

DISSENTING OPINION BY GINOZA, J.

I respectfully dissent from the Summary Disposition Order because under prevailing authority Defendant-Appellant Patrick Ho's (Ho) right to exercise his peremptory challenges was impaired. State v. Timas, 82 Hawai'i 499, 923 P.2d 916 (App. 1996), *cert. denied*, 81 Hawai'i 400, 917 P.2d 727 (1996); State v. Carvalho, 79 Hawai'i 165, 880 P.2d 217 (App. 1994); Hawai'i Rules of Penal Procedure Rule 24(d) ("[c]hallenges for cause may be made at any time prior to the exercise of peremptory challenges.").

This court has held as to alternate jurors that "the defendant shall not be called upon to exercise the [peremptory] challenge until all potential alternate jurors have been examined and passed on challenges for cause." Timas, 82 Hawai'i at 509, 923 P.2d at 926 (quoting Carvalho, 79 Hawai'i at 172, 880 P.2d at 224). No substantive difference is apparent in dealing with peremptory challenges to the regular jury panel. In this case, the State challenged jurors 43a and 8a for cause, but they were not initially dismissed. After rounds of peremptory challenges and Ho had used his last peremptory challenge, the State renewed its "for cause" challenge to jurors 43a and 8a, who were then dismissed for cause. Jurors 7 and 9 were then added to replace jurors 43a and 8a.

Jurors 7 and 9 participated in rendering the verdict. Even though Ho did not challenge jurors 7 or 9 for cause or challenge the Family Court's procedure, under Timas and Carvalho it was plain error to dismiss jurors 43a and 8a for cause and replace them with jurors 7 and 9 after Ho's peremptory challenges had been used. Timas, 82 Hawai'i at 509, 923 P.2d at 926; Carvalho, 79 Hawai'i at 174, 880 P.2d at 226. "[T]he denial or impairment of a defendant's right of peremptory challenge in a criminal case is reversible error not requiring a showing of prejudice." Timas, 82 Hawai'i at 509, 923 P.2d at 926 (quoting Carvalho, 79 Hawai'i at 174, 880 P.2d at 226); see also State v. Iuli, 101 Hawai'i 196, 204, 65 P.3d 143, 151 (2003); State v. Kauhi, 86 Hawai'i 195, 198, 948 P.2d 1036, 1039 (1997).

The circumstances above are distinguishable from Iuli and Kauhi, where trial courts allegedly abused their discretion in refusing to excuse a juror for cause and a defendant then utilized a peremptory challenge to remove that juror. In those situations, the burden is on the defendant to establish, as an initial matter, that his right to exercise a peremptory challenge was "denied or impaired." See Iuli, 101 Hawai'i at 205-06, 65 P.3d at 152-53; Kauhi, 86 Hawai'i at 197-200, 948 P.2d at 1038-41.

Under Carvalho and Timas, the right to exercise peremptory challenges is denied or impaired when a defendant is called on to exercise the challenges before prospective jurors are passed for cause. Pursuant to those cases, Ho's conviction should be vacated and the case remanded for a new trial.

*Tim W. King*