SCWC-20-0000175

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

STATE OF HAWAI‘I, Respondent/Plaintiff-Appellee, vs. RANIER INES, also known as Schizo, Petitioner/Defendant-Appellant, and BRANDON FETU LAFOGA, Defendant-Appellee.	CASE NO. 1PC161001176 RESPONSE TO PETITIONER RANIER INES’ APPLICATION FOR WRIT OF CERTIORARI INTERMEDIATE COURT OF APPEALS HONORABLE LISA M. GINOZA Chief Judge HONORABLE KATHERINE G. LEONARD HONORABLE KAREN T. NAKSONE Associate Judges

RESPONSE TO PETITIONER RANIER INES’
APPLICATION FOR A WRIT OF CERTIORARI

and

CERTIFICATE OF SERVICE

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RESPONSE TO PETITIONER RANIER INES'
APPLICATION FOR A WRIT OF CERTIORARI

I.

INTRODUCTION

Respondent/Plaintiff-Appellee STATE OF HAWAI'I ("Respondent"), by and through its attorneys Steven S. Alm, Prosecuting Attorney, and Stephen K. Tsushima, Deputy Prosecuting Attorney, for the City and County of Honolulu, State of Hawai'i, pursuant to Hawai'i Rules of Appellate Procedure ("HRAP") Rule 40.1(e) (2022), respectfully submits this Response to Petitioner Ranier Ines' Application for a Writ of Certiorari ("Application") filed on August 18, 2022, for a review of the Hawai'i Intermediate Court of Appeals ("ICA")'s Opinion of the Court by Nakasone, J. filed on April 27, 2022, in State v. Ines, CAAP-20-0000589 (Haw.App. April 27, 2022) ("Opinion"). See, Appendix "A" of Application.

II.

STATEMENT OF REASONS
WHY THE APPLICATION SHOULD NOT BE ACCEPTED

A. Petitioner has not demonstrated the need for further appeal.

Respondent submits that Petitioner/Defendant-Appellant RANIER INES, also known as Schizo ("Petitioner")'s Application should not be accepted because he has not demonstrated the ICA's Opinion, reflects the required "[g]rave errors of law or of fact" that dictates the need for further appeal. See, Hawai'i Revised Statutes ("HRS") § 602-59(b) (2016 Repl.).

In the "QUESTIONS PRESENTED" section of Petitioner's Application, he advances the following questions:

I. Did the ICA err in finding that Petitioner's Statutory and Constitutional Rights were not violated despite a partially-anonymous jury procedure that was unsupported by a need for such under the factors enumerated in *Samonte*?
II. Did the ICA err in affirming the Lower Court's finding a) that Conspiracy to Commit Assault is not a lesser included offense of Conspiracy to Commit Murder 2nd, and b) that Assault is not a lesser included offense of Accomplice to Attempted Murder 2nd?
III. Did the ICA err in affirming the prejudicially misleading instructions to the jury regarding enhanced sentencing from a "possible" life term to a "definite" life term?
IV. Did the ICA err in concluding that Accomplice to Attempted Murder 2nd is eligible for § 706-661 enhanced sentencing despite said charge not being one of the charges enumerated under the statute and despite such never having been pled in the indictment?
V. If Accomplice to Attempted Murder 2nd is eligible for § 706-661 sentencing, is a charge prejudicially insufficient where it fails to include notice of § 705-502?

Application at 1; JEFS Dkt. #1, PDF at 4.

In this case, the ICA held that the circuit court's "modified jury selection procedure of referring to the jurors by number and not by name, and of withholding the jurors' names and information from the defendants but not from their counsels, did not constitute plain error under the circumstances of this case." Opinion at 4. Additionally, the ICA concluded that the offenses of Assault in the First Degree, Conspiracy to Commit Assault in the First Degree, Assault in the Second Degree, Conspiracy to Commit Assault in the Second Degree, Assault in the Third Degree, and Conspiracy to Commit Assault in the Third Degree are not included offenses of Accomplice to Attempted Murder or Conspiracy to Commit Murder under HRS § 701-109(4)(a). Opinion at 38-39. Furthermore, the ICA concluded that the extended jury instruction which had the jury consider whether the defendant's sentences should be extended "from a possible life term of imprisonment to a definite life term of imprisonment" was consistent with State v. Keohokapu, 127 Hawai'i 91, 276 P.3d 660 (2012), and were not inaccurate or misleading. Opinion at 45. Lastly, the ICA "also conclude[d] that the extended sentencing statute, HRS § 706-661(1), does apply to Attempted Murder in the Second Degree." Opinion at 4. Consequently, the ICA affirmed Petitioner's September 2, 2020 Amended Judgment of Conviction and Sentence, Notice of Entry. See generally, Opinion.

During portions of his Application, Petitioner essentially puts forth the same arguments he raised in his unsuccessful Opening Brief of Defendant-Appellant ("OB) and Reply Brief of Defendant-Appellant ("RB") before the ICA with respect to the above issues. Where Petitioner merely repeats his prior arguments, Respondent likewise relies on its responses submitted in the Answering Brief of the State of Hawai'i ("AB"), JEFS Dkt. #72 in State v. Ines, CAAP-20-0000589, filed with the ICA on June 4, 2021.

1. The trial court did not violate Petitioner's fundamental right to a fair trial where it redacted jurors' telephone numbers and street addresses from the juror summons cards and explained to the jurors that they would be referred to by number and not by name.

In his first question presented to this Court, Petitioner asks, "Did the ICA err in finding that Petitioner's Statutory and Constitutional Rights were not violated despite a partially-anonymous jury procedure that was unsupported by a need for such under the factors enumerated in *Samonte*?" Application at 1; JEFS Dkt. #1, PDF at 4. At the outset, Respondent points out that Petitioner's complaint with respect to the circuit court's jury procedure appears disingenuous given that the procedure that resulted from the parties' discussion regarding such was suggested by Petitioner's trial counsel. During said discussion, Petitioner's trial counsel stated, "I understand [the trial court's] 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." Opinion at 15. Thus, the record shows that the procedure of which Petitioner now complains on appeal was, in fact, suggested by Petitioner's counsel. Furthermore, as noted by the ICA, at the conclusion of the parties' discussion regarding the matter, Petitioner's trial counsel explicitly stated that the procedure she suggested would "take[] care of all the concerns." See, Opinion at 15. Therefore, in this case, Petitioner's trial counsel expressed satisfaction with the jury procedure which was agreed upon by the parties and did not convey any concern that Petitioner would be negatively impacted by it. Under these circumstances, Respondent submits this issue should be deemed waived by this Honorable Court. See, State v. Fagaragan, 115 Hawai'i 364, 367-368, 167 P.3d 739, 742-743 (App. 2007) ("Normally, an issue not preserved at trial is deemed to be waived.").

Moreover, Petitioner mischaracterizes the circuit court's jury procedure as empaneling an anonymous jury and relies upon State v. Samonte, 83 Hawai'i 507, 928 P.2d 1 (1996). However, as pointed out in Respondent's AB, the trial court's redaction of telephone numbers and street addresses in the instant case is more akin to the procedure followed in State v. Villeza, 85 Hawai'i 258, 942 P.2d 522 (1997) where the Hawai'i Supreme Court held that the trial court did not err in redacting jurors' home street addresses and home/work telephone numbers from the juror qualification forms. 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. Villeza, 85 Hawai'i at 266, 942 P.2d at 530. The Villeza Court, therefore, concluded that the Samonte analysis was not directly applicable. See, Villeza, 85 Hawai'i at 266, fn. 9, 942 P.2d at 530, fn.9. The Hawai'i Supreme Court held that "no danger to Villeza's right to a presumption of innocence and an impartial jury was created by the redaction of only the street addresses and telephone numbers of potential jurors." *Id*. Furthermore, the Villeza Court concluded that

> . . . [t]his redaction did not "raise the specter" that Villeza was a dangerous person so as to endanger his presumption of innocence. Further, because all other vital information regarding the potential jurors was provided to Villeza, the risk of selecting an impartial jury was kept to a minimum. Thus, even under a *Samonte* analysis, the trial court's redaction would be upheld.

Id. Similarly, this reviewing court should conclude that the trial court's redaction of the jurors' telephone numbers and street addresses from the juror summons card did not create an "anonymous jury" situation. Like in Villeza, the Samonte analysis is not directly applicable here. Of significance, however, Petitioner is unable to show how redacting the jurors' telephone numbers and street addresses from the juror summons cards affected his right to a fair trial.

Petitioner, nevertheless, claims the circuit court's jury procedure violated HRS § 612-18(c) and his right to a fair trial because he personally had no information regarding any of the potential jurors, including name and background information (although Petitioner acknowledges

that his trial counsel was provided such information). However, in Villeza, the Hawai'i Supreme Court held that "[t]he partial redaction of the juror qualifications forms did not amount to a substantial failure to comply with HRS Chapter 612." Villeza, 85 Hawai'i at 264, 942 P.2d at 528. "[T]o obtain relief under HRS § 612-23, the moving party must show a *substantial* failure to comply with the law and that the party has been prejudiced thereby." Villeza, 85 Hawai'i at 265, 942 P.2d at 529 (quotation marks, brackets and citation omitted). Here, the ICA noted that "no motion for relief was filed, as required by HRS § 612-23(a) and (c)." State v. Ines, CAAP-20-0000589 at 28. Notably, the ICA concluded that in any event "relief would not be warranted because the non-compliance with HRS 612-18(c) was not substantial, where defense counsels had the jurors' names and information, and where Petitioner was present during the entire jury selection questioning." *Id*. Petitioner claims that the potential impact of the circuit court's jury procedure was substantial "given that Petitioner had no ability to glean background information or conflict information about the judges-of-the-facts in his case." Application at 8. However, Petitioner ignores or overlooks that he was able to "glean background information or conflict information" for purposes of jury selection through other means, to wit, his trial counsel had the jurors' names and information in order to do background investigation and Petitioner, himself, was present during the entire jury selection questioning. Petitioner fails to demonstrate what further insight into the jurors he was unable to obtain under these circumstances. Furthermore, the record shows Petitioner never expressed any concerns with the potential or empaneled jurors at any point before, during, or after trial. Here, Petitioner fails to demonstrate that the circuit court's jury procedure amounted to a substantial failure to comply with HRS § 612-23, or significantly, that he was prejudiced by such procedure. As such, Petitioner has failed to show his right to a fair trial was violated.

In this case, the ICA concluded that the record does not show that Petitioner was prejudiced by the procedure, in light of the neutral manner in which the procedure was implemented and explained to both the prospective jurors and the trial jurors who were ultimately selected. Under the circumstances of this case, Respondent submits this Honorable Court should find that Petitioner's right to a fair trial was not violated, and thus, the circuit court's jury procedure did not constitute plain error.

2. The trial court did not err in refusing to instruct the jury with respect to the offenses of assault in the first degree, conspiracy to commit assault in the first degree, assault in the second degree, conspiracy to commit assault in the second degree, assault in the third degree, or conspiracy to commit assault in the third degree.

In his second question presented to this Court, Petitioner asks, "Did the ICA err in affirming the Lower Court's finding a) that Conspiracy to Commit Assault is not a lesser included offense of Conspiracy to Commit Murder 2nd, and b) that Assault is not a lesser

included offense of Accomplice to Attempted Murder 2nd?" Application at 1; JEFS Dkt. #1, PDF at 4. Here, Petitioner fails to demonstrate that the ICA gravely erred in concluding that the assault offenses are not included offenses for Accomplice to Attempted Murder under HRS § 701-109(4)(a), and that Conspiracy to Commit Assault 1, 2, and 3 are not included offenses under HRS § 701-109(4)(a) for Conspiracy to Commit Murder.

In this case, the ICA agreed with the trial court that Conspiracy to Commit Assault is not a lesser included offense of Conspiracy to Commit Murder 2nd, and that Assault is not a lesser included offense of Accomplice to Attempted Murder 2nd. See, Opinion at 38-39. The ICA noted that "[a]n offense is included under HRS § 701-109(4)(a) when it is established by proof of the same or less than all of the facts required to prove the charged offense. 'The general rule is that an offense is included if it is impossible to commit the greater without also committing the lesser.'" Opinion at 39 (citation omitted). Petitioner's claim that "[t]his analysis overlooks the following very important point: yes, assault requires bodily injury, but so does murder[,]" Application at 8 (emphasis omitted), demonstrates Petitioner's misunderstanding of the analysis by the ICA. Significantly, in its analysis, the ICA points out that "[a]n Accomplice to Attempted Murder offense *does not require proof of bodily injury*; rather, in this case the State was required to prove the conduct of aiding or agreeing or attempting to aid another person in *the planning or commission of the target offense of Attempted Murder*." Opinion at 39-40 (emphases added). As such, "it is possible, rather than "impossible," to commit the greater offense of Accomplice to Attempted Murder without also committing the lesser offenses of Assault 1, 2, and 3[.]" Accordingly, the assault offenses are not included offenses for Accomplice to Attempted Murder under HRS § 701-109(4)(a).

Likewise, Conspiracy to Commit Assault 1, 2, and 3 are not included offenses under HRS § 701-109(4)(a) for Conspiracy to Commit Murder. The ICA found,

> . . . "Criminal conspiracy" requires the defendant to "agree[] with one or more persons" that they or one of them "will engage in or solicit" either the conduct or the result of the specific offense, and the commission of "an overt act in pursuance of the conspiracy." HRS § 705-520. Here, [Petitioner] was charged in Count 3 that he and Lafoga "did agree with each other that they or one or more of them would engage in . . . and/or solicit the result specified" in the offense of "Murder in the Second Degree" and that it "was part of said conspiracy that the Defendants would intentionally or knowingly cause the death of Kele Stout." Thus, the Conspiracy to Commit Murder required an agreement by [Petitioner] and Lafoga "to carry out an intentional killing" of Stout, but a Conspiracy to commit an assault "is a different crime essentially entailing an agreement to inflict" some degree of bodily injury "short of death of the victim." . . . Because the offenses are different, it is possible, rather than "impossible," to commit the greater offense of Conspiracy to Commit Murder, without also committing the lesser offenses of Conspiracy to Commit Assault 1, 2, and 3.

Opinion at 40-41 (citations omitted). In this case, Petitioner fails to show that the ICA gravely erred in so finding. Accordingly, Petitioner's claim with respect to instructional error regarding lesser included offenses is without merit.

Moreover, assuming *arguendo*, the assault offenses are included offenses for Accomplice to Attempted Murder under HRS § 701-109(4)(a), and that Conspiracy to Commit Assault 1, 2, and 3 are included offenses under HRS § 701-109(4)(a) for Conspiracy to Commit Murder, the trial court, nevertheless, did not err in refusing to instruct the jurors with respect to such included offenses because there was no rational basis in the evidence for a verdict acquitting Petitioner of the offense of Accomplice to Attempted Murder and Conspiracy to Commit Murder in the Second Degree and convicting him of any included offense.

In this case, Stout testified that Petitioner and the Polynesian male beat him up, Petitioner "with his fists and the other guy with the baseball bat." State v. Ines, CAAP-20-0000589, 11/22/19 Transcript/JEFS Dkt. #35, PDF at 144-146. At some point after the beating, Stout heard Petitioner "order[] somebody to take care of the body." *Id* at 149. When Petitioner heard Stout moving around in the garage, Petitioner and the Polynesian male again started beating on Stout. *Id* at 150. They then threw Stout into the back of the work van. *Id* at 151. Stout testified that he "tried to take control of the situation" and "told [Petitioner] that [he] knew where the key was for the [cash] register in the show room back at the Aloha[.]" *Id* at 152. Stout saw that Petitioner "just shook his head, slammed the door shut." *Id* at 151-152. The Polynesian male proceeded "into the driver's seat and . . . [drove] off without [Petitioner]" in the van. *Id* at 152, 194.

While the Polynesian male continued to drive, he "says that [Stout will] be the first person that he is going to kill, meaning that he knows he's going to regret it." *Id* at 155. Stout told him, "[J]ust let me go, I'll catch the first flight out of here, like no one's gotta know." *Id*. The Polynesian male replied, "[N]o, I can't do that." *Id*. At some point, the Polynesian male pulled to the side of the road and a car drove past, so he proceeded back onto the road until he found "a quiet spot where there's no one around." *Id*.

The Polynesian male then "parked the work van, [and] climb[ed] in between the seats to come into the back." *Id* at 156. He "kinda hesitated over [Stout] for a little bit, [as Stout] could hear him breathing, and then he . . . shot [Stout] right in the face." *Id* at 157. At some point, Stout "realized [he] wasn't dead yet[.]" *Id*. He "was trying to cough everything out and find a way to breathe[, as i]t was very, very hard to breathe." *Id*. While the Polynesian male was driving, "he turn[ed] back and shoots, and [Stout got] hit again." *Id* at 158. Stout realized that the Polynesian male was "going to be shooting [him] the more [he] ma[d]e noise, he realized [Stout was] not dead, so [Stout] tried to muffle the sound of [his] breathing and coughing." *Id*.

Stout testified that "[a]fter being shot in the face, [he] felt [one shot] in [his] torso and then one in [his] butt cheek, and so [he] only recall[e]d three." *Id* at 159.

Stout heard the Polynesian male talking on the phone to someone about "how he was trying to burn the van with [Stout's] body still in it[.]" *Id* at 160. Stout identified State's Exhibit 303 as the photograph depicting the individual that looked like the Polynesian male, except with lighter skin. *Id* at 176-177. Arakaki and DeCosta identified State's Exhibit 303 as a photograph depicting Lafoga. State v. Ines, CAAP-20-0000589, 11/27/19 Transcript/JEFS Dkt. #38, PDF at 20; State v. Ines, CAAP-20-0000589, 12/3/19 Transcript/JEFS Dkt. #19, PDF at 15-16. Based on such evidence adduced at trial, there was no rational basis in the evidence for a verdict acquitting Petitioner of the offense of Accomplice to Attempted Murder and Conspiracy to Commit Murder in the Second Degree and convicting him of any included offense. Accordingly, Petitioner's claim is without merit.

3. The trial court's extended sentencing jury instruction, which was modeled after HAWJIC 19.3.1A and HAWJIC 19.3.4A, was not prejudicially insufficient, erroneous, inconsistent, or misleading.

In his third question presented to this Court, Petitioner asks, "Did the ICA err in affirming the prejudicially misleading instructions to the jury regarding enhanced sentencing from a "possible" life term to a "definite" life term?" Application at 1; JEFS Dkt. #1, PDF at 4. Here, Petitioner essentially puts forth the same arguments he raised in his unsuccessful OB and RB before the ICA with regard to this issue. As such, Respondent relies on its response submitted in its AB, as follows:

In the instant case, at the hearing on extended sentencing, the trial court's jury instruction in question, provided, in pertinent part:

> 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 possible life term of imprisonment to a definite life term of imprisonment, in Counts 4 and 6 from a possible twenty-year term of imprisonment to a possible life term of imprisonment, and in Counts 8 from a possible ten-year term of imprisonment to a possible twenty-year term of imprisonment?

State v. Ines, CAAP-20-0000589, 12/6/19 Transcript/JEFS Dkt. #21, PDF at 83. The trial court appears to have modeled its jury instruction relating to extended sentencing after the Hawai'i Pattern Jury Instructions – Criminal ("HAWJIC") 19.3.1A with regard to Persistent Offender and HAWJIC 19.3.4A with regard to Multiple Offender. See, HAWJIC 19.3.1A[1] and HAWJIC

[1] HAWJIC 19.3.1A reads, in pertinent part:

2. Has the prosecution proved beyond a reasonable doubt that it is necessary for the protection of the public to extend the Defendant's sentence from a [possible five year term of

19.3.4A[2]; see also, State v. Ines, CAAP-20-0000589, 12/6/19 Transcript/JEFS Dkt. #21, PDF at 17 (where the trial court explained, "And the way the interrogatory is drafted tries to boil down the options in its most basic and understandable terms to a layperson. I believe that's the intent when the HAWJIC committee drafted the language for these enhanced sentencings.").

Respondent acknowledges that while the HAWJIC "have been approved for publication, the Hawai'i Supreme Court has not approved the substance of any of the pattern instructions[,]" HAWJIC Introduction, and the appellate courts are not bound by them. State v. Nupeiset, 90 Hawai'i 175, 181 n. 9, 977 P.2d 183, 189, n. 9 (App. 1999). However, the pattern instructions are instructive, in that they contain general language a court may consider when crafting jury instructions. State v. Hattori, 92 Hawai'i 217, 221 n. 5, 990 P.2d 115, 119 n.5 (App. 1999). In State v. Toro, 77 Hawai'i 340, 884 P.2d 403 (App. 1994), the ICA noted that the HAWJIC were "a product of the cooperative effort of judges and attorneys to encompass and to standardize rules of law in jury instructions, [which are] widely used by the circuit courts. However, as a general proposition, the circuit courts are not required to give such instructions." Toro, 77 Hawai'i at 348, 884 P.2d at 411. Accordingly, although the appellate courts are not bound by the pattern jury instructions, they are instructive. Nupeiset, *supra*; Hattori, *supra*.

Here, the trial court's instruction regarding extended sentencing (as well as HAWJIC 19.3.1A and HAWJIC 19.3.4A) correctly informed the jury in basic and understandable terms the effect an extended sentence has on the various terms of imprisonment. Thus, the trial court provided an "understandable instruction that aid[ed] the jury in applying the law to the facts of the case." State v. Sawyer, 88 Hawai'i 325, 330, 966 P.2d 637, 642 (1998). In this case, the trial court's extended sentence jury instruction, which utilizes the language "possible life term of imprisonment to a definite life term of imprisonment," properly explains in basic and understandable terms the effect an extended sentence has on a life term of imprisonment. Indeed, by referring to the non-extended life term of imprisonment as a "possible life term imprisonment," the trial court's instruction seemingly accounted for the possibility of parole. Inasmuch as the trial court's extended sentencing jury instruction specifically references the

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imprisonment] [possible ten year term of imprisonment] [possible twenty year term of imprisonment] [possible life term of imprisonment] to a [possible ten year term of imprisonment] [possible twenty year term of imprisonment] [possible life term of imprisonment] [definite life term of imprisonment]?

[2] HAWJIC 19.3.4A reads, in pertinent part:

2. Has the prosecution proved beyond a reasonable doubt that it is necessary for the protection of the public to extend the Defendant's sentence from a [possible five year term of imprisonment] [possible ten year term of imprisonment] [possible twenty year term of imprisonment] [possible life term of imprisonment] to a [possible ten year term of imprisonment] [possible twenty year term of imprisonment] [possible life term of imprisonment] [definite life term of imprisonment]?

possible amount of *imprisonment* that the defendant may serve, Petitioner fails to explain how doing so is erroneous. Additionally, Petitioner fails to suggest what he claims is the proper instruction that the trial court should have provided in lieu of the instruction in question. Of importance, Petitioner fails to demonstrate how such language was erroneous or misleading to a layperson, particularly with respect to the possible term of imprisonment. In failing to do so, Petitioner has failed to demonstrate he was prejudiced. Consequently, Respondent submits there is nothing about the trial court's instruction that is "prejudicially insufficient, erroneous, inconsistent, or misleading." Valentine, *supra*.

4. The trial court did not abuse its discretion in sentencing Petitioner to the extended sentence of life imprisonment without the possibility of parole for the offense of accomplice to attempted murder in the second degree.

In his fourth question presented to this Court, Petitioner asks, "Did the ICA err in concluding that Accomplice to Attempted Murder 2nd is eligible for § 706-661 enhanced sentencing despite said charge not being one of the charges enumerated under the statute and despite such never having been pled in the indictment?" Application at 1; JEFS Dkt. #1, PDF at 4. Here, once again, Petitioner puts forth essentially the same arguments he raised in his unsuccessful OB and RB before the ICA with regard to this issue. As such, Respondent relies on its response submitted in its AB, as follows:

> HRS § 706-661 provides, in pertinent part:
>
> The court may sentence a person who satisfies the criteria for any of the categories set forth in § 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 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.

A review of HRS § 706-661 reveals that the extended term of imprisonment statute lays out the various extended sentences of imprisonment available to the sentencing court based on the class and grade of the offense, as shown above. In this case, Petitioner claims that HRS § 706-661(1) only applies to murder in the second degree and not to attempted murder in the second degree. OB at 33. However, in so claiming, Petitioner conspicuously overlooks or ignores HRS § 705-502 (2014 Repl.), "Grading of criminal attempt," which states that "[a]n attempt to commit a crime is an offense of the same class and grade as the . . . offense which is attempted." HRS § 705-502. Therefore, based on the plain language of HRS § 705-502, because the offense of Attempted Murder in the Second Degree is the same class and grade as the offense of Murder in the Second Degree, the extended sentence of "life without the possibility of parole" would apply to it. Consequently, Petitioner's claim is without merit.

5. Petitioner's charge was not prejudicially insufficient.

In his fifth question presented to this Court, Petitioner asks, "If Accomplice to Attempted Murder 2nd is eligible for § 706-661 sentencing, is a charge prejudicially insufficient where it fails to include notice of § 705-502?" Application at 1; JEFS Dkt. #1, PDF at 4. At the outset, Respondent points out that Petitioner failed to raise this issue before both the trial court and in his appellate briefing before the ICA. Thus, in advancing his fifth question, Petitioner asks this Court to review this issue raised for the first time on appeal. This Court has applied different principles depending on whether or not an objection was timely raised in the trial court. State v. Wheeler, 121 Haw. 383, 399, 219 P.3d 1170, 1186 (2009). "Under the '*Motta/Wells* post-conviction liberal construction rule,' [this Court] liberally construe[s] charges challenged for the first time on appeal." *Id* (citations omitted). "Under this approach, there is a 'presumption of validity,' for charges challenged subsequent to conviction. In those circumstances, this court will 'not reverse a conviction based upon a defective indictment [or complaint] unless the defendant can show prejudice or that the indictment [or complaint] cannot within reason be construed to charge a crime." *Id* (citations omitted).

Here, as Petitioner acknowledges, the indictment informed Petitioner that he "may be subject to sentencing in accordance with Section 706-661[.]" Application at 12, Dkt. #1, PDF at 15. In so acknowledging, Petitioner concedes he was provided notice with respect to HRS § 706-661 sentencing. Petitioner claims that he "would have naturally concluded that only Murder 2nd qualifies for said enhancement, and not the derivatives of attempted murder and accomplice murder." *Id*. However, Petitioner's misguided reading of HRS § 706-661, standing alone, does not evince that more was required in the charging instrument to constitute notice. Moreover, Petitioner's reliance on Wheeler, *supra*, is misplaced. This is not a case where "the [] charge did not adequately allege [an] element of the offense." Wheeler, 121 Haw. at 386, 219 P.3d at 1173. To the contrary, the indictment in this case was sufficiently specific and provided adequate notice to Petitioner that he may be subject to sentencing in accordance with HRS § 706-661. Significantly, Petitioner fails to demonstrate that he was prejudiced by the exclusion of reference to HRS § 705-502. Accordingly, Petitioner's claim is meritless.

III.

CONCLUSION

Based on the foregoing reasons and authorities, Respondent submits Petitioner's Application should not be accepted because he has not demonstrated the ICA committed any "[g]rave errors of law or of fact[]" that dictate the need for further appeal. See, HRS Section 602-59(b). Accordingly, Respondent asks that this Honorable Court reject Petitioner's Application.

Dated at Honolulu, Hawai'i: September 15, 2022.

Respectfully submitted,

STATE OF HAWAI'I
Respondent/Plaintiff-Appellee

By STEVEN S. ALM
Prosecuting Attorney

By /s/ STEPHEN K. TSUSHIMA
Deputy Prosecuting Attorney
City and County of Honolulu

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

STATE OF HAWAI‘I, Respondent/Plaintiff-Appellee, vs. RANIER INES, also known as Schizo, Petitioner/Defendant-Appellant, and BRANDON FETU LAFOGA, Defendant-Appellee.	CASE NO. 1PC161001176 RESPONSE TO PETITIONER RANIER INES' APPLICATION FOR WRIT OF CERTIORARI INTERMEDIATE COURT OF APPEALS HONORABLE LISA M. GINOZA Chief Judge HONORABLE KATHERINE G. LEONARD HONORABLE KAREN T. NAKSONE Associate Judges

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2022, one (1) copy of the **Response to Petitioner Ranier Ines' Application for a Writ of Certiorari** was served by electronic notification through JEFS to the following:

KAI LAWRENCE @ kailaw.la@gmail.com
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/s/ STEPHEN K. TSUSHIMA
Deputy Prosecuting Attorney
City and County of Honolulu