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NO._____

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

STATE OF HAWAII, Respondent/Plaintiff-Appellee, v. CHARLES ZUFFANTE, Petitioner/Defendant-Appellant.	) Circuit Course Case No. 3CPC-22-0000315)) ICA Case No. CAAP-23-0000376)) PETITION FOR WRIT OF CERTIORARI) FROM THE JUDGMENT ON APPEAL) ENTERED ON OCTOBER 25, 2024))) CIRCUIT COURT OF THE THIRD) CIRCUIT)) HON. ROBERT D.S. KIM) Judge)

PETITION FOR WRIT OF CERTIORARI

EXHIBITS "1" AND "2"

CERTIFICATE OF SERVICE

LAW OFFICE OF GEORGETTE A.
YAINDL, LLLC
GEORGETTE ANNE YAINDL #8940
P.O. Box 307
Kailua-Kona, Hawai`i 96745-0307
Telephone No. (808) 224-0219
Fax No. (877) 300-8869
Email to: gyaindl@gyattorney.com

Attorney for Petitioner/Defendant-Appellant
CHARLES ZUFFANTE

APPLICATION FOR WRIT OF CERTIORARI

I. QUESTIONS PRESENTED FOR DECISION

1. Did The ICA Gravely Err Affirming Trial Court Admission Of HPD Officer Justin Gaspar's Testimony When The Only Witnesses To The Interrogation Were Zuffante And Gaspar, And Once Gaspar Testified, Zuffante had no choice but to testify?

2. Should Kekona be overruled because recordation of custodial interrogations is a necessary procedure under the Constitution of the State of Hawai`i to safeguard an accused's right to not be compelled to be a witness against self at trial?

3. Did The ICA Gravely Err Finding Sufficient Evidence Was Before The Jury To Sustain A Conviction For Attempted Distribution Of A Dangerous Drug In The First Degree?

4. Was The ICA Gravely Wrong Concluding The Record Was Not Sufficiently Developed For It To Rule On The Question Of Whether Zuffante Had Been Deprived The Assistance Of Effective Trial Counsel?

II. STATEMENT OF PRIOR PROCEEDINGS

On April 13, 2022, a six count Indictment was filed in 3CPC-22-000031 ("3CPC") charging Zuffante with the following offenses:

Promoting a Dangerous Drug in the First Degree (HRS § 1712-1241(1)(a)) (count 1);
Attempted Promotion of a Dangerous Drug in the First Degree (HRS §§ 712-1241(1)(b)(ii) and 705-500) (count 2);
Promoting a Dangerous Drug in the Third Degree (HRS § 712-1243(1)) (count 3);
Promoting a Dangerous Drug in the Second Degree (HRS § 712-1242(1)(b)) (count 4);
Promoting a Detrimental Drug in the Third Degree (HRS § 712-1249(1)) (count 5); and
Prohibited Acts Related to Drug Paraphernalia (HRS § 329-43.5(a)) (count 6).

ROA Dkt #1.

On May 2, 2022, the court appointed Georgette Yaindl successor counsel to Office of the Public Defender in the criminal case and for purposes of appeal. ROA Dkt #25. On August 17, 2022, State's Motion to Determine the Voluntariness of Defendant-Appellant's Statements, ROA Dkt #41, came on for evidentiary hearing, CAAP Dkt #2. On January 24, 2023, the parties appeared for trial for disposition on Zuffante's 3 motions in limine (MIL). CAAP Dkt #25. Trial recommenced on January 31, 2023. CAAP Dkt #26. Count 5, "marijuana +3gms", and count 6, "paraphernalia" were dismissed with prejudice on State's oral motion. Id. Trial continued the next day, February 1, 2023. CAAP Dkt #29. Count 3, "prodang 3" was dismissed with prejudice on State's oral motion. Id. At the conclusion of State's case in chief, Zuffante moved for acquittal as to count 2, "attempted distribution". Id. The court reserved judgment. Id. Zuffante proceeded to give testimony. Id. Zuffante then moved for acquittal as to count 1, "prodang 1";

count 2, “attempted distribution”; and count 4, “prodang 2”. The court reserved ruling. Id.

On February 2, 2023, the jury returned guilty verdicts as to counts 1, 2, and 4, and answered two special interrogatories. CAAP Dkt #31. On February 10, 2023, a merger hearing was held at which time the parties stipulated to merger of counts 1, 2, and 4. State elected for sentencing on count 2, “attempted distribution”. CAAP Dkt #27. On March 24, 2023, the court entered State’s orders denying Zuffante’s motions for acquittal. ROA Dkts ##266 and 268. On April 6, 2023, the court filed and entered First Amended Judgment of Conviction and Sentence; Notice of Entry of Judgment (Count 2: Attempted Promotion of A Dangerous Drug In The First Degree. ROA Dkt #279.

On April 26, 2023, the court granted Zuffante’s motion for more time to file the notice of appeal to June 5, 2023. ROA Dkt #289. The Notice of Appeal was filed in CAAP-23-0000376 on June 2, 2023. CAAP Dkt #1. On June 17, 2024, the ICA filed its order of no oral argument. CAAP Dkt #55. On September 18, 2024, the ICA filed its SDO affirming Zuffante’s conviction. CAAP Dkt #62, Exhibit “1”” attached hereto. Entry of JOA followed on October 25, 2024. CAAP Dkt # 71, Exhibit “2” attached hereto. On November 21, 2024, Zuffante filed a request for an extension of time to file the application for a writ of certiorari. CAAP Dkt #73. On November 22, 2024, the appellate clerk filed notice extending the deadline for an additional thirty days. CAAP Dkt #75.

III. STATEMENT OF THE CASE

This case tells the story of what happens when the trial court admits a police officer’s testimony as to the content of an accused’s custodial statements when the interrogation is not video-recorded, audio recorded, independently observed, or timely memorialized: the evisceration of individual’s ability to make an unfettered choice between the constitutional rights to testify and not to testify Zuffante asks This Court, as he had the trial court, ROA Dkt #79 (Opposition to Voluntariness Motion); ROA Dkt #120 (Zuffante’s proposed voluntariness hearing facts and conclusions); ROA Dkt #47 (MIL #2), and the ICA, CAAP Dkt #40, to overrule Kekona while announcing This Court’s adoption of an updated “Stephan Rule” and apply the new rule to the facts and circumstances of HPD Gaspar’s solo, unrecorded, uncorroborated, and untimely memorialized interrogation of Zuffante on October 21, 2021. CAAP Dkt #29; CAAP Dkt #26.

This case asks that This Court consider whether the ICA gravely erred finding/concluding

sufficient evidence was before the jury to sustain a conviction on Count 2 (Attempted Promotion of a Dangerous Drug in the First Degree (HRS §§ 705-500 and 712-1241(1)(b)(ii)), based on established facts that: Zuffante was a front seat passenger in a motor vehicle subjected to a traffic stop in Kailua-Kona on October 20, 2021, CAAP Dkt #23 at 6-7; CAAP Dkt #26 at 108; Zuffante's girlfriend, Kimberly Jackson, was driving, CAAP Dkt #23 at 6-7; Jackson told HPD Officer Charles Caldwell-Kaai she had been test-driving the car for a couple of days, Id. at 13; Caldwell-Kaai observed bulbous-end glass smoking pipe paraphernalia associated with the ingestion of methamphetamine located in the front seat center console, cup hold area, Id. at 14-15; Caldwell-Kaai informed Jackson of his observation and stated that he was arresting her for the offense of promotion of a dangerous drug in the third degree, Id. at 15-16; Caldwell-Kaai instructed HPD Officer Devon Manuel to arrest Zuffante whereupon Manuel conducted a "pat-down" inventory search of Zuffante and a small zip packet was found located in Zuffante's left front pocket inside a larger ziplocak bag containing residue, Id. at 39, the total weight of which was 3.9 grams of methamphetamine, SDO at 10.

A search of Jackson's vehicle yielded the following: a Bebe handbag within which was a brown in color woman's purse containing zip packets and a black and white polka doted coin purse containing zip packets; an Anne et Valentin Sunglass case on the dashboard; a brown in color fanny pack in the back seat; and various items of women's clothing. CAAP Dkt #26 at 222-224. The Official Report of the HPD Crime Lab received in evidence reports a total of 130.770 +/- 0.150 grams of methamphetamine were found contained in the Bebe handbag, polka dot coin purse, sunglass case and fanny pack. ROA Dkt #287 at 62. The only items found in the search associated with Zuffante were 2 medicine bottles bearing prescriptions written for him. ROA Dkt #287 at 48. Police did not seek to recover any latent fingerprints from any of the items or their contents. CAAP Dkt #29 at 117. Ultimately, Zuffante prays This Court will take up the question, had Gaspar's testimony properly been disallowed at trial, is the foregoing sufficient evidence for the jury fairly to determine Zuffante's culpability for the offense of attempted dangerous drug distribution?

This case asks This Court to consider Zuffante's challenge to the ICA's determination that the record was not sufficiently developed for it to consider Zuffante's ineffective assistance of counsel claim because Zuffante raised it in his reply brief "to which the State could not respond", SDO at 6.

IV. ARGUMENT

A. The ICA Gravely Erred Affirming Trial Court Admission Of HPD Officer Justin Gaspar's Testimony Because The Only Witnesses To The Interrogation Were Zuffante And Gaspar, And Once Gaspar Testified, Zuffante Had No Choice But To Testify.

1. It is clear and should be reversible error for the ICA and trial court to use Zuffante's election to not testify at the voluntariness hearing against him.

Zuffante first challenged Gaspar's failure to video or audio record Zuffante's interrogation in his opposition to State's voluntariness motion, ROA Dkt #79. Zuffante is asking This Court to consider and determine same matters raised in his voluntariness opposition, Id., including: 1) because State must propound on its motion not only on the matter of "voluntariness" of custodial statements but the contents of alleged statements, as well, the trial court should disallow Gaspar's testimony; 2) the unavailability of corroborating evidence of a custodial interrogation is the equivalent of lost or destroyed evidence, citing State v. Matafeo, 71 Haw.183,187, 787 P.2d 671, 673 (1990) (internal quotations omitted); 3) even if Gaspar afforded Zuffante the "procedural safeguards" discussed in State v. Kazanas, 138 Haw. 23, 375 P.3d 1261(2016), such "safeguards" merely require Miranda advisements[1]; and 4) the facts of Zuffante's interrogation compel an expansion of the procedural safeguards conducted during an interrogation to include recordation of the interrogation, ROA Dkt #79.

The ICA wrongfully concluded that because "Zuffante did not show he was denied Kazanas procedural safeguards," SDO at 7, the trial court did not err in determining that Zuffante voluntarily made "the alleged custodial statements, Id. It recognizes that "Zuffante did not testify at the voluntariness hearing or any related motion to suppress[,]" and attempts to support this finding with a footnote citing to *Simmons v. United States* (1968) and *United States v. Salvucci* (1980) which "not[ed] that Simmons 'held that testimony given by a defendant in support of a motion to suppress cannot be admitted as evidence of his [or her] guilt at trial.'" SDO at 7. But Zuffante does not involve a motion to suppress, for which he avers a defendant is burdened with production and persuasion that may or may not require, from his perspective, the need to relinquish the right to remain silent. Neither State nor the ICA provide any authority extending

[1] Kazanas, 138 Haw. 23, 49, 375 P.3d 1261,1287 (2016) ("In *Miranda*, the Court established a procedural safeguard to secure the privilege against self-incrimination because it was concerned that law enforcement was behaving improperly in order to obtain confessions and that the veracity of such confessions was often compromised.").

Simmons to evidentiary pretrial motions brought by State and no authority for its extension to a voluntariness hearing, per se, let alone apply it to the facts presented in this case. This is clear error. And ICA's discussion of the voluntariness hearing continued, "Zuffante *did not present any other evidence* supporting his current contention that Officer Gaspar's testimony was 'unreliable and untrustworthy,' and *did not present any other witnesses to dispute any of the State's witnesses*." SDO at 7. That is true. And it is true because the only witnesses to the unrecorded interrogation were Gaspar and Zuffante; therefore, the only evidence of the interrogation would be testimony by Gaspar and Zuffante; State has the burdens of producing and persuading on the evidence; and Zuffante invoked his right to remain silent. The trial court and ICA were wrong to apply Simmons to Zuffante's election to not testify at the voluntariness motion and further burden Zuffante with any amount of production and persuasion on the motion.

2. It was clear error for the ICA, like the trial court, to not adopt Zuffante's proposed 'voluntariness" Findings ##9-11 and Conclusions ##4-6.

The parties filed respective proposed findings and conclusions following the voluntariness motion. ROA Dkts ##100 and 102. The trial adopted all of State's proposed FOF/COLS and none proposed by Defendant-Appellant. ROA Dkt ##100 and 138. The ICA did not take up Zuffante's argument that it was error for the trail court to fail to enter certain of his proposed findings and conclusions, ROA Dkt #40 at 12-14, that include,

> FOF 9. Ofcr. Gaspar and Defendant were the only persons present during the interrogation following the advisement of rights. ROA Dkt #102 at 3.
>
> FOF 10. Ofcr. Gaspar testified that he did not audio or video record the interrogation of either [Zuffante] or [Jackson] because the recording equipment was broken. Id.
>
> FOF 11. The only evidence adduced by State that Defendant made certain statements during the interrogation was the testimony of Ofcr. Gaspar. Id. at 3-4.
>
> COL 4. "[B]efore the State may use statements stemming from a custodial interrogation, it must first demonstrate the use of procedural safeguards effective to secure the privilege against self-incrimination." State v. Kazanas, 138 Hawai'i 23, 34, 375 P.3d 1261, 1272 (2016). Id. at 5.
>
> COL 5. A video or audio recording, or a transcript of the interrogation was a necessary "procedural safeguard," Kazanas, 138 Haw. 23, 34, 375 P.3d 1261, 1272 (2016) under the totality of the circumstances in this case. Id.
>
> COL 6. The failure of the police department to record Ofcr. Gaspar's interrogation of Defendant and failure of the State to provide any evidence corroborating Ofcr. Gaspar's is akin to lost or damaged evidence, and as a result, any statements made by Defendant during the interrogation must be suppressed.

[citing and quoting *State v Matafeo*, 787 P.2d 671 at 67 (1990). Id. at 5-6.

Zuffante interprets the trial court and ICA's disregard for these undisputed facts and sufficiently supported conclusions as material and urgent that there has been a judicial determination that even if accepted as true, that Zuffante's (proposed) facts and conclusions are differences without distinction. If Zuffante interprets right, then the trial court and ICA are wrong about that as well. These instead are the differences that distinguish this case and the reasons Zuffante prays to This Court for express consideration and determination.

3. Notwithstanding three Tachibana colloquies, it was error for the ICA and trial court to find Zuffante's waiver of the right to remain silent at trial was a voluntary waiver.

The ICA's conclusion that "the trial court did not err finding Zuffante knowingly, voluntarily, and intelligently waived his right to testify," SDO at 9, is wrong. Notwithstanding three Tachibana colloquies with the trial court, CAAP Dkt #25; CAAP Dkt #29, Zuffante did not "choose" to testify because the same trial court gave him no choice. Zuffante's giving of testimony was the only means of challenging, explaining, and rebutting Gaspar's testimony, testimony that the trial court and ICA determined properly were admitted at trial. Having first allowed Gaspar's testimony to proceed following the voluntariness proceedings, supra, the trial court proceeded to defer final ruling on Zuffante's MIL #2 that likewise sought preclusion of Gaspar's testimony. CAAP Dkt #29. Gaspar testified at trial, Id.. His involvement with this case is confined to the four corners of the interrogations of Zuffante and Jackson, Id.. And but for the fact the interrogation is unrecorded and uncorroborated by a third witness, Zuffante would not have had anything to say, Id. (testimony confined to matter of interrogation), and more importantly Zuffante would not have had to have said anything *in any event*, Haw. const. art. 1, § 10 ("No person shall ... be compelled in any criminal case to be a witness against oneself."). State called Gaspar as its last witness. Three times while Gaspar was under direct examination Zuffante yelled out "that's a lie", CAAP Dkt #29. Zuffante's "election" to testify, therefore, hardly can be characterized as an ''unfettered exercise of his own will,'" Torres, 439 P.3d at 245 (internal quotations omitted).

B. Kekona must be overruled because recordation of interrogations is a necessary procedural safeguard under the Constitution of the State of Hawai`i, particularly in situations where only one officer and the accused witness the interrogation.

Zuffante's MIL #2 sought preclusion of Gaspar's testimony on

grounds that due process under the laws of the State of Hawai`i compel Hawaii's state courts follow Stephan v. Alaska, 711 P.2d 1156, 1157 (1985) (holding that an unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect's right to due process and that any statement thus obtained generally is inadmissible), reasoning "*"[a] confession is generally such conclusive evidence of guilt* that a rule of exclusion is justified, when the state, without excuse, fails to preserve evidence of the interchange leading up to the formal statement," Id., P.2d at 1164. *Stephan* was decided some 40 years ago, well before the invention of the camera phone[2], but the Stephan court nevertheless was able to reason: "[a]n electronic recording, thus, protects the defendant's constitutional rights, by providing an objective means for him to corroborate his testimony concerning the circumstances of the confession[;] [An electronic recording] protects the public's interest in honest and effective law enforcement, and the individual interests of those police officers wrongfully accused of improper tactics[; and] [t]he concept of due process is not static; among other things, it must change to keep pace with new technological developments," Stephan, 711 P.2d at 1161.

This Court had occasion to consider *Stephan* in State v. Kekona, 77 Haw. 403, 886 P.2d 740 (1994) (declining to hold that State must produce a tape recordation of a custodial interrogation to establish a defendant's valid waiver of constitutional rights). Kekona is precedent, and this case certainly presents "compelling justification," State v. Garcia, 96 Haw. 2001, 29 P.3d 919, 925 (Haw. 2001), quoting *Hilton v. South Carolina Pub. Ry. Comm'n,* 502 U.S. 197, 202, 112 S.Ct. 560, 116 L.Ed.2d 560 (1991) and "the most cogent reasons and inescapable logic," Id, 29 P.3d at 925, analogizing *Dairy Road Partners v. Island Ins. Co., Ltd.,* 92 Hawai`i 398, 421, 992 P.2d 93, 116 (2000), for retiring it. Justice Levinson dissented from Kekona majority's decision to not adopt a *Stephan*-like procedural safeguard because it "virtually invites a deluge of time-consuming and avoidable appeals in the future," Kekona, 77 Haw. at 410, 886 P.2d at 747, CAAP DKT #40, and Zuffante says, including the instant one. At least the facts in Kekona, unlike the instant, included that the defendant's interrogation was conducted by two police officers and each wrote a report. Kekona, 77 Haw. 403, 404, 886 P.2d 740, 741. Finally, a

[2] See e.g., *Camera Phone*, Wikipedia, *available at:/* https://en.wikipedia.org/wiki/Camera_phone#:~:text=The%20first%20commercial%20camera%20phone%20was%20the%20Kyocera%20Visual%20Phone,%2Dpixel%20front%2Dfacing%20camera (last viewed December 19, 2024) ("The first commercial camera phone was the Kyocera Visual Phone VP-210, released in Japan in May 1999).

recordation requirement is a multifunctional procedural safeguard that assists the Judiciary's delivery of effective Fourth Amendment counsel in the State of Hawaii, *infra* at IV. D.

C. The ICA Gravely Erred Finding That Sufficient Evidence Was Before The Jury To Sustain A Conviction Against Zuffante For Attempted Distribution Of A Dangerous Drug In The First Degree.

"On appeal, the test for a claim of insufficient evidence is whether, viewing the evidence in the light most favorable to the State, there is substantial evidence to support the conclusion of the trier of fact." State v. Matias, 74 Haw. 197, 207, 840 P.2d 374, 379 (1993) (citations omitted). "'Substantial evidence' as to *every material element* of the offense charged is credible evidence which is of *sufficient quality* and probative value to enable *a person of reasonable caution* to support a conclusion.'" State v. Behrendt, 124 Hawai`i 90, 102, 237 P.3d 1156, 1168 (Hawai`i 2010) (quoting *State v. Richie*, 88 Hawai`i 19, 33, 960 P.2d 1227, 1241 (1998)(emphasis added). Accord, SDO at 10-11, citing *State v. Angei*, 152 Haw. 484, 492, 526 P.3d 461, 469 (2023). Zuffante moved for judgment of acquittal on Count 2 at the conclusion of State's case in chief and following Zuffante's giving of testimony. CAAP Dkt #29. The trial court deferred ruling and subsequently entered State's proposed orders denying the motion. ROA Dkts #266 and #268. The ICA affirmed. SDO at 10-11. The trial court and ICA are wrong and for the following reasons:

1. State did not put on any evidence that Zuffante attempted to distribute any of the methamphetamine recovered in this case.

It is undisputed that State did not put on any evidence that Zuffante attempted to distribute any of the methamphetamine recovered in this case. CAAP Dkt #29. Defense argued in Zuffante's oral motions to acquit that because State did not put on any evidence that Zuffante had engaged in negotiations, offered or agreed to sell any of the recovered methamphetamine, the charged offense of attempted distribution could not be sustained. Id. at 122; CAAP Dkt #40 (OB) at 27. In support, Zuffante relies on State v. Ugalino, 107 Haw. 144, 111 P.3d 39 (Haw. App. 2005) (finding evidence was insufficient to sustain attempted distribution offense); State v. Schofill, 621 P.2d 364, 368 (Haw. 1980) ("the crime of promoting a dangerous drug by distributing the same is complete where, with the specific intent to sell, the accused has offered to sell the contraband"); and HRS § 712-1240 (under chapter 712, "distribute" specifically :means to sell, transfer, prescribe, give, or deliver to another, or to leave, barter, or exchange with another, or to offer or agree to do the same.") The ICA contends, wrongfully, that the

"evidence presented at trial in this case is clearly distinguishable from that found insufficient in Ugalino, SDO at 10, and does not address *Schofill* or the statutory definition of "to distribute."

But Ugalino squarely is on point. Here, the ICA reversed a conviction on an attempted promotion of a dangerous drug in the first-degree charge, as charged in the instant in Count 2, finding "[t]here was no evidence that Ugliano had "engaged in negotiations, offered, or agreed to distribute any of the 17.44 grams of methamphetamine *found in his possession*. Indeed, there is no *direct evidence* of what Ugalino intended to do with the 17.44 grams." State v. Ugalino, 111 P.3d 39, 53 (Haw. App. 2005) (cert. den. May 5, 2005) (emphasis added). The 17.44 grams of meth found in Ugalino's possession were recovered off his person in a pat down search, along with 2 small ziplock packets with residue, and eight small empty ziplocks, Ugalino, 111 P.3d at 52, in contrast to the 17.44 grams of meth and empty zip packets found located in Ugalino's pocket, 3.9 grams were recovered from the Zuffante's pocket in a single zip, SDO, at 10. The ICA determined that there was no evidence presented that Zuffante was a meth user or that any of the meth would be personally consumed, unlike in *Ugalino.* Id. The ICA is wrong. See, e.g., ROA Dkt #138 at 7 (FOFs/COLS) (57.Officer Caldwell Kaai advised [Zuffante and Jackson] of his observation of a glass smoking pipe in the center console cup holder; 58. At this time, Defendant [Zuffante] states something to the effect, can I put that away.")] The only "direct evidence" and the only fact distinguishing Zuffante from Ugalino is Gaspar's hearsay testimony about Zuffante's alleged custodial statements. SDO at 10. And notwithstanding, no testimony was adduced or other evidence put before the jury establishing what Zuffante intended to do with the methamphetamine recovered in this case.

2. There was insufficient evidence for the jury to find Defendant-Appellant knowingly possessed the fanny pack or its content.

The search of Jackson's vehicle yielded a Bebe handbag within which was a brown in color woman's purse; an Anne et Valentin Sunglass case on the dashboard; a brown in color fanny pack in the back seat; and various items of women's clothing. CAAP Dkt #26 at 222-224. The Official Report of the HPD Crime Lab received in evidence reports a total of 130.770 +/- 0.150 grams of methamphetamine were found contained in the Bebe handbag, polka dot coin purse, sunglass case and fanny pack. ROA Dkt #287 at 62. The only evidence, other than Gaspar's hearsay testimony, that Zuffante had any knowledge of the contents of the fanny pack was his proximity to it, a status he equally shared with Jackson. The only items found in the search of Jackson's car associated with Zuffante were 2 medicine bottles bearing prescriptions

written for him. ROA Dkt #287 at 48. Police did not seek to recover any latent fingerprints from any of the items or their contents. CAAP Dkt #29 at 117. And "mere proximity and power to exercise control over contraband are insufficient to sustain a conviction for possession absent evidence of intent," State v. Foster, 128 Haw. 18, 20, 282 P.3d 560, 562 (2012). The only evidence of Zuffante's intent with respect to meth found located in the brown fanny pack is Zuffante's undisputed statement to Gaspar that he does not want Jackson to be charged for the drugs found in her car. CAAP Dkt #29 at 115 and 117.

D. The ICA Was Gravely Wrong Concluding That The Record Was Not Sufficiently Developed For It To Rule On The Question Of Whether Zuffante Had Been Deprived The Assistance Of Effective Trial Counsel.

Declining to consider and instead defer Zuffante's ineffective assistance of counsel claim to Zuffante's initiating HRPP Rule 40 proceedings, SDO at 6, a claim which the ICA contends was raised for the first time on appeal in Zuffante's reply brief, Id., the ICA relies on State v. Yuen, No. SCWC-21-0000679, 2024 WL3873948 (Haw. Aug. 20, 2024) [555 P.3d 121 (Haw. 2024)] for support.

> Here, unlike the situation in Yuen, Zuffante's trial counsel was properly served with Zuffante's appears to have served herself, as well as the State, with a copy of Zuffante's reply brief. The dispositive circumstance here, however, which also distinguishes this case from Yuen, is that Zuffante did not raise an ineffective assistance claim in his opening brief; *he waited for his reply brief*, to which the State could not respond. We thus decline to address Zuffante's *late* ineffective assistance claim consistent with established law.

SDO at 6 (citations omitted).

But Zuffante did not wait, and he was not late in making the claim. Instead, Zuffante properly confined his reply brief to "matters presented in [State's] answering brief", HRAP Rule 28(d), including follows, quoting State's answering brief, CAAP Dkt #45: "Appellant did not move to suppress the statement Appellant is now aggrieving, nor was a motion to exclude the statement due to spoliation filed for," CAAP Dkt #45 at 7; "Appellant failed to properly preserve the issue [re admitting Defendant's statements at trial] for review," Id. at 10; "Although it is undisputed that no recording was generated, there was no evidence adduced that the police were at fault for the inoperability of the recording equipment or that the officers had an alternative method of recording available and failed to use that available alternative recording method," Id. at 11; "In denying the Appellant's [MIL #2],the Court noted 'Mr. Zuffante has the

ability at trial if he chooses to contradict any statements made by Gaspar, and the Defense is free to discuss the lack of a recording. However, there is no contradictory evidence presented for the Court to basically consider, and that's why I say without prejudice...,'" Id. at 10; "On cross-examination, Appellant did not ask if there were any alternative means to record the interview," Id. at 15; "Appellant did not present any evidence that other means to record the interrogation existed," Id. at 22; "Defendant did not testify at the Motion to Determine Voluntariness." Id. at 15-16; "Appellant did not testify at the MTDV to dispute the account of police surrounding the nature nor the contents of the custodial interrogation. As such, Appellant has not made a showing that recording of the interrogation would have been feasible," Id. at 22-23; and "Appellant had the opportunity to testify at a suppression/exclusion hearing to challenge the admissibility of the interrogation," Id. at 23.

Notwithstanding Zuffante's appellate counsel is not new appellate counsel, appellate counsel nevertheless did "address the ineffective assistance claim based on the record," Id., 555 P.3d at 135, and the ICA was wrong to not decide the matter and to instead refer the matter back to the same trial court that appointed Zuffante counsel for purposes of trial and appeal. ROA Dkt #25. Notwithstanding Zuffante's trial counsel's attempt to otherwise exclude Gaspar's testimony, CAAP Dkt #79 (Opposition to voluntariness motion); CAAP Dkt #147 (MIL #2 "Re: "Defendant's Statements Made in the HPD Interview Room), he did not bring a motion to suppress Gaspar's testimony, SDO at 7, and following Yuen, This Court likewise must conclude that "[b]ased on the record, trial counsel was ineffective in not filing a motion to suppress," Id., 555 P.3d at 134.

V. CONCLUSION

This Court should enter a judgment of acquittal on Count 2, concluding that absent Gaspar's inadmissible testimony, there is insufficient evidence to sustain the conviction. In the alternative, This Court should adopt a modernized *Stephan* rule, vacate the conviction, and remand for a new trial and appointment of a new trial lawyer.

DATED: Kailua-Kona, Hawai`i; December 23, 2024

/s/ Georgette A. Yaindl
GEORGETTE ANNE YAINDL
Attorney for Petitioner/Defendant-Appellant
CHARLES ZUFFANTE

EXHIBIT “1”

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NO. CAAP-23-0000376

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
CHARLES ZUFFANTE, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CASE NO. 3CPC-22-0000315)

SUMMARY DISPOSITION ORDER
(By: Leonard, Acting C.J., and Wadsworth and McCullen, JJ.)

Defendant-Appellant Charles Zuffante (**Zuffante**) appeals from the First Amended Judgment of Conviction and Sentence (**Judgment**), entered on April 6, 2023, in the Circuit Court of the Third Circuit (**Circuit Court**).[1/] Following a jury trial, Zuffante was convicted of Attempted Promotion of a Dangerous Drug in the First Degree, in violation of Hawaii Revised Statutes (**HRS**) § 705-500[2/] and 712-1241(1)(b)(ii).[3/]

[1/] The Honorable Robert D.S. Kim presided.

[2/] HRS § 705-500 (2014) provides:

> **Criminal attempt.** (1) A person is guilty of an attempt to commit a crime if the person:
>
> (a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as the person believes them to be; or
>
> (b) Intentionally engages in conduct which, under the circumstances as the person believes them to be, constitutes a substantial step in a course of conduct intended to culminate in the person's commission of the crime.
>
> (2) When causing a particular result is an element of the crime, a person is guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with

On appeal, Zuffante contends that the Circuit Court erred or, as to his second point of error, abused its discretion in: (1) entering the September 14, 2022 "Findings of Facts and Conclusions of Law Re: State's Motion to Determine Voluntariness of [Zuffante's] Statements" (**FOFs/COLs**) "because the statements were made during custodial interrogation and were not recorded or witnessed by anyone other than [Hawai‘i County Police Department (**HCPD**) Officer Justin] Gaspar [(**Officer Gaspar**)] and [Zuffante]"; (2) denying Zuffante's November 10, 2022 motion in limine no. 2 (**MIL 2**) "because the proper administration of criminal justice in the State of Hawai‘i compels adoption of the State of Alaska's 'Stephan Rule'"; (3) "find[ing] that [Zuffante's] waiver of the right not to testify was a voluntary waiver"; (4) denying Zuffante's motion to quash Count 2 of the April 13, 2022 Indictment "because the charge is defective"; (5) denying Zuffante's oral motion to acquit on Count 2 "because [the] State

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respect to the attendant circumstances specified in the definition of the crime, the person intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.

(3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent.

[3/] HRS § 712-1241(1)(b)(ii) (Supp. 2016) provides:

Promoting a dangerous drug in the first degree. (1) A person commits the offense of promoting a dangerous drug in the first degree if the person knowingly:

. . . .

(b) Distributes:

. . . .

(ii) One or more preparations, compounds, mixtures, or substances of an aggregate weight of:

(A) One-eighth ounce or more, containing methamphetamine, heroin, morphine, or cocaine or any of their respective salts, isomers, and salts of isomers; or

(B) Three-eighths ounce or more, containing any other dangerous drug[.]

did not put on any evidence that [Zuffante] attempted to distribute the recovered methamphetamine"; and (6) denying Zuffante's oral motion to acquit on Count 2 "because there was insufficient evidence for the jury . . . to find [Zuffante] knowingly possessed the fanny pack or its content."

After reviewing the record on appeal and the relevant legal authorities, and giving due consideration to the issues raised and the arguments advanced by the parties, we resolve Zuffante's contentions as follows, and affirm.

(1) through (3) Zuffante's first three points of error concern statements he allegedly made to Officer Gaspar during a custodial interrogation that occurred after Zuffante was arrested and advised of his Miranda rights, and which was not recorded. First, Zuffante contends that the Circuit Court erred in concluding that Zuffante waived his Miranda rights and voluntarily made the statements, because the interrogation was not recorded or independently witnessed, "rendering [Officer] Gaspar's testimony on the matter unreliable and untrustworthy."[4/] Second, Zuffante contends that the Circuit Court abused its

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[4/] Relatedly, Zuffante argues that the court erred in entering FOFs 103, 113, 114 and COL 30. These FOFs and COL state:

> 103. At this time the recording device for the interview room was not working through no fault of Officer Gaspar.
>
> . . . .
>
> 113. Defendant was not threatened, forced, coerced, nor promises made to him to waive his rights to an attorney and to remain silent, nor were any threats, force, coercion, or promises made to him inducing him to make a statement.
>
> 114. In summary, Defendant then gave a statement indicating that everything was his, that all the meth was his. That he buys a pound of meth and sells them in eight ball. Defendant told Officer Gaspar the price in which he buys, sells "meth", and his profit.
>
> . . . .
>
> 30. At that time, after being read the form, Defendant waived his Miranda rights and warnings intelligently, knowingly and voluntarily and voluntarily spoke with Officer Gaspar.

Zuffante challenges these FOFs and COL based entirely on the absence of "any evidence independent of [Officer Gaspar's] own testimony" supporting them. He does not contend there is not otherwise substantial evidence supporting them based on Officer Gaspar's testimony.

discretion in denying his Motion in Limine No. 2 by failing to adopt the so-called "Stephan Rule." In Stephan v. Alaska, 711 P.2d 1156, 1158 (Alaska 1985), the Alaska Supreme Court held that in order to be admissible under the due process clause of the Alaska State Constitution, custodial confessions must be recorded when the interrogation occurs in a place of detention and recording is feasible. See State v. Kekona, 77 Hawai'i 403, 408-09, 886 P.2d 740, 745-46 (1994) (describing the Stephan holding and concluding that the due process clause of the Hawai'i Constitution does not require such a recording practice). Third, Zuffante contends that the Circuit Court, having allowed Officer Gaspar to testify as to Zuffante's statements during the custodial interrogation, erred in finding that Zuffante voluntarily waived his right not to testify, because Zuffante was left with no choice but to testify in order to rebut Officer Gaspar's testimony.

As to Zuffante's second contention (supra), the State argues that Zuffante failed to properly preserve, and thus waived, the issue for appeal, because the denial of the motion in limine was not an unequivocal holding concerning the issue raised, and Zuffante did not object at trial to Officer Gaspar's testimony about Zuffante's statements to him, or cross-examine Officer Gaspar on whether other means of recording the interrogation existed. In his reply brief, Zuffante agrees that he "failed to properly preserve the issue [re admitting [his] statements at trial] for review[,]" and attributes this failure to ineffective assistance of his trial counsel.

As to the State's waiver argument, we look to Kobashigawa v. Silva, 129 Hawai'i 313, 300 P.3d 579, (2013), for guidance. There, the supreme court explained: "The denial of a motion in limine, in itself, is not a reversible error. The harm, if any, occurs when the evidence is improperly admitted at trial." Id. at 320, 300 P.3d at 586 (quoting State v. Eid, 126 Hawai'i 430, 440, 272 P.3d 1197, 1207 (2012)). Accordingly, "when a motion in limine to exclude evidence is simply denied without a ruling on admissibility and the evidence is subsequently introduced by the opposing party during trial, a

proper objection at that time is necessary to preserve the error for appellate review." Id. at 322, 300 P.3d at 588 (quoting Lussier v. Mau-Van Dev., Inc., 4 Haw. App. 359, 393, 667 P.2d 804, 826 (1983)) (internal quotations marks omitted). However, "objections need not be renewed if the prior ruling on the motion in limine amounted to an unequivocal holding concerning the issue raised." Id. (quoting Lussier, 4 Haw. App. at 393, 667 P.2d at 826).

In his MIL 2, Zuffante sought an order precluding the testimony of Officer Gaspar concerning the alleged custodial statements made by Zuffante on the bases that: (1) the statements were uncorroborated (because they were unrecorded); and (2) due process compelled adoption of the Stephan rule. The Circuit Court denied the motion without prejudice, stating in part: "Mr. Zuffante has the ability at trial if he chooses to contradict any statements made by Officer Gaspar, and the Defense is free to discuss the lack of a recording. However, there is no contradictory evidence presented for the Court to basically consider, and that's why I say without prejudice . . . ." (Formatting altered.) The court did not mention the Stephan rule. On this record, we cannot say that the Circuit Court's denial of MIL 2 without prejudice constituted an unequivocal holding rejecting the adoption or applicability of the Stephan rule in these circumstances. Thus, by failing to object at trial to Officer Gaspar's testimony about Zuffante's statements, Zuffante failed to preserve his current contention that the Circuit erred in denying his MIL 2 by failing to adopt the Stephan rule.

As noted above, Zuffante argues in his reply brief that his trial counsel was ineffective in failing to properly preserve this issue. In State v. Yuen, No. SCWC-21-0000679, 2024 WL 3873948 (Haw. Aug. 20, 2024), the supreme court recently addressed an ineffective assistance claim that was raised in the defendant's opening brief. See id. at *6. The court held in part:

> [I]f new appellate counsel on direct appeal fails to serve an ineffective assistance claim on trial counsel, the appellate court must order counsel to do so and provide

> trial counsel with a reasonable opportunity to respond. The appellate court is to address the ineffective assistance claim based on the record after that opportunity has been provided instead of denying an ineffective assistance claim without prejudice to a HRPP Rule 40 petition.

Id. at *13.

Here, unlike the situation in Yuen, Zuffante's trial counsel was properly served with Zuffante's ineffective assistance claim. Indeed, Zuffante's appellate counsel was his trial counsel, and appears to have served herself, as well as the State, with a copy of Zuffante's reply brief. The dispositive circumstance here, however, which also distinguishes this case from Yuen, is that Zuffante did not raise an ineffective assistance claim in his opening brief; he waited for his reply brief, to which the State could not respond. We thus decline to address Zuffante's late ineffective assistance claim consistent with established law. See State v. Mark, 123 Hawai‘i 205, 230, 231 P.3d 478, 503 (2010) (citing In re Hawaiian Flour Mills, Inc., 76 Hawai‘i 1, 14 n.5, 868 P.2d 419, 432 n.5 (1994), and Hawai‘i Rule of Appellate Procedure (**HRAP**) Rule 28(d)). Given the unusual circumstances here, our decision is without prejudice to Zuffante's right to file a related post-conviction petition under Hawai‘i Rules of Penal Procedure (**HRPP**) Rule 40.

As to Zuffante's first contention – that the Circuit Court erred in concluding that Zuffante voluntarily made the alleged custodial statements to Officer Gaspar – the State argues that Zuffante's partial opposition to the State's motion to determine voluntariness "did not address the voluntariness of the statements that were opposed, but instead argued that the lack of the audio or video recording of the interrogation equated to a lack of procedural safeguards effective to securing the privilege against self-incrimination, referring to State v. Kazanas, 138 Hawai‘i 23, 34, 375 P.3d 1261, 1272 (2016)." The State further argues that substantial evidence supported the Circuit Court's determination of voluntariness, based on Officer Gaspar's testimony at the voluntariness hearing and Zuffante's failure to present any evidence to dispute that testimony. In his reply brief, Zuffante appears to attribute this and other alleged failures to the ineffective assistance of his trial counsel.

On this record, we conclude that the Circuit Court did not err in COL 30 in concluding that Zuffante "waived his Miranda rights and warnings intelligently, knowingly and voluntarily and voluntarily spoke with Officer Gaspar." (Underlining added.) At the voluntariness hearing, Officer Gaspar testified that on the day of Zuffante's custodial interrogation, the recording device in the HCPD interview room was not working. Officer Gaspar confirmed this was not "[his] fault[.]" On cross examination, Zuffante did not challenge that assertion or ask if there was any feasible alternative means to record the interview. Officer Gaspar further testified that he advised Zuffante of his Miranda rights and warnings using the Hawai'i Police Department Advice of Rights form, and that Zuffante indicated he understood his Miranda rights, did not want a lawyer present, and was willing to make a statement to the police. Zuffante did not testify at the voluntariness hearing or any related motion to suppress,[5/] did not present any other evidence supporting his current contention that Officer Gaspar's testimony was "unreliable and untrustworthy," and did not present any other witnesses to dispute any of the State's witnesses. "It is well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of evidence; this is the province of the trier of fact." Fisher v. Fisher, 111 Hawai'i 41, 46, 137 P.3d 355, 360 (2006) (quoting In re Doe, 95 Hawai'i 183, 190, 20 P.3d 616, 623 (2001)). In sum, Zuffante did not show that he was denied any procedural safeguard discussed in Kazanas, and the Circuit Court did not err in determining that Zuffante voluntarily made the alleged custodial statements to Officer Gaspar.[6/]

Further, we decline to address Zuffante's related ineffective assistance claim, made for the first time in his reply brief, for the reasons previously stated, and without

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[5/] See Simmons v. United States, 390 U.S. 377 (1968), and United State v. Salvucci, 448 U.S. 83, 88 (1980) (noting that Simmons "held that testimony given by a defendant in support of a motion to suppress cannot be admitted as evidence of his [or her] guilt at trial.").

[6/] We further conclude that COLS 103, 113, and 114 are supported by substantial evidence and are not clearly erroneous.

prejudice to his right to file a post-conviction petition under HRPP Rule 40. See Mark, 123 Hawai‘i at 230, 983 P.3d at 503.

As to Zuffante's third contention – that he was essentially forced to testify – the State argues that this claim is without merit because "[Zuffante] failed to challenge the interrogation at pre-trial and could have testified at a pre-trial motion while still asserting [his] right to remain silent at trial." In his reply brief, Zuffante agrees that he did not move to suppress the statements at issue or otherwise challenge the reliability of Officer Gaspar's testimony at the voluntariness hearing, and asserts that his "[trial c]ounsel's failure coerced [his] election to give up his right to remain silent and coerced his election to testify at trial."

Based on our review of the record, including the relevant Tachibana colloquies, which Zuffante does not challenge, we cannot conclude that the Circuit Court erred in finding that Zuffante knowingly, voluntarily, and intelligently waived his right not to testify. Again, we decline to address Zuffante's ineffective assistance claim, made for the first time in his reply brief, for the reasons previously stated, and without prejudice to his right to file a post-conviction petition under HRPP Rule 40. See Mark, 123 Hawai‘i at 230, 983 P.3d at 503.

(4) Zuffante contends that the Circuit Court erred in denying his motion to quash Count 2 of the Indictment – for Attempted Promotion of a Dangerous Drug in the First Degree – "because the charge is defective."

Count 2 states:

> On or about October 20, 2021, in Kona, within the County and State of Hawai‘i, CHARLES ZUFFANTE intentionally engaged in conduct, possessing methamphetamine and/or scale and/or zip packets, which, under the circumstances as he believed them to be, constituted a substantial step in the course of conduct intended to culminate in his commission of the crime of Promoting a Dangerous Drug in the First Degree ,[sic] said crime being distributed [sic] one or more preparations, compounds, mixtures, or substances of an aggregate weight of [(crossed out text with initials)] one-eighth ounce or more, containing methamphetamine, heroin, morphine, or cocaine or any of their respective salts, isomers, and salts of isomers, that is, methamphetamine,,[sic] thereby committing the offense of Attempted Promotion of a Dangerous Drug in the First Degree, in violation of Sections 705-500 and 712-1241(1)(b)(ii), Hawai‘i Revised Statutes, as amended.

It is difficult to discern exactly what "defect" in Count 2 Zuffante challenges on appeal. He argues that Count 2 does not allege that he took a substantial step intended to "distribute," as defined by HRS § 712-1240, the required amount of methamphetamine, "and clearly unclearly charges, 'said crime being *distributed*,' . . . a completed crime[,]" and thus "failed to allege a fact of inchoate conduct . . . ." (Emphasis in original.) Thus, it appears that Zuffante is challenging the use of the past participle form of the word "distribute*d*," instead of the present participle form "distribut*ing*," in Count 2.

This is not the argument that Zuffante made in his motion to quash Count 2. There, he contended that Count 2 should be dismissed because it did "not allege [that he] attempted to distribute any dangerous drug." (Capitalization altered.) In quoting Count 2, Zuffante inserted the word "sic" after the word "distributed," indicating he understood that the word contained a grammatical form error. Then, relying on State v. Ugalino, 107 Hawai‘i 144, 111 P.3d 39 (2005), Zuffante argued that Count 2 did not allege that he committed an act of attempted distribution, *e.g.*, negotiating or offering to sell the drug. He thus waived any argument based on the form of the word "distribute" in Count 2. In any event, we conclude that Count 2 sufficiently alleged all of the essential elements of the offense charged so as to sufficiently apprise Zuffante of what he had to be prepared to meet. See State v. Jardine, 151 Hawai‘i 96, 100, 508 P.3d 1182, 1186 (2022) (quoting State v. Merino, 81 Hawai‘i 198, 212, 915 P.2d 672, 686 (1996)).

(5) and (6) Relying primarily on Ugalino, Zuffante contends that the Circuit Court erred in denying his oral motion to acquit on Count 2, because there was insufficient evidence for the jury to find that he attempted to distribute the recovered methamphetamine and/or that he knowingly possessed the recovered fanny pack or its content. In Ugalino, this court ruled there was insufficient evidence adduced at trial to show that the defendant took a substantial step toward distribution of at least one-eighth ounce (3.5 grams) of the methamphetamine in his possession. 107 Hawai‘i at 158-59, 111 P.3d at 53-54.

In order to convict Zuffante of the attempted distribution of methamphetamine charged in Count 2, the State was required to prove beyond a reasonable doubt that Zuffante intentionally engaged in conduct constituting "a substantial step in the course of conduct intended to culminate" in the distribution of at least one-eighth ounce of methamphetamine. See HRS §§ 705-500, 712-1241(1)(b)(ii); Ugalino, 107 Hawai'i at 158, 111 P.3d at 53.

Here, the evidence at trial showed that when Zuffante was arrested, the police recovered, among other things: (1) from Zuffante's person, a one-gallon zip-lock bag containing (a) a white crystalline substance later determined to be methamphetamine, and (b) a two-by-two-inch pink zip packet containing a white crystalline substance, later determined to be methamphetamine – with a total weight of approximately 3.9 grams; and (2) from the vehicle in which Zuffante was found, a fanny pack containing sixteen small zip packets, including multiple packets containing approximately 3.5 grams of methamphetamine. Additionally, Officer Gaspar testified that Zuffante told him that: (1) "[e]verything found in the car was his" and confirmed that "the items within the fanny pack were his"; (2) "[Zuffante] spends $7,000 for a pound of meth at a time, and he breaks it down into eight-ball[7/] increments"; and (3) "[Zufante] sells the crystal methamphetamine . . . in eight-ball increments . . . for $150 a piece." (Footnote added.) There was no evidence presented that Zuffante was a methamphetamine user or that any of the methamphetamine recovered would be personally consumed. In sum, the evidence presented at trial in this case is clearly distinguishable from that found insufficient in Ugalino.

Viewing the evidence in the light most favorable to the prosecution, and in full recognition of the jury's right to determine credibility, weigh the evidence, and draw reasonable inferences of fact, we conclude there was sufficient evidence to support a prima facie case so that a reasonable mind might fairly conclude that Zuffante was guilty beyond a reasonable doubt of

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[7/] Officer Gaspar testified that an "eight-ball" is "street vernacular" for an eighth of an ounce, which is 3.5 grams.

Attempted Promotion of a Dangerous Drug in the First Degree. See State v. Angei, 152 Hawai‘i 484, 492, 526 P.3d 461, 469 (2023). The Circuit Court's denial of Zuffante's motion for judgment of acquittal on Count 2 was not erroneous.

For the reasons discussed above, the First Amended Judgment of Conviction and Sentence, entered on April 6, 2023, in the Circuit Court of the Third Circuit, is affirmed.

DATED: Honolulu, Hawai‘i, September 18, 2024.

On the briefs:

Georgette Anne Yaindl
(Law Office of Georgette A. Yaindl, LLLC)
for Defendant-Appellant.

Frederick M. Macapinlac,
Deputy Prosecuting Attorney,
County of Hawai‘i,
for Plaintiff-Appellee.

/s/ Katherine G. Leonard
Acting Chief Judge

/s/ Clyde J. Wadsworth
Associate Judge

/s/ Sonja M.P. McCullen
Associate Judge

EXHIBIT “2”

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NO. CAAP-23-0000376

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
CHARLES ZUFFANTE, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CASE NO. 3CPC-22-0000315)

JUDGMENT ON APPEAL
(By: Wadsworth, J., for the court[1/])

Pursuant to the Summary Disposition Order of the Intermediate Court of Appeals of the State of Hawaiʻi entered on September 18, 2024, the First Amended Judgment of Conviction and Sentence, entered on April 6, 2023, in the Circuit Court of the Third Circuit, is affirmed.

DATED: Honolulu, Hawaiʻi, October 25, 2024.

FOR THE COURT:

/s/ Clyde J. Wadsworth
Associate Judge

[1/] Leonard, Acting C.J., and Wadsworth and McCullen, JJ.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the document within was served by electronic means on the date stated below via JEFS addressed to:

KELDEN B.A. WALTJEN
Prosecuting Attorney
KAUANOE A. JACKSON
Deputy Prosecuting Attorney
FREDERICK MACAPINLAC
Deputy Prosecuting Attorney
Office of the Prosecuting
Attorney County of Hawai`i
74-675 Kealakehe Pkwy.
Kailua-Kona, HI 96740
Email to: hcpajefs@hawaiicounty.gov

Attorney for Respondent/Plaintiff-Appellee
STATE OF HAWAI`I

DATED: Kailua-Kona, Hawai`i; December 23, 2024

/s/ Georgette A. Yaindl
GEORGETTE ANNE YAINDL
Attorney for Petitioner/Defendant-Appellant
CHARLES ZUFFANTE