S.C.W.C.-20-0000175

THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff- Appellee-Respondent, vs BRANDON FETU LAFOGA, Defendant-Appellant/Appellee, and RANIER INES, Defendant-Appellant/Appellee-Petitioner.	1PC161001176 CAAP-20-0000175 CAAP-20-0000589 (this case being consolidated into the above-noted appeal ending 0175 (*see* CAAP-20-0000589, dkt 94 OCON)

PETITIONER RANIER INES' REPLY TO RESPONDENT'S DKT 11, RAC

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PETITIONER RANIER INES' REPLY TO RESPONDENT'S DKT 11, RAC[1]

I. The Intermediate Court of Appeals erred by finding that Petitioner's right to a fair trial was not violated despite the Court's partially-anonymous-jury procedure.

Respondent first argues that the *sua sponte*, partially-anonymous jury procedure was Petitioner's idea. Dkt 11, RAC at 4 ("the procedure of which Petitioner now complains on appeal was, in fact, suggested by Petitioner's counsel."). Wrong. Neither party had any reservations that alleged gang-membership by Petitioner's co-defendant would cause any juror issues. This was wholly a Court worry only. What is more, there was no evidence at all that this was, or should have been, a valid concern of the Court. Finally, Respondent's argument fails to note that said suggestion from Petitioner's counsel only came after the Court had dealt with Petitioner's objection to the jury process. *See* CAAP-20-0000589 dkt 40, 11.1.2019 at 40-41. Therefore, Respondent is not just wrong, but completely inappropriate where it attempts to place the blame for this bogus process on the innocent-until-proven-guilty defendant.

Next, regarding this *sua sponte*, partially-anonymous jury procedure, Respondent argues *Villeza* as standing for the proposition that a less-than-fully-anonymous jury process does not implicate the requirements of *Samonte*. Dkt 11, RAC at 4 ((("The Hawai'i Supreme Court did not regard the partial redaction of jurors' home street addresses and home/work telephone numbers as creating an "anonymous jury" situation.) (*citing State v. Villeza*, 85 Hawai'i at 266, 942 P.2d at 530.)). Wrong. First, *Villeza* never states that a less-than-fully-anonymous jury process does not still require compliance with *Samonte*. Second, the processes in *Villeza* versus in *Samonte* were much different, requiring differing conclusions. In *Villeza*, all that was redacted from the juror forms was street address and telephone. *Villeza*, at 266, 942 P.2d at 530. The defendant, crucially, still had the names of the jurors; whereas, in *Samonte*, the first names of the jurors were redacted, along with street/phone redactions as well. *Id.* (*see* fn9). Therefore, even if *Villeza* does not require compliance with *Samonte* in certain circumstances, as Respondent argues, still, our case is more similar to *Samonte* given that the partial redactions included juror name redactions as was the case in *Samonte*. Therefore, *Samonte* still requires compliance, of which the Lower Court offered none. Finally, if indeed *Samonte* is inapplicable

[1] Citations to the CAAP-20-0000589 docket ("CAAP-20-0000589 dkt") and the 1PC161001176 ("PC dkt") will be to the pdf page number, unless otherwise indicated.

to the case at bar, as Respondent argues, then why did the Intermediate Court of Appeals ("ICA") go to great lengths to analyze the *sua sponte*, partially-anonymous jury procedure under *Samonte*? *See* CAAP-20-0000589 dkt 100, OP at 22-23. Again, this cuts against Respondent's arguments that *Samonte* is of no consequence given the facts of the case.

Respondent also argues that "Petitioner is unable to show how redacting the jurors' [names][2] from the juror summons cards affected his right to a fair trial." Dkt 11, RAC at 4. Wrong. Petitioner argued time and again that the lack of the names ensured that Petitioner would be unable, in any respect, to assist his counsel in reviewing background and conflict information relating to the potential jurors to ensure a fair jury pool. This is the exact harm the *Samonte* and statutory rules are meant to curb. *See State v. Villeza*, 85 Haw. 258, 266 (Haw. 1997) ("The statute also protects a criminal defendant's constitutional guarantees of a presumption of innocence and an impartial jury.").

Also damning to Respondent's case is the fact that Respondent failed to address Petitioner's arguments regarding *Hilario* as standing for the proposition that a defendant is constitutionally required to have meaningful participation with his counsel at all stages of a proceeding, even at jury selection. Indeed, here, Petitioner's inability to assist his counsel due to the *sua sponte*, partially-anonymous jury procedure, is a fraternal twin to the situation in *Hilario* where the defendant was not allowed to assist counsel in questioning jurors at bench conferences.

Finally, Respondent argues that "the ICA concluded that the record does not show that Petitioner was prejudiced by the procedure[…]" Dkt 11, RAC at 5. This is not fatal to Petitioner's argument, however. Indeed, in *Hilario*, discussed above, there likewise was no indication that any specific prejudice adhered to the defendant from the bogus procedure <u>other than his inability to assist counsel</u>. *State v. Hilario*, 394 P.3d 776, 785 (Haw. Ct. App. 2017) (noting that the ICA only had this to say of Hilario's 'specific' prejudice: "we cannot say that Hilario's absence from those sidebars did not affect his ability to participate in the jury selection.").

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[2] Respondent had stated that the forms had the telephone numbers and addresses redacted, but it appears that this is a typo as the main issue in the case was the name redactions, not the addresses, etc.

Therefore, based on the above, the arguments advanced at trial and on direct appeal, and the arguments in Petitioner's Application, this Court should accept certiorari, vacate the relevant orders, and remand for a new trial with a standard jury selection process.

II. The Intermediate Court of Appeals erred by affirming the Circuit Court's extended term instruction to the jury despite said instruction being "materially false[,]" "inaccurate[,]" "prejudicially deceptive[,] and misleading."

Regarding the lower court's extended term jury instructions, Respondent misses the point of Petitioner's argument where Respndnet writes that the jury instructions "correctly informed the jury in basic and understandable terms the effect an extended sentence has on the various terms of imprisonment[,]" and where Respondent writes that Petitioner "fails to demonstrate how such language was erroneous or misleading to a layperson, particularly with respect to the possible term of imprisonment." Dkt 11, RAC at 9. In this case, Petitioner had objected to the Court's instruction to the jury that they must decide whether it is necessary for the protection of the public to extend the sentence for Petitioner from a "possible life term" of imprisonment to a "definite life term" of imprisonment. *See* dkt 21, 12.6.2019 at 16. Regarding Respondent's first contention, while this language informs of the effect of the extended term – causing a "definite" life term – it nevertheless does not adequately explain the starting point. Indeed, the extended term only applies where it is necessary to protect the public. How can the jury even attempt this analysis without an accurate picture of the starting point? Here, the starting point is incorrectly portrayed where the jury was informed that Petitioner only was under a "possible" life term. This is not correct. He never received a "possible" life term. He received a "life term". That is it. Therefore, the lower court should have correctly instructed on this point. Failure to do so could cause jurors to believe Petitioner received a less-than-life term, thereby leading them to be more inclined to extend the term. This is wrong and requires vacation of the conviction and a new extended term trial.

III. The Intermediate Court of Appeals erred by affirming the lower court's imposition of an illegally enhanced sentence on Petitioner.

Respondent, regarding this allegation of error by the ICA, merely relies on its arguments from its ICA brief. Dkt 11, RAC at 10 ("Respondent relies on its response submitted in its AB"). Because of this, Respondent fails, in any respect, to meet Petitioner's arguments that Attempted Murder 2 was conspicuously and intentionally withheld from Hawaii Revised Statutes' ("HRS")

extended sentencing statute, HRS § 706-661. Indeed, while Respondent's ICA brief argued that § 706-661 should be read together with § 705-502, it never considered that said argument cuts both ways because § 706-661 would likewise have to be read together with § 701-107. That section, § 701-107, specifically notes that "[f]elonies include murder in the first and second degrees, attempted murder in the first and second degrees, and the following three classes: class A, class B, and class C[,]" while the extended sentence statute conspicuously does not mention attempted murder at all. *Compare* HRS § 701-107 to HRS § 706-661. Principals of statutory construction dictate that if attempted murder was conspicuously included in the former, and conspicuously excluded from the latter, then this choice was intentional by the legislature, and "attempt" is not eligible therefore for said extension. Based on the above, this Court should find that the ICA and Lower Court both erred, vacate the relevant orders/judgement, and remand for resentencing without the extended term.

IV. The Intermediate Court of Appeals erred by failing to find the indictment insufficient where the underlying statute is defective for failing to give adequate notice of an extended term.

Petitioner argues that because HRS §706-661 does not mention attempted murder at all, the indictment itself, referencing said statute as possibly applying to Petitioner, was defective as it failed to adequately apprise Petitioner of potential penalties against him. Respondent argues that "there is a 'presumption of validity,' for charges challenged subsequent to conviction." Dkt 11, RAC at 11 (*citing State v. Wheeler*, 121 Haw. 383, 399, (2009)). Even if this Court applies said 'presumption of validity', still that does not mean the charge is beyond reproach. Indeed, *Wheeler* itself, cited by Respondent re the presumption, notes two cases - *State v. Ruggiero*, 114 Hawai'i 227, 160 P.3d 703 (2007) and *State v. Kekuewa*, 114 Hawai'i 411, 163 P.3d 1148 (2007) – both of which are examples of cases where the charge was still held insufficient even where the charge was not challenged until post-trial. *Wheeler*, at 396-399.

Indeed, in the case at bar, the prejudice to Petitioner is simple and clear. The charge advised Petitioner that he "may" be subject to § 706-661 enhanced sentencing (PC dkt 1, IND at 4), but, on turning to said statute, Petitioner was informed of nothing because the statute does not list 'attempt' as being subject to said enhancement. This is akin to a citizen being convicted of speeding on a road that has no speed-limit signs. This is error, and based on the above, this

Court should vacate the relevant orders and judgements and remand with instructions to resentence without the extension.

CONCLUSION

Based on the above, this Court should accept certiorari, vacate the ICA's judgment on appeal, vacate the lower court's judgment of conviction and sentence, and remand for a new trial or new sentencing given the improper juror-anonymity procedure, the improper denial of Petitioner's requested lesser-included offenses, the improper instructions relating to the enhanced sentence, the illegal sentence imposed, and the insufficient charge.

DATED: Kahala, HI, September 20, 2022,

KAI LAWRENCE
Court-Appointed Counsel for Petitioner