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SCWC-20-0000399

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

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

vs.

CLIFFORD L. ROSA,  
Petitioner/Defendant-Appellant,

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CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS  
(CAAP-20-0000399; 1CPC-19-0001438)

DISSENT TO ORDER REJECTING APPLICATION FOR WRIT OF CERTIORARI  
(By: Wilson, J., with whom McKenna, J., joins)

I respectfully dissent. I would accept certiorari because the Circuit Court of the First Circuit ("circuit court") abused its discretion by denying Rosa's motion to sever. Rosa was charged by indictment with robbery in the first degree, in violation of Hawai'i Revised Statutes ("HRS") § 708-840(1)(b)(ii) (2014), for allegedly robbing a Starbucks ("Count One"), and robbery in the second degree, in violation of HRS § 708-841(1)(a) (2014), for allegedly snatching a woman's

purse in a Foodland parking lot ("Count Two"). The alleged offenses occurred at different locations, at different times, and involved different witnesses. Even if Counts One and Two of the indictment were properly joined under Hawai'i Rules of Penal Procedure ("HRPP") Rule 8(a), the circuit court should have granted severance under HRPP 14 because the prejudice to Rosa caused by joinder of the Counts outweighs the public interest in judicial efficiency furthered by the joinder.

The prejudice for Count Two, in particular, was substantial. First, I agree with Rosa that there was potential for the jury to infer that because he was charged "with two violent offenses, he may be of that criminal disposition to engage freely in violent behavior[.]" As Rosa argued in his motion to sever, there was the danger that the jury would decide his guilt "based on [his] propensity to commit violent burglaries and not on the evidence presented." Second, the strong identity evidence adduced as to Count One bolstered the weak identity evidence adduced as to Count Two. Chang, the complaining witness for Count Two, was unable to identify her assailant, and although another witness, Fernandez, eventually identified Rosa as the assailant, Fernandez was able to make an identification only after seeing the police photo lineup twice and partially covering Rosa's face in his photo. The evidence establishing Rosa's identity for Count One (where the

complaining witness identified Rosa and his testimony and description of his assailant was corroborated by surveillance video) was significantly stronger than the aforementioned identity evidence for Count Two, and there was the danger that the evidence for Count One bolstered the case for Count Two.

Joinder substantially prejudiced Rosa and interfered with his right to receive a fair trial on the separate Counts of the indictment. I would remand this case to the circuit court for severance of Counts One and Two and new trials ordered on both Counts.

For the foregoing reasons, I dissent from the court's rejection of certiorari.

DATED: Honolulu, Hawai'i, October 1, 2021.

/s/ Sabrina S. McKenna

/s/ Michael D. Wilson

