

Electronically Filed
Supreme Court
SCWC-30205
14-FEB-2014
01:25 PM

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

---o0o---

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

vs.

MARYANN ACKER, Petitioner/Defendant-Appellant,

and

WILLIAM GERALD ACKER, Respondent/Defendant.

SCWC-30205

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. 30205; CR. NO. 056042)

February 14, 2014

CONCURRING AND DISSENTING OPINION BY ACOBA, J.,
IN WHICH MCKENNA, J., JOINS

In my view, the decision by the circuit court of the first circuit (the court) denying the request of Petitioner/Defendant-Appellant Maryann Acker (Maryann) to recall Respondent/Defendant William Acker (William) as a witness in her case-in-chief violated Maryann's constitutional right to

compulsory process, right to confrontation, right to present a complete defense, and right to a fair trial. See U.S. Const. amend. VI, XIV; Haw. Const. art. I, § 14. Respectfully, the court's decision to accept the testimony of Deputy Sheriff Thomas Cayetano (Deputy Cayetano) that William refused to testify was an insufficient substitute for the protection of such rights, and their denial was not harmless beyond a reasonable doubt. Accordingly, I would remand this case for a new trial.¹

I.

A.

Briefly, this case involves a charge against Maryann for the murder of Lawrence Hasker (Hasker) in 1978, an incident involving Maryann, who was 18, and William, who was 28 at the time of the crime. In June of 1978, the recently married couple was in Hawai'i and took part in two criminal incidents, one involving the robbery of Joseph Leach (Leach) and one involving the robbery and murder of Hasker. In August 1981, William and Maryann were indicted in Hawai'i for various charges related to these two incidents. William pleaded guilty to robbing Hasker

¹ I concur with the majority that the court did not abuse its discretion in denying Maryann's motion for a mistrial, majority's opinion at 53-58, that the State's use of the Presentence Report to question Maryann during cross-examination was harmless beyond a reasonable doubt, majority's opinion at 55-59, and that the jury instructions on murder and accomplice liability were not prejudicially insufficient, erroneous, inconsistent or misleading, majority's opinion at 72-76. Inasmuch as I would hold, based on the discussion herein, that the judgment of conviction must be vacated and the case should be remanded for a new trial, the other questions presented by Maryann's Application are not addressed.

and agreed to testify against Maryann. Maryann was tried in Hawai'i in 1982, and William testified for the prosecution at her trial, stating that Maryann shot Hasker. Maryann was found guilty of the charges regarding the Leach incident and the murder of Hasker. Maryann appealed to this court, which affirmed her convictions.

In 1991, while he was incarcerated in California, William apparently testified under oath at a hearing before the California Parole Board (Parole Board) that he was solely responsible for Hasker's murder. See Acker v. State, No. 27081, 2007 WL 2800803 (App. Sept. 27, 2007) (SDO). On August 15, 2000, Maryann filed a Hawai'i Rules of Penal Procedure (HRPP) Rule 40 petition for post-conviction relief, on the basis, inter alia, that William had admitted that he killed Hasker. Id. The court granted Maryann's HRPP Rule 40 petition, and on appeal, the Intermediate Court of Appeals (ICA) concluded that the State's failure to disclose the true facts concerning William's nolo contendere plea in connection with another incident in California, his conviction on first degree murder rather than felony murder, and sentence in California to life with the possibility of parole denied Maryann a right to a fair trial on the charge of murdering Hasker. Id. at *2-3. Maryann was granted a new trial. Id. at *3. This retrial is the basis for the current appeal.

B.

1.

The retrial began on August 18, 2009.² The primary issue was the credibility of the two primary witnesses, William and Maryann. William testified as part of the State's case-in-chief. He related, inter alia, that Maryann shot Hasker, stating that he did not threaten or force Maryann to go along with the robbery because, "[w]e did this together. There was no force. She wasn't compelled to do anything. At any time she could have left. Any time."

On cross-examination by defense counsel, William was asked, "[d]o you ever lie under oath, commit perjury as it pertain[ed] to Maryann?" William responded that he "never lied in court." Defense counsel then asked, "have you ever lied under oath as it pertains to Maryann?" William then asked the court, "does a board hearing count?" The court responded, "[i]f it's under oath, yes, I don't know what the board -- I assume we are talking about a California board hearing; is that right?" The court then held a bench conference, after which it struck "that last whole series of questions about perjury and the answers" and directed the jury to disregard those questions and answers.

² The Honorable Michael A. Town, presided.

Defense counsel asked William about a 1978 report in which he admitted to using cocaine since the age of 18, using one to two grams on a daily basis for approximately three months, and supporting his cocaine habit by selling narcotics and robbing individuals. William stated that he lied to the report writer so that he could go to a "rehab center as opposed to prison." According to William, he would lie to get himself out of prison, but that he would not lie under oath. Another bench conference took place. Defense counsel then resumed questioning. He asked William whether he had ever committed perjury or lied under oath as it related to Maryann. William testified, "I don't think so . . . I could have, but not in court. There's a lot of times you take oaths, but not in court." Defense counsel posed the question of whether William had "ever lied under oath as it pertains to anything about Maryann[,]" to which he responded, "[p]robably." Defense counsel then asked, "[w]hen you lied under oath about Maryann, was there any repercussion to you?" William responded "[n]o, there wasn't because there wasn't a lie on her. I'm trying to do something for her."

William further testified, on cross-examination, regarding an "agreement or deal" with the prosecution. He reported that the prosecution gave him immunity for the case involving Leach and Hasker, except as to a robbery count. William said that the deal meant that he could never be charged

or convicted of Hasker's murder. The defense attorney elicited further declarations from William that he avoided 65-75 years of time in prison by signing the agreement, not including the life sentence he would have served if he had been convicted of killing Hasker. Defense counsel also questioned William about the lack of physical evidence supporting his assertion that Maryann shot Hasker, and about his willingness to lie.

Additionally, defense counsel inquired about William's 1991 sworn statements to the Parole Board that he committed the murder in Hawai'i, of Hasker. He was asked, "[a]nd in fact, [the Parole Board] asked you specifically point blank, Maryann didn't do anything? And you said, Absolutely nothing[,]'" to which William responded, "[y]eah. That's exactly what I said. I wanted her to get out."

On re-direct examination, the prosecutor asked William about the Parole Board hearing and admitting to shooting Hasker. William testified that he had tried to clear Maryann's name because some law students from UCLA that were on Maryann's case urged him to do so:

I basically put myself in [Maryann's] position to try -- because some lawyers from UCLA that were on her case, student lawyers, in corresponding with me told me that I could free her. She could go home if I said these things to the board. Well, they lied. They lied. Just like they lie. So I did say it. I lied trying to get her off. And they lied and I didn't get out -- she didn't get out, nor did I. I probably wouldn't have got out as quick as she would have. But they led me to believe she would -- her next board hearing she would be out.

2.

Several other witnesses also testified for the prosecution, including Deputy Sheriff Ahn (Deputy Ahn), who was assigned to investigate the murder of a Cesario Arauza (Arauza) in California. On October 9, 1979, William contacted Deputy Ahn and talked to him about the Arauza homicide and the criminal activities involving William and Maryann in Hawai'i. According to Deputy Ahn, William indicated that he and Maryann robbed Leach and Hasker, and Maryann shot Hasker. Deputy Ahn testified that he had official contact with William between 50 and 75 times while William was "in [his] custody."

3.

Maryann testified during the defense's case-in-chief. During her testimony, she stated that she was coerced into taking part in the events surrounding Hasker's murder. According to Maryann, "[William] would hold the gun to my head or my ribs and tell me I would do what he said." She explained that she was forced to burglarize Hasker's apartment and that although she was with William prior to the murder, she did not know what was happening. Maryann said she was "[e]ighteen years old and married to this guy and doing what my husband told me to do." She testified that she saw William exit the car, holding a gun, with Hasker and that the two men went down an embankment. She heard gunshots, and then William returned to the car.

Maryann also stated that, contrary to William's explanation of his statements before the Parole Board, she was never represented by "UCLA" law students at any point prior to 1994, but instead was represented by University of Southern California (USC) law students in 1995.

4.

After Maryann finished testifying as part of the defense's case-in-chief, the court had a discussion with the attorneys, outside the presence of the jury, about additional witnesses for the defense. The court asked why the defense was planning to call William, and defense counsel explained that there were two reasons. The first reason appeared to be related to Deputy Ahn's testimony about the number of times he met with William:

[Defense Counsel:] Your Honor, I'm calling him for two reasons. One is that the prosecution read the transcript of the prior testimony of [Deputy] Ahn who said - - again, I may be incorrect but something in the lines of 50 to 75 times that he met with [William].

. . . .

And the jurors [have] to be wondering why is he meeting with [William] 50 to 75 times? And the reason is [] because [William] was, in the nomenclature, a jailhouse informant.

THE COURT: He was cooperating

[Defense counsel:] He was cooperating.

The second reason was that William had testified that prior to his 1991 and 1994 Parole Board hearings, law students representing Maryann contacted him and told him that if he took responsibility, Maryann would be released from prison. Defense

counsel related he wanted to ask William about this, because "[h]e was in protective custody[;] there's no way he could have talked to any of these lawyers." The prosecutor asked that, if William was recalled as a witness, that the questions be narrowly tailored, and that they "have time to tell [William] what he's going to be put back on the stand for."

On the following day, the court indicated that it had a chambers conference with Deputy Cayetano, and that "it's wise if we get his testimony for the record." The deputy was then called to testify outside the presence of the jury. No objection was raised. Deputy Cayetano testified that, pursuant to a subpoena, William was transported from the correctional facility to the courthouse, and was being held in the courthouse cell block. William was told why he was brought to court and informed that he had been subpoenaed to testify. William apparently told Deputy Cayetano that he did not want to testify. According to the deputy, William's "primary concern is for his safety and well-being." Deputy Cayetano also testified to the "extraction" process, which "means that you can remove [William] from his cell and bring him to the courtroom." He indicated it would take approximately "an hour to two hours" to do the procedure.

On cross-examination, the prosecutor asked whether William had been informed "of what his testimony would be[,]" specifically "that it would be with regard to the cooperation or

testimony he's given in other cases on the mainland[.]” Deputy Cayetano confirmed this and that it “was on those issues that [William] was concerned for his safety[.]”

Defense counsel made his request to have William produced. The court inquired of counsel as to whether William would refuse anyway. Defense counsel responded, “[w]ell, he can refuse if he chooses, but I mean, I’m entitled to put on a defense.” The following offer of proof was made by defense counsel on-the-record, as to the relevance of William’s testimony:

After the jury heard the prior testimony of [Deputy] Ahn, who testified previously that he -- since 1979 through 1982, at the time of the testimony, that he had met with William [] 58 to 75 times. And the jury would obviously hear that and say, well, why are they meeting 50 to 75 times? They can raise all kinds of inferences or jump to certain conclusions as to why, and perhaps that is used -- that type of information is used to bolster the credibility of William [].

The fact of the matter is that William [] was a cooperating witness with the California sheriff’s office in a number of homicides. . . .

. . . .

Now, in the 1991 parole hearing where he said under oath that Maryann did not shoot [] Aruaza or [] Hasker, that he shot both of them and that he committed perjury against Maryann, what the jury was not allowed to hear at that point in time was that he was also quick to clarify that he did not lie in any other trial or any other information that he gave. And so that he’s clarifying to say, [h]ey, yes, I lied against Maryann, but in all these other cooperating or informant activities, I did not lie. And he wanted to make sure that the parole board heard that. And that was in the 1991 parole board.

. . . .

Now, we’d also -- talking to him about when he testified that prior to his 1991 and 1994 hearings, that UCLA students representing Maryann contacted him and told him what to say. Or it’s not really clear exactly what they told him to say. And that we further go on, well, if his

name and location were secrets, that he doesn't want to come into court and talk about it, he doesn't -- he doesn't want his picture taken, then how did these students from UCLA, who were representing him³, able to contact him personally and tell him to say what they wanted him to say if he is in protective custody and his name, identity, an location are secret.

And that after this trial, he can again go to the [] Parole Board and state that he testified for the prosecution in an effort to gain parole. And that he could try to use his testimony in court for his benefit. And that as he did testify under oath, that he's always trying to gain a favorable legal position.

(Emphases added.) The court ultimately denied the request, stating, "I'm going to refuse your request to extract [William] because I don't think there would be any gain and it would be -- just wouldn't work and wouldn't be helpful for the jury."

The court, however, suggested that it should "at least put [Deputy Cayetano] on the stand in front of the jury and say [William] refuses to testify." The prosecutor raised concerns that the deputy sheriff's statement that William refused to testify would be hearsay and was not relevant. However, the court ultimately concluded that it would allow Deputy Cayetano to take the stand, over the State's objection. The deputy testified that William was transferred to the courthouse to testify as an adverse witness in the defendant's case, but William refused to do so.

5.

During closing argument, the State argued that William

³ William's testimony reflected that the UCLA law students were representing Maryann, not William.

was a credible witness and that Maryann had shot Hasker. The defense, on the other hand, alleged that William was not a credible witness, referring to his inconsistent statements under oath regarding Maryann's involvement in the murders of Hasker and Arauza. For example, defense counsel argued that "William [] admitted that he committed perjury against Maryann. William admitted under oath that he shot and killed [] Hasker and [] Arauza. And he did it more than once."

In its rebuttal closing, the State again emphasized the credibility of William's testimony, as follows:

[Defense counsel] wants you to believe that at the time William [] gave his first statement to [Deputy] Ahn regarding the Hawai'i and the California incidents saying that Maryann was the shooter, he was trying to save himself. [Defense counsel] says that [William] knew that [Maryann] had been convicted. [William] knew that the use allegation was found untrue, and therefore, he must be the shooter.

Well, think back to the testimony, ladies and gentlemen. And you recall, when William [] was shown Maryann[\'s] judgment on the stand, that was the first time he had ever seen it. He did not know that she had her use allegation stricken. He only knew that she had been convicted of murder. And recall, the conviction happened in January. William [] didn't say anything to [Deputy] Ahn until March, after he had that meeting with [Maryann]. . . where she said, "Have you snapped? I killed [] Arauza."

And at that point, he just gave up, ladies and gentlemen. He pled nolo contendere, no contest. It's not an admission, but the [c]ourt did not find him guilty of everything charged. There was no trial, no admission, but he just gave up. He didn't ask for anything. He didn't get anything. He's still in custody today.

(Emphases added.) Defense counsel then objected to the prosecutor's argument as follows:

It's improper. We weren't allowed to present the testimony of William that he made all these deals on the side and he was trying to get something out of it. So, I mean, he's saying that he didn't get anything out of it. He

didn't have any other ulterior motive. That's not true. We couldn't present that evidence because he refused to testify.

(Emphases added.) The court overruled the objection.

C.

The jury found Maryann guilty of murder. Maryann appealed to the ICA, and the ICA affirmed Maryann's conviction in its October 12, 2012 Memorandum Opinion. State v. Acker, 128 Hawai'i 497, 291 P.3d 395, 2012 WL 4857018, at *1 (App. Oct. 12, 2012). The ICA concluded, in relevant part, that "the manner in which the [] court addressed William's refusal to be recalled as a witness in the defense case did not deprive Maryann of a fair trial." Id. at *16.

II.

The court's decision prohibiting Maryann from recalling William as part of the defense's case-in-chief violated Maryann's (1) right to compulsory process, (2) right to confront adverse witnesses, (3) right to present a defense, and (4) right to a fair trial.⁴ Under the circumstances, the court's decision to prohibit the defense from calling William as a witness cannot be said to be harmless beyond a reasonable doubt.

⁴ In her Application, Maryann maintains that the court's refusal to enforce the subpoena that Maryann had served on William violated her right to compulsory process and her right to present a defense. The State's response brief does not address this point of error.

The majority's analysis of the court's decision precluding re-examination of William ultimately rests on the scope of a trial court's discretion over the presentation of the evidence. See majority's opinion at 66. However, any discretion afforded the court in this context must bow to constitutional principles. See e.g., State v. Peseti, 101 Hawai'i 172, 181, 65 P.3d 119, 128 (2003) (holding that "when a statutory privilege interferes with a defendant's right to cross-examine," the statutory privilege is secondary to the defendant's constitutional rights); State v. Apilando, 79 Hawai'i 128, 141, 900 P.2d 135, 148 (1995) (admission of the complainant's videotaped interview with police, in lieu of her direct examination, violated the defendant's right of face-to-face confrontation); State v. Grindles, 70 Haw. 528, 532, 777 P.2d 1187, 1190 (1989) (holding that despite the court's discretion to control the order of proof, it could not compel the defendant to present his evidence before hearing all of the state's evidence against him, because that was a violation of his due process right to a fair trial). As will be explained infra, the court did in fact abuse its discretion under the evidentiary rules in denying the defense's recall of William, and in failing to support its decision. The constitutional rights at issue are discussed first.

III.

A.

"In all criminal prosecutions, the accused shall enjoy the right to . . . have compulsory process for obtaining witnesses in the accused's favor[.]" Haw. Const. art. 1 § 14. A criminal defendant's right to compulsory process is set forth both in the Hawai'i Constitution and in the Sixth Amendment of the U.S. Constitution. See U.S. Const. amend. VI. This court has recognized that "[t]he right to compulsory process is of paramount importance in assuring a defendant the right to a meaningful defense and a fair trial." State v. Mitake, 64 Haw. 217, 224, 638 P.2d 324, 329 (1981) (citations omitted). Further, the right to compulsory process "affords a defendant . . . not only the power to compel attendance of witnesses, but also the right to have those witnesses heard." Id.; see also Rock v. Arkansas, 483 U.S. 44, 52 (1987) (describing the Sixth Amendment's guarantee as "the accused's right to call witnesses whose testimony is 'material and favorable to his defense.'" (quoting United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982))).

Of course, the right to compulsory process does not guarantee the absolute right of a defendant to call all potential witnesses. See id. Nevertheless, a defendant has the right to compel the attendance of witnesses who may give "relevant and

beneficial testimony." Id. It is readily apparent that the court's refusal to allow re-examination of William as part of Maryann's case-in-chief did amount to a denial of her right to compulsory process.⁵

B.

William had testified as part of the prosecution's case-in-chief. But, when it came time for him to testify as an adverse witness during the defense's case, William apparently declined. Thus, defense counsel was compelled to request that William be ordered to appear and testify. Despite recognizing that its ruling would result in William being able to choose to testify for the prosecution, but not for the defense, the court decided not to bring William to the courtroom. This was a manifest violation of the right to compulsory process.

Maryann was not simply asking to secure the presence of a witness in her defense, but asking to secure the presence of a witness who had already testified in the case for the prosecution and who was present at the courthouse. It is well-established that a party may call a witness for the sole purpose of impeaching that witness. See Hawai'i Rules of Evidence (HRE)

⁵ The majority states that "[o]nce William was transported to the court and refused to testify, Maryann's compulsory process rights were satisfied." Majority's opinion at 65 n.15. As will be discussed infra, it is not enough that William merely be transported to the courthouse. Instead, by refusing to bring William to the courtroom, the court did not allow re-examination and Maryann's right to compulsory process was not satisfied. It was not enough that William merely tell Deputy Cayetano that he would not testify.

Rule 607 (1993) ("The credibility of a witness may be attacked by any party, including the party calling the witness."). Under these circumstances, it is evident that the court should have recalled William to testify, in light of the fact that compulsory process is "of paramount importance in assuring a defendant the right to a meaningful defense and a fair trial." Mitake, 64 Haw. at 224, 638 P.3d at 330 (citations omitted).

C.

Furthermore, setting aside the fact that William had already testified, it is plain that William's testimony would have been both "relevant and beneficial" and therefore would satisfy the standard for calling a witness under this court's case law on the right to compulsory process. Id. In support of his request to examine William during the defense's case-in-chief, defense counsel had made an offer of proof for the court that included a number of reasons why William's testimony would be "relevant and beneficial."

After William's testimony for the prosecution, Deputy Ahn had testified for the prosecution as to the number of times that he had met with William, specifically stating that he had met with William for up to 75 times between 1979 and 1982. Defense counsel evinced his concern that this testimony bolstered William's credibility as opposed to Maryann's, when in fact William was a cooperating witness in a number of other, unrelated

cases. Thus, defense counsel sought to expose William's intent or motive for meeting with Deputy Ahn.

Any information that would help the jury evaluate William's credibility was vital to the defense, and therefore "relevant." Defense counsel indicated that such questioning would clarify for the jury that not all of the meetings between William and Deputy Ahn were regarding the incidents involving Maryann, but rather, resulted from William's continuing status as an informant in other cases. William's connection to law enforcement officials would have a tendency to influence the jury's view of his credibility in favor of William. By exposing this connection, defense counsel could mitigate any boost in credibility William received from Deputy Ahn's testimony about his contacts with law enforcement. Thus, such information would also be "beneficial" to the defense. See Mitake, 64 Haw. at 224, 638 P.2d at 330.

The conclusion that this testimony was necessary in assuring Maryann a meaningful defense is evident in light of the prosecution's final argument. The prosecution stated that, "[Defense counsel] wants you to believe that at the time William [] gave his first statement to [Deputy] Ahn regarding the Hawai'i and the California incidents saying that Maryann was the shooter, he was trying to save himself." As noted, the prosecution went on to allege that "[William] pled nolo contendere, no contest.

It's not an admission, but the [c]ourt did find him guilty of everything charged. There was no trial, no admission, but he just gave up." The prosecution emphasized that William did not get anything in exchange for his meetings with Deputy Ahn: "He didn't ask for anything. He didn't get anything. He's still in custody today." Although the prosecution states that this reference was not related to Hasker, but rather, William's cooperation in the Arauza case, for which he met with Deputy Ahn, it is easy to see that the jury might be confused about William's activities as a cooperating witness. Had the defense been able to question William, on the stand, about Deputy Ahn's testimony, the extent to which William did or did not receive anything in exchange for his statements about the criminal activity allegedly involving Maryann and his motive for such statements, it would have enabled the jury to meaningfully judge William's credibility.

As part of his offer of proof, defense counsel sought to introduce testimony regarding William's nolo contendere plea in the Arauza case, and the recommendation that William be committed to a California state hospital, rather than to prison. It is far from evident that in fact William "didn't get anything" in exchange for his testimony. But the defense was foreclosed from access to William on this issue, and thus prevented from fully responding to the prosecutor's argument that William did not ask for anything and did not get anything. William's testimony on

direct during the defense's case would have been highly relevant to the key issue of William's credibility, and would have been beneficial in uncovering what exactly took place with respect to William's cooperation in the Hasker and Arauza cases.

Defense counsel also asked to recall William to ask him about his 1991 testimony under oath when he stated that Maryann did "[a]bsolutely nothing." Without a doubt, this was relevant to William's credibility, since his inconsistent testimony in this case was that Maryann did shoot Hasker. According to the special interrogatory, the jury ultimately found that Maryann did not "possess[], use[], or threaten[] to use a pistol" during the commission of the murder. However, William's testimony before the Parole Board in 1991 was still pertinent because he said that Maryann did "[a]bsolutely nothing[,]" which would be directly contrary to the jury's ultimate finding that Maryann was liable for the commission of the crime.

As to the 1991 testimony under oath, defense counsel indicated that he sought to clarify several inconsistencies in William's explanation about why he was lying in 1991 when he confessed to the shooting and said that Maryann did nothing. First, William said that he was told to confess by UCLA students, but defense counsel sought to question William on how these law students were able to contact him despite the fact that he was in

protective custody, a matter which directly bore upon William's credibility.

Second, and directly related to Maryann's testimony during the defense's case-in-chief, defense counsel needed to question William about his assertion that the UCLA students were representing Maryann in 1991. Maryann had testified that she was not represented by law students until 1994, and that the students were from USC. Thus, Maryann had testified, after William, in a way that directly contradicted William's explanation of why he previously said under oath that Maryann "did nothing" in the Hasker case.

These contradictions would directly affect William's believability as a witness. Questioning William on those issues could demonstrate to the jury that William was actually telling the truth at the 1991 Parole Board hearing, and lying in the instant case. In other words, if William had no motive to lie in 1991 when he said that Maryann "did nothing", then the jury may have believed that that was the truth. Thus, such evidence would also be beneficial to Maryann's case. Even if the jury did not affirmatively decide that William was telling the truth in 1991, defense counsel's ability to impeach William with Maryann's subsequent testimony would have the effect of further casting doubt upon William's veracity in asserting that Maryann "could have walked away" from the commission of the crimes.

Because defense counsel was able to show, in his offer of proof, that William's testimony would have been relevant and necessary, the court's order precluding William from being questioned under oath violated Maryann's right to compulsory process under the Hawai'i Constitution and the United States constitution. As noted, this error was particularly egregious inasmuch as William provided extensive testimony during the prosecution's case-in-chief, but was allowed to choose not to testify in the defense's case.

D.

1.

In asserting that Maryann's right to compulsory process was satisfied in this case, the majority states that "[a] trial court is not required to have a witness take the stand solely to invoke his privilege against self incrimination in front of the jury." Majority's opinion at 61. Despite the fact that William did not invoke his Fifth Amendment privilege against self-incrimination, the majority analogizes cases involving the Fifth Amendment.⁶ However, such analysis is inapposite for several reasons.

⁶ The Fifth Amendment to the United States Constitution provides that "No person . . . shall be compelled in any criminal case to be a witness against himself[.]" U.S. Const. amend. V. Similarly, the Hawai'i Constitution provides that "nor shall any person be compelled in a criminal case to be a witness against oneself." Haw. Const. art. 1, § 10.

First, in the context of the privilege against self-incrimination, a witness may lawfully refuse to testify. State v. Kamao, 103 Hawai'i 315, 320, 82 P.3d 401, 406 (2003) ("Pursuant to the fifth amendment to the United States Constitution and article I, section 10 of the Hawai'i Constitution, a criminal defendant has the right to remain silent and not incriminate himself or herself in a criminal proceeding." (citations omitted)). When a witness refuses to testify for other reasons, however, the refusal may be unlawful -- as it was in this case.

William had waived his fifth amendment right by testifying for the prosecution in the case, and therefore would have had to respond to questioning as part of the defense's case-in-chief, or risk prosecution for obstruction of justice, see HRS § 710-1072.5 (1993), or an order of contempt, or possibly rescission of the agreement he had with the prosecution regarding testifying at trial. This court has never held that one party has the sole right to a witness. For example, in State v. Diaz, 100 Hawai'i 210, 58 P.3d 1257 (2002), the defendant sought to call a witness for the defense's case-in-chief who then exercised her constitutional right not to testify pursuant to the Fifth Amendment. 100 Hawai'i at 216, 58 P.3d at 1263. Diaz held that "[the defendant's] sixth amendment right to compulsory process [would] not be satisfied at the expense of [the witness's] fifth

amendment right to remain silent." Id. at 227, 58 P.3d at 1274. In Diaz, however, the witness had not already testified for the prosecution thereby waiving his Fifth Amendment right. Id. at 216, 58 P.3d at 1263.

Under the circumstances presented here, contrary to the majority's contention, the court was required to have William take the stand. As will be discussed infra, we do not know if William would have refused to testify if he had in fact taken the stand, or if he would, the extent of his recalcitrance. However, even in the event that William still refused to testify, it would have been readily apparent to the jury that such refusal was unlawful. This is unlike the situation where a witness successfully invokes his or her privilege against self-incrimination, which serves as a valid basis for the witness to step down. Kamano, 103 Hawai'i at 320, 82 P.3d at 406 ("The right to remain silent, otherwise referred to as the privilege against self-incrimination, provides us with some of our most treasured protections -- preservation of our autonomy, privacy, and dignity against the threat of state action." (citation and internal quotation marks omitted)).

Second, the cases cited by the majority in fact illustrate that an analogy to the right against self-incrimination is not apropos. In State v. Sale, 110 Hawai'i 386, 133 P.3d 815 (App. 2006), the defendant argued that the circuit

court abused its discretion in refusing to call his nephew to the stand to invoke his Fifth Amendment privilege in front of the jury. 110 Hawai'i at 392, 133 P.3d at 821. In upholding the circuit's court determination, the ICA relied on HRE Rule 513 (1993), which provides that "[i]n jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury." Id. (quoting HRE Rule 513(b) (emphasis added)). William was not asserting a privilege, under the facts should not have been able to assert a privilege, and moreover did not take the stand, and so the rationale underlying HRE Rule 513 does not apply.

The majority cites to U.S. v. Edmond, 52 F.3d 1080 (D.C. Cir. 1995), stating that "[T]he accused's right to compulsory process does not include the right to compel a witness to waive his fifth amendment privilege[.]'" Majority's opinion at 61 (quoting Edmond, 52 F.3d at 1109). In other words, the Sixth Amendment compulsory process right is subsumed where it conflicts with the Fifth Amendment right against self-incrimination. Id. This does not affect whether or not a witness not claiming the Fifth Amendment privilege or who could not assert the privilege, must take the stand. Similarly, United States v. Bowling, 239 F.3d 973 (2001), holds that a defendant's "right to compulsory process . . . does not include the right to compel a witness to waive his or her Fifth Amendment privilege

against self-incrimination.” 239 F.3d at 976. In Bowling, the witness in question did not testify for either the government or the defense, because he asserted his Fifth Amendment privilege. Id. Here, in contrast, William testified for the government, but refused to testify for the defense.

The majority's citation to the decision by the Fifth Circuit Court of Appeals in United States v. Griffin, 66 F.3d 68, (5th Cir. 1995) is similarly unavailing. See majority's opinion at 61. There, the Fifth Circuit stated that “[t]he Sixth Amendment requires that a witness be brought to court, but it does not require that he take the stand after refusing to testify[;]” id. at 70 (emphasis added), however, William was not even brought into court. Instead, the court heard a secondhand account of William's refusal to testify. Thus, even under Griffin, the procedures in this case were insufficient to satisfy Maryann's right to compulsory process. See id. (“Once a witness appears in court and refuses to testify, a defendant's compulsory process rights are exhausted.”).

2.

While the majority notes that the purpose of the right to compulsory process is to produce testimony for the defendant, majority's opinion at 69 (citing United States v. Roberts, 503 F.2d 598, 600 (9th Cir. 1974)), in this case it is impossible under the court's procedure to know whether William would have

produced testimony for Maryann, and so fairness required that William be brought to the courtroom.

The facts of this case are thus distinguishable from those of In re Blizzard, 559 F. Supp. 507 (S.D. Ga. 1983), where that court refused to enforce a subpoena calling a particular witness to testify. 559 F. Supp. at 510. There, the witness had taken the stand in a previous trial involving the same events and had refused to testify. Id. at 509. Here, as will be discussed infra, in contrast, William had already testified in the same trial for the prosecution, and aside from an indication provided through the intermediary of Deputy Cayetano, the court had no other reason to believe that William would not respond to questions regarding the content of his earlier testimony in the trial.

3.

The majority alleges that William would not have been able to provide relevant and material testimony for the defense. Majority's opinion at 64. But, the very purpose of recalling William was to impeach him based on Deputy Ahn's and Maryann's testimony, which followed after William's earlier testimony. The majority cannot forecast what would have happened if William was examined on Ahn's and Maryann's testimony, because, as a result of the court's ruling, William could not be examined on matters

that were submitted into evidence after his testimony for the prosecution.

Maryann had an absolute right to question William to "further impeach" him, especially because the impeachment was based on evidence introduced after William had testified. As will be discussed infra, "a defendant has a constitutional right to present any and all competent evidence in his [or her] defense." State v. Kassebeer, 118 Hawai'i 493, 514, 193 P.3d 409, 430 (2008) (emphasis added) (citing State v. Horn, 58 Haw. 252, 255, 566 P.2d 1378, 1380 (1977)). Because Maryann could not impeach William based on Deputy Ahn's and her testimonies at trial, Maryann was denied the right to present any and all competent evidence in her defense.⁷ Id.

Further, evidence of the number of times that William met with Deputy Ahn is not the same evidence as an acknowledgment of William's own plea bargain. The testimony regarding Deputy Ahn would raise the jury's estimation of William's credibility beyond only his plea agreement. Since this information had never been addressed by William, clearly his testimony in Maryann's

⁷ Neither would William's testimony have been cumulative. In order for evidence to be considered "cumulative", it "must be substantially the same as other evidence that has already been received." State v. Pulse, 83 Hawai'i 229, 247, 925 P.2d 797, 815 (1996). Manifestly, the evidence that defense counsel sought to establish would not have been cumulative because Deputy Ahn testified after William, and thus the defense had no opportunity to question William about the new information presented to the jury in the form of Deputy Ahn's testimony.

direct case would not have been "substantially the same" as the evidence already received.

Defense counsel also sought to clarify issues in Deputy Ahn's testimony about the nature of William's cooperation and what he had received in exchange for the cooperation. Had the defense been allowed to re-examine William, the defense might have been able to discredit his testimony by showing that in fact, William lied in other cases.

Moreover, the offer of proof regarding whether or how William was contacted by student lawyers while he was in protective custody was firmly grounded in the evidence. Specifically, there was evidence that William was an informant during much of his incarceration, and that he had been contacted by law students representing Maryann. At the time Maryann sought to recall William, Maryann had just testified as part of her case-in-chief, and there were conflicts between Maryann's testimony and William's testimony regarding Maryann's representation by law students in the 1990s. This issue hinged on Maryann's testimony and thus William would not have been cross-examined on these inconsistencies during the earlier cross-examination of him in the prosecution's case-in-chief. The fact that William's testimony conflicted with Maryann's made this particular line of questioning critical in presenting a defense by Maryann. Although the jury had previously been alerted to the

issue of William's credibility regarding his statements made to the Parole Board, this would make William's potential testimony as to whether the alleged interactions with the law students occurred more relevant, not less.

This situation also illustrates why it is normal trial practice to call adverse witnesses as part of one's case-in-chief. See HRE Rule 607. Maryann should have had the opportunity to impeach William based on her earlier testimony. A reference in the defense's closing argument to the inconsistency is no substitute for examination during trial.⁸ Simply because William's overall credibility might have been challenged earlier in the trial, does not justify the court's decision to prevent Maryann from calling William to confront him with the conflicts between Maryann's subsequent testimony and William's earlier testimony.

Under our constitutions, Maryann was guaranteed the opportunity to actually ask William questions face-to-face while he was on the stand. Only this would have complied with the

⁸ The majority maintains that the reference by Maryann to William's refusal to testify in her closing argument was sufficient to satisfy her constitutional rights. See majority's opinion at 64, 71. However, at the time of closing argument, Maryann had no other option with respect to William's testimony other than drawing the jury's attention to the lack thereof. Although the majority suggests that Maryann "capitalized" on William's failure to testify, it cannot establish how strong Maryann's case would have been if William had been brought before the court and confronted with evidence that was introduced after his examination in the prosecution's case, beyond mere speculation. The fact that defense counsel made this reference in closing argument also emphasizes the importance of William's testimony at trial.

compulsory process guarantee that a defendant have the "right to a meaningful defense and a fair trial." Mitake, 64 Haw. at 224, 638 P.2d at 329.

IV.

A.

The Hawai'i Constitution and the Sixth Amendment to the United States Constitution provide criminal defendants with the right of confrontation, specifically, that "the accused shall enjoy the right . . . to be confronted with the witnesses against the accused[.]" Haw. Const. art. 1, § 14. "[T]he right to cross-examine witnesses'" and the right "'to call witnesses in one's own behalf'" are "essential to due process." State v. Pond, 118 Hawai'i 452, 479, 193 P.3d 368, 395 (2008) (Acoba, J., concurring and dissenting) (quoting Chambers v. Mississippi, 410 U.S. 284, 294 (1973)). "[T]he right of confrontation affords the accused both the opportunity to challenge the credibility and veracity of the prosecution's witnesses and an occasion for the jury to weigh the demeanor of those witnesses." State v. Kassebeer, 118 Hawai'i 493, 193 P.3d 409 (2008) (citations and internal quotation marks omitted). With respect to cross-examining witnesses, "[t]he '[s]ixth [a]mendment [to the U.S. Constitution] is satisfied where sufficient information is elicited to allow the jury to gauge adequately a witness' credibility and to assess his or her motives or possible bias."

State v. Marcos, 106 Hawai'i 116, 121, 102 P.3d 360, 365 (2004) (emphasis omitted) (quoting State v. Balisbisana, 83 Hawai'i 109, 114, 924 P.2d 1215, 1220 (1996)).

In Balisbisana, the defendant was charged with abuse of family or household member, and at trial, defense counsel sought to introduce evidence about prior bad acts of the complainant, specifically evidence of the complainant's prior conviction for harassment of the defendant. 83 Hawai'i at 112, 924 P.2d at 1218. This court stated that the appropriate inquiry where a violation of the confrontation clause is concerned "is whether the jury had sufficient information from which to make an informed appraisal of [the complainant's] motives and bias[,] " absent the excluded evidence. Id. at 116, 924 P.2d at 1222. Based on the facts of the case, Balisbisana concluded that the confrontation clause was violated because defense counsel was not allowed to introduce the fact of the harassment conviction, from which jurors could draw inferences relating to the complainant's credibility. Id. It further stated that, "the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on [the complainant's] testimony which provided a crucial link in the proof of [the defendant's] act.'" Id. (emphasis added) (internal quotation marks and ellipses omitted) (quoting Davis v. Alaska, 415 U.S. 308, 317 (1974)).

In Marcos, we analyzed another violation of the confrontation clause, reiterating much of the language from the earlier decision in Balisbisana. Marcos, 106 Hawai'i at 121-22, 102 P.3d at 365-66. In Marcos, the defendant was also charged with abuse of a family or household member, and at trial, defense counsel sought to cross-examine the complainant on a pending family court case concerning the minor child of the defendant and complainant. Id. at 118, 102 P.3d at 362. Defense counsel argued to the court that complainant had a motive to feign the injury allegedly caused by the defendant, because the defendant had indicated that he intended to obtain custody of their child. Id. But, the court declined to allow cross-examination on that issue. Id.

This court stated that "[b]ecause there were no witnesses to the alleged abuse, complainant's credibility was at issue and evidence of her alleged motive or bias and demeanor bore upon that issue." Id. at 123, 102 P.3d at 367. Accordingly, Marcos held that defendant's right to confrontation was violated and the case was remanded for a new trial. Id. at 122, 102 P.3d at 366.

Although Balisbisana and Marcos both addressed situations where the defense was precluded entirely from questioning the witness on a particular motive or bias, in State v. Levell, 128 Hawai'i 34, 282 P.3d 576 (2012), this court

concluded that the defendant's right to confrontation was violated where he was unable to cross-examine the witness to further pursue his existing theory that the witness had a reason to falsely testify against him. See 128 Hawai' at 40, 282 P.3d at 582. There, the defendant had moved for permission to cross-examine the complainant on whether she had stolen and used his credit cards after he was arrested for the offense of harassment. Id. at 37, 282 P.3d at 580. The court did not allow the cross-examination because it concluded that the testimony was not relevant and was outweighed by the risk of unfair prejudice under HRE Rule 403. Id. at 40, 282 P.3d at 582.

On appeal, the State argued that the defendant was "given 'considerable latitude' during cross-examination and was able to argue to the court that [c]omplainant fabricated the harassment incident because she wanted to keep [the defendant's] cell phone and stay in his apartment without paying rent." Id. at 41, 282 P.3d at 583 (emphasis added). Despite the ability of the defense to cross-examine the complainant on those issues, we held that the defendant's right to confrontation was infringed because the defense could not cross-examine the complainant regarding the alleged credit card theft. Id. at 40, 128 P.3d at 582. We first established that the testimony on cross-examination would be relevant. Levell, 128 Hawai'i at 40, 282 P.3d at 582. Under HRE Rule 609.1, "[t]he credibility of a

witness [such as William] may be attacked by evidence of bias, interest or motive[,]” and “[b]ias, interest or motive is always relevant” Id. (emphasis in original) (quoting State v. Estrada, 69 Haw. 204, 738 P.2d 812, 823 (1987)). Evidence is relevant if it has “any tendency to support an inference of the witness’ disposition or tendency, consciously or unconsciously, to slant testimony one way or the other, from the straight and true.” Id. (emphasis in original) (quoting Addison M. Bowman, Hawai‘i Rules of Evidence Manual (HRE Manual) § 608.1-[1][C] (2010-11 ed.)). Levell then explained that, “the court [as fact-finder] might have had a significantly different impression of [c]omplainant’s credibility had [defense] counsel been permitted to pursue this proposed line of cross-examination.” Id. at 41, 128 P.3d at 41. Thus, Levell concluded that the defendant’s right to confrontation had been infringed. Id.

B.

Maryann cross-examined William during his testimony as a witness for the prosecution. However, the jury would not have “had sufficient information from which to make an informed appraisal of [the complainant’s] motives and bias[,]” Balisbisana, 83 Hawai‘i at 116, 924 P.2d at 1222, absent the excluded examination in Maryann’s case. William and Maryann were the only witnesses to the murder in this case. As in Balisbisana, Marcos, and Levell, this case revolved around

testimony by the defendant and another witness who testified to a different version of the key events. As in those cases, here, the prosecution's case against Maryann "hinged on the [fact-finder's] willingness to believe [William's] testimony over [Maryann's] version of the events[.]" Levell, 128 Hawai'i at 40, 282 P.3d at 582. Thus, it was absolutely critical that "the jurors . . . have the benefit of the defense theory before them so they could make an informed judgement as to the weight to place on [William's] testimony which provided a crucial link in the proof of [Maryann's] act." Balisbana, 83 Hawai'i at 116, 924 P.2d at 1222 (citation and internal quotation marks omitted).

1.

As explained, the number of times that William met with Deputy Ahn bolstered William's credibility. Maryann could not have questioned William about this issue during the prosecution's case-in-chief because Deputy Ahn testified after William. Moreover, as described, during closing argument the State sought to show that William had no motive for lying. An examination of William on his informant activities, what he told Deputy Ahn, and what he received in exchange for his initial testimony against Maryann would certainly have a tendency to support an inference in the mind of the jury that William may have, "consciously or unconsciously, [] slant[ed] testimony one way or the other, from

the straight and true[]" in the instant case. Levell, 128 Hawai'i at 41, 282 P.3d at 583.

Furthermore, the jurors were entitled to have the full scope of the defense's theory before them -- namely, that based on confronting William with Maryann's testimony, William was a liar, and that he had specific motive to lie when he said that Maryann shot Hasker and that she "could have left [at] any time" if she did not want to go along with their plans. Plainly, this examination following Deputy Ahn's and Maryann's testimony would have enabled the jury to "make an informed judgement as to the weight to place on [William's] testimony." Balisbana, 83 Hawai'i at 116, 924 P.2d at 1222 (internal quotation marks omitted).

2.

Second, as discussed, the defense sought to further question William on inconsistencies in his testimony regarding his motive for testifying before the Parole Board that Maryann had done "[a]bsolutely nothing." This 1991 testimony before the Parole Board was under oath, and that testimony contradicted William's sworn testimony in the instant case. William explained during the prosecution's case-in-chief that he had testified falsely before the Parole Board in an effort to clear Maryann's liability, based on what some student lawyers from UCLA had allegedly told him. But, this reason was inconsistent with Maryann's testimony about when she was represented by law

students, and clashed with the fact that William may have been under protective custody around the time that he was testifying before the Parole Board and thus would not have been accessible to any students.

As explained supra, in order for the jury to have properly assessed the evidence before it, it was vital that the jury have been able to consider William's motives when he went before the Parole Board in 1991 in light of Maryann's subsequent testimony in the instant case. These motives were certainly pertinent to whether William's testimony in the instant case was slanted "one way or the other." Levell, 128 Hawai'i at 41, 282 P.3d at 583. The defense was thus entitled to counter William with Maryann's rebuttal of his prior testimony to allow the jury to "make an informed judgment as to the weight to place on [William's] testimony which provided a crucial link in the proof of [Maryann's] case." Balisbana, 83 Hawai'i at 116, 924 P.2d at 1222 (internal quotation marks and citation omitted). However, Maryann had no opportunity before the jury to examine William on the testimony that Maryann gave during the defense's case-in-chief.

William's testimony constituted the heart of the prosecution's case against Maryann. Absent an opportunity to examine William about these two issues, and whether William had received other concessions or favors from the government, the

jury was deprived of facts on which to adequately assess William's truthfulness. The majority asserts that the jury did have sufficient information, and points to a number of statements William made regarding lying under oath and lying to police and prosecutors. See majority's opinion at 69-70, 70 n.17. However, because William recanted his previous prevarication, the testimony sought by the defense was essential to answering questions that would have arisen in the jury's mind regarding whether William was being truthful in this case, and to rebut the prosecution's final argument that William "didn't ask for anything" and "didn't get anything." Yet, William was placed outside the reach of the defense's case. Defense counsel was not able to question William on the defense's own terms. As in Levell, the fact finder "might have had a significantly different impression of [William's] credibility had [defense] counsel been permitted to pursue his proposed line of [questioning]." 128 Hawai'i at 41, 282 P.3d at 583.

V.

As with the constitutional rights articulated above, a trial court's discretion in controlling the presentation of evidence must cede to the defendant's right to a fair trial and right to present a defense. "The due process guarantee of the Federal and Hawai'i constitutions serves to protect the right of an accused in a criminal case to a fundamentally fair trial."

State v. Matafeo, 71 Haw. 183, 185, 787 P.2d 671, 672 (1990) (citing State v. Keliioholokai, 58 Haw. 256, 569 P.2d 891 (1977)). Furthermore, "[c]entral to the protections of due process is the right to be accorded 'a meaningful opportunity to present a complete defense.'" Id. (quoting California v. Trombetta, 467 U.S. 479, 485 (1984)) (other citation omitted). Thus, "a defendant has the constitutional right to present any and all competent evidence in his defense." Kassebeer, 118 Hawai'i at 514, 193 P.3d at 430. Plainly, Maryann was not afforded a "meaningful opportunity to present a complete defense." Matafeo, 71 Haw. at 185, 787 P.2d at 672 (internal citation and quotation marks omitted).

A.

1.

The majority frames the recall issue in terms of whether the court abused its discretion in applying HRE Rule 611(a) (1993). See majority's opinion at 67.

HRE Rule 611(a) provides:

Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

However, in all cases, the right to present a fair defense must be considered with the other legitimate interests in the criminal trial process. See Pond, 118 Hawai'i at 481, 193

P.3d at 397 (Acoba, J. concurring and dissenting). Any rule excluding evidence, including HRE Rule 611(a), must avoid "relegat[ing] the defendant's constitutional rights to that of rule status." Id.

Any interpretation of the Federal Rule of Evidence (FRE) Rule 611, which is identical to Hawai'i's HRE Rule 611, must be consistent with the protection of a defendant's constitutional rights. "While Rule 611(a) gives courts broad powers to regulate the mode and order of proof, those powers must be exercised consistent with certain constitutional rights of litigants to present evidence." Wright and Miller, Federal Practice and Procedure, 28 Fed. Prac. & Proc. Evid. § 6164 (2d ed.) (emphasis added). "In criminal cases, several constitutional rights may be implicated by rulings under Rule 611(a) which are adverse to the accused. . . includ[ing] the right to present a defense and the right to testify, which are aspects of the right to due process." Id. See Chambers, 410 U.S. at 297 (due process was violated because state evidence rules effectively prevented the defendant from exploring his claim that another person committed the crime for which the defendant was on trial).

In United States v. Grande, 620 F.2d 1026 (4th Cir. 1980), the court refused to permit defendants to recall a government witness concerning an exhibit offered into evidence by the government after the witness had been excused subject to

recall. 620 F.2d at 1035. The Fourth Circuit held that "[t]he due process clause unquestionably guarantees to a defendant the right to rebut a case proved against him, and this right in turn includes the right to cross-examine the government's witnesses whose testimony incriminates him and to present evidence in his own behalf." Id.

Additionally, "[i]t is clear that the courts' powers under Rule 611 cannot be exercised to limit cross-examination of prosecution witnesses until the constitutionally required level of confrontation has been afforded the accused." Wright and Miller, Federal Practice and Procedure, 28 Fed. Prac. & Proc. Evid. § 6164 (2d ed.); see also United States v. Lankford, 955 F.2d 1545, 1548 (11th Cir. 1992) ("The district court's discretion in limiting the scope of cross-examination is subject . . . to the requirements of the Sixth Amendment." (citation and internal quotation marks omitted)); Hoover v. State of Md., 714 F.2d 301, 305 (4th Cir. 1983) ("The trial judge's traditional discretion to control the limits of cross-examination cannot be exercised until the constitutionally required threshold level of inquiry has been afforded the defendant." (citation and internal quotation marks omitted)); United States v. Elliott, 571 F.2d 880, 908 (5th Cir. 1978) ("We have long recognized that while the scope of cross-examination is within the discretion of the trial judge, this discretionary authority to limit cross-examination

comes into play only after there has been permitted as a matter of right sufficient cross-examination to satisfy the Sixth Amendment." (internal quotation marks omitted)); United States v. Garrett, 542 F.2d 23, 25 (6th Cir. 1976) ("[A] limitation on cross-examination which prevents a person charged with a crime from placing before the jury facts from which bias, prejudice or lack of credibility of a prosecution witness might be inferred constitutes denial of the right of confrontation guaranteed by the Sixth Amendment." (citations and internal quotation marks omitted)).

2.

This court has confirmed that the discretion of the court pursuant to HRE Rule 611 is overborne by the defendant's right to a fair trial. For example, in Grindles, the trial court bifurcated the two alternate methods of proof for the single offense of driving while under the influence of intoxicating liquor (DUI), by deciding that it would take all testimony from the State and the defendant as to the first method of proving the offense, and then only permit evidence on the second method of proving the offense if the State failed to establish the first. 70 Haw. at 529, 777 P.2d at 1189. This had the effect of requiring that the defendant present "his evidence to the DUI charge before hearing all of the State's evidence against him." Id. at 532, 777 P.2d at 1190. Grindles held that the defendant's

due process right to a fair trial was violated because "the defendant has an absolute right to hear all of the State's evidence against him prior to putting on his defense." Id.

Here, Maryann was effectively required to put on her defense before hearing all of the State's evidence against her. Maryann cross-examined William, then the State called Deputy Ahn to testify for the prosecution, and then Maryann presented her testimony, including testimony that conflicted with William's account. Subsequently, Maryann sought to call William to the stand, as part of her case, on matters that were, among other things, relevant to Deputy Ahn's testimony, which, as noted, took place after William had previously testified for the prosecution. Maryann was denied the opportunity to recall William to testify, and therefore was required to rely only on her prior cross-examination of him, despite the fact that the State had not presented all of its evidence at the time Maryann had cross-examined William.

Thus, by compelling her to rely on her earlier cross-examination, the court effectively required Maryann to put on part of her defense -- her inquiry into William's credibility -- during the prosecution's case-in-chief, before the State had fully presented its evidence. Therefore, in light of Grindles, Maryann's right to a fair trial was violated by the court's refusal to allow Maryann to recall William. See also State v.

Kido, 102 Hawai'i 369, 379 76 P.3d 612, 622 (App. 2003)

(concluding that a violation of defendant's right to due process resulted from the trial court's direction, over defendant's objection, that he testify before his other defense witnesses). This prevented Maryann from presenting a complete defense, because she was not allowed to "present any and all competent evidence" in her defense. Kassebeer, 118 Hawai'i at 514, 193 P.3d at 430 (citation omitted).

B.

Had the court in fact recalled William to the witness stand, it could have easily controlled the presentation of evidence to avoid testimony that was duplicative of what had already been covered during Maryann's earlier cross-examination of William. In State v. Alfonso, 65 Haw. 95, 648 P.2d 696 (1982), the trial court allowed the prosecution to recall the complainant to the stand to give additional testimony, even though she had testified earlier in the prosecution's case-in-chief. 65 Haw. at 98, 648 P.2d at 699. Alfonso held that the trial court's decision was a valid exercise of its discretion because the prosecution had not rested its case, the complainant was examined off the record to determine the substance of the new testimony, and the court had limited the scope of the direct examination to matters that had not been covered during the

victim's previous appearance on the stand. Id. at 99, 648 P.2d at 700.

In the instant case, the court did make some effort to ascertain the scope of the issues that Maryann sought to ask William during the defense's case-in-chief. Therefore, like the trial court in Alfonso, the court could have limited the scope of William's testimony to issues not addressed during William's previous appearance on the stand. See id. Such a result would have avoided duplicative testimony while protecting Maryann's right to a fair trial and right to present a defense.

C.

Criticism has also been leveled at cases in which the court's discretion has been upheld in the face of constitutional rights. In Romeo v. Hariri, 80 Hawai'i 450, 911 P.2d 85 (App. 1996), a civil case, the plaintiff called the defendant as an adverse witness. 80 Hawai'i at 454, 911 P.2d at 89. The trial court, apparently in an effort to avoid repetitive testimony, asked defense counsel to elect one of three possible procedures: (1) the defendant would, during cross-examination, testify fully about any relevant matter, then forego testimony during his own case-in-chief; (2) the defendant would forego cross-examination following the adversary direct examination, then testify in the usual manner in his case-in-chief; or (3) the defendant's cross-examination would be limited to the matters broached on direct,

and his direct examination during his own case-in-chief would be limited to matters not covered during his first appearance. Bowman, HRE Manual, at § 611-2[4] (citing Romero, 80 Hawai'i at 454, 911 P.2d at 89). The ICA approved the trial court's procedure as an appropriate exercise of discretion under Rule 611(a) "to control the manner in which testimony was gathered from [the d]efendant." Id. (quoting Romero, 80 Hawai'i at 454, 911 P.2d at 89).

However, the ICA's decision in Romero was criticized by Bowman in his treatise on evidence, the Hawai'i Rules of Evidence Manual. Id. He stated that the court in Romero should have had discretion to "suffer a certain amount of repetition resulting from an accommodation of (1) [the] plaintiff's undoubted right to call and question defendant about relevant matters, and (2) [the] defendant's legitimate desire not to be compelled to forgo either a contemporaneous 'cross' of himself that explains matters elicited in response to adversary questioning by [the] plaintiff or the ability to supply a reasonably coherent and complete narrative . . . during his testimony in his own case-in-chief." Id. (emphases added). The instant case illustrates some of Bowman's concerns, chief among them that the court's exercise of discretion would infringe upon the party's right to call and question his adversary about relevant matters in the party's own case-in-chief. Id.

As explained, because of the court's "exercise of discretion," Maryann was denied not only her right to compulsory process and right to confront adverse witnesses, but also her right to present a defense and her due process right to a fair trial. Furthermore, as discussed, Maryann was compelled to forgo questioning William during the defense's case-in-chief, and was instead required to elicit all of William's testimony during the initial cross-examination. However, this case was even more egregious than in Romero, in that Maryann did not know when she cross-examined William that she would not be allowed to call him as a witness later in the defense's case-in-chief, and could not have foreseen the court's denial of the defendant's fundamental rights that would otherwise be exercised in the ordinary course of trial.

In light of these considerations, it is evident that Maryann's right to a fair trial was infringed by the court's Rule 611(a) decision. The court had ample leeway to fashion an alternate remedy to alleviate any concerns that it may have had with respect to William testifying as part of the defense's case.

VII.

A.

Respectfully, the court's application of HRE Rule 611(a) was clearly wrong because it failed to give reasons for its decision. As noted, HRE Rule 611(a) requires that the

court's control be in the interest of "(1) mak[ing] the interrogation and presentation effective for the ascertainment of the truth, (2) avoid[ing] needless consumption of time, and (3) protect[ing] witnesses from harassment or undue embarrassment." The court did not explain how its decision to preclude Maryann from recalling William satisfied any of these goals.

Instead, as indicated supra, the court simply related to the defense that it did not "think there would be any gain," and it "wouldn't work and wouldn't be helpful[.]" It also related that "the [c]ourt's . . . not interested in extracting him because I don't think in the interest of justice and in fairness to both sides that would be helpful." However, because William's credibility was the central issue in the case, the court's denial was detrimental to the ultimate truth-seeking function of the trial.

Second, the court may have intended to avoid "needless consumption of time," HRE Rule 611(a). However, it did not ever state that this was its reason for denying the recall.⁹ And, if bringing William to the courtroom would have taken one to two hours, which in itself is unclear, the court should have

⁹ The majority asserts that the court was not concerned with the delay, although this is not entirely clear from the record either. See majority's opinion at 63. If time was not the court's concern, then it may have been expense or inconvenience, as the majority seems to assume. See majority's opinion at 64. Regardless, it is not apparent from the record what the precise reason was for the court's decision, and respectfully, the majority makes assumptions as to the court's reasoning.

explained how that was a "needless consumption of time[.]" In a complex trial spanning many days it is difficult to ascertain how one or two hours could justify this decision, particularly where Maryann's constitutional rights were at issue, and William had already testified in the prosecution's case.

The majority emphasizes Deputy Cayetano's testimony that protocol for bringing up William to the courtroom would have involved law enforcement resources. See majority's opinion at 63. Contrary to the majority's contention, it was never established in the record what exactly would be involved. Although apparently safety protocol could be implemented at the courthouse, the necessity for this was not shown in any specific detail relating to William's particular situation. In any event, the protocol should be irrelevant in the court's ultimate decision, because William was a witness called to testify in a criminal trial, had already testified, and therefore the court had a duty to obtain William's presence in the courtroom. The record does not establish at all that this was not possible, since no effort whatsoever was made to accomplish this.

Third, there is no indication that the court believed that William was being harassed or embarrassed by the defense. As explained, William was a seasoned informant and witness, and did not seem concerned at all to be testifying for the prosecution in this case. Under these circumstances, it would be

questionable to contend that any additional testimony on William's part would result in harassment or embarrassment. See State v. DeCenso, 5 Haw. App. 127, 133, 681 P.2d 573, 579 (1984). Indeed, the court did not seem to be perturbed by this possibility either. In the absence of explanations as to why the objectives of HRE Rule 611(a) overrode the constitutional protections and the normal course of presenting evidence, it cannot be said that the court properly exercised its discretion. The absence of supporting evidence for the court's decision plainly underscores the lack of a legal basis for the court's decision denying Maryann's recall of William.

In State v. Cramer, 129 Hawai'i 296, 299 P.3d 756 (2013), this court recently held that the consideration of one factor alone was not enough to justify the trial court's decision to deny the defendant a continuance. 129 Hawai'i at 302, 299 P.3d at 762 ("The record does not reflect that the circuit court considered, for example, the length of the delay requested, the impact of the delay on the prosecution, witness or the court, and whether the delay was for a dilatory purpose."). Here, the court did not weigh the potential for any supposed inconvenience with the countervailing prejudice to the defendant's case and the resulting infringement of Maryann's constitutional rights. Respectfully, for the lack of articulate reasons alone, the

court's decision with respect to the recall should result in a new trial.

B.

Even the brief statement by the court was inadequate. The court recognized that William's rights under the Fifth Amendment were not implicated. Yet, the court assumed that William would not testify in the event that he was actually brought to the stand. Contrary to the majority's view, see majority opinion at 64, 65, 71-72, this assumption is clearly erroneous and wrong. William had apparently told Deputy Cayetano that he would not testify, but, there was no way to know whether or not he actually would have testified had he been placed on the stand.

The majority's decision rests on the supposition that William would not have testified. See majority's opinion at 65 ("Thus, Maryann was not entitled to have William refuse to testify in front of the jury."). However, as discussed, it is not clear what would have happened had William been called to the court, because William never took the stand. Thus, the issue is not whether William would refuse to testify in front of the jury, but whether the court should have brought William to the courtroom to ascertain for itself whether any impediments to his testifying justifiably existed.

The court seemed to assume that it had no ability to persuade William to testify because he was already serving a life sentence. It stated that "[t]here's not much I can do [be]cause he's doing life." The majority makes a similar assumption. See majority's opinion at 66 ("[T]here is no suggestion in the record that an exchange [between the court and William] would have persuaded William to testify"). But there is nothing in the record that would indicate William, upon inquiry by the court, would not have testified. No conclusion can reasonably be reached as to what would have occurred, because the record is simply devoid of a colloquy in open court. The court overlooked the fact that William would be compelled to testify because he had been granted immunity. These were not "unique circumstances", majority's opinion at 67, that can justify the court's action, because we cannot know whether the court could have persuaded William to testify, inasmuch as his failure to testify could have impacted the agreement he made regarding his appearance in court. The court therefore wrongly relied on William's statements to Deputy Cayetano. The deputy's conversation with William cannot substitute for a judge's admonition in court to a witness requiring that he testify.

C.

Consequently, it cannot be emphasized enough that the court did not know whether William would in fact testify, because

William was never questioned by the court. The court never inquired of William about his refusal to testify, but relied solely on what William told the deputy. The court had a duty to address the witness personally in court to vindicate the subpoena.¹⁰ Plainly, the deputy was not a proxy for the court. Moreover, we do not know exactly what Deputy Cayetano said to William with respect to the questions he would be asked, or how the conversation may have contributed to William's apparent decision not to testify. The majority notes that "Deputy Sheriff Cayetano testified under oath that William was informed of why he was brought to the courthouse and that he had been subpoenaed to testify." Majority's opinion at 66. However, William was also apparently told what issues he would be testifying about, "with regard to the cooperation or testimony he's given in other cases on the mainland." We do not know how Deputy Cayetano explained this to William, but the generalized way in which the statement was posed may have contributed to William's concerns about testifying. It would appear apparent that the court would have been better able to explicate to William the scope of the issues to be covered during his testimony. Significantly, the parties -

¹⁰ The majority avers that the court "did not abuse its discretion in not personally addressing William sua sponte." Majority's opinion at 66. "[S]ua sponte" implies that the court had no duty to address William personally, however, the court did have the obligation to ensure that Maryann had the opportunity to obtain William's testimony and personally addressing William was part of that task.

- including defense counsel -- were prevented from examining William as to the reasons why he would not testify. Obviously, the defense had the right to ascertain William's veracity under oath on this specific issue, for purposes of mounting its defense and for argument to the court as to why the court should compel William's testimony.

D.

Furthermore, respectfully, although the court explained that its decision was in "the interest of justice and [] fairness to both sides", this cannot be true given the facts. The failure to secure William to testify in the defense's case, where he had already testified at length for the prosecution, was inimical to the interest of justice and fundamentally unfair. Rather, the interest of justice and fairness mandated that William be called to testify in the defense's case, where he had already testified at length for the prosecution. The court recognized as much when it acknowledged that "[William] came in not voluntarily, under subpoena, for [the prosecution] and in agreement. Now he refuses to do it for [defense counsel]." Although the court perceived the inequity, it did nothing to remedy the manifest prejudice to Maryann by this tactic. The majority states that "because William refused to testify, the circuit court was not presented with the option of presenting William's testimony to the jury." Majority's opinion at 72. However, this again assumes that

William would not have testified had he been put on the stand. And to the contrary, the court was presented with the option of ascertaining for itself, in person, subject to examination by counsel and on the record, that William would or would not testify, and to use its judicial offices to admonish William of his obligations as one subpoenaed to testify by court order.

Under the circumstances of this case, as Maryann argues, it was patently wrong for the court not to order that William be brought to the stand so that the court itself could ascertain, through a face-to-face interaction, the basis and appropriateness of William's position and to consider such measures as would be appropriate. For, it was obviously unfair to deny the defense the same opportunity that the prosecution had to ask William questions during its case-in-chief. This incongruity between the treatment of the prosecution's case-in-chief and the defense's case-in-chief with respect to William's testimony manifestly violated Maryann's due process right to a fair trial and prevented Maryann from presenting all competent evidence in her defense.

E.

It cannot be doubted that Deputy Cayetano was not an adequate replacement for William. Deputy Cayetano conveyed to the jury that William was informed that he had been subpoenaed to testify for the defense, and that William had refused to come to

the courtroom. However, there is no way of knowing if this would have been consistent with what William would have conveyed to the jury had he actually been put on the stand, for William had already testified in the prosecution's case.¹¹

Also, Deputy Cayetano's testimony before the jury was hearsay.¹² Indeed, the prosecutor alleged that the deputy's testimony as to William's statement would be hearsay. Deputy Cayetano testified that William would not obey the subpoena, and would refuse to answer questions under oath regarding his knowledge of the case. William's refusal to testify was offered to the jury for "the truth of the matter asserted." That is, the jury was to believe that William in fact refused to testify. Therefore, Deputy Cayetano's testimony regarding William's refusal to testify was hearsay.

As noted before, defense counsel had little choice but to request that Deputy Cayetano relate to the jury that William refused to testify. The majority makes much of the fact that

¹¹ The majority notes that the court stated that Deputy Cayetano could be called as a witness "out of a concern for fairness and in order to avoid any juror confusion." Majority's opinion at 35; see also majority's opinion at 63. Respectfully, it is not evident how the testimony of Deputy Cayetano would avoid any juror confusion, but surely added to it, since William had testified previously.

¹² HRE Rule 801 (Supp. 2002) provides that, for purposes of the hearsay rule, "[h]earsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." A "[s]tatement" is an oral assertion, an assertion in writing or nonverbal conduct of a person, if it is intended by the person as an assertion." HRE Rule 801.

Maryann agreed to Deputy Cayetano's testimony, see majority's opinion at 63-64, but the court itself initially proposed that option. The court asked "[y]ou want to put [Deputy] Cayetano on [the stand] and let [the jury] know that [William] just simply refuses to come out?" After the court decided not to have William brought to the courtroom, Maryann was without viable options, and was left with the avenue mentioned by the court.

Furthermore, the deputy's testimony may have demonstrated that William could effectively choose not to testify for the defense, and avoid facing the jury in the courtroom. It would have appeared to the jury that Maryann did not have a right to compel his testimony and to cross-examine him on evidence that had been subsequently introduced. Deputy Cayetano related that "[William is] physically in the cell block, but he's refusing to come to this particular courtroom." This had to have had a significant impact on the jury and the defendant's ability to present a defense.¹³ The failure to place William on the stand verified that he legally had the right to refuse to testify and that the defense had no legal right to have him testify, much less to confront him with Deputy Ahn's testimony and Maryann's

¹³ Contrary to the majority's assertion, the fact that Deputy Cayetano's testimony was introduced cannot support a conclusion that Maryann's right to compulsory process and her right to a fair trial were satisfied. Majority's opinion at 64. As noted, the impetus to have Deputy Cayetano testify initially came from the court, not Maryann. Maryann was left without a choice.

version of the events. The court, in effect, kept William from the scrutiny of the jury's deliberation and thereby allowed the prosecution's argument that William asked for nothing and received nothing to go unchallenged, despite Deputy Ahn's and Maryann's testimony. Consequently, for the several reasons recounted, Deputy Cayetano's testimony was an acutely inappropriate substitute for William's live testimony on the stand.

F.

In offering post hoc reasons to justify the court's refusal to recall William to testify, the majority emphasizes William's concern for his safety as a valid reason for the court to decide not to recall him as a witness for the defense. Majority's opinion at 70-71. Respectfully, this is simply implausible. Of course, the court never expressly indicated this as one the reasons for its decision.

This would fly in the face of the facts and the record. The majority refers to William's declaration and a letter from California authorities "emphaz[ing] the importance of protecting William" inasmuch as he had "provided the Department of Corrections and Rehabilitation with highly sensitive information." Majority's opinion at 71. Yet, this declaration was given before trial, and William subsequently testified for three days as a witness for the prosecution. The court had

granted William's motion prohibiting video, photographic, or sketch art images of William at trial.

The record does not indicate that William or the prosecution requested any other safety measures. Safety was not raised as an issue when William had been cross-examined by the defense during the prosecution's case. Nothing indicated examination during the defendant's case posed more danger. Simply put, no one considered safety concerns because William had already testified for the prosecution for three days. Obviously, any limits on William's testimony could have been raised and ruled on during William's testimony, without prohibiting defense counsel from questioning him in the defense's case at all.

William suddenly decided that his safety was compromised by testifying as part of the defense's case-in-chief. The alleged concerns for his safety only during Maryann's case-in-chief ring hollow in light of his direct and redirect testimony and cross-examination in the prosecution's case-in-chief. Plainly, safety was not a valid reason for the court's refusal to recall William. The use of this excuse for prohibiting the defense to confront William in its own case unequivocally contravened Maryann's right to a fair trial. It is not up to the witnesses to decide who they will testify for, and whether they will testify. A witness cannot be strictly limited to aiding the prosecution's case only. Respectfully, the court

ceded management of the trial to William without regard to complete and equal access to the witnesses inhering in the right to a fair trial. Maryann was precluded from presenting "any and all competent evidence in [her] defense." Kassebeer, 118 Hawai'i at 514, 193 P.3d at 430.

VIII.

The errors in the instant case were not harmless. Thus the case must be remanded for a new trial. We have held that "[t]he 'denial of a defendant's constitutionally protected opportunity to impeach a witness for bias, motive, or interest is subject to harmless error analysis.'" Levell, 128 Hawai'i at 41, 282 P.3d at 583 (quoting Balisbisana, 83 Hawai'i at 117, 924 P.2d at 1223). Consequently, "[e]rror that infringes on one's constitutionally protected right[s] cannot be said to be harmless beyond a reasonable doubt." State v. Schnabel, 127 Hawai'i 432, 450, 279 P.3d 1237, 1255 (2012) (citing State v. Cuevas, 53 Haw. 110, 115, 488 P.2d 322, 325 (1971) (concluding that "error is neither unimportant nor insignificant where "it infringes upon a basic right[s] of the accuse[d]"; "[in such instances, the error] raises a reasonable possibility that it might have contributed to the conviction" such that it "cannot [be said] that it was harmless beyond a reasonable doubt") (other citations omitted). "The relevant question under the harmless beyond a reasonable doubt standard is "whether there is a reasonable possibility

that error might have contributed to conviction.'" Schnabel, 127 Hawai'i at 450, 279 P.3d at 1255 (emphases in original) (quoting State v. Duncan, 101 Hawai'i 269, 278, 67 P.3d at 768, 777 (2003) (other citation and internal quotation marks omitted)).

This case was essentially about the believability of Maryann's version as opposed William's version of Hasker's murder. William's testimony was that Maryann was free to leave at any time, and thus was a willing participant in the murder. On the other hand, Maryann's testimony was that she was intimidated and coerced into taking part in the events leading up to and culminating in, Hasker's murder. Thus, whether Maryann was a willing participant or not was the determinative issue.

With the credibility of William and Maryann as the paramount concern for the jury, the harmless error analysis turns on the fact that we cannot know what William's testimony would have been, had the court permitted him to be called as a witness in the defense's case-in-chief. For example, it is possible that upon examination, defense counsel could have discredited William's alleged motive for testifying to the Parole Board that Maryann did "[a]bsolutely nothing", and as a result, the jury may have concluded that William was telling the truth before the Parole Board and lying in this case. Or, William's additional testimony may have further called into question his ability to tell the truth while under oath. Any of these scenarios could

have changed the result in favor of Maryann in the minds of the jurors, or led them to the conclusion that Maryann's guilt had not been proven beyond a reasonable doubt. Thus, the errors in this case were not harmless beyond a reasonable doubt.

IX.

In light of the foregoing, the ICA's November 9, 2012 Judgment, filed pursuant to its October 12, 2012 Memorandum Opinion, and the Judgment of Conviction and Sentence entered by the court on November 9, 2009 should be vacated. The case should be remanded for a new trial.

/s/ Simeon R. Acoba, Jr.

/s/ Sabrina S. McKenna

