, laboratory technicians, radiology technicians, and social workers, providing services in the emergency room of a hospital;

(g) The person intentionally or knowingly causes bodily injury to a person employed at a state-operated or -contracted mental health facility. For the purposes of this paragraph, "a person employed at a state-operated or -contracted mental health facility" includes health care professionals as defined in section 451D-2, administrators, orderlies, security personnel, volunteers, and any other person who is engaged in the performance of a duty at a state-operated or -contracted mental health facility;

(h) The person intentionally or knowingly causes bodily injury to a person who:

(i) The defendant has been restrained from, by order of any court, including an ex parte order, contacting, threatening, or physically abusing pursuant to chapter 586; or

(ii) Is being protected by a police officer ordering the defendant to leave the premises of that protected person pursuant to section 709-906(4), during the effective period of that order;

(i) The person intentionally or knowingly causes bodily injury to any firefighter or water safety officer who is engaged in the performance of duty. For the purposes of this paragraph, "firefighter" has the same meaning as in section 710-1012 and "water safety officer" means any public servant employed by the United States, the State, or any county as a lifeguard or person authorized to conduct water rescue or ocean safety functions;

(2) Assault in the second degree is a class C felony.

Section 707-720 Kidnapping.

(1) A person commits the offense of kidnapping if the person intentionally or knowingly restrains another person with intent to:

(a) Hold that person for ransom or reward;

(b) Use that person as a shield or hostage;

(c) Facilitate the commission of a felony or flight thereafter;

(d) Inflict bodily injury upon that person or subject that person to a sexual offense;

(e) Terrorize that person or a third person;

(f) Interfere with the performance of any governmental or political function; or

(g) Unlawfully obtain the labor or services of that person, regardless of whether related to the collection of a debt.

(2) Except as provided in subsection (3), kidnapping is a class A felony.

(3) In a prosecution for kidnapping, it is a defense which reduces the offense to a class B felony that the defendant voluntarily released the victim, alive and not suffering from serious or substantial bodily injury, in a safe place prior to trial.

Section 708-840 Robbery in the first degree.

(1) A person commits the offense of robbery in the first degree if, in the course of committing theft or non-consensual taking of a motor vehicle:

(a) The person attempts to kill another or intentionally or knowingly inflicts or attempts to inflict serious bodily injury upon another;

(b) The person is armed with a dangerous instrument or a simulated firearm and:

(i) The person uses force against the person of anyone present with intent to overcome that person's physical resistance or physical power of resistance; or

(ii) The person threatens the imminent use of force against the person of anyone present with intent to compel acquiescence to the taking of or escaping with the property;

(c) The person uses force against the person of anyone present with the intent to overcome that person's physical resistance or physical power of resistance during an emergency period proclaimed by the governor or mayor pursuant to chapter 127A, within the area covered by the emergency or disaster; or

(d) The person threatens the imminent use of force against the person of anyone present with intent to compel acquiescence to the taking of or escaping with the property during an emergency period proclaimed by the governor or mayor pursuant to chapter 127A, within the area covered by the emergency or disaster.

(2) As used in this section:

"Dangerous instrument" means any firearm, whether loaded or not, and whether operable or not, or other weapon, device, instrument, material, or substance, whether animate or inanimate, which in the manner it is used or threatened to be used is capable of producing death or serious bodily injury.

"Simulated firearm" means any object that:

(a) Substantially resembles a firearm;

(b) Can reasonably be perceived to be a firearm; or

(c) Is used or brandished as a firearm.

(3) Robbery in the first degree is a class A felony.

Hawai`i Rules of Penal Procedure

Rule 48. Dismissal.

(a) By prosecutor. The prosecutor may by leave of court file a dismissal of a charge and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

(b) By court. Except in the case of traffic offenses that are not punishable by imprisonment, the court shall, on motion of the defendant, dismiss the charge, with or without prejudice in its discretion, if trial is not commenced within 6 months:

(1) from the date of arrest if bail is set or from the filing of the charge, whichever is sooner, on any offense based on the same conduct or arising from the same criminal episode for which the arrest or charge was made; or

(2) from the date of re-arrest or re-filing of the charge, in cases where an initial charge was dismissed upon motion of the defendant; or

(3) from the date of mistrial, order granting a new trial or remand, in cases where such events require a new trial.

Clauses (b)(1) and (b)(2) shall not be applicable to any offense for which the arrest was made or the charge was filed prior to the effective date of the rule.

(c) Excluded periods. The following periods shall be excluded in computing the time for trial commencement:

(1) that delay the commencement of trial and are caused by collateral or other proceedings concerning the defendant, including but not limited to penal irresponsibility examinations and periods during which the defendant is incompetent to stand trial, pretrial motions, interlocutory appeals and trials of other charges;

(2) periods that delay the commencement of trial and are caused by congestion of the trial docket when the congestion is attributable to exceptional circumstances;

(3) periods that delay the commencement of trial and are caused by a continuance granted at the request or with the consent of the defendant or defendant's counsel;

(4) periods that delay the commencement of trial and are caused by a continuance granted at the request of the prosecutor if:

(i) the continuance is granted because of the unavailability of evidence material to the prosecution's case, when the prosecutor has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will be available at a later date; or

(ii) the continuance is granted to allow the prosecutor additional time to prepare the prosecutor's case and additional time is justified because of the exceptional circumstances of the case;

(5) periods that delay the commencement of trial and are caused by the absence or unavailability of the defendant;

(6) the period between a dismissal of the charge by the prosecutor to the time of arrest or filing of a new charge, whichever is sooner, for the same offense or an offense required to be joined with that offense;

(7) a reasonable period of delay when the defendant is joined for trial

with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance; and

(8) other periods of delay for good cause.

(d) Per se excludable and includable periods of time for purposes of subsection (c)(1) of this rule.

(1) For purposes of subsection (c)(1) of this rule, the period of time, from the filing through the prompt disposition of the following motions filed by a defendant, shall be deemed to be periods of delay resulting from collateral or other proceedings concerning the defendant: motions to dismiss, to suppress, for voluntariness hearing heard before trial, to sever counts or defendants, for disqualification of the prosecutor, for withdrawal of counsel including the time period for appointment of new counsel if so ordered, for mental examination, to continue trial, for transfer to the circuit court, for remand from the circuit court, for change of venue, to secure the attendance of a witness by a material witness order, and to secure the attendance of a witness from without the state.

(2) For purposes of subsection (c)(1) of this rule, the period of time, from the filing through the prompt disposition of the following motions or court papers, shall be deemed not to be excluded in computing the time for trial commencement: notice of alibi, requests/motions for discovery, and motions in limine, for voluntariness hearing heard at trial, for bail reduction, for release pending trial, for bill of particulars, to strike surplusage from the charge, for return of property, for discovery sanctions, for litigation expenses and for depositions.

(3) The criteria provided in section (c) shall be applied to motions that are not listed in subsections(d)(1) and (d)(2) in determining whether the associated periods of time may be excluded in computing the time for trial commencement.

Rule 52 Harmless error and plain error.

(a) Harmless error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF RELATED CASES

Co-defendant Ranier Ines has an appeal pending before this Court in CAAP-20-0000589, arising out of the same Circuit Court case, 1PC161001176.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing will be served on the following individual by U.S. Mail or personal delivery:

Walter J. Rodby, Esq.
733 Bishop Street, # 2302
Honolulu, HI 96813

DATED: Honolulu, Hawaii, October 14, 2020.

/s/ William K. Li
WILLIAM K. LI
ATTORNEY FOR DEFENDANT-APPELLANT