DISSENTING OPINION BY ACOBA, J.

I respectfully disagree.

A slumbering juror is not a competent one. While the prejudicial effect of such conduct may rest on the specific facts of a case, in light of our case law we ought not to establish the legal precedent in this jurisdiction that sleeping through twenty percent of a defendant's final argument, especially that pertaining to reasonable doubt, is legally sustainable. The juror here admitted to sleeping through "20% at the most" of defense counsel's closing argument and perhaps through 10-15 seconds of the prosecutor's closing argument.

I.

While closing argument is not evidence, it is the opportunity afforded the parties to sum up their cases, to establish the relevancy of the evidence to the law and to persuade the jurors as to their theory of the case. What may appear disjointed and unrelated during the evidentiary phase of the trial may be brought into comprehension and understanding for the jurors in final argument. Quoting the United States Supreme Court, this court has concurred that

> [i]t can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses

> of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt.
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> [Herring v. New York,] 422 U.S. [853, 862 (1975)] (footnotes and citations omitted).

State v. Vliet, 91 Hawai'i 288, 294-95, 983 P.2d 189, 195-96 (1999) (emphases added). Inasmuch as the defense was unable "to present [its] respective version[] of the case as a whole[,]" id. at 295, 983 P.2d at 196, the majority's conclusion that such a deficiency was cured because the jurors heard the evidence and the instructions on reasonable doubt is not convincing. Majority opinion at 12-13. In People v. Evans, 710 P.2d 1167 (Colo. Ct. App. 1985), one of the jurors slept during defense counsel's closing argument. The bailiff, as in the instant case, brought this to the trial court's attention. The trial court denied the defendant's motion for judgment of acquittal or, alternatively, for a new trial. In vacating the court's denial, the Court of Appeals declared that a new trial must be afforded the defendant because it was "imperative" the defendant have an effective "opportunity" to present closing argument before consideration of the case by the jurors.

> The purpose of closing argument is to "sharpen and clarify the issues for resolution by the trier of fact." T. Borillo, 6 *Criminal Practice and Procedure* § 897 (1977 Pocket Part). Therefore, it is imperative that the defendant enjoy the opportunity to marshall the evidence before submission of the case.
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> We agree with the trial court that closing argument is "one of the most consequential parts of the trial" and with its conclusion that the juror's inattention during that stage of the proceedings was not only "contemptuous of the court, but contemptuous of the rights of the defendant."

Id. at 1168. The majority construes Evans as requiring more than

the presence of a sleeping juror, but the majority concedes the court's finding of substantial prejudice "was implicit in its grant of [the] motion for a new trial[]" filed by Defendant-Appellant Kaleokalani Yamada (Defendant). Majority opinion at 11. Hence, the fact that in Evans the trial court failed to grant a new trial even though finding the juror's conduct contemptuous of the rights of the defendant is not distinguishable in principle from this case. For after taking testimony from the jurors regarding the sleeping allegation, the court in the instant case had to have found prejudice to Defendant because it ordered a new trial. Therefore the Colorado appellate court's reversal of the trial court in Evans and remand for a new trial was consistent with the course chosen by the court in our case, in granting a new trial.

Jurors decide the weight to be given the evidence and, thus, ultimately are the judges of the facts. Hence, it is fundamental in our jurisprudence that a defendant's right to a fair trial entitles the defendant to the considered judgment of each juror as to the appropriate vote to cast. The defendant is also guaranteed a juror's independent judgment as to the appropriate verdict in a case. The same applies to the presentation of the prosecution's case. Such considered independent judgment cannot be exercised properly by a juror if that juror is in effect, absent from the trial. The verdict necessarily rested on the unanimous vote of the jurors. Hence the misconduct of even one juror is significant.

II.

The effect of the juror's misconduct additionally rendered the trial fundamentally unfair. In this case the juror apparently listened to all but a few seconds of the argument of Plaintiff-Appellant State of Hawai'i but was not cognizant of a substantial part of Defendant's argument. The result is that Defendant's access to the juror was significantly curtailed, as was the juror's consideration of Defendant's position. Quoting again, from the United States Supreme Court opinion in Herring, this court has agreed that

> [t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment.
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> 422 U.S. at [862] (footnotes and citations omitted).

Vliet, 91 Hawai'i at 295, 983 P.2d at 196 (emphasis added). As observed by the Supreme Court, there is no aspect in the "adversary system of criminal justice" "more important than the opportunity finally to marshal the evidence," id., in closing argument for the jurors before the judgment. Infringment of that right deprives the defense of the opportunity to present a complete defense. Under such circumstances, Defendant's right to a fair trial was substantially prejudiced. See e.g., State v. Staley, 91 Hawai'i 275, 282, 982 P.2d 904, 911 (1999) ("The due process guarantee of a fair trial under the fourteenth amendment to the United States Constitution and article 1, section 14, of

the Hawai'i Constitution confers upon the accused in criminal proceedings a meaningful opportunity to present a complete defense." (Emphasis, internal quotation marks, and citations omitted.)); State v. Matafeo, 71 Haw. 183, 185, 787 P.2d 671, 672 (1990) ("The due process guarantee of the Federal and Hawaii constitutions serves to protect the right of an accused in a criminal case to a fundamentally fair trial. Central to the protections of due process is the right to be accorded a meaningful opportunity to present a complete defense." (Internal quotation marks and citations omitted.)); State v. Lowther, 7 Haw. App. 20, 23, 740 P.2d 1017, 1019 (1987) ("The due process guarantee of a fair trial under the constitutions of both the United States and Hawaii requires that criminal defendants be afforded a meaningful opportunity to present a complete defense." (Internal quotation marks and citations omitted.)).

Considerations of constitutional magnitude such as whether the defendant was afforded the opportunity to present a complete defense exemplify why the majority's cite to Hasson v. Ford Motor Co., 650 P.2d 1171 (Cal. 1982), is simply not germane. The majority cites Hasson for the proposition that even the most attentive and committed juror may not be one hundred percent focused on the proceedings at hand at some point and may allow his or her mind to wander temporarily. Majority opinion at 15. Hasson was a products liability civil action arising from brake failure in a 1966 Lincoln Continental. Id. at 1176. Testimony involved the design of the car's braking system, the boiling

point of brake fluid and its "hygroscopic quality," and details of the plaintiff's injuries and the trial spanned over a period of "nearly three months." Id. at 1176-78 (emphasis added). In Hasson, declarations of three jurors stated that one juror was reading a novel and other jurors were working crossword puzzles during trial proceedings. Id. at 1184-1185. Four of the five jurors accused of misconduct signed counter declarations which stated in part that, "I specifically deny that I did not pay attention to the testimony of witnesses and evidence being presented during the trial . . . [and] I specifically state that I did pay attention to all testimony and evidence presented during the trial." Id. at 1185. While the majority cites Hasson for an ordinary proposition which is not controverted, even it disavows any deference to be given to the Hasson holding. Majority opinion at 15.

Hasson is clearly distinguishable and inapplicable. The instant case involves a juror who was asleep for twelve minutes, not merely distracted, as in Hasson. Here, the juror admitted to being asleep during "20% at most" of defense counsel's closing argument and approximately 10-15 seconds of the prosecutor's closing argument and did not profess to have been paying attention during those periods. The instant case lasted only nine days rather than three months and included testimony regarding robbery, assault, and the identity of the perpetrator. Sleep took place during what this court has confirmed is a crucial stage of a criminal trial. There are vast differences

between civil and criminal trials, not the least of which is the requirement that the prosecution prove its case beyond a reasonable doubt in criminal trials - the very subject addressed in closing argument as the juror in the instant case slept. On any principled basis it must be concluded the juror misconduct in this case was not harmless beyond a reasonable doubt.

III.

Here the court did everything it was supposed to do in making an inquiry into the juror misconduct. Under our case law, the court's decision is entitled to substantial deference by virtue of the abuse of discretion standard. As this court originally held in State v. Sacoco, 45 Haw. 288, 292, 367 P.2d 11, 13 (1961), "a discretion vested in a trial court and exercised by it will not be disturbed unless it affirmatively appears that there has been a plain abuse of such discretion."

"[T]o constitute an abuse it must appear that the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Id. See, e.g., State v. Iuli, 101 Hawai'i 196, 203, 65 P.3d 143, 150 (2003) ("An abuse of discretion occurs when the trial court exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant." (Quotation marks and citation omitted.)). In light of the circumstances of this case, the broad deference given the court under the abuse of discretion standard, and the

law related above, the court did not "clearly exceed[] the bounds of reason or disregard[] rules or principles of law or practice to the substantial detriment of a party litigant." Sacoco, 45 Haw. at 292, 367 P.2d at 13. This court's prior resolute affirmation of the importance of final argument in criminal cases that echoed the same declarations by the United States Supreme Court, plainly outweighs other cases cited by the majority. See majority opinion at 10-11.

Deference to the court is also compelled because here the trial judge has been engaged with the jurors in the trial of the case, questioned and instructed them, and observed them and attended to them over several days. See e.g., Golsun v. United States, 592 A.2d 1054, 1058 (D.C. 1991) (with respect to sleeping jurors, the court of appeals "accord[ed] the trial court substantial deference in exercising its discretion because of the court's familiarity with the proceedings, its observations of the witnesses and lawyers, and its superior opportunity to get a feel for the case" (citing Johnson v. United States, 398 A.2d 354, 362 (D.C. 1979)); Yoon v. Consolidated Freightways, Inc., 726 S.W.2d 721, 723 (Mo. 1987) (in case involving jurors dozing during trial, the Missouri Supreme Court stated that "[t]he trial judge who directs the course of the trial and personally observes the basis of the ruling is in the best position to know the effect of the error[]" (citations omitted)). Having also conducted the necessary inquiry of the three subject jurors pursuant to Defendant's motion, the court's assessment of the impact of a

juror's sleep on the deliberation and verdict of the jury should be given controlling weight in view of our case law.[1] Thus, the court's order for a new trial should be affirmed.

[1] I agree with the dissent of Justice Duffy that emphasizes this point. As noted supra, the consequence of the majority's decision is in effect to establish the rule that sleeping through twenty percent of a defendant's final argument regarding proof beyond a reasonable doubt is legally allowable. Because of our case law on closing argument, see State v. Vliet, 91 Hawai'i 288, 983 P.2d 189 (1999), it would be a rare criminal case where such conduct would not amount to prejudice.