IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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

vs.

JASON K. UCHIMA,
Petitioner/Defendant-Appellant.

SCWC-17-0000081

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-17-0000081; CASE NO. 1DTA-16-01965)

MAY 19, 2020

OPINION BY RECKTENWALD, C.J., CONCURRING IN PART AND DISSENTING IN PART, AND CONCURRING IN THE JUDGMENT

I. INTRODUCTION

The majority correctly concludes that Hawai'i Revised Statutes (HRS) § 602-59(a) confers a right to appeal to the Supreme Court; that criminal defendants have the right to

counsel - and the concomitant right to effective counsel - on application for writ of certiorari; and that counsel's procedural failures cannot deprive a defendant of their statutory right to seek this court's review. I write separately because the right to counsel on appeal after the first appeal as of right is guaranteed by statute, and accordingly, this court need not determine at this time whether the Hawai'i constitution affords the same protection. I also address the majority's description of Hawai'i's appellate structure.

II. DISCUSSION

A. HRS § 802-5 Confers a Right to Effective Counsel on Appeal to the Hawai'i Supreme Court

HRS § 802-5 provides in pertinent part: "when it shall appear to a judge that a person requesting the appointment of counsel satisfies the requirements of this chapter, the judge shall appoint counsel to represent the person at all stages of the proceedings, including appeal, if any." (Emphasis added.) "Appeal" and "stages of the proceedings" as used in the provision encompass proceedings before this court, for Hawai'i Supreme Court review is both an appeal and a stage of criminal proceedings. Thus, I agree with the majority's conclusion that criminal defendants have a right to counsel on appeal to the Supreme Court pursuant to the plain language of HRS § 802-5, and

if Jason Uchima were indigent, he would have been entitled to representation at no cost.[1]

Where the right to counsel attaches, that counsel - court-appointed or otherwise[2] - must be effective. If the legislature chooses to offer assistance to an indigent party, that choice would be meaningless unless the assistance is guaranteed to be competent.[3] See Commonwealth v. Albert, 561

[1] While this conclusion is apparent from the face of the statute, the legislative history confirms the same. In 2006, the provision in HRS § 802-5 related to attorney's fees on appeal was amended to remove the limiting language "to the intermediate appellate court." The House Committee on Judiciary said of this change: "[the law in its prior form] permits compensation for appeals to the Intermediate Appellate Court only. There is a concern that [the law] may be interpreted to prevent compensation for appeals pending in or decided by the Supreme Court," and thus the Committee removed the limiting language. H. Stand. Comm. Rep. No. 1559-06, in 2006 House Journal, at 1669 (emphasis added). Additionally, when the provision was originally enacted in 1971, the House Judiciary Committee amended an early version of the bill to remove reference to the Supreme Court as the agency "authorized to contract for services to indigent persons"; this change was in order "to eliminate any aura of conflict in a situation where those persons defending indigents are appearing in the Supreme Court of the State." H. Stand. Comm. Rep. No. 877, in 1971 House Journal, at 1072 (emphasis added). Thus, the legislature explicitly contemplated that appeals before the Supreme Court would be within the scope of HRS § 802-5.

[2] Indeed, it would be fundamentally unfair to extend the remedy of ineffective assistance of counsel only to the indigent, and in turn, to deny the same to the nonindigent because they can afford an attorney. The nonindigent, layperson defendant is no more equipped to "understand or detect his attorney's derelictions" than the indigent defendant. 5 Am. Jur. Proof of Facts 2d Ineffective Assistance of Counsel Supp. § 3 (2020). Thus, the legislature could not have intended that only the indigent would be guaranteed counsel that meets a requisite level of competency in the proceedings in which it has chosen to provide counsel to the poor.

[3] I believe this conclusion is consonant with the Hawai'i Constitution, but I note that federal courts have held that the United States Constitution does not require it. See Chalk v. Kuhlmann, 311 F.3d 525, 529 (2d Cir. 2002) ("The fact that a state may, 'as a matter of legislative choice,' Ross v. Moffitt, 417 U.S. [600,] 618, 94 S. Ct. 2437[, 2447 (1974)], provide a right to counsel for discretionary appeals subsequent to the first appeal as of right does not extend the Constitution's guarantee of counsel to (continued)

A.2d 736, 738 (Pa. 1989) ("It is axiomatic that the right to counsel includes the concomitant right to effective assistance of counsel. . . . Indeed the right to counsel is meaningless if effective assistance is not guaranteed.") (citations omitted); Jackson v. Weber, 637 N.W.2d 19, 22-23 (S.D. 2001) ("We will not presume that our legislature has mandated some 'useless formality' requiring the mere physical presence of counsel as opposed to effective and competent counsel" (quoting Lozada v. Warden, State Prison, 613 A.2d 818, 838 (Conn. 1992))); Patchette v. State, 374 N.W.2d 397, 398 (Iowa 1985) ("[T]he

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such proceedings."); Miller v. Keeney, 882 F.2d 1428, 1432 (9th Cir. 1989) ("If a state is not constitutionally required to provide a lawyer, the constitution cannot place any constraints on that lawyer's performance.")

Federal courts have noted the "irony" in this rule, given that generally, once a state chooses to provide assistance that the Constitution does not require, "constitutional requirements spring into place," including that the assistance comport with due process. Miller, 882 F.2d at 1432 (citing, inter alia, Goldberg v. Kelly, 397 U.S. 254 (1970)). Nonetheless, as set forth herein, most states require that a statutory grant of counsel comport with a minimum level of effectiveness, either as a matter of statutory interpretation or as a matter of due process. In my view, Hawai'i is no exception, and I find the reasoning of the Texas Court of Appeals compelling:

> Whether a convicted person has the right to effective assistance of counsel in a [proceeding in which state statute confers a right to counsel] comes down to one of two propositions: either we accept the notion that the absence of a constitutional right to counsel precludes a right to an effective assistance of counsel claim in [the] proceeding, or we accept the proposition that the right to counsel - constitutional or statutory - is meaningless if effective assistance is not guaranteed. We accept the latter because we hold that due process compels it.

Ard v. State, 191 S.W.3d 342, 346 (Tex. Ct. App. 2006)

statutory grant of a postconviction applicant's right to court-appointed counsel necessarily implies that that counsel be effective."); see also In re M.S., 115 S.W.3d 534, 544 & n.30 (Tex. 2003) (collecting state supreme court cases that stand for the principle that "the statutory right to counsel in parental-rights termination cases embodies the right to effective counsel").

Because the right to counsel on certiorari review is provided by HRS § 802-5, we need not determine at this time whether the Hawai'i constitution guarantees the same. "A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." Rees v. Carlisle, 113 Hawai'i 446, 456, 153 P.3d 1131, 1141 (2007) (quoting City and County of Honolulu v. Sherman, 110 Hawai'i 39, 57 n.7, 129 P.3d 542, 559 n.7 (2006)). Jason Uchima is entitled to identical relief whether his right to effective counsel stems from statute or the constitution, and so the constitutional question should be avoided. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 447 (1988).

B. Seeking This Court's Review Is a Second Appeal

While I agree that we have jurisdiction to consider the merits of Uchima's application for writ of certiorari in the

instant case, I disagree with the majority's suggestion that appeal to the Supreme Court is part of a defendant's first appeal. Majority at 27 n.17. Seeking our review is an "appeal" to be sure, but it constitutes a separate, second appeal. Black's Law Dictionary defines "appeal" as "to seek review (from a lower court's decision) by a higher court." Appeal, Black's Law Dictionary (11th ed. 2019). Consistent with this definition, the boundaries of an appeal are defined by the court that is considering it. As other jurisdictions recognize, once a party seeks review of a lower court's decision in a different court, a separate appeal has begun. See Lundgren v. State, 434 S.W.3d 594, 599–600 (Tex. Ct. Crim. App. 2014) (explaining that "an appeal is an opportunity . . . to argue to a different tribunal" (emphasis added)); City of East Provident v. United Steelworkers of Am., Local 15509, 925 A.2d 246, 254 (R.I. 2007) (noting that an appeal is "undertaken" by submitting a decision "to a higher court" (emphasis added)). An application for writ of certiorari in our state judiciary asks a different court - this court - to review the decision of the Intermediate Court of Appeals (ICA) and, accordingly, begins a subsequent appeal.[4]

[4] In the context of appellate systems that do not meaningfully differ from our own, several federal courts have considered the argument advanced by the majority and soundly rejected it. In Chalk v. Kuhlmann, for instance, the United States Court of Appeals for the Second Circuit reasoned that because a defendant's application for leave to seek review by the New

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The statutes and court rules cited by the majority are inapposite. For example, Hawaiʻi Rules of Appellate Procedure (HRAP) Rule 2.1 provides a definition for the term "appeal"; that word as used in our rules "includes every proceeding in the Hawaiʻi appellate courts other than an original action[.]" HRAP Rule 2.1 does not define a unitary appeal process of which every "proceeding in the Hawaiʻi appellate courts" is a component; it only establishes that seeking a writ of certiorari is encompassed within the term "appeal" as defined by that rule. Likewise, the reference to "appeal" in HRS § 802-5 is not limited to "an appeal" or "the appeal," which would imply a singular, unitary appellate process. That statute also uses the generalized term "appeal." And the statutes and court rules staying a judgment of the ICA pending the disposition of the case in this court do not define the extent of the "first appeal," but merely permit an aggrieved party to seek review before the judgment - and all of the real consequences the judgment signifies - take effect. It is a prudential provision,

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York Court of Appeals could only be filed after the intermediate appeals court issued a decision, and because the application "seeks review of that decision," the leave application to the Court of Appeals was not the final step of the first appeal but the first step in a second appeal. 311 F.3d 525, 529 (2d Cir. 2002); see also Pena v. United States, 534 F.3d 92, 96 (2d Cir. 2008); Moore v. Cockrell, 313 F.3d 860, 882 (5th Cir. 2002) (determining that the first appeal as of right ends "when the decision by the appellate court is entered").

not a substantive one, in the same way that trial courts may stay a judgment pending appeal without changing the character of their jurisdiction from original to appellate. Thus, the Hawai'i Supreme Court is no doubt an appellate court, and the cases we hear are certainly appeals. But an appeal to this court is not part of the "first appeal."

That said, the arguments underpinning our cases excusing procedural deficiencies on first appeal apply with equal force to the case at hand. The right to appeal to the ICA is provided by statute, as is the right to file an application for certiorari.[5] Where the actions of defendant's counsel - to which the defendant is, again, entitled by statute - denies the defendant our review on certiorari, counsel effectively deprives the defendant of this statutory right. "[I]t is clear that an indigent criminal defendant is entitled, on his first appeal, to court-appointed counsel who may not deprive him of his appeal by electing to forego compliance with procedural rules"; where statute gives a criminal defendant the right to counsel on their

[5] I respectfully disagree with Justice Nakayama's interpretation of HRS § 602-59(a). As the majority explains, HRS § 602-59(a) closely parallels the language of HRS § 641-11. In turn, HRS § 641-11 gives a criminal defendant the right to appeal to the ICA from the circuit court. Because there is no dispute that defendants who were convicted in the circuit court may appeal to the ICA as of right, under our statutory scheme, defendants must be able to file an application for writ of certiorari as of right. While the right to appeal to this court does not require us to issue an opinion on the merits, ineffective counsel cannot deprive a defendant of the right to have their application for writ of certiorari rejected or accepted on its merits.

second appeal, that counsel likewise may not deprive their client of appellate review to which the defendant has a right. State v. Erwin, 57 Haw. 268, 269, 554 P.2d 236, 238 (1976). Both in a criminal defendant's first appeal to the ICA and their second appeal to this court, procedural deficiencies caused by the ineffective assistance of counsel similarly lead to "harsh results repugnant to notions of fair play and justice." State v. Caraballo, 62 Haw. 309, 314, 615 P.2d 91, 95 (1980). No remedy exists to "restore [a] client's lost liberty" where the mistakes of counsel foreclose our ability to review the defendant's case. Id. (citation omitted). Where, as here, the defendant is denied his right to seek this court's review due solely to the failings of the counsel to which he is entitled, we may excuse a procedural deficiency if justice so requires.[6]

III. CONCLUSION

For the foregoing reasons, I respectfully concur in part and dissent in part.

/s/ Mark E. Recktenwald

[6] On the merits, I agree that the arguments in Uchima's application for writ of certiorari are unavailing and concur in the judgment.