IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI, Respondent/Plaintiff-Appellee,

vs.

STEPHEN CRAMER, JR., Petitioner/Defendant-Appellant.

SCWC-11-0000085

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-11-0000085; CR. NO. 07-1-0679(2))

April 29, 2013

CONCURRING OPINION BY ACOBA, J., WITH WHOM POLLACK, J., JOINS

I concur in the vacation and remand of this case,[1] but for the reasons set forth herein, because, pursuant to the Hawaiʻi constitution, some rights are so fundamental that they are not subject to a separate harmless error analysis. The approach set

[1] The majority concludes that the denial of counsel to Petitioner/Defendant-Appellant Stephen Cramer, Jr. (Cramer) was "structural error." Majority's opinion at 20. As a result, the majority concludes that the judgment imposed by the Circuit Court for the Second Circuit (the circuit court) must be vacated, and on remand, Cramer can argue for any potentially applicable sentence. Id. at 22.

forth by the United States Supreme Court in Arizona v. Fulminante, 499 U.S. 279 (1991), and its progeny, based on a dichotomy between "trial" and "structural" error, may be of diminishing viability. Instead, reliance should be placed on the Hawaiʻi constitution and our case law for guidance in deciding whether a particular right is so fundamental that its violation can never be harmless.

I.

A.

State v. Suka, 79 Hawaiʻi 293, 901 P.2d 1272 (App. 1995), cert. denied, 79 Hawaiʻi 341, 902 P.2d 976 (1995), sets forth the categories Hawaiʻi courts have developed through case law in addressing harmless error.[2] Id. at 298, 902 P.2d at 1277.

[2] In Suka, the ICA addressed a defendant's allegation that a particular remark made by the prosecution constituted prejudicial misconduct, and, as a result, the trial court erred in denying the defendant's motion to reopen the evidence, for mistrial, to dismiss the charges, and for a new trial. 79 Hawaiʻi at 297, 901 P.2d at 1276. The ICA agreed with the trial court that the statement was improper, and considered whether the judgement must be set aside as a result of the improper statement. Id. Suka's four part categorization was part of that court's consideration of what standard to apply under Hawaiʻi Rule of Penal Procedure (HRPP) Rule 52(a), wherein it noted that "an array of standards [have been] employed." Id. After reviewing the various standards, Suka reasoned that, "[w]e are not confronted here with the claim that the prosecutor's argument violated any specific constitutional rights of [the d]efendant." Id. at 299, 901 P.2d at 1278. Instead, Suka concluded, "to determine whether reversal is required under HRPP Rule 52(a) because of improper remarks by a prosecutor which could affect [the d]efendant's right to a fair trial, we apply the harmless beyond a reasonable doubt standard of review." Id. at 301, 901 P.2d at 1280. Applying that standard, the ICA determined that, "[i]n light of the brevity of the prosecutor's remark, the oral and written admonitions to the jury to disregard matters ordered stricken by the court, and the evidence presented at trial, we conclude that there was no reasonable possibility that the prosecutor's improper statement contributed to the conviction." Id. at 303, 901 P.2d at 1282.

There are four "fairly distinct" categories of cases discussed in Suka:

> First, are those cases involving federal and/or state "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error[.]" Chapman v. California, 386 U.S. 18, 23 [] (1967). Accord State v. Silva, 78 Hawaiʻi 115, 121, 890 P.2d 702, 708 (App.1995) [,] [abrogated on other grounds by Tachibana v. State, 79 Hawaiʻi 226, 231-32, 900 P.2d 1293, 1298-99 (1995)] (right to impartial judge). Second, are those cases involving the violation of all other federal and/or state constitutional rights which the appellate court must find to have been harmless beyond a reasonable doubt before they can be deemed harmless. Chapman, 386 U.S. at 24 []; State v. Okumura, 58 Haw. 425, 431, 570 P.2d 848, 853 (1977); State v. Pokini, 57 Haw. 26, 29, 548 P.2d 1402, 1405, cert. denied, 429 U.S. 963 [] (1976); Silva, 78 Hawaiʻi at 125, 890 P.2d at 712. Third, are those cases involving a limited number of rights, not of constitutional magnitude, but the violation of which has been deemed never to be harmless. E.g. State v. Carvalho, 79 Hawaiʻi 165, 880 P.2d 217 (App. [1994]), cert. granted, 77 Hawaiʻi 373, 884 P.2d 1149 (1994), cert. dismissed, 78 Hawaiʻi 474, 896 P.2d 930 (1995) (peremptory challenges). Finally, there are those errors not of constitutional magnitude which may be deemed harmless unless the violation substantially affected the verdict or outcome of the case. Kotteakos v. United States, 328 U.S. 750 [] (1946); State v. Arnold, 66 Haw. 175, 657 P.2d 1052 (1983); State v. Toro, 77 Hawaiʻi 340, 347, 884 P.2d 403, 410, reconsideration denied, 77 Hawaiʻi 340, 884 P.2d 403 (App. [1994]), cert. denied, 77 Hawaiʻi 489, 889 P.2d 66 (1994).

Id. (emphasis added).

Relevant to this case is the first category discussed in Suka, namely, "those cases involving federal and/or state 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error[.]'" Id. (emphasis added) (quoting Chapman, 386 U.S. at 23). This first category has been affirmed by this court. See State v. Mundon, 121 Hawaiʻi 339, 382, 219 P.3d 1126, 1169 (2009) (Acoba, J., concurring and dissenting) ("Hawaiʻi courts have recognized that

the Hawaiʻi constitution protects certain rights 'so basic to a fair trial that [their] contravention can never be deemed harmless.'") (quoting State v. Holbron, 80 Hawaiʻi 27, 32 n.12, 904 P.2d 912, 917 n.12 (1995)).[3] Hawaiʻi courts have applied this "never harmless" standard in the context of other constitutional rights. See, e.g., Silva, 78 Hawaiʻi at 121, 890 P.2d at 708 (holding that an error with respect to the right to have an impartial tribunal, "by definition, is inherently prejudicial and not harmless"); Bowe, 77 Hawaiʻi at 56, 881 P.2d at 543 (recognizing that, under the Hawaiʻi constitution, admitting coerced confessions is "fundamentally unfair"); State v. Chow, 77 Hawaiʻi 241, 251, 883 P.2d 663, 673 (App. 1994) ("[W]e doubt that the denial of presentence allocution can ever be harmless error.").

Suka also recognized that some other "specific constitutional right[s] [] ostensibly requir[e] the application of the 'harmless beyond a reasonable doubt standard.'" Suka, 79

[3] Holbron recognized that, "[i]n Suka, [] the ICA acknowledged that this court has viewed certain rights protected by the Hawaiʻi constitution to be 'so basic to a fair trial that [their] contravention can never be deemed harmless,' [Suka, 79 Hawaiʻi at 298, 901 P.2d at 1277] [(]citing []Bowe, 77 Hawaiʻi 51, 881 P.3d 538 [] (holding that use of a coerced confession in a criminal trial would be fundamentally unfair)[)], as an example." Holbron, 80 Hawaiʻi at 32 n.12, 904 P.2d at 917 n.12. Holbron commented on another of Suka's categories, specifically the fact that Suka recognized "a class of errors in criminal cases 'not of constitutional magnitude which may be deemed harmless unless the violation substantially affected the verdict or outcome of the case.'" Id. (quoting Suka, 79 Hawaiʻi at 298, 901 P.2d at 1277). In doing so, Holbron implicitly affirmed the other categories set forth in Suka, including the first category of rights that can "never be deemed harmless." Id. (quoting id.).

Hawaiʻi at 299, 901 P.2d at 1278; see Chapman, 386 U.S. at 24. Further, even where the rights at issue are not of constitutional magnitude, this court has evinced a preference for the harmless beyond a reasonable doubt standard. Holbron stated that "[t]o the extent that the language in Suka implies a standard of review under [] HRPP Rule 52(a) other than 'harmless beyond a reasonable doubt,' we expressly disapprove and overrule it." 80 Hawaiʻi at 32 n.12, 904 P.2d at 917 n.12. State v. Malufau, 80 Hawaiʻi 126, 906 P.2d 612 (1995), discussed Suka's holding with respect to the harmless error standard under HRPP Rule 52, and concluded that "[b]ecause a defendant may not be convicted of an offense except upon proof establishing his or her guilt beyond a reasonable doubt, we question whether a standard more lenient than the harmless beyond a reasonable doubt standard is ever appropriate in criminal cases." 80 Hawaiʻi at 130-31, 906 P.2d at 616-17. Malufau appeared to draw a distinction between the harmless beyond a reasonable doubt standard and the harmless error standard, and ultimately declined to resolve the issue. Id. at 131, 906 P.2d at 617. However, neither Holbron nor Malufau disputed Suka's analysis with respect to the other categories of errors. See Suka, 79 Hawaiʻi at 298, 902 P.2d at 1277.

B.

1.

Suka also acknowledged that, in Fulminante, the United

States Supreme Court had adopted a two category approach to harmless error review, identifying errors as either "trial errors" or "structural errors." Id. In Fulminante, Justice White delivered the opinion of the Court with respect to, inter alia, Part I, and stated that the appeal arose from the Arizona Supreme Court's ruling that admission of a coerced confession at trial against the defendant in violation of the Fifth and Fourteenth Amendments to the United States Constitution was error, but harmless. 499 U.S. at 284-85. On the defendant's motion for reconsideration, however, the Arizona court determined that United States Supreme Court precedent, specifically Chapman, precluded the use of harmless error analysis where a coerced confession had been introduced. Id. A majority of justices on the United States Supreme Court, 5-4, agreed with Justice White that the confession had in fact been coerced. Id. at 287.

However, with respect to whether harmless error applied to admission of the confession, the court split 5-4 again, but this time, Chief Justice Rehnquist wrote for this majority, in Part II of his opinion.[4] Id. at 302. The Chief Justice held that the harmless beyond a reasonable doubt rule governed introduction

[4] In Fulminante, Justice White's opinion had the majority of votes with respect to Parts I, III, and IV of his opinion, and Part II of his opinion was a dissent. Chief Justice Rehnquist had the majority of votes with respect to Part II of his opinion, and Parts I, III, and IV of his opinion was a dissent.

of a coerced confession. Id. at 310. According to Chief Justice Rehnquist, "trial error" is defined as "error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." Id. at 307-08. "Structural error" on the other hand, was defined as a "structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." Id. at 310. "Structural errors" implicate protections that allow a criminal trial to "serve its function as a vehicle for determination of guilt or innocence, and [without which] no criminal punishment may be regarded as fundamentally fair." Id.

Having established this framework, Chief Justice Rehnquist concluded that "constitutional structural errors are per se reversible whereas constitutional trial errors are reversible if they are not harmless beyond a reasonable doubt." Suka, 79 Hawaiʻi at 299, 901 P.2d at 1278 (citing Fulminante, 299 U.S. at 309). This proposition is applicable to both constitutional violations that occur at trial and those that occur at sentencing. Sullivan v. Louisiana, 508 U.S. 275, 282 (1993) (Rehnquist, C.J., concurring). Applying this formula, the majority held that the coerced confession was a "'classic trial error' subject to the

harmless beyond a reasonable doubt standard." Id. (quoting Fulminante, 299 U.S. at 309) (internal quotation marks omitted). In coming to this conclusion, this majority noted that "the admission of an involuntary confession is [not] the type of error which 'transcends the criminal process.'" Id. Having concluded that harmless error analysis applied to coerced confessions, the Chief Justice held that "the State has failed to meet its burden of establishing, beyond a reasonable doubt, that the admission of Fulminante's [coerced] confession . . . was harmless error." Id. at 297.

The four dissenting justices would have held that the harmless error analysis did not apply, and that such an error should never be subject to harmless error analysis. Id. at 295 (White, J., dissenting). The dissent stated that, "the majority concedes, . . . prior cases 'have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error[.]]'" Id. at 289-90 (quoting Chapman, 386 U.S. at 23, and n.8) (emphasis in original). In Justice White's view, "'certain constitutional rights are not, and should not be, subject to harmless error analysis because those rights protect important values that are unrelated to the truth-seeking function of trial.'" Id. at 295 (quoting Rose v. Clark, 478 U.S. 570, 587 (1986) (Stevens, J., concurring)).

As examples of errors implicating such constitutional rights, the dissent listed, inter alia, the right to counsel at trial (Gideon v. Wainwright, 372 U.S. 335 (1963)), unlawful exclusion of members of the defendant's race from the grand jury that indicted him (Vasquez v. Hillery, 474 U.S. 254 (1986)), a judge with a financial interest in the outcome (Tumey v. Ohio, 273 U.S. 510, 535 (1927)), and a violation of the guarantee of a public trial (Waller v. Georgia, 467 U.S. 39, 49 (1984)), which "required reversal without any showing of prejudice and even though the values of a public trial may be intangible and unprovable in any particular case." Fulminante, 499 U.S. at 294-95 (White, J., dissenting) (emphases added).

Justice White concluded that the right of the defendant not to have his coerced confession used against him was also "among those rights" because "using a coerced confession 'aborts the basic trial process' and 'renders' a trial fundamentally unfair." Id. (quoting Rose, 478 U.S. at 577) (brackets omitted) (emphasis added). He pointed out that "ours is an accusatorial and not an inquisitorial system" and "permitting a coerced confession to be part of the evidence on which a jury is free to base its verdict of guilty is inconsistent with [that] thesis . . . ." Id. at 293 (citation omitted). Thus, the dissent considered the values underlying the constitutional right, and concluded that

use of a coerced confession against a criminal defendant should never be subject to harmless error analysis.[5] Id. at 295.

2.

Construing Fulminante, Suka stated that, "[i]n considering claimed violations of federal constitutional rights, our appellate courts would be bound by the majority's holding in Fulminante." 79 Hawaiʻi at 298-99, 901 P.2d at 1277-78. However, Suka deemed that, "with respect to parallel provisions of the Hawaiʻi constitution, we would be free to adopt the [Fulminante] dissent's rationale, if we believed the majority's opinion would lead to unsound results." Id. at 299, 901 P.2d at 1278. Thus, for future cases dealing with fundamental rights and harmless error under the Hawaiʻi constitution, Suka stated that,

> [i]t is well-established that broader rights may be afforded to our citizens under our state constitution than under the federal constitution." [] Chow, 77 Hawaiʻi [at] 247, 883 P.2d [at] 669 []. See State v. Hoey, 77 Hawaiʻi 17, 36, 881 P.2d 504, 523 (1994). Clearly, the Hawaiʻi Supreme Court may declare a Hawaiʻi constitutional right so basic to a fair trial that its contravention can never be deemed harmless. Silva, 78 Hawaiʻi at 121, 890 P.2d at 708. For example, the Hawai'i Supreme Court has held that the use of a coerced confession in a criminal trial under the Hawai'i constitution would be fundamentally unfair. [] Bowe, 77 Hawai'i 51, 881 P.2d 538 [].

Id. (emphasis added).

[5] Justice White's reasoning with respect to using a coerced confession against a defendant in a criminal trial resonates with the instant case inasmuch as the Fulminante dissent states that "[t]he inability to assess its effect on a conviction causes the admission of a coerced confession to defy analysis by harmless error standards, . . . just as certainly as do deprivation of counsel and trial before a biased judge." Fulminante, 499 U.S. at 290 (White, J., dissenting) (internal quotation marks and citation omitted) (emphasis added).

In Bowe, this court considered a question similar to that determined by Fulminante, namely, "[w]hether the coercive conduct of a private person is sufficient to render a confession involuntary." 77 Hawaiʻi at 54, 881 P.2d at 541. Instead of adopting federal constitutional confession law, Bowe determined that "independent considerations arising under article 1, sections 5 and 10 of the Hawaiʻi constitution compel us to hold that the coercive conduct of a private person may be sufficient to render a [d]efendant's confession involuntary." Id. at 57, 881 P.2d at 544. In so holding, this court employed the same language as the Fulminante dissent,[6] stating that "[w]e have also recognized a preference for an accusatorial system of justice, rather than an inquisitorial one, to ensure the reliability of our criminal law enforcement system." Id. at 58, 881 P.2d at 545 (emphasis added) (citation omitted). This court emphasized the importance of the right to due process, quoting Justice Brennan's dissent to Colorado v. Connelly, 479 U.S. 157, 175 (1996), in which he stated that, "'[t]he Fourteenth Amendment secures against state invasion . . . the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will . . . .'" Bowe,

[6] Although Bowe uses the same language as the Justice White's dissenting opinion in Fulminante, Bowe does not quote or cite to Fulminante. See Bowe, 77 Hawaiʻi at 58, 881 P.2d at 545. Rather, it cites to Hawaiʻi case law for this proposition, which appears to have come from earlier United States Supreme Court opinions. Id. See State v. Kelekoilio, 74 Haw. 479, 501 849 P.2d 58, 69 (citing State v. Wakinekona, 53 Haw. 574, 576, 499 P.2d 678, 680 (1972)).

77 Hawaiʻi at 59, 881 P.2d at 546 (quoting Connelly, 479 U.S. at 176 (Brennan, J., dissenting) (alterations in original). Bowe also grounded its holding in the due process clause of the Hawaiʻi constitution, noting that "implicit in a 'fundamentally fair trial' is a right to make a meaningful choice between confessing and remaining silent.'" Id. at 59, 881 P.2d at 546 (quoting State v. Matafeo, 71 Haw. 183, 185, 787 P.2d 671, 672 (1990)). Bowe concluded that the admission of coerced admissions impinged on this right and thus was "fundamentally unfair." Id. This court stated,

> Accordingly, we recognize that an individual's capacity to make a rational and free choice between confessing and remaining silent may be overborne as much by the coercive conduct of a private individual as by the coercive conduct of the police. Therefore, we hold that admitting coerced confessions, regardless of the source of the coercion, is fundamentally unfair.

Id. (emphasis added). This holding follows the approach of the Fulminante dissent, and does not adhere to the rule employed by the Fulminante majority, which, as noted, held that a coerced confession was subject to the harmless beyond a reasonable doubt standard. Fulminante, 299 U.S. at 309. Under Hawaiʻi case law, then, a coerced confession is "fundamentally unfair" and thus "can never be deemed harmless." See Mundon, 121 Hawaiʻi at 382, 219 P.3d at 1169 (Acoba, J., concurring and dissenting).

II.

The dichotomic approach adopted in Fulminante has not

been strictly followed by the United States Supreme Court or lower federal courts, and has been criticized as "analytically flawed." See David McCord, The "Trial"/"Structural" Error Dichotomy: Erroneous, and Not Harmless, 45 U. Kan. L. Rev. 1401, 1401 (1996). Although since Fulminante, the Court has used the terms "trial error" and "structural error" in its analysis, it appears not to have wholly abandoned the approach set forth in Chapman. See Chapman, 386 U.S. at 22-23.

For example, in Sullivan v. Louisiana, 508 U.S. 275 (1993), an opinion authored by Justice Scalia, the Court appeared to focus on the nature of the underlying constitutional right. See Sullivan, 508 U.S. at 278-281. There, the issue was whether a constitutionally deficient reasonable doubt jury instruction could constitute harmless error. Id. at 276. The Court began its discussion of whether to apply harmless error by discussing the relevant constitutional provisions that were violated. Id. at 278. Justice Scalia then went on to state that Cage v. Louisiana, 498 U.S. 39 (1990) (per curiam), had held that a jury instruction like the one given in Sullivan was unconstitutional and therefore could not produce a valid jury verdict of guilty beyond a reasonable doubt. Sullivan, 508 U.S. at 280. Thus, he concluded, in Sullivan, "there was no jury verdict within the meaning of the Sixth Amendment," and therefore, "[t]here is no object, so to speak, upon which harmless-error scrutiny can operate." Id.

(emphasis in original). In other words, because there was no valid verdict to review, there was no way to determine whether the jury's actual finding of guilty beyond a reasonable doubt would have been different. Id.

Sullivan did refer to the Fulminante dichotomy as "[a]nother mode of analysis [that] leads to the same conclusion that harmless error analysis does not apply[.]" Id. (emphasis added). The Court stated that denial of a jury verdict of guilt beyond a reasonable doubt was a "structural error," "the jury guarantee being a 'basic protection[]' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function." Id. at 281 (emphasis added) (quoting Rose, 478 U.S. at 577). Thus, the opinion acknowledged that it was applying more than just the Fulminante approach when it referred to Fulminante as "another mode of analysis," and focused on the nature of the constitutional guarantee affected, the right to trial by jury. Id. (citing Rose, 478 U.S. at 577). Hence, Sullivan emphasized the nature of the constitutional right, rather than the categorization exclusively set forth in Fulminante.[7]

Sullivan in effect confirmed the dissent's position in Fulminante, written two years before. The dissent in Fulminante predicted that under the majority's approach, the "omission of a

[7] As noted, lower courts have had trouble applying the Fulminante dichotomy. See McCord, supra, at 1429-1454.

reasonable doubt instruction" would constitute trial error, but maintained that such an omission "distorts the very structure of trial because it creates the risk that the jury will convict the defendant even if the State has not met its required burden of proof." Fulminante, 499 U.S. at 291 (White, J., dissenting). This statement by Justice White would prove prescient. As discussed supra, in Sullivan, the United States Supreme Court subsequently held that a defective reasonable doubt jury instruction could never constitute harmless error. 508 U.S. at 279-80. Even Chief Justice Rehnquist, who authored the majority opinion in Part II of Fulminante that established the trial and structural dichotomy, concurred in Sullivan, concluding that he "accept[ed] the Court's conclusion that a constitutionally deficient reasonable doubt instruction is a breed apart from many other instructional errors that we have held are amenable to harmless error analysis." Id. at 284 (Rehnquist, C.J., concurring).

The reasoning of the Court in United States v. Gonzalez-Lopez, 548 U.S. 140 (2006), cited by the majority, also focused on the nature of the right violated. In that case, the Government did not dispute that the District Court erroneously deprived the respondent of his counsel of choice, but argued that "the [Sixth Amendment] violation is not 'complete' unless the defendant can show that substitute counsel was ineffective within the meaning of

Strickland v. Washington, 466 U.S. 668 [] (1984) - i.e., that substitute counsel's performance was deficient and the defendant was prejudiced by it[,]" or in the alternative, that the defendant was prejudiced under Strickland by the denial of his counsel of choice even if the substitute counsel's performance was not constitutionally deficient. Gonzalez-Lopez, 548 U.S. at 144-45.

In addressing the government's contention, Justice Scalia, writing for the majority, stated that, "[t]o be sure, the right to counsel of choice 'is circumscribed in several important respects.'" Id. at 144 (quoting Wheat v. United States, 486 U.S. 153, 159 (1988)). Assuming the "wrongful denial of counsel of choice," however, an element of the Sixth Amendment right to counsel "is the right of a defendant who does not require appointed counsel to choose who will represent him." Id. at 144 (citing Wheat, 486 U.S. at 159) (citation omitted).

The majority rejected the Government's position that the Sixth Amendment right to counsel of choice can be disregarded so long as the trial is "on the whole, fair." Id. at 145. Instead, the right to counsel of choice "commands, not that the trial be fair, but that a particular guarantee of fairness be provided - to wit, that the accused be defended by the counsel he believes to be best." Id. at 146. In the majority's view, the Constitution defines the basic elements of a fair trial, and if a defendant is

wrongfully deprived of these rights, "[n]o additional showing of prejudice is required to make the violation 'complete.'" Id. According to the Court, "[w]here the right to be assisted by counsel of one's choice is wrongly denied, therefore, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation." Id. at 148 (emphases added). This appears to resolve in the negative the issue of whether there was a need for harmless error review, by focusing on the nature of the right rather than on whether the error was "structural" in nature.

Justice Scalia then concluded in brief that the erroneous deprivation of the right to counsel of choice "unquestionably qualifies as 'structural error.'" Id. at 150. Although he clearly categorized the error in accordance with the dichotomy established by the Fulminante majority, it is not clear if this was necessary in light of his earlier conclusion that the defendant need not show prejudice. See id. at 148. In fact, in response to the Government's argument that ineffective assistance of counsel claims may also "pervade[] the entire trial," and yet require a showing of prejudice, Justice Scalia stated, "[b]ut the requirement of showing prejudice in ineffectiveness claims stems from the very definition of the right at issue; it is not a matter of showing that the violation was harmless, but of showing that a

violation of the right to effective representation occurred." Id. at 150 (first emphasis added, second emphasis in original). Consequently, although Justice Scalia indicated that his harmlessness analysis was based on the trial and structural error dichotomy, as in Sullivan, his reasoning with respect to whether a defendant must show prejudice supports the view that certain constitutional rights,[8] including the right to counsel of choice, are "so basic to a fair trial that their infraction can never be treated as harmless error." Chapman, 386 U.S. at 23.

III.

In any event, the approach taken by Justice White's dissent in Fulminante is akin to that adopted by this court in Bowe and recognized in Suka.[9] Rather than resting on a trial

[8] Justice Scalia's majority opinion in Gonzalez-Lopez appears to distinguish between rights that are specifically defined in the United States Constitution, including the Sixth Amendment right to counsel of choice, and those that are part of the Constitutional guarantee to a fair trial. See 548 U.S. at 146; see also Jeffrey L. Fisher, Categorical Requirements in Constitutional Criminal Procedure, 94 Geo. L.J. 1493, 1522-27 (2006) (distinguishing between criminal procedure provisions in the Bill of Rights that "enshrine certain values and leave it to courts to ensure that those values are honored" and those that "choose how certain values are to be protected"). Under our case law, this is not a distinction relevant to the construction of rights under the Hawaiʻi constitution.

[9] It must be noted that "state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." Arizona v. Evans, 514 U.S. 1, 8 (1995). "If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached." Michigan v. Long, 463 U.S. 1032, 1041 (1983). In consonance with Long, federal cases are cited in this opinion only for the purpose of

error or structural error analysis, this court should conduct its harmless error analysis in accordance with the approach adopted by the dissenting justices in Fuliminante,[10] and in comportment with our case law. See Bowe, 77 Hawaiʻi at 59, 881 P.2d at 546.

This court, in determining whether to apply harmless error review to the violation of a particular right, should look at the "nature of the right at issue [as well as] the effect of an error upon trial." Fulminante, 499 U.S. at 291. If a violation of the right would "'abort[] the basic trial process' and 'render[]' a trial [or sentence] fundamentally unfair[,]'" id. at 292 (quoting Rose, 478 U.S. at 577), then an infraction of that right cannot be treated as harmless error. See id. at 290. Once such an infraction is established, a criminal defendant thus is not be required to show prejudice where the right that was violated protects important values underlying constitutional guarantees, such as the tenet that our system is "accusatorial"

guidance as to the issues addressed in this case. The Hawaiʻi constitution, as opposed to federal law, compels the result reached herein.

[10] In the past, this court has not hesitated to adopt the dissents in United States Supreme Court cases when it was believed the dissent was better reasoned than the majority opinion. See, e.g., State v. Cuntapay, 104 Hawaiʻi 109, 85 P.3d 634 (2004) (agreeing with the dissent in Minnesota v. Carter, 525 U.S. 83 (1998)); see also State v. Kam, 69 Haw. 483, 748 P.2d 372 (1988)(adopting the reasoning of the dissent in Pope v. Illinois, 481 U.S. 497 (1987)); see also State v. Santiago, 53 Haw. 254, 492 P.2d 657 (1971) (adopting the dissent in Harris v. New York, 401 U.S. 222 (1971)).

and not "inquisitorial," even if the underlying value "may be intangible and unprovable in any particular case." Id. at 294-95.

IV.

The right to counsel is specifically guaranteed and is an essential component of a fair trial under the Hawaiʻi constitution. Cf. State v. Dickson, 4 Haw.App. 614, 618, 673 P.2d 1036, 1041 (App. 1983) (citing State v. Tarumoto, 62 Haw. 298, 299 614 P.2d 397, 398 (1980)). Absent a knowing and intelligent waiver thereof, "no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he [or she] was represented by counsel at trial." Id. (citing id.).

In State v. Maddagan, 95 Hawaiʻi 177, 19 P.3d 1289 (2001), this court confirmed that, "'it is well settled that article I, section 14 of the Hawaiʻi constitution parallels the sixth amendment's guarantee of a defendant's right to counsel in criminal cases[,]'" 95 Hawaiʻi at 179, 19 P.3d at 1291 (quoting State v. Soto, 84 Hawaiʻi 229, 237 n.8, 933 P.2d 66, 86 n.8 (1997)) (internal quotation marks and brackets omitted) (citations omitted).[11] Maddagan distinguishes between the right to counsel of

[11] The Sixth Amendment of the United States Constitution has been interpreted by the United States Supreme Court to encompass "the right of a defendant who does not require appointed counsel to choose who will represent him." Gonzalez-Lopez, 548 U.S. at 144 (citing Wheat, 486 U.S. at 159); see also Powell v. Alabama, 287 U.S. at 53 (1932) ("It is hardly necessary to say that, the right to counsel being conceded a defendant should be afforded a fair opportunity to secure counsel of his own choice."). "'[T]he Sixth Amendment guarantees a defendant the right to be represented by an otherwise

choice with respect to appointed counsel and private counsel. "Where a defendant is indigent, defendant's right to counsel of his or her choice is subject to some statutory and practical constraints." Id. at 180 n.3, 19 P.3d at 1292 n.3.[12] On the other hand, Maddagan stated that "[o]n independent state constitutional grounds, we also recognize that the right to counsel in article I, section 14 of the Hawaiʻi constitution encompasses a right to privately retained counsel of choice." Id. at 180, 19 P.3d at 1292 (emphasis added).

Although this court's opinion in Maddagan states that "'the right to counsel of choice is qualified, and can be outweighed by countervailing governmental interests[,]'" id. (quoting United States v. Monsanto, 836 F.2d 74, 80 (2d Cir. 1987) (citation omitted)),[13] such considerations do not pertain to the choice of counsel. Once it is established that the right to retained counsel of choice is wrongfully denied, a defendant need not show prejudice or prove the underlying value of such a choice.

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qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds.'" Id. (citing Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624-25 (1989)).

[12] In Hawaiʻi, an indigent defendant charged with a crime for which imprisonment is authorized has the right to the assistance of a public defender or court-appointed counsel. Haw. Const. art. I, § 14; HRS § 802-1 (1993); State v. Char, 80 Haw. 246, 267, 909 P.2d 574, 595 (App. 1995).

[13] Maddagan also stated, "[a] finding of good cause for substitution of counsel is ordinarily required for substitution of appointed counsel." 95 Hawaiʻi at 180 n.3, 19 P.3d at 1292 n.3.

In that circumstance, the denial of substitution of counsel will violate the article I, section 14 right to privately retained counsel of choice in the Hawaiʻi constitution and cannot be harmless.[14]

/s/ Simeon R. Acoba, Jr.

/s/ Richard W. Pollack

[14] Such a determination does not rest on considerations pertaining to continuances, effectiveness of counsel, see Gonzalez-Lopez, 548 U.S. at 148, or the overall fairness of trial, see id. at 146, but on the violation of the guarantee itself.