CONCURRING OPINION OF ACOBA, J.,
WITH WHOM RAMIL, J., JOINS

We believe that in the public interest, this case should be published. See Torres v. Torres, No. 23089, 2002 WL 31819669, at *36 (Hawaiʻi Dec. 17, 2002) (Appendix A) (Acoba, J., dissenting, joined by Ramil, J.).

We must, of necessity, decide issues of first impression in reaching the disposition in this case.[1] Therefore,

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[1] Section IV of this opinion provides new guidance by stating that, while the Hawaiʻi Penal Code (HPC) condenses several common law larceny and related crimes into a single HPC offense of theft, defendants should nevertheless be provided with fair notice of the particular form of the theft that is charged. However, the absence of the phrase "failed to take reasonable measures to discover and notify the owner" in an indictment charging a violation of Hawaiʻi Revised Statutes (HRS) § 708-830(3) (appropriation of lost or mislaid property) does not amount to a failure to allege all of elements of that crime.

Section V clarifies for the first time that a prosecutor did not violate his or her duties under Hawaiʻi Rules of Penal Procedure (HRPP) Rule 16(b)(1)(vii) to provide discovery in a HRS § 708-830(3) theft case, inasmuch as discovery of how stolen property was initially lost or mislaid, is not material to a defense that the defendant did not know that property was lost or mislaid. Further, under the circumstances, (1) there was sufficient evidence otherwise to establish that the defendant knew that the property was mislaid and (2) the defendant would not have gained any advantage from discovering that a witness had given false statements because the impeachment impact of disclosing the prevarication was limited under the circumstances.

Section V also indicates that, while the prosecutor's failure to disclose a witness's apparent false statement did not result in prejudicial harm to defendant, a prosecutor's duty to disclose such falsehood is a continuing one under HRPP Rule 16(e)(2) (obligation for continuing discovery) and the failure to disclose is a ground for referral to the Office of Disciplinary Counsel.

Section VI states a new rule in this jurisdiction that convening a formal evidentiary hearing regarding juror and prosecutorial misconduct is in the sound discretion of the court based on the "issue . . . raised, . . . the seriousness of the claim presented and the adequacy of the defendant's factual showing." See infra page 26-27 (quoting Commonwealth v. Figueroa, 661 N.E.2d 208, 213 (Mass. 1998) (other citation omitted). In this case, (1) the parties' arguments made at a motion for new trial, (2) the parties' contentions in the course of a chambers conference, and (3) affidavits in support of and against the motion are deemed adequate bases for the court's decision not to convene an evidentiary hearing.

Section VII sets forth for the first time the standards to be applied for Hawaiʻi Rules of Professional Conduct (HRPC) Rule 3.5(e)(4) (communications with jurors after dismissal of the jury) and HRPC Rule 3.5(e)(4)(i) ("freely granted" debriefings). The good cause requirement for

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this decision should be published.[2] See Zanakis-Pico v. Cutter Dodge, Inc., No. 22987 slip op. at 1 n.1 (June 14, 2002) (Acoba, J., concurring) (stating that cases adopting new rules of law should be published and listing several jurisdictions that have adopted such rules). Above all, I believe the parties and any interested persons are entitled to know the reasons and supporting law which underlie the result in this case. In my view, the need to make that known is rendered obligatory by new and complex issues required to be considered in reaching that result. Hence, with all due respect, I consider the majority's decision to relegate this matter to a summary disposition order format wrong.

I.

One of the principles of civility is judicial accuracy. This fundamental civility principle may become relevant in the disposition of cases or internal processing of cases. Any other approach skews the outcome of the decision. As has been observed, a justice who authors a majority opinion is sometimes compelled to author a concurrence because agreement cannot be reached as to publication.

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[1](...continued) communications with jurors in HRPC 3.5(e)(4)(ii) is defined and the good cause standard applied to the facts.

[2] One of these issues relates to jury communications and jury misconduct during deliberations, a matter as to which attorneys and judges seek guidance. I note that a topic at the Hawaiʻi State Judiciary's Annual Judicial Education Conference, Spring 2002, was "Jury Communications and Jury Misconduct During Deliberations."

> In the case of the Justice or Judge who pens the majority opinion but does not garner the votes for publication, the Judge or Justice may be forced to write a concurring opinion to concur in the result but express disagreement with the decision of the majority not to publish.

N.K. Shimamoto, Justice is Blind, But Should She be Mute?, 6 Hawaiʻi B.J. 6, 7 n.12 (2002) (emphasis added). Accordingly, inasmuch as the majority agrees with and has adopted this concurring opinion's rationale in reaching the majority's conclusion, I set out the facts and law that support the propositions the majority agrees with and has adopted. See Parts II-XII infra.

II.

A.

On December 5, 1996, Archie Kalepa, a lifeguard for the County of Maui (county), enlisted the aid of three fellow lifeguard employees to assist him after work with steering and sailing a privately owned canoe from "D.T. Fleming Beach" on Maui, across the Pailolo Channel, to Molokaʻi. Kalepa asked Thomas Lilly, a surfer he knew, to follow them on a water ski with a red county lifeguard water sled (sled) in tow for "safety" reasons and to transport all of the men back to Maui. Kalepa "rigged" the sled to the water ski and last saw it on the beach connected to the water ski. Kalepa and his group left in the canoe ahead of Lilly.

During the passage to Molokaʻi the canoe encountered gale force winds and ocean swells of ten to fifteen feet but

arrived safely. Lilly arrived on the ski about ten minutes after Kalepa and his group, but without the sled. When Kalepa asked Lilly about the absence of the sled, Lilly said several times he "didn't know" and was "happy to be alive."

Kalepa attempted to locate the sled but was unsuccessful. When he returned to work three days later, he called the police and filed a report, representing that the sled had been left on the beach by him, he had assumed other lifeguards had retrieved it, but he later discovered it was missing. After calling the police department, Kalepa also notified Defendant-Appellant Wilfred Enriquez (Defendant), his immediate supervisor, about the missing sled and filed an incident report of the same nature.

When questioned on direct examination about his statements to police, Kalepa related that he "told [the police] that the sled was left out [on the beach] and we [did not] know what happened to it." However, later, on direct examination, Kalepa admitted that he lied to the police because he borrowed the sled without permission and was "afraid for his job." Kalepa also admitted he had related the same inaccurate version of the event to Defendant and in his testimony before the grand jury.

While the sled was missing, a wind surfer named Dave Kalama informed Kalepa that the sled was on Molokaʻi. Kalepa did not report this information to the police. However, he claimed he "reported it to all the [lifeguard] captains, the

supervisors[, including Defendant, and Marian Feenstra,] the chief [of aquatics for the county's Department of Parks and Recreation], at [their] monthly captain meetings."

On December 5, 1997, Kalepa went to Defendant's residence in Pāʻia, Maui to pick up a county jet ski which had been stored there. According to Kalepa, when he went to Defendant's garage Defendant asked him if "he [saw] anything that looked familiar." Kalepa responded, "No," and Defendant then said, "Look, you guys sled." When Kalepa looked in the direction that Defendant pointed, he observed the subject sled among other sleds in the corner of Defendant's garage. Kalepa related that Defendant had said, "Don't worry. I not going to say nothing to [Feenstra]."

Two days after leaving Defendant's residence, Kalepa "came forward" and told Feenstra that Defendant was in possession of the county sled. According to Kalepa, Feenstra then notified the police.

On March 23, 1998, the Maui grand jury indicted Defendant and his wife, Shana Enriquez, for Theft in the Second Degree, Hawaiʻi Revised Statutes (HRS) § 708-831(1)(b) (1993), of the sled.

B.

On June 3, 1998, Plaintiff-Appellee State of Hawaiʻi (the prosecution) provided Defendant with the bulk of the

discovery in the instant case, including most of the police reports.

The trial proceedings which followed, traveled a complicated route.

At trial, Detective Tivoli Faaumu testified that he observed the sled at Defendant's residence on January 8, 1998, when he went there to recover it.

During the trial, on direct and cross-examination, Kalepa admitted he had lied to the police in his incident report, in a tape recorded statement to the police, and to the grand jury about how the sled was initially lost. After his testimony, Kalepa was released, with agreement from Defendant.

In her testimony, Feenstra revealed that a written report prepared by Maui county investigators contained a June 10, 1998 statement by Defendant, in which he admitted to her that he had lied to the police. In a bench conference, the defense claimed not to have received the report. In response, the prosecutor indicated that she was unaware of the report, but that the report was written by county "investigators . . . as [part of] an internal investigation" and that both the prosecution and defense had knowledge of the internal investigation. The court did not expressly rule upon Defendant's discovery request, but stated there was no evidence that the prosecutor had hidden the report from the defense.

During further cross-examination, Feenstra stated that the prosecutor became aware of Kalepa's lie at the same time she did, apparently in May of 1998:

> Q [CO-DEFENSE COUNSEL]: You had already talked to the police in January of 1998 and December of -- you had already spoken to the police?
> A: Yes.
> Q: Why didn't you pick up the phone and go back to the police and say the chief complaining witness Archie Kalepa told you a lie?
> A: Well, [the prosecutor] did know about that at the same time I did, and I didn't feel that it was something I needed to tell the police at that point because we were already going -- getting ready to go to trial.
> . . . .
> Q. Do you have an independent memory of when [Kalepa] told you [that he drove the sled to Molokai]?
> A. I know it was in May.

(Emphasis added.)

In a July 15, 1998 chambers conference, counsel for both defendants orally moved to dismiss the charges for prosecutorial misconduct, based on the prosecutor's failure to disclose the report and to inform the defense of Kalepa's disclosure to Feenstra. The court ruled that, based on the representations and arguments of counsel, it "[did] not believe that there [were] enough grounds to grant the motion to dismiss."

C.

On July 15, 1998, the court also addressed the propriety of a subpoena duces tecum issued by the defense to Deputy Corporation Counsel Greg Ball.[3] The subpoena requested

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[3] There is no indication in the record as to whether there was a motion filed or an oral request made by the parties or the county to review the propriety of the subpoena. However, at the conference, the county requested the court to "regulate in camera proceedings in discovery [and]
(continued...)

"all the reports, and any statements, made by [Kalepa], [his co-workers who assisted him] or any other individual regarding the sled allegedly stolen by [Defendant]." The court ordered that any statements by Kalepa, his co-workers who assisted him the day he lost the sled, and Feenstra be given to the defense. The defense did not object to the court's ruling.

Further, on July 15, 1998, Defendant filed a Motion to Recall Kalepa or to Continue Trial (motion to recall). On July 20, 1998, Defendant's counsel renewed her motion for dismissal based upon prosecutorial misconduct and also moved to continue the trial to permit further cross-examination of Kalepa.

However, defense counsel confirmed knowledge of the investigation and stated that, after discovering that the statement was not in the prosecutor's possession, she made no further efforts to obtain it. The court then denied both motions.

D.

On July 16, 1998, trial continued and Steve Yeider testified that, in December 1997, he found what appeared to be "a big boogie board" on a Moloka'i beach. A few days later he sold the sled to Robert Seales for $200. Stafford Caparida testified

[3](...continued)
. . . that [the proceedings] be sealed, so that the [c]ourt could determine that some of these reports are not really needed by the defense in this case."

that, in October of 1997, Defendant purchased the sled from Seales for $650, through him.

On July 21, 1998, the prosecution stipulated with both defense counsel to the admission of Kalepa's June 10, 1998 written statement, with the understanding it had been "provided to the corporation counsel" by investigator Shea.

Defendant testified that Caparida mentioned that Caparida's neighbor had a sled on sale for $650. Explaining he did not immediately agree to purchase the sled because he was unable to travel to Molokaʻi, Defendant asked Caparida to ship the sled to him, charge him the freight, and if he was interested he would deposit $650 into Caparida's account for the neighbor. According to Defendant, he examined the sled, contacted Caparida, and purchased the sled, but did not know that it belonged to the county. Defendant denied that the conversation in his garage took place as Kalepa reported. As related by Defendant, Kalepa stared at the corner of his garage, Defendant asked him, "What, does something look familiar?" and Kalepa said, "No." Defendant also denied learning at the captains' meeting that the sled had been on Molokaʻi.

On July 27, 1998, the prosecutor represented that Kalepa had returned from France and was on Oʻahu, was willing to return to testify, and that she had informed defense counsel four days prior of these matters. Both counsel indicated they did not plan to call Kalepa as a witness.

E.

On July 27, 1998, the defense rested and, in moving for a judgment of acquittal, incorporated "by reference its previous arguments made throughout . . . [the] trial, including the predecessor motion for judgment of acquittal and for dismissal." The court denied the motions.

On July 28, 1998, the court read to the jury instruction No. 23 regarding the elements of the offense of theft in the second degree, which stated in relevant part as follows:

> 1. . . . [O]n or about the period of October 28, 1997 through January 8, 1998, inclusive, in the County of Maui, State of Hawaii [Defendant] <u>obtained or exerted control over the property of the County of Maui, which Defendant knew had been lost or mislaid; and</u>
> 2. <u>With the intent to deprive the County of Maui of the property, the Defendant failed to take reasonable measures to discover and notify</u> the County of Maui; and
> 3. That the value of the property exceeded three hundred dollars.

(Emphases added). Defendant did not object to the instruction.

On July 29, 1998, the jury acquitted Shana but found Defendant guilty on the charged offense.

III.

A.

On August 7, 1998, Defendant filed a Motion for New Trial and Arrest of Judgment (motion for new trial) pursuant to Hawaiʻi Rules of Penal Procedure (HRPP) Rules 33 (1977)[4] and 34

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[4] HRPP Rule 33 governing new trials provides in relevant part that "[t]he court on motion of a defendant <u>may grant a new trial to him [or her] if required in the interest of justice</u>." (Emphasis added.)

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(1977),[5] and supplemented it on September 28 1998. The grounds alleged were (1) that the indictment failed to allege an offense and (2) that a newly discovered tape-recorded statement Kalepa made to investigator Shea had not been disclosed to him,[6] (3) the prosecutor committed misconduct, (4) one of the jurors, who was unnamed in the motion, changed his mind about the verdict, and (5) Suzanne Henry, another juror, had engaged in misconduct.

On September 29, 1998, the prosecution filed a transcript of Kalepa's taped statement with the court.

At a September 30, 1998 hearing, the court denied Defendant's motion with respect to the allegation of a defective indictment and of prosecutorial misconduct for failing to disclose Kalepa's taped statement.

B.

On August 14, 1998, Defendant filed a Motion for Leave to Communicate with Jurors (motion to communicate with jurors), pursuant to Hawai‘i Rules of Professional Conduct (HRPC) Rule 3.5(e)(4)(i) (1996),[7] on the ground that the jury's two-day

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[4](...continued)

[5] HRPP Rule 34 pertaining to arresting a judgment states in relevant part that "the court on motion of a defendant shall arrest judgment <u>if the charge does not allege an offense</u>[.]" (Emphasis added.)

[6] Kalepa apparently provided both a written and taped statement to investigator Shea. This motion is the first mention of the taped statement. All previous references to a statement by Kalepa in the facts concern Kalepa's June 10, 1998 written statement.

[7] For the text of HRPC Rule 3.5(e)(4)(i) and (ii), see <u>infra</u> page 28.

deliberations were “protracted and heated.” At an August 19, 1998 hearing, the court denied Defendant’s motion.

On August 25, 1998, Defendant filed a Motion for Leave to Conduct In-Court Examination of Discharged Juror (motion to examine juror), pursuant to HRPC Rule 3.5(e)(4)(ii), alleging that juror Henry repeatedly violated the court’s order not to discuss the case with anyone or to investigate the case. In an August 25, 1998 affidavit, JoJo Apo, a county lifeguard, reported that in July 1998, Henry “told [them] who was testifying and what [the witnesses] were saying.” Apo related that Henry asked her whether there was “bad blood” between Kalepa and Defendant, Apo confirmed there was, and Henry responded, “I knew there was something missing from the trial.”

At an August 28, 1998 hearing on the motion to examine juror, the court ruled that Defendant failed to “established sufficient cause for the in-court questioning of the juror.” On August 31, 1998, Defendant moved for reconsideration of the court’s oral denial of the motion to examine juror. The court denied the motion for reconsideration on September 2, 1998.

C.

On September 4, 1998, Defendant filed with the court, and served upon Deputy Corporation Counsel Ball, a subpoena duces tecum requesting

> [a c]opy of that certain bound booklet[[8]] prepared by [investigator Shea] relating to the [county sled] allegedly lost/stolen on or about December 1996, including all tapes, notes, and other materials relating to said booklet.

On September 14, 1998, the county filed a motion to quash this subpoena.

At the September 25, 1998 hearing on the motion to quash, Defendant's counsel also requested "an in camera review" of the entire investigative file and the "seal[ing of the] entire record for meaningful appellate review." The court granted the motion to quash, stating in relevant part that good cause did not exist to grant it.

D.

On October 2, 1998, the court entered its judgment, adjudging Defendant guilty of theft in the second degree and sentencing Defendant to five years' probation.[9]

IV.

On appeal, Defendant argues that the court erred in denying his motions to arrest the judgment and to dismiss the indictment because: (1) the indictment failed to allege all of the essential elements of the offense charged; (2) jury instruction No. 23, regarding the elements of theft,

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[8] The term "booklet" is not more precisely defined but in the context of the record, appears to refer to the report prepared by investigator Shea.

[9] Certain conditions and special terms were made a part of the probation sentence.

constructively amended the indictment; and (3) the indictment should have been dismissed with prejudice due to prosecutorial misconduct. Additionally, Defendant asserts that the court erred when it: (1) refused to grant an evidentiary hearing on the motion; (2) denied his motion to examine juror Henry; (3) rejected his request to communicate with jurors; (4) quashed his subpoena duces tecum seeking the booklet prepared by the county's private investigator; and (5) denied a new trial based on cumulative effect of the alleged errors. His points are considered in seriatim.

V.

A.

A challenge alleging a defective indictment brought after trial is subject to the liberal rule of construction adopted in State v. Motta, 66 Haw. 89, 91, 657 P.2d 1019, 1020 (1983). Under this rule, a conviction will not be reversed unless the defendant can show that he or she was substantially prejudiced, as in the case where, for example, "'the indictment cannot within reason be construed to charge a crime.'" Id. (quoting U.S. v. Hart, 640 F.2d 856, 857-58 (6th Cir.), cert. denied, 451 U.S. 992, 101 S.Ct. 2334 (1981); citing U.S. v. Previte, 648 F.2d 73, 80 (1st Cir. 1981)). Thus, in the absence of substantial prejudice, "'we must liberally construe the indictment in favor of validity[.]'" Id. at 93-94, 657 P.2d at

1021-22 (internal citations omitted) (quoting U.S. v. Thompson, 356 F.2d 216, 226 (2d Cir.), cert. denied, 384 U.S. 964, 86 S.Ct. 1591 (1965)). Because Defendant did not challenge the indictment until after trial, the rule of liberal construction applies.

B.

Defendant was indicted for violating HRS § 708-831(1)(b), which states that "[a] person commits the offense of theft in the second degree if the person commits theft: . . . (b) of property or services the value of which exceeds $300." The term "theft" as used in HRS §§ 708-830.5 to -833 (1993) is a term of art that encompasses various forms of common law property crimes. Thus,

> [HRS] § 708-830 provides that a person commits theft if the person engages in any of the modes of conduct specified therein, and [HRS] §§ 708-831 through 833 divide theft into three degrees[[10]] differentiated by the mode of the conduct involved and the object of the theft.

Commentary on HRS §§ 708-830 to -833. In adopting this statutory framework,

> [t]he [Hawaiʻi Penal Code (HPC)] follows the Model Penal Code[[11]] and other recent revisions in

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10 There are currently four degrees of theft, which are denoted in HRS §§ 708-830.5 (1993) (first degree), -831 (Supp. 1999) (second degree), -832 (1993) (third degree), and -833 (1993) (fourth degree).

11 The Model Penal Code (MPC) designates eight forms of theft and allows proof of any form of the offense "notwithstanding the specification of a different manner" in the charging instrument. MPC § 233.1(1). However, this allowance is subject to a fair notice requirement for protection of the defendant. See MPC §§ 223.1 - 223.9 (1980). MPC § 223.1(1) states that

> [a]n accusation of theft may be supported by evidence that it was committed in any manner that would be theft under this Article, notwithstanding the specification of a

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> consolidating under a single offense the traditionally distinct common-law crimes of larceny, embezzlement, obtaining by false pretenses, obtaining by trick or device, fraudulent conversion, cheating, extortion, and blackmail.

Id. Accordingly, the HPC enumerates eight categories of prohibited conduct, all of which fall under the umbrella offense of "theft."

The fact, however, that the penal code intended to "consolidat[e] under a single offense [certain] traditionally distinct common law crimes," Commentary on HRS §§ 708-830 through -833, does not dispense with the requirement that an indictment "give defendants fair notice of the charges against them." State v. Apao, 59 Haw. 625, 636, 586 P.2d 250, 258 (1978), motion to amend denied by 66 Haw. 682, 693 P.2d 405 (1984); see also State v. Schroeder, 76 Hawai‘i 517, 523, 880 P.2d 192, 198 (1994). While this requirement is diluted somewhat under the post-conviction liberal construction rule "'in favor of validity'" of the charging document, Motta, 66 Haw. at 93-94, 657 P.2d at 1021-22 (quoting Thompson, 356 F.2d at 226), fair notice of the charge must still be imparted to the accused, applying a reasonable construction to the charging language employed. See State v. Motta, 66 Haw. 254, 264, 659 P.2d 745, 752 (1983).

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[11] (...continued)

> different manner in the indictment or information, subject only to the power of the Court to ensure fair trial by granting a continuance or other appropriate relief where the conduct of the defense would be prejudiced by lack of fair notice or by surprise.

(Emphases added.) The drafters of the MPC consolidated the theft offenses because of problems with defining the offenses and "to avoid procedural problems." Commentary to MPC § 223.1, at 130-33.

C.

Defendant was charged under Count 4 of the indictment with theft in the second degree as follows:

> That during or about the period of October 28, 1997, through January 8, 1998, inclusive, in the County of Maui, State of Hawaii, [Defendant], did obtain or exert unauthorized control over the property of the County of Maui, Department of Parks and Recreation, Water Safety Division, and/or did obtain or exert control over the property of the County of Maui, Department of Parks and Recreation, Water Safety Division[,] which the person knows to have been lost or mislaid, to wit, a rescue sled, the value of which exceeded Three Hundred Dollars ($300.00), with the intent to deprive the owner of the property, thereby committing the offense of Theft in the Second Degree in Violation of Section 708-831(1)(b) of the [HRS].

(Emphases added.)

He contends that the indictment failed to allege the essential elements of theft under HRS § 708-830(1)[12] and (3)[13] by omitting the phrase "with intent to deprive," with respect to the former, and the phrase "the person fails to take reasonable measures to discover and notify the owner," with respect to the

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[12] HRS § 708-830(1) reads:

> A person commits theft if the person does any of the following:
> (1) Obtains or exerts unauthorized control over property. A person obtains, or exerts control over, the property of another with intent to deprive the other of the property.

[13] Under HRS § 708-830(3), a person commits theft by appropriation of property:

> (3) Appropriation of property. A person obtains, or exerts control over, the property of another which the person knows to have been lost or mislaid, or to have been delivered under a mistake as to the nature or amount of the property, the identity of the recipient, or other facts, and, with the intent to deprive the owner of the property, the person fails to take reasonable measures to discover and notify the owner.

(Emphases added.)

latter. The indictment did allege alternative forms of theft, one, by way of obtaining or exerting unauthorized control over property, as defined in HRS § 708-830(1), and the other by appropriation of property, as defined in HRS § 708-830(3). However, in instruction No. 23, the court instructed the jury only on the type of theft set forth in HRS § 708-830(3) and, thus, I confine my discussion to that provision.[14] See supra note 13.

By alleging in Count 4 that Defendant "did obtain or exert unauthorized control over the property" of the county, which he "knows to have been lost or mislaid . . . with the intent to deprive the owner of the property," the indictment set forth the mode of theft described as "appropriation of property" in HRS § 708-830(3) in near identical terms.[15] The failure to take reasonable measures "to discover and notify the owner" of the property describes an attendant circumstance, which must be

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[14] In his reply brief, Defendant argues that phrasing the alternative theories of liability in the disjunctive was inadequate notice of the offense charged. The indictment here, however, was phrased in both the conjunctive and disjunctive.

[15] The commentary accompanying HRS §§ 708-830 through -833 describes the offense of appropriation of property as follows:

> [HRS §] 708-830(4)[*] covers property over which the actor has gained control[.] . . . The actor must know the property to be lost, mislaid, or mistakenly delivered. . . . The requisite state of mind, intent, requires that the failure to take measures to restore the property be intentional, so that a negligent or even reckless failure in this regard would not suffice to establish liability. . . . The actor may at the time of finding, intend to restore the property to its owner, subsequently decide not to, continue to exert control over the property, and thus be guilty of theft.

*The commentary references to subsections (3) and (4) of HRS § 708-830 concerning, respectively, "appropriation of property" and "obtaining services by deception" are in reverse order in the statutory text.

proven, and, thus, constitutes an element of this mode of theft as to which the court was required to instruct. Admittedly, the words "failed to take reasonable measures to discover and notify the owner," set forth in HRS § 708-830(3), were omitted from the indictment.

However, the indictment unmistakably apprised Defendant of the particular mode of theft charged. First, the indictment alleged that Defendant knew that the subject property was "lost or mislaid," which is generic only to appropriation of property as defined in HRS § 708-830(3). Second, the indictment accused Defendant of exerting unauthorized control over such property, coincident with the requisite intent to deprive.[16] I conclude that this construction of the indictment is well within the bounds of reason, and the indictment, so construed, charged Defendant with the offense for which he was convicted. See Motta, 66 Haw. at 94, 657 P.2d at 1022.[17]

D.

Defendant also urges that the judgment should be arrested because "[j]ury [i]nstruction No. 23[18] . . . added an

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[16] State v. Borochov, 86 Hawai'i 183, 948 P.2d 604 (App. 1997), does not support Defendant's position, as he contends, because there the Intermediate Court of Appeals concluded the charge was so defective as to defy a reasonable supporting construction. See id. at 193, 948 P.2d at 614.

[17] The prosecution admits the indictment was "inartfully drafted."

[18] For the relevant text of Jury Instruction No. 23, see supra page 10.

element not contained in the indictment in violation of the federal and state grand jury clauses." Defendant does not identify what words were added. If Defendant means to challenge the addition of the words "take reasonable measures to discover and notify the owner" to Instruction No. 23, the indictment, as reasonably construed, charged appropriation of property as defined under HRS § 708-830(3). See supra. Accordingly, there was no "alter[ation]" of the indictment through "instruction No. 23" as contended by Defendant. The court was obligated to instruct as to the element of discovery and notification under HRS § 708-830(3), and it did so. Therefore, the court did not err in denying Defendant's motion to arrest the judgment made under HRPP Rule 34.

VI.

As to Defendant's point that the indictment should be dismissed because of prosecutorial misconduct, it appears that his arguments all relate to potential "impeachment material" the prosecution "had obtained around May 1998 -- two months before trial that [its] star witness[, Kalepa,] had admitted lying to the Maui police[,] . . . grand jury[,] and others about how the county water sled had been purportedly stolen."

A.

A prosecutor violates HRPP Rule 16(b)(1)(vii) if the prosecutor possesses or controls information that tends to negate the guilt of the defendant or to reduce the defendant's punishment, but fails to provide that information to the defense.[19] See State v. Moriwaki, 71 Haw. 347, 355, 791 P.2d 392, 396,[20] reconsideration denied, 71 Haw. 665, 833 P.2d 900 (1990). HRPP Rule 16(e)(2) (1993) mandates that these duties are continuing.[21]

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[19] HRPP Rule 16(b)(1)(vii) states that the prosecutor must

> disclose to the defendant or the defendant's attorney the following material and information within the prosecutor's possession or control: . . . any material or information which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce the defendant's punishment therefor.

(Emphasis added.)

[20] The prosecution is also under a duty to disclose discoverable information, as specifically designated by the defense, that is possessed by other government agencies. See HRPP Rule 16(b)(2). HRPP Rule 16(b)(2) reads:

> (2) Disclosure of Matters Not Within Prosecution's Possession. Upon written request of defense counsel and specific designation by defense counsel of material or information which would be discoverable if in the possession or control of the prosecutor and which is in the possession or control of other governmental personnel, the prosecutor shall use diligent good faith efforts to cause such material or information to be made available to defense counsel; and if the prosecutor's efforts are unsuccessful, the court shall issue suitable subpoenas or orders to cause such material or information to be made available to defense counsel.

(Emphases added.)

I note that Defendant does not claim a violation of HRPP Rule 16(b)(2).

[21] HRPP Rule 16(e)(2) provides as follows:

> (2) Continuing Duty to Disclose. If subsequent to compliance with these rules or orders entered pursuant to

(continued...)

Apart from the HRPP Rule 16 analysis, this court also held in Moriwaki, that suppression of evidence favorable to the accused is a violation of the defendant's "right to a fair trial guaranteed by the fifth and fourteenth amendments of the United States Constitution and article 1, section 5 of the Hawai'i State Constitution." 71 Haw. at 356, 791 P.2d at 397 (citing Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196 (1963)). Violations of a defendant's due process rights occur when the evidence suppressed is material either to guilt or to punishment and "[e]vidence is material 'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. . . .'" Id. (quoting United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380 (1985)).

B.

1.

In applying the foregoing prosecutorial obligation, I note that there are two separate discovery matters at issue: (1) the report by investigator Shea reflecting Kalepa's June 10, 1998 written admission of his lies and (2) the prosecutor's

[21](...continued)

> these rules, a party discovers additional material or information which would have been subject to disclosure pursuant to this Rule 16, he [or she] shall promptly notify the other party or his [or her] counsel of the existence of such additional material or information, and if the additional material or information is discovered during trial, the court shall also be notified.

apparent knowledge that Kalepa had admitted to the lies in May of 1998 to Feenstra and others.[22] In either instance, it cannot be said that HRPP Rule 16(b)(1)(vii) was violated. First, the prosecution was apparently not aware of the existence of the Shea report, nor did it have control over the report and, therefore, was not required to provide the defense with the report pursuant to HRPP Rule 16(b)(1)(vii).

Second, discovery of Kalepa's misrepresentation of how the sled was lost would not "tend[] to negate the guilt of [Defendant] as to the offense charged or . . . tend to reduce [Defendant's] punishment therefor." HRPP Rule 16(b)(1)(vii). Defendant was charged with controlling property which he knew was lost or mislaid. How the property was initially lost would not be material to his defense that he did not know the sled was lost or mislaid by the county.

As related previously, Detective Faaumu testified that he recovered the sled at Defendant's residence. Defendant himself admitted to having purchased the sled. The prosecution submitted substantial evidence, not challenged on appeal, aside from Kalepa's testimony, from which the jury could infer Defendant was aware the sled belonged to the county. Therefore, the subject information was not "material" to Defendant's defense that he did not knowingly commit theft, because it did not "tend

[22] The prosecution did not deny at trial, nor on appeal, that the trial prosecutor was aware as early as May of 1998, prior to trial, that Kalepa admitted to lying. However, the prosecutor maintained that she was unaware of the existence of the report until trial started.

to negate" his guilt or reduce his punishment. See Moriwaki, 71 Haw. at 355-56, 791 P.2d at 396-97.

2.

Since Kalepa's admission was not "material either to guilt or punishment" for the offense charged, there was no "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. at 356, 791 P.2d at 397. Consequently, there was no suppression of evidence violative of Defendant's due process right to a fair trial. See id.

As to a pretrial motion to dismiss indictment, it is established in this jurisdiction that the prosecutor is required to present to the grand jury evidence favorable to defense only where such evidence is "clearly exculpatory." State v. Adams, 64 Haw. 568, 571, 645 P.2d 308, 310-11 (1982). Testimony of the manner in which the sled was lost would not, as evident from the discussion, supra, amount to evidence "clearly exculpatory" of the charge against Defendant.

Moreover, Defendant would not have gained any benefit by focusing on Kalepa's admission that he lied to the police, the grand jury, and others, because Kalepa admitted to having done so on direct examination and defense counsel re-emphasized this admission in their cross-examination. Thus, the impeaching impact of such information would have been largely blunted even

if defense counsel had the information before trial. Indeed, the defense was given the opportunity to recall Kalepa to testify at trial, at which point defense counsel could have "focused" on such lies, but it declined to do so.

C.

While for purposes of Rule 16(b)(1)(vii), disclosure of Kalepa's apparent false statement would not ultimately reflect upon Defendant's criminal liability or punishment, I believe it obvious that, upon learning of Kalepa's prevarication in May 1998, two months before trial, the prosecution was under an obligation to disclose to the defense the fact of Kalepa's falsehood and of his repetition of it to the grand jury and the police, as reflected in the grand jury transcript and the police report[23] produced by the prosecution.[24]

The failure to do so was a patent violation of the rule of continuing discovery, HRPP Rule 16(e)(2), and is grounds for referral by the court and defense counsel to disciplinary counsel for investigation. State v. Dowsett, 10 Haw. App. 491, 499-500, 878 P.2d 739, 744 (App. 1994) ("[W]e hold that contempt and

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[23] I note that police reports were provided to the defense by the prosecution pursuant to HRPP Rule 16(b)(i), which requires disclosure of, inter alia, "any relevant written or recorded statements, provided that statements recorded by the prosecutor shall not be subject to disclosure."

[24] I express no opinion as to whether the prosecutor should have informed the police, assuming it had not, of Kalepa's falsehood to them and/or commenced a criminal prosecution against Kalepa for lying to the grand jury, as the defense suggests. The violation of any law as to the former falls within the primary jurisdiction of the attorney general as the chief law enforcement officer of the state, and the latter is one committed to the prosecution's discretion.

referral for professional disciplinary action are available to the court as sanctions against counsel under HRPP Rule 16(e)(9)(ii) for willfully violating discovery rules and orders.”), overruled on other grounds by State v. Rogan, 91 Hawaiʻi 405, 423 n.10, 984 P.2d 1231, 1249 n.10 (1999). To a certain extent, the failure to disclose misled the defense and, as the defense argues, impinged upon its preparation for trial, although not ultimately prejudicial to Defendant. But by the end of trial, as indicated supra, defense counsel had decided not to further pursue this line of inquiry although given the opportunity to do so.

VII.

As to Defendant’s first point regarding his motion for a new trial, I would conclude the court did not abuse its discretion in refusing the request for an evidentiary hearing on his prosecutorial and juror misconduct contentions. “[U]nless otherwise required by statute, a rule of practice or a rule of evidence, whether to conduct an evidentiary hearing generally is a matter that rests within the sound discretion of the trial court.” State v. Nguyen, 756 A.2d 833, 841 (Conn. 2000). In making his or her decision, the judge “must consider whether a substantial issue necessitating a hearing has been raised, looking to the seriousness of the claim presented and the adequacy of the defendant’s factual showing.” Commonwealth v.

Figueroa, 661 N.E.2d 65, 70 (Mass. 1998) (citing Commonwealth v. Trung Chi Troung, 615 N.E.2d 208, 213 (Mass. App.), review denied by 621 N.E.2d 380 (Mass. 1993)). In doing so, a trial court must conduct a preliminary inquiry, on the record. See Nguyen, 756 A.2d at 840-41.

Here the court heard the assertions of the parties at the hearing on the motion for new trial and at a chambers conference on the motion to dismiss for prosecutorial misconduct, and considered supporting affidavits in the parties' moving and opposition pleadings. Thus, the court conducted a proper preliminary inquiry of counsel and had obtained information on Defendant's request without the necessity of a formal evidentiary hearing. See id. at 841-43. Further, the court's denial of an evidentiary hearing was not an abuse of discretion because, under the law applicable to prosecutorial misconduct supra, and juror misconduct infra, Defendant suffered no prejudice.

VIII.

Defendant assigns error to the court's denials of his requests to communicate with jurors post-trial. First, he contends that "the . . . court abused its discretion by refusing to allow post-verdict interviews with . . . discharged jurors[.]"[25] (Capitalization omitted.) Second, he argues that

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[25] As stated supra, Defendant had requested leave to communicate with jurors out-of-court because "a reliable source" informed him that the jury's two-day deliberations were "protracted and heated."

(continued...)

the court similarly erred in refusing to allow for in-court examination of discharged jurors.[26] A court's rulings relating to post-trial juror interviews or examinations are reviewed for an abuse of discretion. Cf. State v. Furutani, 76 Hawai'i 172, 179, 873 P.2d 51, 58 (1994) (citations omitted) (applying abuse of discretion standard to a ruling on a motion for new trial based on juror misconduct).

IX.

A.

The court's denial of Defendant's motion for leave to conduct out-of-court communications with jurors based on the supposedly "protracted and heated deliberations," was within its discretion. HRPC Rule 3.5(e)(4), which governs a lawyer's freedom to contact jurors post-trial, reads, in part:

> (4) [A]fter dismissal of the jury in a case with which the lawyer is connected, [the lawyer shall not] communicate with a juror regarding the trial except that:
>
> (i) upon leave of the court, which leave shall be freely granted, a lawyer may ask questions of, or respond to questions from, jurors about the trial, provided that the lawyer does so in a manner that is not calculated to harass or embarrass any juror and does not seek to influence the juror's actions in future jury service in any particular case; and
>
> (ii) upon leave of the court for good cause shown, a lawyer who believes there are grounds for legal challenge to a verdict may conduct an in-court examination of jurors or former jurors to determine whether the verdict is subject to challenge.

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[25](...continued)

[26] As mentioned supra, Defendant had moved for leave to conduct an in-court examination of the jurors based on Apo's affidavit that a juror had discussed the case with the public in the course of trial.

(Emphases added.)

Defendant argues that, as stated in HRPC 3.5(e)(4)(i), leave to communicate with the jury "shall be freely granted." The objective of HRPC 3.5(e)(4)(i), however, was to provide an opportunity for beneficial educational exchanges among jurors and lawyers and it is for that purpose that counsel's contact with jurors should be "freely granted." HRPC Rule 3.5(e)(4)(i) "recogniz[ed] that respectful post-charge debriefing of a jury is beneficial to both lawyer and jurors" and, thus, "where the purpose of the requested interview is to educate the lawyer and the jury, the value of respectful debriefing is such that leave for respectful post-trial debriefing should be freely granted." Commentary to HRPC 3.5.

Hence, HRPC Rule 3.5 allows for "legitimate collateral benefits -- to attorneys, judges, and jurors alike -- that accrue from post-trial jury 'debriefings'" subject to the condition that such debriefings must not occur ex parte or otherwise violate the HRPC. Furutani, 76 Hawaiʻi at 177 n.8, 873 P.2d at 56 n.8. Rule 3.5(4)(e)(i) does not contemplate that permission will be freely granted to attorneys to speak with jurors where the objective of the communications is to seek grounds for attacking a verdict.

B.

As opposed to subsection (4)(e)(i), under which the trial judge is instructed to "freely grant" communications with jurors, subsection (4)(e)(ii) mandates that a "good cause" determination be made by the trial judge before permitting such contact. The purpose of subsection (e) is to protect the "public policy interests in" the "inviolabl[eness]" of jury deliberations and "the privacy of jurors." Commentary to HRPC 3.5. Whereas Defendant sought to communicate with the jurors out-of-court for the purpose of challenging the verdict and not for educational purposes, I believe HRPC Rule 3.5(e)(4)(ii), requiring good cause, was applicable. The relevant commentary to this section of the rule explains that

> to avoid juror harassment . . . an attorney seeking to challenge a verdict due to jury irregularity must (i) show good cause for a belief that grounds for a challenge exist, (ii) obtain leave of the court to question a juror or jurors and, if the motion to examine the jury is granted, (iii) conduct the examination in court and under conditions set by the judge.

Commentary to HRPC Rule 3.5(e)(4)(ii).[27] "Subdivision (e)(4)(ii)

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[27] Similarly, the ABA Standards for Criminal Justice Prosecution Function and Defense Function (3d ed. 1996) [hereinafter "ABA Standards"] Standard 4-7.3 (c), governing relations with the jury, states that

> [a]fter discharge of the jury from further consideration of a case, defense counsel should not intentionally make comments to or ask questions of a juror for the purpose of harassing or embarrassing the juror[.] . . . If defense counsel believes that the verdict may be subject to legal challenge, he or she may properly, if no statute or rule prohibits such course, communicate with jurors to determine whether such challenge may be available.

(Emphasis added). This rule is "vital to the proper functioning of the jury system [because it ensures] that jurors [will] not be influenced in their deliberations by fears that they subsequently will be harassed by lawyers or others who wish to learn what transpired in the jury room." Commentary to ABA

(continued...)

is designed to enforce the policies of holding jury thought processes inviolable and protecting the privacy of jurors." Commentary to HRPC 3.5; see also Rapp v. Disciplinary Bd. of Hawaiʻi Supreme Court, 916 F. Supp. 1525, 1536 (D. Hawaiʻi 1996) (concluding that "the public policy holding jury deliberations and verdicts inviolable and the aim of protecting the privacy of the jurors are two compelling interests" to consider in deciding requests to interview discharged jurors). Hence, juror communication for the purpose of challenging the verdict may only be conducted in court, and then only upon leave granted for "good cause" to believe "juror irregularities" took place.

There is no definition of "good cause" in HRPC Rule 3.5. However, "good cause" can be defined generally as "'a substantial reason[.]'" Miller v. Tanaka, 80 Hawaiʻi 358, 363, 910 P.2d 129, 134 (App. 1995) (quoting Black's Law Dictionary 692 (6th ed. 1990), cert. denied, 80 Hawaiʻi 357, 910 P.2d 128 (1996), other grounds superceded by statute as stated in Gray v. Administrative Dir. of the Court, 84 Hawaiʻi 138, 143 n.8, 931 P.2d 580, 585 n.8 (1997). What constitutes "good cause" "'depends upon the circumstances of the individual case, and a finding of its existence lies largely in the discretion of the

[27](...continued)
Standard 4-7.3, at 218. Thus, "[g]enerally, once the jury is discharged, a lawyer who believes a verdict may be subject to challenge due to juror misconduct or extraneous influence may communicate with jurors to determine whether cause exists, if no statute or rule prohibits the action." J. Pitulla, Ground Rules for Post-trial Contact With Jurors, 78 ABA J. 102, 102 (1992) (emphasis added).

officer or court to which the decision is committed.'" Id. at 363-64, 910 P.2d at 134-35 (quoting Black's Law Dictionary at 692) (brackets omitted).

This court has held that any juror misconduct will be regarded as "'harmless and disregarded if it does not affect the substantial rights of the'" defendant. Furutani, 76 Hawai'i at 180, 873 P.2d at 59 (quoting State v. Amorin, 58 Haw. 623, 630, 574 P.2d 895, 900 (1978)). Thus, in a challenge to jury verdicts, good cause exists when there is "substantial reason" to believe juror irregularity substantially prejudiced the rights of a defendant.

X.

A.

"'[I]n allowing attorneys . . . to question jurors for good cause, the rule provides a remedy for those extraordinary situations where an injustice might otherwise result.'" Rapp, 916 F. Supp. at 1536 (quoting State v. Loftin, 670 A.2d 557, 574, (N.J. Super. Ct. App. Div.), cert. denied, 675 A.2d 1123 (N.J.)). Here, the basis of Defendant's motion was that the "trial took an inordinate amount of time (five weeks),[[28]] which produced a protracted and heated two-day jury deliberation." These reasons do not amount to the good cause.

[28] The trial before the jury was for a shorter period of time. Numerous hearings and chambers conferences on the various interim requests and motions contributed to the lengthening of the trial.

Defendant fails to specifically relate how two days of deliberation, even though "heated," rendered the jury's verdict improper or subject to challenge. Cf. Loftin, 670 A.2d at 573 (the trial court did not err in denying the defendant's motion for either a new trial or an order to conduct post-trial interviews because "even if the jurors guessed that the defendant was represented by a public defender, such conjecture does not have a manifest capacity to prejudice the jury"). Accordingly, Defendant failed to show that a substantial reason existed to believe he suffered substantial prejudice.

B.

Similarly, I discern no error in the court's denial of Defendant's motion for leave to conduct an in-court examination of discharged jurors based on Apo's affidavit. A defendant has the burden of "making a prima facie showing" that the juror's misconduct "substantially prejudice[d his or her] right to a fair trial by an impartial jury." Furutani, 76 Hawai'i at 181, 873 P.2d at 60. In such an instance, the trial court must

> initial[ly] . . . determine whether the nature of the [misconduct] rises to the level of being substantially prejudicial . . . [a]nd whether it does rise to the level of substantial prejudice is ordinarily a question committed to the trial court's decision. If it does not rise to such a level, the trial court is under no duty to interrogate the jury.

Id. at 180, 873 P.2d at 59.

While Henry's conversations with Apo and others constituted misconduct, it cannot be said the court abused its

discretion in determining that Defendant's right to a fair and impartial jury had not been substantially prejudiced for three reasons. First, as the court pointed out, the information that "bad blood" existed between Kalepa and Defendant was not novel information because "Kalepa testified against . . . Defendant [and] admitted in no uncertain terms that he lied." In this respect, the matters discussed in public were already before the jury in the form of either testimony by the witnesses or evidence submitted at trial. <u>See</u> <u>Orndoff v. Wilson</u>, 760 A.2d 1, 4 (Pa. Super. Ct. 2000) (affirming the trial court's denial of the plaintiff's request for an evidentiary hearing because the information obtained by the juror through his personal investigation of the accident site was not prejudicial to the defendant as "the extraneous information was not new [and, thus,] this [was] not a clear case of juror misconduct").

Second, it was never alleged or established that juror Henry communicated Apo's remarks to the other jurors. <u>See</u> <u>State v. Jackson</u>, 81 Hawaiʻi 39, 50, 912 P.2d 71, 82 (1996) (the trial court did not abuse its discretion in refusing to grant a new trial based on juror misconduct, inasmuch as the juror "did not communicate her recollection [regarding her own victimization] to the other jurors"); <u>State v. Williamson</u>, 71 Haw. 97, 103, 807 P.2d 593, 596 (1991) ("A new trial will not be granted if it can be shown that the jury could not have been influenced by the alleged misconduct." (Citation omitted.)); <u>Amorin</u>, 58 Haw. at

630, 574 P.2d at 900 ("A new trial will not be granted if it can be shown that the jury could not have been influenced by the alleged misconduct." (Citation omitted.)); State v. Augustin, 89 Hawaiʻi 215, 220, 971 P.2d 304, 309 (App. 1998) (explaining that, "[w]ith respect to the issue of a juror's improper investigation, it is the defendant's burden to prove that a juror made an improper investigation" and that, if this burden is met, "there is a presumption of prejudice and the verdict will be set aside unless it is clearly shown that the juror's conduct could not have affected the verdict" (internal quotation marks and citation omitted)).

Finally, the reference to "bad blood" between Kalepa and Defendant was, at most, equivocal; the presence of animosity between the two is not, on its face, a circumstance from which an inference of bias against Defendant can be drawn. Cf. Furutani, 76 Hawaiʻi at 182, 873 P.2d at 61 ("proof of a juror's 'inadvertent' nondisclosure of information [during voir dire] 'of only peripheral significance' fails to meet the defendant's prima facie burden of demonstrating presumptive prejudice" (quoting People v. Dunoyair, 660 P.2d 890, 895 (Colo. 1983))); State v. Mabuti, 72 Haw. 106, 111-12, 807 P.2d 1264, 1268 (1991) (holding that anonymous phone calls to two jurors, one in which a person asked to speak to a witness on the case, likely not relayed to the other jurors, were "apparently benign"); State v. Napulou, 85 Hawaiʻi 49, 56, 936 P.2d 1297, 1304 (App. 1997) (explaining that

trial court's determination that jurors were fair was proper, particularly considering that "any concerns of the jurors about [the defendant]'s family [allegedly following a juror] were peripheral to the matter of [the defendant]'s guilt or innocence and did not have a direct bearing on the evidence in the case" (emphasis added)). Accordingly, the misconduct claim cannot be said to "rise[] to the level of being substantially prejudicial" to Defendant. Furutani, 76 Hawai'i at 180, 873 P.2d at 59. Thus, there was no good cause under HRPC Rule 3.5(e)(4)(ii) to permit in-court examinations of any of the discharged jurors. The court did not have a duty, then, to interrogate the jury or to subject them, as requested by Defendant, to an in-court examination by defense counsel.

XI.

A.

Finally, I conclude that the court did not act arbitrarily in quashing Defendant's subpoena issued on September 4, 1998, which sought investigator Shea's "booklet," in denying an in camera review of the materials, and in refusing to seal the records. "On review, the action of a trial court in enforcing or quashing the subpoena will be disturbed only if plainly arbitrary and without support in the record." Bank of Hawai'i v. Shaw, 83 Hawai'i 50, 59, 924 P.2d 544, 553 (App. 1996) (internal quotation marks and citation omitted).

B.

The purpose of the subpoena was to obtain materials "in preparation for the hearing on [Defendant's] motion for new trial." In its September 14, 1998 affidavit, the corporation counsel indicated: (1) that the materials sought were prepared by investigator Shea for "a civil investigation . . . [to] aid . . . the Department of Personnel in making decisions relative to the employment of Defendant, Shana, and Caparida; (2) that [the materials subpoenaed] consisted of "a bound booklet of interviews, . . . [and] tapes, notes and other materials . . . provided [to] affiant's staff"; (3) that "[investigator Shea] did not have copies of any police reports relative to the coincidental criminal proceedings"; (4) that the investigation had led to a civil action against Defendant, among others; and (5) that "the investigation covered seven matters of concern . . . far beyond and not 'relating' to the sled . . . so intertwined . . . that it would be a complicated time consuming process to redact them out or dub them out." In conclusion, the corporation counsel objected to an in camera review or sealing of the documents.

HRPP Rule 17(b) (1977) governs the issuance of the subpoena. The subpoena issued under this rule "should meet HRPP Rule 17 requirements of specificity and particularity." State v. Mason, 79 Hawai'i 175, 184, 900 P.2d 172, 181 (App.) (citing State v. Le Vasseur, 1 Haw. App. 19, 28, 613 P.2d 1328, 1334,

cert. denied, 449 U.S. 1018, 101 S.Ct. 582, 66 L.Ed 2d. 479 (1980)), cert. denied, 79 Hawai‘i 341, 902 P.2d 976 (1995). In State v. Pacarro, 61 Haw. 84, 595 P.2d 295 (1979), the defendant’s subpoenas duces tecum stated:

> YOU ARE FURTHER ORDERED to bring with you the books, papers and documents or other things in your possession or under your control, described as follows:
> All reports and records, including “mug shot” photographs, related to the arrest and booking of defendant for (1) the above entitled offense, and (2) a similar statutory offense allegedly committed approximately two hours earlier at the Liberty House, Kahala Mall store, the police report of which being the subject hereof.

Id. at 86, 595 P.2d at 296-97 (emphasis added).

This court concluded that the subpoenas duces tecum “failed to meet the requirements of [the District Court Rules of Penal Procedure] Rule 31(c) . . . because [the subpoenas] were overbroad and lacking in specificity” and reversed the district court’s order.[29] Id. at 87, 595 P.2d at 298.

C.

In the present case, the subpoena duces tecum issued by Defendant is similar to the one in Pacarro in that it generally requested the “bound booklet prepared by [investigator Shea] relating to the [county sled] allegedly lost/stolen on or about December 1996” and other related materials. Because Defendant’s subpoena is not specific, it is in the nature of a discovery request, not permitted by [HRPP Rule 17(b)], and akin to a

[29] This court did not specifically focus on which words rendered the subpoenas duces tecum “overbroad and lacking in specificity.” Pacarro, 66 Haw. at 88, 595 P.2d at 298. However, it appears that the decision was influenced by the general terms of the subpoenas requesting materials related to the offense and the short time prior to trial when the subpoenas were served on the prosecution. See id. at 85-88, 595 P.2d at 296-98.

"fishing expedition" for evidence. See Pacarro, 61 Haw. at 87-88, 595 P.2d at 297-98; In re Progressive Labs, 505 N.Y.S.2d 787, 787 (1986). Moreover, Defendant's subpoena requests the full investigative report, including investigator Shea's communications with those individuals who are not parties to the action, without a showing of relevancy to support any particular claim or defense, see In re Grand Jury Subpoenas Issued for Nash, 858 F. Supp. 132, 135-36 (D. Ariz. 1994), or necessity. Thus, the nature of Defendant's request can also be viewed as "oppressive and unreasonable" since it might result in the disclosure of information, confidential or otherwise, discovered through the independent efforts of the county's investigator which could have been obtained in Defendant's own investigation. See Le Vasseur, 1 Haw. App at 27, 613 P.2d at 1333. Finally, the court properly quashed the subpoena on the ground that it was essentially duplicative of a prior subpoena, which the court had granted. Accordingly, I cannot conclude the court acted arbitrarily in quashing the subpoena and in refusing to review the materials in camera or to seal the record.

XII.

Because there were no errors to cumulate, it cannot be concluded that Defendant deserved a new trial based on cumulative error. State v. Samuel, 74 Haw. 141, 159, 838 P.2d 1374, 1383 (1992) ("After carefully reviewing the record, we conclude that

the individual errors raised by [a]ppellant are by themselves insubstantial. Thus, it is unnecessary to address the cumulative effect of these 'alleged errors.'" (Citing State v. Heirs of Kapahi, 48 Haw. 101, 120, 395 P.2d 932, 943 (1964)).).