NOS. 24489 and 29818

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

NO. 24489
STATE OF HAWAIʻI, Plaintiff-Appellee, v.
FRANK O. LOHER, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 99-1621)

NO. 29818
FRANK O. LOHER, Petitioner-Appellant, v.
STATE OF HAWAIʻI, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(S.P.P. NO. 05-1-0067; CR. NO. 99-1621)

ORDER VACATING JUDGMENTS AND SETTING FURTHER BRIEFING
(By: Leonard, Presiding Judge, Reifurth, and Ginoza, JJ.)

On September 23, 2016, in Appeal No. 24489, Plaintiff-Appellee State of Hawaiʻi (**State**) filed a Motion Requesting This Court to Reinstate [Defendant-Appellant Frank O.] Loher's [(**Loher's**)] Direct Appeal Pursuant to Federal Mandate (**Motion Pursuant to Mandate**).

On September 30, 2016, this court ordered that the Motion Pursuant to Mandate be deemed filed in Appeal No. 29818, as well as in Appeal No. 24489. In addition, the court ordered the cases be consolidated for the limited purpose of considering

the State's Motion Pursuant to Mandate, to enable the court to effect complete relief in the matter, as appropriate.

Pursuant to collateral proceedings in the United States District Court, District of Hawai‘i (**District Court**), No. 1:11-cv-00731-LEK-KSC, and the United States Court of Appeals for the Ninth Circuit, No. 14-16147, the State seeks to vacate this court's May 31, 2011 Memorandum Opinion in 29818 to the extent this court "concluded that Loher's appellate counsel on direct appeal was not ineffective when failing to raise a 'forced testimony' issue on direct appeal," and to reinstate Loher's direct appeal in 24489 so that Loher can raise what the District Court also described as the Brooks issue, on a direct appeal.

In consideration of the foregoing, IT IS HEREBY ORDERED as follows:

(1) This court's Notice and Judgment on Appeal, entered on June 19, 2003, in No. 24489 is hereby vacated;

(2) This court's Judgment on Appeal, entered on July 19, 2011, in 29818 is hereby vacated;

(3) Loher's direct appeal in No. 24489 is hereby reinstated to allow Loher to raise on direct appeal his claim that, in violation of his constitutional rights, Loher was "forced" to testify when the trial court refused to grant Loher a continuance in order to testify after his other witnesses; and

(4) Within 40 days after the date of this order, Loher shall file an opening brief on the mandated issue, in accordance with Hawai‘i Rules of Appellate Procedure (HRAP) Rule 28;

(5) Within 40 days after service of Loher's opening brief on the mandated issue, the State shall file an answering brief on the mandated issue, in accordance with HRAP Rule 28(c); and

(6) Within 14 days after service of the State's answering brief on the mandated issue, Loher may file a reply brief on the mandated issue or a notification that no reply will be filed, in accordance with HRAP Rule 28(d).

DATED: Honolulu, Hawaiʻi, October 25, 2016.

Presiding Judge

Associate Judge

Associate Judge