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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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

vs.

SCOTT A. ABREGANO, Petitioner/Defendant-Appellant.

SCWC-13-0000401

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-13-0000401; FC-CR. NO. 12-1-01963)

DECEMBER 11, 2015

DISSENTING OPINION TO PART II

(By: Recktenwald, C.J., with whom Nakayama, J., joins)

Respectfully, I dissent from Part II.

In his application for writ of certiorari, Defendant Scott Abregano asked this court to vacate his conviction on several grounds. First, Abregano argued that Hawai'i Rules of Penal Procedure (HRPP) Rule 48 was violated since he was not

brought to trial within the 180 days required by the rule. Second, Abregano argued that comments made by the family court when the State questioned Abregano's wife KA regarding the terms of the protective order constituted improper commentary on the evidence.¹

The first issue, which is addressed in Part I, is dispositive. Accordingly, I would not reach the second issue, which is addressed in Part II.

The Majority suggests that it is not unusual for our appellate courts to provide guidance on remand. That said, Part II has the practical effect of precluding the State from relying on Sections III(B) (3) or (4) of the protective order when Abregano is retried. Notably, Abregano moved for a judgment of acquittal challenging the sufficiency of the evidence with regard to those sections. The family court denied the motion, and Abregano did not raise this issue in his appeal to the ICA or to this court. Thus, I do not believe we should address the issue here.

¹ Abregano also raised the question of whether the ICA erred in holding that the trial court properly precluded him from presenting a member of the jury as a witness in support of his motion for a new trial, as he hoped to establish that an outside influence was present during jury deliberations. Because the first issue is dispositive of this appeal, there is no need to address this contention. See United Pub. Workers, AFSCME, Local 646, AFL-CIO v. Hanneman, 106 Hawai'i 359, 360, 105 P.3d 236, 237 (2005), as corrected (Mar. 28, 2005).

For the foregoing reasons, I respectfully dissent from
Part II.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

