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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.

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

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SCWC-11-0000085

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

APRIL 29, 2013

RECKTENWALD, C.J., NAKAYAMA, McKENNA, AND POLLACK, JJ., WITH  
ACOPA, J., CONCURRING SEPARATELY, WITH WHOM POLLACK, J., JOINS

OPINION OF THE COURT BY RECKTENWALD, C.J.

Stephen Cramer, Jr. was found guilty of several drug-related offenses following his termination from the Drug Court program. At his sentencing hearing approximately two months later, Cramer was represented by a court-appointed deputy public defender. Privately retained counsel also appeared on behalf of

Cramer, and sought to substitute for the deputy public defender "provided that [he was] given the opportunity to properly prepare." Cramer's privately retained counsel requested a three week continuance to prepare.

The Circuit Court for the Second Circuit denied Cramer's motion for substitution of counsel and a continuance as untimely.<sup>1</sup> The deputy public defender represented Cramer for the duration of the hearing. The circuit court eventually continued the sentencing hearing for five days, apparently to obtain additional information with regard to whether Cramer was eligible for a sentence of probation under Hawai'i Revised Statutes (HRS) § 706-622.5, quoted infra.

At the continued sentencing hearing, Cramer was again represented by the deputy public defender. The circuit court determined that Cramer was not entitled to sentencing pursuant to HRS § 706-622.5. The circuit court then sentenced Cramer to a ten-year indeterminate term of incarceration for Promoting a Dangerous Drug in the Second Degree, a five-year term for Prohibited Acts Related to Drug Paraphernalia, and a thirty-day term for Promoting a Detrimental Drug in the Third Degree, all terms to run concurrently.

Cramer's privately retained counsel was subsequently permitted to substitute for the deputy public defender. Cramer

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<sup>1</sup> The Honorable Shackley F. Raffetto presided.

appealed the circuit court's judgment of conviction and sentence, arguing, *inter alia*, that the circuit court violated his constitutional right to counsel of his choice when it denied his motion for substitution of counsel and a continuance of the sentencing hearing. The ICA determined that the circuit court did not abuse its discretion in denying Cramer's motion, and accordingly affirmed the circuit court's judgment. State v. Cramer, No. CAAP-11-0000085, 2012 WL 1560671, at \*2 (App. May 3, 2012) (Summary Disposition Order).

In his application to this court, Cramer again argues that the circuit court violated his constitutional right to counsel of his choice when it denied his motion. We agree that Cramer was denied his right to privately retained counsel of his choice under article I, section 14 of the Hawai'i constitution. We also hold that the circuit court abused its discretion in denying the motion for substitution of counsel and continuance of the hearing. Specifically, the circuit court relied only on the timeliness of the request, and the record does not reflect that the circuit court properly balanced Cramer's right to counsel of his choice against countervailing government interests. Accordingly, we vacate the ICA's June 1, 2012 judgment and the circuit court's January 11, 2011 judgment, and remand to the circuit court for resentencing.

## I. Background

The following factual background is taken from the record on appeal.

### A. Circuit Court Proceedings

On November 9, 2007, Cramer was charged with Promoting a Dangerous Drug in the Second Degree, in violation of HRS § 712-1242(1)(b)(i)<sup>2</sup> (Count One), Prohibited Acts Related to Drug Paraphernalia, in violation of HRS § 329-43.5(a)<sup>3</sup> (Count Two), and Promoting a Detrimental Drug in the Third Degree, in violation of HRS § 712-1249(1)<sup>4</sup> (Count Three), in relation to an

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<sup>2</sup> HRS § 712-1242(1)(b)(i) (Supp. 2007) provides:

A person commits the offense of promoting a dangerous drug in the second degree if the person knowingly . . . [p]ossesses one or more preparations, compounds, mixtures, or substances of an aggregate weight of . . . [o]ne-eighth ounce or more, containing methamphetamine, heroin, morphine, or cocaine or any of their respective salts, isomers, and salts of isomers[.]

<sup>3</sup> HRS § 329-43.5(a) (1993) provides:

It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter. Any person who violates this section is guilty of a class C felony and upon conviction may be imprisoned pursuant to section 706-660 and, if appropriate as provided in section 706-641, fined pursuant to section 706-640.

<sup>4</sup> HRS § 712-1249(1) (1993) provides:

A person commits the offense of promoting a detrimental drug in the third degree if the person knowingly possesses any marijuana or any Schedule V substance in any amount.

incident on September 19, 2007, when officers executed a search warrant on Cramer's vehicle and discovered crystal methamphetamine and other drug paraphernalia.

On February 25, 2009, Cramer filed a Petition for Admission to Drug Court and Waiver of Rights; Admission Agreement (Petition), in which he admitted to the charged offenses. He acknowledged that the State would prosecute him if he did not successfully complete the Drug Court Program, and that he would be tried without a jury. At a February 25, 2009 hearing, the circuit court granted Cramer's Petition and admitted him into the Drug Court program.<sup>5</sup>

On July 21, 2010, the State filed a motion to terminate Cramer's participation in the Maui Drug Court Program because Cramer failed to comply with the terms and conditions of the program, specifically conditions A and B of the Drug Court Program Admission Agreement.<sup>6</sup>

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<sup>5</sup> Cramer was represented at the hearing by privately retained counsel Christopher Dunn. It appears that Dunn was permitted to withdraw as Cramer's counsel at a July 14, 2010 hearing, and the Office of the Public Defender was appointed to represent Cramer.

<sup>6</sup> Conditions A and B of the Maui Drug Court Program Admission Agreement, which Cramer agreed to, provided:

- A. I will commit myself to full participation in the Maui Drug Court Program ("Drug Court") toward the goal of remaining clean and sober for the rest of my life.
- B. I will give truthful answers to any questions asked by the Drug Court Judge ("Court") and the Drug Court staff including any treatment providers to whom I am referred by the Drug Court staff. Honesty is of critical importance, and my truthful answers may help determine the

(continued...)

A hearing was held on the State's motion, with Cramer represented by Deputy Public Defender (DPD) Danielle Sears, and on September 3, 2010, the circuit court filed an order granting the State's motion to terminate Cramer's participation in Drug Court. On November 4, 2010, the circuit court held a stipulated facts trial. The circuit court admitted Cramer's Petition into evidence, found Cramer guilty as charged on all three counts, and set sentencing for January 6, 2011. In the interim, Cramer was free on \$100,000 bail.

At the start of the scheduled January 6, 2011 sentencing hearing, the following exchange occurred:

[DPD] SEARS: Good morning, Your Honor. Danielle Sears, Deputy Public Defender on behalf of [] Cramer.

THE COURT: Good morning.

[DPD] SEARS: There has been a development.

[] ALULI: Good morning, Your Honor. Hayden Aluli on behalf of [] Cramer. If I may, Your Honor, I would move to substitute for [DPD] Danielle Sears provided that I'm given the opportunity to effectively prepare. And I'm asking for three weeks continuance of these proceedings, Your Honor. I've spoken with the prosecution. And if there needs to be discussion, we can approach the bar.

THE COURT: No. We can do it on record. What is your position on it?

[DPA]: Your Honor, the State is ready for sentencing today.

THE COURT: All right. We're going to go ahead today. So I'll deny your motion. Thank you. It's untimely. Thank you.

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<sup>6</sup>(...continued)  
type of treatment that is best for me.

DPD Sears then informed the circuit court that she had received a presentence investigation report and a Substance Abuse Assessment of Cramer, and wanted to know whether the court had also received the Substance Abuse Assessment. The circuit court stated it did not receive the Substance Abuse Assessment, but wanted to review it to assess whether Cramer qualified for sentencing under "Act 44."<sup>7</sup> The circuit court also noted that Cramer had a protective order entered against him in 2008 and convictions for violations of temporary restraining orders, and stated that it needed more information about those incidents before it made a determination as to whether Cramer was nonviolent and therefore qualified for sentencing under Act 44.

The deputy prosecuting attorney then stated, "Can we ask for a continuance." The circuit court responded, "I would like to continue this, but not more than a week." The circuit court also reiterated that it did not receive the Substance Abuse Assessment, which was a "critical determination in this case." The circuit court continued the sentencing until January 11, 2011.

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<sup>7</sup> HRS § 706-622.5 (Supp. 2007), commonly referred to as Act 44, provides, *inter alia*, that persons convicted for the first time for certain specified drug offenses may be sentenced to probation if the court determines that the person is nonviolent, has been assessed by a certified substance abuse counselor to be in need of substance abuse treatment, and has presented a proposal to receive substance abuse treatment. 2004 Haw. Sess. Laws Act 44, § 11 at 214. Pursuant to HRS § 706-622.5(4), if a defendant successfully completes the substance abuse treatment program and complies with other terms and conditions of probation, then the court "shall issue a court order to expunge the record of conviction for that particular offense."

DPD Sears appeared on behalf of Cramer at the January 11, 2011 sentencing hearing. The circuit court denied probation under Act 44, and sentenced Cramer to incarceration for ten years on count one, five years on count two, and thirty days on count three, all terms to run concurrently. The circuit court filed its Judgment of Conviction and Sentence on January 11, 2011.

On February 3, 2011, the circuit court approved the withdrawal of DPD Sears and the substitution of Aluli as Cramer's counsel. Cramer, through Aluli, filed a notice of appeal.

On March 21, 2011, Cramer, through Aluli, filed in the circuit court a Motion to Reduce Sentence pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 35(b).<sup>8</sup> On April 7, 2011, at a hearing on Cramer's motion to reduce sentence, the circuit court concluded that Cramer "needs to have the consequences of his behavior to finally understand that he needs to change." Accordingly, the circuit court denied Cramer's motion to reduce sentence.

## **B. ICA Appeal**

In his opening brief, Cramer asserted that the trial court committed reversible error in denying his motion for substitution of counsel and for a continuance of the sentencing

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<sup>8</sup> HRPP Rule 35(b) (2011) provides in relevant part: "The filing of a notice of appeal shall not deprive the court of jurisdiction to entertain a timely motion to reduce a sentence."



proceeding, in violation of his constitutional right to counsel of his choice. Although Cramer acknowledged that trial courts are given "wide discretion" in determining whether to grant a continuance, he contended that the circuit court abused its discretion because it "simply said that the motion was untimely and failed to engage in weighing Cramer's constitutional right to a reasonable delay of sentencing against the needs of fairness and the demands of its calendar." (Citing United States v. Gonzalez-Lopez, 548 U.S. 140 (2006)).<sup>9</sup>

In its answering brief, the State argued that the circuit court properly exercised its discretion in denying Cramer's motion because the request for substitution of counsel was "tentative and conditional" upon the granting of a three-week continuance. In addition, the State asserted that Cramer "made no representation that he was dissatisfied or had lost confidence in [DPD Sears] or that he had discharged present counsel, and that he wanted or had retained [] Aluli as his new counsel." The State, citing State v. Torres, 54 Haw. 502, 510 P.2d 494

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<sup>9</sup> Cramer also asserted that the circuit court abused its discretion in failing to sentence him to probation as a first-time drug offender under HRS § 706-622.5. The ICA concluded: "Based on the family court's finding that Cramer had engaged in family violence, the circuit court determined it could not conclude that Cramer was nonviolent as required under HRS § 706-622.5. Because Cramer was not eligible to be sentenced to probation, the circuit court did not err in refusing to sentence Cramer under HRS § 706-622.5." Cramer, 2012 WL 1560671, at \*2. Cramer does not challenge this determination in his application. However, as discussed further below, we conclude that Cramer can argue for any potentially applicable sentence (including sentencing under Act 44) on remand, since the denial of counsel of choice at his original hearing was structural error.

(1973),<sup>10</sup> argued that in denying Cramer's motion, it was "apparent that the [circuit] [c]ourt was concerned about the orderly flow of business in the court system."

Cramer filed a reply brief and argued, *inter alia*, that the State provided no support for its contention that he needed to justify his assertion of the right to private counsel of his choice, and that Torres was distinguishable because it involved a claim of ineffective assistance of counsel.

In its May 3, 2012 SDO, the ICA determined, *inter alia*:

Here, Cramer was represented by counsel from the public defender's office at the Drug Court termination hearing on August 19, 2010 and the Stipulated Facts trial on November 4, 2010. Not until the sentencing hearing on January 6, 2011 did other counsel make an appearance and request substitution, contingent on the circuit court's willingness to continue the hearing for three weeks. Cramer provided no reason for the request for new counsel and, on appeal, has not argued he was prejudiced by the court's denial of a continuance to accommodate appointment of new counsel. We conclude the circuit court did not abuse its discretion in denying Cramer's oral motion for substitution of counsel and a continuance.

Cramer, 2012 WL 1560671, at \*1.

Accordingly, the ICA affirmed the circuit court's Judgment of Conviction and Sentence and subsequently entered its Judgment on Appeal on June 1, 2012. Cramer timely filed an application for writ of certiorari and the State timely filed its response.

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<sup>10</sup> As discussed further *infra*, in Torres, this court determined that the trial court's substitution of counsel on the eve of trial and subsequent denial of a continuance did not deprive the defendant of his constitutional right to the effective assistance of counsel. 54 Haw. at 503, 507, 510 P.2d at 496-97. This court articulated a test to balance the need for counsel to have adequate time to prepare with "due consideration for the orderly administration of justice[.]" Id. at 505-06, 510 P.2d at 496-97.

## II. Standard of Review

With regard to a motion for substitution, this court has stated that:

the right to counsel of choice is qualified, and can be outweighed by countervailing governmental interests. But in light of the right to counsel, and in the absence of countervailing considerations, a criminal defendant should have his, her, or its choice of privately retained counsel. . . . Whether a change in counsel should be permitted . . . rests in the sound discretion of the trial court.

State v. Maddagan, 95 Hawai'i 177, 180, 19 P.3d 1289, 1292 (2001) (citations and quotation marks omitted).

In addition, "a motion for continuance is addressed to the sound discretion of the trial court, and the court's ruling will not be disturbed on appeal absent a showing of abuse of that discretion." State v. Lee, 9 Haw. App. 600, 603, 856 P.2d 1279, 1281 (1993). "Generally, to constitute an abuse, it must appear that the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." State v. Crisostomo, 94 Hawai'i 282, 287, 12 P.3d 873, 878 (2000) (internal quotation marks, citation, and brackets omitted).

## III. Discussion

### A. The circuit court abused its discretion in denying Cramer's motion for substitution of counsel and a continuance of the sentencing hearing

Cramer asserts that pursuant to the Sixth Amendment of the United States Constitution and article I, section 14 of the Hawai'i Constitution, he was entitled to privately retained

counsel of his choice, and that the circuit court abused its discretion in denying his motion for substitution of counsel and a continuance. As explained below, we conclude that Cramer was denied his right to privately retained counsel of his choice under the Hawai'i constitution.

Article I, section 14 of the Hawai'i Constitution provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for the accused's defense." We have interpreted this provision to guarantee a criminal defendant's right to privately retained counsel of his or her choice. Maddagan, 95 Hawai'i at 180, 19 P.3d at 1292 ("On independent state constitutional grounds, we also recognize that the right to counsel in article I, section 14 of the Hawai'i Constitution encompasses a right to privately retained counsel of choice.").

In Maddagan, the circuit court denied the defendant's motion to withdraw his guilty plea, made through new counsel, because no motion to withdraw or substitute counsel was filed. Id. at 178, 19 P.3d at 1290. Attached to defendant's motion was his affidavit that stated that he was authorizing his new counsel, Earle A. Partington, to represent him on the motion. Id. On appeal, this court recognized that article I, section 14 of the Hawai'i Constitution "encompasses a right to privately retained counsel of choice[,]" but that "the right to counsel of choice is qualified, and can be outweighed by countervailing

governmental interests." Id. at 180, 19 P.3d at 1292 (emphasis added and citation omitted). This court determined that the circuit court had discretion to allow the substitution of Partington and that the defendant should have been given a hearing to advocate for the substitution. Id. at 182, 19 P.3d at 1294.

It is clear from Maddagan that a criminal defendant has a constitutional right under article I, section 14 of the Hawai'i Constitution to privately retained counsel of his or her choice. This right, however, must be balanced against countervailing governmental interests. See Maddagan, 95 Hawai'i at 180, 19 P.3d at 1292 ("[T]he right to counsel of choice is qualified, and can be outweighed by countervailing governmental interests.") (citation omitted); cf. Wheat v. United States, 486 U.S. 153, 164 (1988) (holding that federal courts "must recognize a presumption in favor of petitioner's counsel of choice, but that presumption may be overcome not only by a demonstration of actual conflict [of interest] but by a showing of a serious potential for conflict. The evaluation of the facts and circumstances of each case under this standard must be left primarily to the informed judgment of the trial court") (emphasis added).

This court has not had occasion to examine the countervailing governmental interests that should be balanced against the right to counsel of choice. However, other jurisdictions have identified several factors that can be

relevant in making such a determination. See, e.g., People v. Butcher, 79 Cal. Rptr. 618, 621 (Cal Ct. App. 1969) (in considering motions to substitute counsel and to continue made on the day of trial, the trial court should have considered: (1) length of the continuance; (2) whether there was a dilatory motive for the continuance; (3) whether the prosecution knew of the motions beforehand and whether the prosecution objected; (4) whether the delay would have inconvenienced the prosecution or its witnesses; (5) whether current court-appointed counsel was prepared to proceed; (6) whether the defendant had already retained private counsel; and (7) whether the continuance would interfere with the efficient administration of justice).

In State v. Prineas, 766 N.W.2d 206, 212 (Wis. Ct. App. 2009), the defendant in a sexual assault prosecution hired privately retained counsel and filed a motion for his present attorney to withdraw, to substitute counsel, and for a continuance one week before the trial date. 766 N.W.2d at 210. The court held a hearing in which the State argued that the complaining witness and her family wanted the case to "be done so she could get on with her life." Id. The court stated that it would not grant the request so close to trial unless it was given "some extraordinary reason" other than a desire to change counsel, but none was offered by defense counsel. Id. at 214-15. Accordingly, the court denied the motion. Id. On appeal, the

defendant argued, inter alia, that he was denied his right to private counsel of his choice. Id. at 212.

The Wisconsin Court of Appeals held that decisions relating to substitution of counsel were within the sound discretion of the trial court, and noted that when making its determination to grant or deny a request for substitution of counsel of choice, the trial court needed to balance the defendant's request against "the public's interest in the prompt and efficient administration of justice." Id. The appellate court listed several examples of factors that "assist the court in balancing the relevant interests," including: the length of the delay requested, whether competent counsel was presently available and prepared to try the case, whether prior continuances have been requested and received by the defendant, the inconvenience to the parties, witnesses and the court, and whether the delay was for legitimate reasons or whether its purpose was dilatory. Id. The appellate court determined that the trial court properly balanced the request against the "public's interest in the prompt and efficient administration of justice." Id. at 215 (citation omitted). The appellate court determined:

Several factors weigh in favor of the court's exercise of its discretion, for example: [the defendant] did not specify the length of delay that would be required; he did not dispute his current counsel's ability to try the case; the court considered the inconvenience to the court and the concerns of the victim; and [the defendant] provided no reason for substitution and the accompanying delay.

Id.

Accordingly, upon consideration of multiple factors, the Wisconsin Court of Appeals affirmed the trial court's denial of the defendant's request for substitution of counsel and a continuance. Id. at 215, 219.

In the instant case, the circuit court merely considered one factor -- timeliness of the request -- in making its determination to deny the motion for substitution and a continuance. 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, witnesses or the court, and whether the delay was for a dilatory purpose.

Consideration of those other factors supports the conclusion that the circuit court abused its discretion in denying the motion for substitution and a continuance. The State took no position on the request and there was no apparent prejudice to the State. The record does not establish that the circuit court would have been inconvenienced by the request, particularly given that it subsequently ordered a one-week continuance of the sentencing hearing. The record also does not establish that there were witnesses present at the initial hearing who would be inconvenienced by a continuance.

Furthermore, there had been only one prior continuance in the proceeding, which was a stipulated continuance of the trial from September 16, 2010 to November 4, 2010. Under the circumstances,



the court's summary denial of the motion for substitution and a continuance as untimely was an abuse of discretion.

Although the ICA relied on Torres in affirming Cramer's sentence in the instant case, Torres is distinguishable. There, on the day before trial on a burglary charge, Richard Torres asked the court for the appointment of new counsel. 54 Haw. at 502-03, 510 P.2d at 495. The circuit court dismissed the original attorney and appointed Torres's chosen attorney, Mr. Hall. Id. Both Torres and Hall moved for a continuance so that Hall could prepare for trial. Id. The circuit court denied the motions because the jury was waiting to be impaneled and there had been several continuances leading up to trial. Id. at 503, 510 P.2d at 495-96. Hall went to trial less than twenty-four hours later. Id. at 504, 510 P.2d at 496.

On appeal to this court, Torres argued that he was denied his constitutional right to the effective assistance of counsel. Id. at 503, 510 P.2d at 495. This court held,

Generally, any request for continuance is to be disposed of in the discretion of the trial judge. A denial of a continuance is not per se a denial of the constitutional right to counsel, but the appellate court should scrupulously review the record to determine whether, under all the circumstances, there was an abuse of discretion that prejudiced the defendant by amounting to an unconstitutional denial of the right to effective assistance of counsel.

Id. at 504-05, 510 P.2d at 496.

This court determined that Torres was not denied the effective assistance of counsel. Id. at 57, 510 P.2d at 498.

This court found no deficiencies in Hall's performance at trial, Hall had complete access to notes from the prosecution's and Dwight's files, and Torres did not request a change of counsel until the very moment of trial and therefore was to blame for the tardiness of the request for new counsel. Id. at 507, 510 P.2d at 497-98.

Torres is distinguishable. Torres involved a claim of ineffective assistance of counsel after the circuit court granted a motion for substitution and after it denied Torres's motion for a continuance of trial. 54 Haw. at 503, 510 P.2d at 495. Here, the issue is whether the circuit court violated the defendant's constitutional right to counsel of choice and thus, erred in denying a motion to substitute counsel. Put another way, this court need not analyze this case for ineffectiveness of counsel because substitute counsel was not appointed.

Cramer also asserts that the ICA's determination that "Cramer provided no reason for the request for new counsel and, on appeal, has not argued he was prejudiced by the court's denial of a continuance to accommodate appointment of new counsel" was inconsistent with Gonzalez-Lopez. Cramer, 2012 WL 1560671, at \*1. The ICA's determination is indeed inconsistent with Gonzalez-Lopez.

In Gonzalez-Lopez, the defendant, Cuauhtemoc Gonzalez-Lopez, was charged in the Eastern District of Missouri with conspiracy to distribute more than 100 kilograms of marijuana.

548 U.S. at 142. His family hired an attorney to represent him. Id. Gonzalez-Lopez later called a California attorney, Joseph Low, to represent him. Id. Although the district court initially permitted Low's provisional entry of appearance, it subsequently revoked the provisional acceptance and did not allow participation or representation by Low, Gonzalez-Lopez's counsel of choice. Id.

On appeal, the issue before the Court was whether a trial court's erroneous deprivation of a criminal defendant's choice of counsel entitled him to reversal of his conviction. Id. The prosecution did not dispute that Gonzalez-Lopez was erroneously deprived of his counsel of choice. Id. at 144. The Court determined that the erroneous deprivation of Gonzalez-Lopez's counsel of choice required reversal of the conviction. Id. at 151-52. The Court determined that no additional showing of prejudice was required when a defendant's Sixth Amendment right to counsel of his choice was violated: "[d]eprivation of the right is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received." Id. at 148. The Court reaffirmed its holding that the right to counsel of choice was "limit[ed]" and needed to be "balanc[ed]" "against the needs of fairness, and against the demands of [the court's] calendar," but concluded that that consideration was not relevant to Gonzalez-Lopez's case because the prosecution

"conceded that the [court] here erred when it denied [Gonzalez-Lopez] his choice of counsel." Id. at 151-52 (citations omitted).

In addition, the Court held that the denial of the right to counsel of choice was a "structural error" not subject to a harmless error analysis.<sup>11</sup> 548 U.S. at 150. Furthermore, the Court determined, "[i]t is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings." Id. Similarly, requiring Cramer to argue that he was "prejudiced" by the denial of the continuance to accommodate the appointment of new counsel would require us to speculate as to how Aluli would have represented Cramer at the sentencing hearing, an inquiry that was rejected in Gonzalez-Lopez. For the same reasons, Cramer is free to argue on remand that he should be sentenced to probation pursuant to Act 44, or any other potentially applicable sentence.

Accordingly, the circuit court abused its discretion in denying the motion for substitution and a continuance.

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<sup>11</sup> Structural errors affect "the framework within which the trial proceeds, rather than simply an error in the trial process itself." State v. Ortiz, 91 Hawai'i 181, 193, 981 P.2d 1127, 1139 (1999) (citing Arizona v. Fulminante, 499 U.S. 279, 310 (1991)); State v. Swanson, 112 Hawai'i 343, 353, 145 P.3d 886, 896 (App. 2006). As the concurring opinion observes, there have been criticisms of the decision in Fulminante. See Concurring Opinion at 12-20. Respectfully, however, we need not resolve those concerns here because they would not affect the result in the instant case. See Concurring Opinion at 1.

**IV. Conclusion**

We hold that the circuit court abused its discretion in denying the motion for substitution of counsel and continuance of the hearing. Thus, we vacate the ICA's June 1, 2012 judgment and the circuit court's January 11, 2011 judgment, and remand to the circuit court for resentencing.

Hayden Aluli  
for petitioner

/s/ Mark E. Recktenwald

Artemio C. Baxa  
for respondent

/s/ Paula A. Nakayama

/s/ Sabrina S. McKenna

/s/ Richard W. Pollack

