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Supreme Court  
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NO. SCWC-29623

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, Respondent/Plaintiff-Appellee,

vs.

BEN BALDADO, Petitioner/Defendant-Appellant.

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CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS  
(ICA NO. 29623; CR NO. 06-1-196K)

DISSENT BY ACOBA, J., WITH WHOM MCKENNA, J., JOINS

I would grant the petition for certiorari filed by  
Petitioner/Defendant-Appellant Ben Baldado (Petitioner) on  
October 24, 2011. Plainly, HRPP Rule 24(c)<sup>1</sup> was violated in this

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<sup>1</sup> At the time of trial in this case, Hawai'i Rules of Penal Procedure (HRPP) Rule 24(c) provided that "[a]n alternate juror who does not replace a regular juror shall be discharged when the jury retires to consider its verdict." (Emphasis added.)

case and such violation cannot be said to have been harmless beyond a reasonable doubt under the circumstances.

I.

In State v. Wideman, this court held that HRPP Rule 24(c) is violated by the “substitution of the juror after the jury had retired to consider its verdict.” 69 Haw. 268, 269, 739 P.2d 931, 932 (1987). According to Wideman, HRPP Rule 24(c) embodies a policy of preventing an alternate juror from being “subject to potential undue pressure from the original jury members to reach a conclusion they may have agreed upon during their prior deliberations.” Id. The Intermediate Court of Appeals (ICA) correctly concluded that HRPP Rule 24(c) was violated in this case and the State did not file a petition for writ of certiorari challenging that conclusion.

In his petition, Petitioner challenges the ICA’s conclusion that the violation of HRPP Rule 24(c) was harmless beyond a reasonable doubt. In considering the circumstances in Wideman, this court rejected the State’s argument that the violation of HRPP Rule 24(c) was harmless beyond a reasonable doubt “[i]n view of the conflicting testimony between [the defendant] and the victim, the jury being deadlocked during much of its deliberations, and the lack of an instruction to the new jury to begin its deliberations anew[.]” Wideman, 69 Haw. at 269, 739 P.2d at 932. It is well-established that a violation is

harmless only if "there is no reasonable possibility, that the [violation] may have contributed to [the defendant's] conviction[.]" State v. Domingo, 69 Haw. 68, 70, 733 P.2d 690, 692 (1987).<sup>2</sup>

## II.

There is a reasonable possibility in this case that the violation may have contributed to Petitioner's conviction.

### A.

First, as in Wideman, the jury was deadlocked during its deliberations. Because juries deliberate in secret, it is impossible to know whether the original jury, i.e., the jury that had been deliberating prior to substitution, would not have also found the defendant guilty. However, Wideman's consideration in its analysis of a previously deadlocked jury would seem to reflect a concern that a guilty verdict soon after substitution may suggest that the alternate juror was overcome by the other jurors that had been deliberating prior to the substitution. Wideman, 69 Haw. at 269, 739 P.2d at 932.

Here, on the second day of deliberation, the jury sent the following question to the court: "We as the jury can not come to a unanimous decision, what do we do now?" The jury continued deliberating. Then, on the fourth day of its

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<sup>2</sup> Notably, Wideman specifically cited to Domingo in support of its conclusion that the violation of HRPP Rule 24(c) was not harmless beyond a reasonable doubt.

deliberations, the jury requested an alternate juror because Juror #3, who was pregnant, was "in pain [and] concerned about not having any movement of the child" and her physician "suggested she go into [the] emergency room[.]" Juror #3 was subsequently dismissed after a finding by the court "that Juror #3 was suffering from a viral illness coupled with stress[.]"<sup>3</sup> (Emphasis added.) Less than six hours after deliberations began with the juror that replaced Juror #3 (alternate juror), the jury returned a guilty verdict.

In Wideman, the jury deliberated for two days with the replacement juror before returning its guilty verdict. This court nevertheless held the substitution violated HRPP Rule 24(c) and, under the circumstances, was harmful, remanding for a new trial. Here, to reiterate, on the fourth day of deliberation and after an indication on the second day that it was deadlocked, the jury returned a guilty verdict in less than six hours after substitution with the alternate juror. The foregoing suggests the reasonable possibility that the alternate juror may have been "subject to potential undue pressure from the original jury members to reach a conclusion they may have agreed upon during their prior deliberations." Wideman, 69 Haw. at 269, 739 P.2d at 932. The point is that such questions were resolved by HRPP Rule

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<sup>3</sup> It is notable that the court made a specific finding that in addition to her illness, "stress" prevented Juror #3 from remaining on the panel.

24(c) itself which prevented substitution by an alternate juror after the jury began deliberation, and the facts here do not establish beyond a reasonable doubt the absence of such a reasonable possibility.

B.

Unlike in Wideman, following the replacement of Juror #3, the alternate juror and jury as a whole were instructed to begin deliberations anew. It is generally "presumed that the jury follows the court's instructions." State v. Cardus, 86 Hawai'i 426, 438, 949 P.2d 1047, 1059 (App. 1997) (State v. Samuel, 74 Haw. 141, 149 n.2, 838 P.2d 1374, 1378 n.2 (1992)). But the foregoing presumption is reasonably called into question here by the fact that the jury was previously unable to reach a verdict over four days of deliberation with Juror #3, but then reached a verdict with the alternate juror in less than six hours. Under such circumstances, there is a reasonable possibility that the alternate juror had been overcome by the eleven other jurors that had been deliberating for nearly four days prior to the replacement, and the jury did not actually begin deliberations anew.

C.

Finally, briefly stated, as in Wideman, there is some conflicting testimony in this case. Without reviewing specific countervailing evidence, the lack of the strength of the evidence

in this case would appear somewhat apparent from the fact that the jury was deadlocked at some point during its deliberations and deliberated for nearly four days without reaching a verdict before the alternate juror was substituted. Under the circumstances, it cannot be concluded that "there was no reasonable possibility that the error contributed to [Petitioner]'s conviction." State v. Machado, 109 Hawai'i 445, 453-56, 127 P.3d 941, 949-52 (2006).

III.

In view of the foregoing, this case merits further review and thus, I would accept Petitioner's petition.

DATED: Honolulu, Hawai'i, December 1, 2011.

/s/ Simeon R. Acoba, Jr.

/s/ Sabrina S. McKenna

