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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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ALBERT BATALONA,
Petitioner and Respondent/Petitioner-Appellant,

vs.

STATE OF HAWAI'I,
Respondent and Petitioner/Respondent-Appellee.

SCWC-15-0000569

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-15-0000569; S.P.P. NO. 10-1-0096; CR. NO. 99-1549)

MARCH 19, 2018

DISSENTING OPINION BY NAKAYAMA, J.,
WITH WHOM RECKTENWALD, C.J., JOINS

In 2000, Petitioner and Respondent/Petitioner-Appellant Albert Batalona (Batalona) was convicted of one count of robbery in the first degree, one count of attempted murder in the first degree, one count of carrying, using, or threatening to use a firearm in the commission of a separate felony, and one count of possession of a prohibited firearm in connection with his

involvement in an armed bank robbery that took place in July 1999. He was sentenced to, inter alia, life imprisonment without the possibility of parole. On appeal, this court affirmed the Circuit Court of the First Circuit's (circuit court) judgment of conviction and sentence in 2003. Batalona was represented by the same attorney at trial and on direct appeal.

Proceeding pro se, Batalona filed a petition for post-conviction relief pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 40 (Rule 40 Petition) in 2010, which, as supplemented, asserted twenty-three grounds for relief. The circuit court denied the Rule 40 Petition in its entirety without a hearing, ruling that all of his asserted grounds for post-conviction relief were patently frivolous and without a trace of support either in the record or the evidence submitted.

On appeal, the Intermediate Court of Appeals (ICA) vacated the circuit court's decision with respect to Ground 1, which alleged ineffective assistance of counsel due to defense counsel's failure to dismiss certain jurors for cause, and Ground 20(f), which alleged ineffective assistance of counsel due to defense counsel's failure to subpoena the live testimony of two co-defendants whose recorded statements were used against Batalona at trial in violation of his constitutional right to confrontation. The ICA affirmed the circuit court's decision denying the Rule 40 Petition without a hearing on all of the

other grounds for post-conviction relief.

On certiorari, the Majority holds that the ICA gravely erred in affirming the circuit court's denial of the Rule 40 Petition without a hearing as to Ground 8, which alleged ineffective assistance of counsel for declining to provide Batalona with a redacted copy of the materials obtained during discovery, and Ground 10, which alleged ineffective assistance of counsel for advising Batalona not to testify at trial. The Majority affirms the ICA's decision with respect to all of the other grounds in the Rule 40 Petition.

I disagree with the Majority's decision as to Grounds 8 and 10. As to Ground 8, Batalona has not demonstrated that defense counsel's actions regarding the redacted discovery materials constituted a specific error relating to his lack of skill, diligence, or judgment. With respect to Ground 10, it appears that defense counsel's advice to Batalona that Batalona should not testify at trial was appropriately based on a complete understanding of the nature and scope of Batalona's testimony, as well as defense counsel's knowledge of the evidence in the record.

Thus, I would hold that the ICA correctly affirmed the circuit court's denial of the Rule 40 Petition without a hearing on Grounds 8 and 10. Accordingly, I respectfully dissent.

I. DISCUSSION

A. The ICA correctly affirmed the circuit court's¹ ruling on Ground 8 of the Rule 40 Petition.

To establish a claim of ineffective assistance of counsel at trial, the defendant must meet a two-part test. State v. Wakisaka, 102 Hawai'i 504, 513-14, 78 P.3d 317, 326-27 (2003). First, the defendant must establish "that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence." Id. at 514, 78 P.3d at 327 (quoting State v. Aplaca, 74 Haw. 54, 67, 837 P.2d 1298, 1305 (1992)). Then, the defendant must illustrate "that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." Id. (quoting Aplaca, 74 Haw. at 67, 837 P.2d at 1305).

The Majority holds that Ground 8 presents a colorable claim of ineffective assistance of counsel because "counsel for Batalona failed to act in response to the amendment to HRPP Rule 16(e)(3)." Majority at 33. The Majority emphasizes that after the circuit court² denied defense counsel's pre-trial request to provide Batalona with discovery materials, HRPP Rule 16(e)(3) was amended, and allowed defense counsel to furnish Batalona a copy

¹ The Honorable Colette Y. Garibaldi presided over the Rule 40 Petition.

² The Honorable Marie N. Milks presided over the pretrial proceedings and Batalona's trial on the underlying criminal offenses.

of the discovery materials without the circuit court's permission. Majority at 27-29. Based upon Batalona's assertion that he could have used the knowledge gained from reviewing the discovery materials to guide defense counsel "toward viable defense options, including the presentation of factual evidence that would disprove that he was the shooter," the Majority concludes that defense counsel's failure to take such action in response to the amendment to HRPP Rule 16(e)(3) was a specific error relating to defense counsel's lack of skill, diligence, or judgment, which resulted in the substantial impairment of a meritorious defense. Majority at 33.

I do not agree with the Majority's analysis for two reasons. First the Majority misconstrues Batalona's argument in Ground 8. In Ground 8, Batalona did not argue that defense counsel's assistance was ineffective because defense counsel failed to take action after HRPP Rule 16(e)(3) was amended. Rather, Batalona contended that defense counsel "erred by 'asking the court's permission' to give Batalona redacted copies of his discovery, when it was his OBLIGATION to do so, [and] when HRPP [Rule] 16(e)(3) (1993) places the burden on [the] PROSECUTION to 'show cause' why Batalona should NOT be provided [with] discovery." Therefore, in addressing the first part of the two-part test governing a claim of ineffective assistance of counsel, Batalona specifically identified the fact that defense counsel

sought the circuit court's permission to provide him with a redacted copy of the discovery materials as the "specific error[] . . . reflecting counsel's lack of skill, judgment, or diligence." Wakisaka, 102 Hawai'i at 514, 78 P.3d at 327 (citing Aplaca, 74 Haw. at 67, 837 P.2d at 1305).

Defense counsel requested the circuit court's permission to provide Batalona with a redacted copy of the discovery materials at a hearing held on February 15, 2000. At that time, HRPP Rule 16(e) (3) provided:

Any material furnished to an attorney pursuant to these rules shall remain in the attorney's exclusive custody and be used only for the purposes of conducting the attorney's side of the case, and shall be subject to such other terms and conditions as the court may provide.

HRPP Rule 16(e) (3) (1993) (emphases added).

HRPP Rule 16(e) (3) (1993) required that discovery materials be kept solely in counsel's possession, but also provided that the materials could be subject to other conditions imposed by the trial court. Here, acting pursuant to these provisions in the Rule, defense counsel properly kept the discovery materials in his exclusive custody, acknowledged that he was "not permitted to give Mr. Batalona the actual discovery," and requested that the circuit court allow him to provide Batalona with redacted copies of the materials before trial. Because the record indicates that defense counsel fully complied with HRPP Rule 16(e) (3) as it was written when he requested the

circuit court's permission to provide Batalona with a redacted copy of the discovery materials, Batalona's contentions in Ground 8 do not demonstrate that defense counsel committed a "specific error[] . . . reflecting [his] lack of skill, judgment, or diligence," and do not support a colorable claim of ineffective assistance of counsel. Wakisaka, 102 Hawai'i at 514, 78 P.3d at 327 (quoting Aplaca, 74 Haw. at 67, 837 P.2d at 1305).

Second, the amendment to HRPP Rule 16(e)(3) that took effect on July 1, 2000 (2000 amendment) is not relevant to whether Ground 8 states a colorable claim for ineffective assistance of counsel. Following the 2000 amendment, HRPP Rule 16(e)(3) provided:

Except as otherwise provided in this subsection, any discovery material furnished to an attorney pursuant to these rules shall remain in the attorney's exclusive custody and be used only for the purposes of conducting the attorney's side of the case, and shall be subject to such other terms and conditions as the court may provide. The attorney may provide the defendant with a copy of any discovery material obtained if the attorney gives the prosecutor written notice of the attorney's intent to do so and the prosecutor does not file a motion for protective order within ten (10) days of the receipt of the notice.

HRPP Rule 16(e)(3) (2002) (emphasis added).

Indeed, the Majority correctly notes that after its amendment in 2000, HRPP Rule 16(e)(3) authorized defense counsel to provide Batalona with a copy of the materials obtained during discovery without having to seek the circuit court's permission. Majority at 28-29. However, that defense counsel no longer

needed the circuit court's permission to provide Batalona with copies of the discovery materials does not alter the fact that defense counsel's actions were proper at the time he initially made his pre-trial request for such permission. And, defense counsel's actions prior to the 2000 amendment to HRPP Rule 16(e)(3) are the focus of Batalona's claim for ineffective assistance of counsel in Ground 8. Therefore, I believe that the 2000 amendment to HRPP Rule 16(e)(3) is not relevant to Batalona's allegations of ineffective assistance of counsel in Ground 8.³

Moreover, even assuming arguendo that the 2000 amendment to HRPP Rule 16(e)(3) is relevant to Ground 8 in Batalona's Rule 40 Petition, I believe that defense counsel's

³ The Majority maintains that the 2000 amendment is relevant to Ground 8 because "Batalona's reliance on the 2000 amendment to HRPP Rule 16(e)(3) is markedly apparent," insofar as Batalona's argument in support of his ineffective assistance of counsel claim in Ground 8 incorporates language that tracks the language in HRPP Rule 16(e)(3) (2002). Majority at 28 n.24.

Respectfully, I disagree. Regardless of whether Batalona appeared to rely upon the 2000 amendment to HRPP Rule 16(e)(3) (notwithstanding the fact that Batalona's arguments in Ground 8 specifically cite to HRPP Rule 16(e)(3) (1993)), the fact of the matter remains that Batalona's ineffective assistance of counsel claim in Ground 8 is premised upon actions that defense counsel took before the 2000 amendment was effective. Specifically, in Ground 8, Batalona argued that defense counsel "erred by 'asking the court's permission' to give Batalona redacted copies of his discovery, when it was his OBLIGATION to do so, [and] when HRPP Rule 16(e)(3) (1993) places the burden on [the] PROSECUTION, to 'show cause' why Batalona should NOT be provided [with] discovery." (Emphasis added.) As discussed in section I.A, supra, defense counsel requested the circuit court's permission to provide Batalona with a copy of the discovery materials on February 15, 2000, several months before the 2000 amendment became effective.

Therefore, because the factual allegations at the core of Batalona's ineffective assistance of counsel claim in Ground 8 referred to defense counsel's conduct before the 2000 amendment took effect, the pre-2000 version of HRPP Rule 16(e)(3) applies to determine whether Ground 8 states a colorable claim for relief, irrespective of whether Batalona may have relied upon the 2000 amendment in advancing his argument.

inaction in response to the 2000 amendment does not give rise to a colorable claim of ineffective assistance of counsel.

Following the 2000 amendment, HRPP Rule 16(e) (3) permitted, but did not require, defense counsel to provide the defendant with copies of discovery materials, provided that defense counsel gave the prosecutor appropriate notice, and the prosecutor did not timely file for a protective order. See HRPP Rule 16(e) (3) (2002). Therefore, while it is true that defense counsel could have later given Batalona copies of the discovery materials, I do not believe that defense counsel's inaction necessarily constituted a "specific error[] . . . reflecting [his] lack of skill, diligence, or judgment," as HRPP Rule 16(e) (3) did not require such action. Wakisaka, 102 Hawai'i at 514, 78 P.3d at 327 (citing Aplaca, 74 Haw. at 67, 837 P.2d at 1305). Consequently, I do not believe that defense counsel's inaction following the 2000 amendment to HRPP Rule 16(e) (3) satisfies the first part of the two-part test governing a claim for ineffective assistance of counsel.

To conclude, I believe that Batalona's arguments in support of his ineffective assistance of counsel claim in Ground 8 do not establish that defense counsel committed a specific error reflecting a lack of skill, diligence, or judgment on his part. Defense counsel properly complied with the requirements of HRPP Rule 16(e) (3) (1993) when he initially sought the circuit

court's permission to provide Batalona with redacted copies of the materials obtained in discovery. Defense counsel was not under any obligation to provide Batalona with redacted copies of the discovery materials pursuant to HRPP Rule 16(e)(3) (2002). Consequently, I agree with the ICA that Ground 8 does not state a colorable claim for ineffective assistance of counsel, and that the circuit court correctly denied Batalona's claim for post-conviction relief in Ground 8 without a hearing.

B. The ICA correctly affirmed the circuit court's ruling on Ground 10 of the Rule 40 Petition.

The Majority holds that Ground 10 "raises a colorable claim of ineffective assistance of counsel," as the facts alleged in Ground 10 support that "Batalona's waiver of the right to testify may have been 'the product of coercion or undue influence' because he had not been provided a copy of the discovery due to defense counsel's failure to act in response to the amendment to HRPP Rule 16(e)(3)." Majority at 35 (quoting State v. Silva, 78 Hawai'i 115, 123, 890 P.2d 702, 710 (App. 1995), abrogated on other grounds by Tachibana v. State, 79 Hawai'i 226, 900 P.2d 1293 (1995)). The Majority posits that defense counsel may have unduly influenced or coerced Batalona in his decision not to testify at trial because defense counsel "repeatedly urged [Batalona] not to testify" and because defense counsel did not provide Batalona with redacted copies of the

materials obtained during discovery. Majority at 35.

Again, I respectfully disagree, as I believe that the Majority misconstrues Batalona's argument in support of his ineffective assistance of counsel claim in Ground 10. Batalona did not contend that defense counsel's assistance was ineffective because defense counsel effectively coerced Batalona into waiving his right to testify at trial, and thereby infringed upon his right to testify. In fact, Batalona himself acknowledged that he was not claiming that his right to testify had been violated, inasmuch as he emphasized that a claim of ineffective assistance of counsel "can be maintained, that is CONCEPTUALLY DISTINCT from a claim that a defendant's right to testify was violated." By contrast, Batalona argued that defense counsel "provid[ed] faulty advise [sic] that Batalona SHOULD NOT testify [at] trial." In other words, Batalona appeared to argue that defense counsel committed a "specific error[] . . . reflecting [his] lack of skill, judgment, or diligence" by providing flawed advice with respect to whether Batalona should testify at trial. Wakisaka, 102 Hawai'i at 514, 78 P.3d at 327 (quoting Aplaca, 74 Haw. at 67, 837 P.2d at 1305).

In support of this contention, Batalona asserted that prior to trial, Batalona told defense counsel that he wanted to testify. Batalona stated that he would have testified that: (1) at co-defendant Roger Dailey's (Dailey) request, Batalona

modified an AR-15 rifle to fire automatically for Dailey's use; (2) Dailey was the individual who test-fired the AR-15 at Waiahole Ranch and; (3) Dailey was the individual who fired the AR-15 at Officer Frederick Rosskopf (Officer Rosskopf) during the robbery.

Batalona contended that defense counsel advised Batalona that "any testimony about building Dailey an AR-15 would be harmful to the defense [and] would 'open the door' about his firearm expertise" and that defense counsel "wanted to keep such information 'out of focus.'" Batalona also stated that defense counsel advised Batalona that Batalona's testimony would be contradicted by Dailey's testimony that Dailey was using a revolver, rather than a rifle, during the robbery. Moreover, defense counsel emphasized that Dailey's testimony would be bolstered by the fact that he had agreed to testify truthfully at trial pursuant to a plea agreement with the United States Attorney's Office. However, Batalona asserted that his testimony would have been corroborated by other evidence, and that Dailey's testimony would have little effect in impeaching his testimony because Dailey "lied to investigators" when he stated that he had used a revolver during the robbery.

Batalona consequently argued that "[b]ut for [defense counsel] repeatedly urging Batalona NOT to testify, Batalona would NOT have waived his right to testify." He asserted that

because he followed defense counsel's poor advice, the jury did not hear his testimony, which would have illustrated that Dailey was the individual who shot at Officer Rosskopf, not Batalona. Accordingly, Batalona argued that defense counsel's unsound advice deprived him of a meritorious defense at trial, and that he was therefore entitled to post-conviction relief due to ineffective assistance of counsel.

In Jones v. State, 79 Hawai'i 330, 902 P.2d 965 (1995), this court addressed whether a defendant had established a claim of ineffective assistance of counsel based on his assertion that his trial counsel gave him inadequate advice regarding whether he should testify at trial. After being convicted of murder in the second degree, Jones filed a petition for post-conviction relief pursuant to HRPP Rule 40. Jones, 79 Hawai'i at 332-33, 902 P.2d at 967-68. Therein, Jones alleged a claim of ineffective assistance of counsel, arguing that his counsel failed to advise him that the decision whether to testify or not was his decision to make, and that although he had signed a written waiver of his right to testify, he could change his mind at any time before the end of trial. Id. at 333, 902 P.2d at 968. Following a hearing, the circuit court denied Jones's petition. Id.

On appeal, the Jones court clarified how the two-part test for ineffective assistance of counsel claims applied to Jones's assertion that defense counsel proffered faulty advice

regarding whether Jones should testify at trial:

Because the decision whether or not to testify is a highly tactical one that is "ultimately committed to a defendant's own discretion," an attorney's recommendation as to whether or not a defendant should testify will rarely qualify as an error reflecting a "lack of judgment." On the other hand, the provision of erroneous legal advice to a defendant by trial counsel-e.g., misinforming the defendant as to the types of evidence that can be used to attack his or her credibility on cross-examination-could constitute a "lack of skill." Likewise, an attorney's failure to perform sufficient investigation and trial preparation to be able to adequately advise a defendant whether or not to testify-e.g., by failing to ascertain the full scope of the testimony that the defendant has to offer-could constitute a "lack of diligence."

In the event that defense counsel's lack of skill, judgment, or diligence is established, the petitioner must further demonstrate the withdrawal or substantial impairment of a potentially meritorious defense resulting therefrom. In the context of faulty advice that allegedly influenced the decision not to testify, a two-prong test must be satisfied. The petitioner must show (1) that, absent defense counsel's failings, the petitioner would have decided to testify, and (2) that there is a reasonable possibility that his or her testimony could have established or supported an available defense.

Id. at 334-35, 902 P.2d at 969-70 (citations omitted).

Applying these principles, the Jones court first determined that based upon its review of the record, the circuit court's finding that trial counsel properly advised Jones of his right to testify was not clearly erroneous. Id. at 335, 902 P.2d at 970. This court then observed that aside from Jones's meritless allegation that defense counsel failed to inform him that the decision whether to testify or not was his decision, and that Jones could change his mind at any time before trial despite having signed a written waiver of his right to testify, "there is nothing in the record suggesting that the advice given by Jones's

trial counsel was in any way lacking." Id. Accordingly, this court held that "Jones failed to establish any error or omission reflecting a lack of skill, judgment, or diligence." Id.

Similarly, in the present case, neither the facts in the record nor Batalona's proffered facts indicate that defense counsel's advice to Batalona not to testify at trial stemmed from a lack of skill, diligence, or judgment on his part. Based on Batalona's account of his conversations with defense counsel, it seems that defense counsel understood the nature and scope of the testimony that Batalona had to offer. However, defense counsel was apparently concerned that Batalona's credibility was susceptible to attack on cross-examination based on his understanding that Batalona's testimony would be contradicted by Dailey's testimony, and that the prosecution could use Batalona's firearm expertise against him.

Furthermore, Batalona did not argue, nor does the record indicate, that defense counsel misinformed Batalona about his right to testify. In accordance with our holding in Tachibana v. State, 79 Hawai'i 226, 900 P.2d 1293 (1995), the circuit court engaged Batalona in a comprehensive colloquy after the State rested its case. During this colloquy, Batalona confirmed that defense counsel made clear to him that he had the right to testify. Additionally, in response to the circuit court's questions, Batalona indicated that he clearly understood

that: (1) he had the right to testify if he wanted to; (2) nobody could prevent him from exercising his right to testify; (3) he would be subject to cross-examination if he chose to testify; and (4) should he choose not to testify, the jury could be instructed to not draw any negative inferences from his decision.

Therefore, in light of the facts that Batalona has alleged, it appears that defense counsel's advice to Batalona that he should not testify at trial was based on a complete understanding of the nature and scope of Batalona's testimony, as well as defense counsel's knowledge of other evidence that could be used to attack Batalona's credibility at trial. Moreover, the record does not suggest that defense counsel did not adequately inform Batalona of his right to testify at trial. Accordingly, in my view, Batalona has not demonstrated that defense counsel's advice to Batalona that he should not testify at trial constituted a specific error reflecting a lack of judgment, skill, or diligence. I would consequently hold that the ICA correctly affirmed the circuit court's denial of relief without a hearing on Ground 10.

II. CONCLUSION

For the reasons stated above, I respectfully dissent. I would affirm the ICA's November 17, 2016 judgment on appeal,

filed pursuant to its October 18, 2016 memorandum opinion, and hold that the circuit court correctly denied Batalona's claims for post-conviction relief without a hearing with respect to Grounds 8 and 10 of his Rule 40 Petition.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

