DISSENTING OPINION BY NAKAYAMA, J.,
IN WHICH MOON, C.J., JOINS IN PART

I respectfully dissent from the majority's holdings that: (1) the ICA gravely erred because the trial court should have sua sponte instructed the jury on the mistake of fact defense; and (2) the trial court's failure to separately instruct the jury on the mistake of fact defense was not harmless.

A. The Trial Court Was Not Required To Instruct the Jury Sua Sponte On the Mistake Of Fact Defense.

The majority holds that the ICA gravely erred because the trial court should have sua sponte instructed the jury on the mistake of fact defense. Although this court has clearly stated that the trial court has the duty to "properly instruct the jury," this court has not resolved whether, under this rule, the trial court must sua sponte instruct the jury as to a defense instruction. Cf. State v. Pinero, 75 Haw. 282, 305 n.13, 859 P.2d 1369, 1380 n.13 (1993) (noting that, in resolving the point of error, the court need not determine whether "a trial court is required to provide self-defense instructions, sua sponte, whenever supported by the evidence"), disapproved of on other grounds by Raines v. State, 79 Hawai‘i 219, 900 P.2d 1286 (1995).

Although I recognize that a trial court has the duty to instruct the jury properly and that appellate courts may vacate once instructional error is demonstrated, these rules cannot logically be construed to provide that the trial court's failure to instruct sua sponte as to a defense constitutes instructional error. Instead, in my view, this court should hold that the right to the mistake of fact instruction only accrues after the

defendant or prosecution requests the defense instruction, in order to promote judicial efficiency, as well as take into consideration the duties of the prosecution and defense counsel.

Stenger requested that the trial court instruct the jury as to the claim of right defense, but she apparently decided not to request a mistake of fact instruction.[1] Nevertheless, she argues on appeal that the trial court committed plain error in failing to give a mistake of fact instruction sua sponte.

Preliminarily, I recognize that this court has repeatedly stated that the trial court has the duty to instruct the jury properly:

> [it] is the duty of the circuit judge to see to it that the case goes to the jury in a clear and intelligent manner, so that they may have a clear and correct understanding of what it is they are to decide, and he [or she] shall state to them fully the law applicable to the facts.
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> State v. Feliciano, 62 Haw. 637, 643, 618 P.2d 306, 310 (1980) (quoting People v. Henry, [] 236 N.W.2d 489, 492 (1975)) (emphasis added). And faced with inaccurate or incomplete instructions, "[the] trial court has a duty to, with the aid of counsel, either correct the defective instruction or to otherwise incorporate it into its own instruction." State v. Riveira, 59 Haw. 148, 155, 577 P.2d 793, 797 (1978) (emphasis added and citations omitted) . . . . In other words, the ultimate responsibility properly to instruct the jury . . . [lies] with the circuit court and not with trial counsel.

State v. Kupau, 76 Hawai'i 387, 395, 879 P.2d 492, 500 (1994), overruled on other grounds by State v. Haanio, 94 Hawai'i 405, 407, 16 P.3d 246, 248 (2001) (quoting Briones v. State, 74 Haw.

[1] As stated in the majority opinion, the "Petitioner presented evidence that could have supported the conclusion that she mistakenly believed that she in fact provided all of the required information, which would have been a factual mistake, and not a mistake as to any statutory law." Majority opinion at 22. If Stenger had requested the mistake of fact instruction, under State v. Locquiao, 100 Hawai'i 195, 205, 58 P.3d 1242, 1252 (2002), the trial court would have been required to instruct the jury as to this defense. See Majority opinion at 22-23.

442, 472-73, 848 P.2d 966, 980 (1993) (Levinson, J., concurring) (emphasis in original)) (some citations omitted, ellipses in original); State v. Gomes, 93 Hawai'i 13, 21-22, 995 P.2d 314, 322-23 (2000) (citations omitted); State v. Kassebeer, 118 Hawai'i 493, 511, 193 P.3d 409, 427 (2008) (citation omitted); State v. Murray, 116 Hawai'i 3, 14 n.9, 169 P.3d 955, 966 n.9 (2007) (citation omitted).

Because of the trial court's duty to instruct the jury properly, this court has held that, "although as a general matter forfeited assignments of error are to be reviewed under the HRPP Rule 52(b) plain error standard of review, in the case of erroneous jury instructions, that standard of review is effectively merged with the HRPP Rule 52(a) harmless error standard of review . . . ." State v. Nichols, 111 Hawai'i 327, 337, 141 P.3d 974, 984 (2006). Consequently, "once instructional error is demonstrated, we will vacate, without regard to whether timely objection was made, if there is a reasonable possibility that the error contributed to the defendant's conviction, i.e., that the erroneous jury instruction was not harmless beyond a reasonable doubt." Id. (emphasis added).

Under the foregoing rules, it is not apparent that the trial court is required to issue a defense instruction sua sponte when there is evidence -- however weak -- that supports the consideration of that issue. See State v. Auld, 114 Hawai'i 135, 146, 157 P.3d 574, 585 (App. 2007) (Nakamura, J., concurring and dissenting). Although this court has not settled whether a trial court's failure to issue a defense instruction sua sponte results

in an "instructional error" that requires the vacation of the defendant's conviction, the ICA has held that trial courts must instruct the jury sua sponte on defenses that are "permitted by the evidence." Id. at 145, 157 P.3d at 584. In Auld, Auld was tried on two counts of terroristic threatening and three counts of assault in the third degree. Id. at 136, 157 P.3d at 575. His "primary defense with respect to the Terroristic Threatening charges was that he never threatened anyone with the knife." Id. at 144, 157 P.3d at 583 (internal quotation marks omitted). Auld requested a self-defense instruction with respect to the assault charges, but did not request a self-defense instruction with respect to the terroristic threatening charges. Id. at 146-47, 157 P.3d at 585-86 (Nakamura, J., concurring and dissenting). After failing to request a self-defense instruction at trial with respect to the terroristic threatening charges, on appeal he asserted that the trial court erred by failing to give a self-defense instruction because "the evidence presented at trial also fairly raised the issue of self-defense." Id. at 144, 157 P.3d at 583 (internal quotation marks omitted). The ICA held that Auld was entitled to a self-defense instruction sua sponte and reasoned that "regardless of the defendant's theory of defense, the defendant and/or the defense counsel cannot stop the court from giving to the jury a self-defense instruction that is permitted by the evidence." Id. at 145, 157 P.3d at 584 (emphasis added). Pursuant to Auld, Hawai‘i's trial courts must issue a defense instruction "permitted by the evidence" sua sponte even if it conflicts with the defendant's trial strategy.

In my view, Auld was wrongly decided and should be overturned partly for the reasons outlined by Judge Nakamura in his concurring and dissenting opinion. Judge Nakamura dissented to the majority's opinion that the defendant was entitled to a self-defense instruction sua sponte. Id. at 145-46, 157 P.3d at 584-85 (Nakamura, J., concurring and dissenting). Judge Nakamura dissented because although "Hawai'i law is clear that when requested by a defendant, the trial court is required to give a self-defense instruction if the evidence fairly raises the issue of self-defense[,]" it is "less apparent . . . whether Hawai'i law requires the trial court to instruct the jury on self-defense when the defendant for strategic reasons decides he or she does not want the instruction." Id. at 146, 157 P.3d at 585. Judge Nakamura would have held that the "the trial court had no duty to give and did not err in failing to give a self-defense instruction on the terroristic threatening charges which Auld did not request and apparently for strategic reasons did not want." Id. at 150, 157 P.3d at 589. Judge Nakamura was concerned that a rule requiring trial courts to give defense instructions sua sponte when inconsistent with a defendant's theory of the case would "impair the defendant's ability to present his or her defense[,]" place trial courts in the difficult position of having to determine whether unargued defenses apply, and "create the potential for manipulation." Id. at 148, 148-49, 157 P.3d at 587, 587-88.

Based on the case law governing defense instructions and Judge Nakamura's concurring and dissenting opinion in Auld, I

must also conclude that a trial court's duty to instruct the jury properly does not include the duty to instruct the jury sua sponte as to a defense instruction. Therefore, in my view, this court should overrule Auld, and hold that a court's failure to sua sponte instruct the jury of a defense is not an "instructional error" that requires an appellate court to "vacate, without regard to whether timely objection was made."

1. As this court has previously stated, a defense instruction must be requested by the defendant or prosecution.

This court has previously stated that either the defendant or prosecution must request the defense instruction before the trial court is responsible to instruct as to the defense. In Pinero, 75 Haw. at 303-05, 859 P.2d at 1379-80, this court reviewed whether the defendant's right to a fair trial was prejudiced when the court, at the prosecution's request, instructed the jury concerning self-defense. At trial, the defendant objected to the instructions because self-defense was not part of his theory of the case. Id. at 303, 859 P.2d at 1379. In Pinero, this court acknowledged the trial court's "duty" to "instruct the jury on every defense or theory of defense having any support in the evidence," but expressly limited its duty, stating that "[t]he factual circumstances underlying our precedent, however, make clear that the court's 'duty' is only prompted by a requested instruction." Id. at 304-05, 859 P.2d at 1380 (emphasis added) (citing State v. Pinero, 70 Haw. 509, 525, 778 P.2d 704, 715 (1989); State v. O'Daniel, 62

Haw. 518, 527-28, 616 P.2d 1383, 1390-91 (1980) (ruling that "[t]he trial court did not err in refusing to give the requested instruction on accidental death")). Finding that the prosecution met this requirement when it requested the self-defense instruction, it then proceeded to discuss whether the court was entitled to give the instruction without the consent of the defendant. Id. at 305, 859 P.2d at 1380. This court ruled that "self-defense instructions requested by the prosecution should be given unless the defendant objects to the giving of the instructions on the basis that the record does not reflect any evidence on this issue and the trial court agrees with the defendant." Id. (emphasis added). A request from either party permits both parties to present arguments as to whether the evidence supports this issue and allows the trial court to decide, based on their arguments, whether to issue the instruction.

There are several established rules that are pertinent to this issue: (1) a "defendant is entitled to every defense . . . having any support in the evidence . . . " (2) a trial court is required to instruct the jury properly, and (3) a trial court must sua sponte instruct "as to any included offense having a rational basis in the evidence." Nevertheless, none of them can be logically construed to require the trial court to instruct the jury as to every defense, "no matter how weak," sua sponte.

I recognize the well-established precedent that "a defendant is entitled to an instruction on every defense or theory of defense having any support in the evidence, provided

such evidence would support the consideration of that issue by the jury, no matter how weak, inconclusive, or unsatisfactory the evidence may be."[2] State v. Hironaka, 99 Hawai'i 198, 204, 53 P.3d 806, 812 (2002) (quoting State v. Maelega, 80 Hawai'i 172, 178-79, 907 P.2d 758, 764-65 (1995)) (internal quotation marks omitted) (emphasis added). In addition, pursuant to the trial court's duty to instruct a jury properly, it is required to "state to [the jury] fully the law applicable to the facts." State v. Feliciano, 62 Haw. 637, 643, 618 P.2d 306, 310 (1980) (citation omitted). I do not dispute that a defense, such as mistake of fact, is a (1) law that (2) may be applicable to the facts presented. See, e.g., Hawai'i Revised Statutes ("HRS") § 702-218 (1993) (providing that "it is a defense that the accused engaged in the prohibited conduct under ignorance or mistake of

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[2] This jurisdiction's standard for defense instructions is rooted in Territory v. Alcantara, 24 Haw. 197 (Haw. Terr. 1918), which reviewed whether the trial court erred in refusing to submit to the jury a manslaughter instruction in the defendant's conviction of murder in the first degree. The Alcantara court's standard was intended to prevent a trial court from withholding a defense from the jury:

> The trial of criminal cases is by a jury of the country, and not by the courts. The jurors, and they alone, are to judge of the facts, and weigh the evidence. The law has established this tribunal because it is believed that, from its numbers, the mode of their selection, and the fact that the jurors come from all classes of society, they are better calculated to judge of motives, weigh probabilities, and take what may be called a common sense view of a set of circumstances, involving both act and intent, than any single man, however pure, wise and eminent he may be . . . . [T]o give it full effect, the jury must be left to weigh the evidence, and to examine the alleged motives by their own tests.

24 Haw. at 207 (quoting People v. Garbutt, 17 Mich. 9 (1868)) (ellipses and brackets added). Far from requiring a trial court to sua sponte issue a defense instruction, a trial court is simply prohibited from rejecting a requested defense instruction for the protection of the jury and tribunal.

fact if . . . [t]he ignorance or mistake negatives the state of mind required to establish an element of the offense"); State v. Locquaio, 100 Hawai'i 195, 208, 58 P.3d 1242, 1255 (2002) (holding that "where a defendant has adduced evidence at trial supporting an instruction on the statutory defense of ignorance or mistake of fact, the trial court must, at the defendant's request, separately instruct as to the defense"). However, whether the defense law is actually "applicable to the facts," is contingent on whether it is requested because it is an optional instruction based on both the facts and each party's trial strategy. See supra. These rules do not -- and should not, see infra, -- burden the trial court to automatically instruct the jury as to every possible defense that may be inferred from the facts or supported by a scant amount of "unsatisfactory" evidence. Instead, as suggested by Pinero, the defendant's legal right to a defense instruction accrues when the defendant, or for certain defenses the defendant or prosecution, see supra, requests the instruction. An instruction as to a defense is not required if the defendant or prosecution, for strategic reasons, do not request it. See People v. Palladino, 47 A.D.3d 491, 492, 849 N.Y.S.2d 542, 543 (N.Y. App. Div. 2008) (rejecting defendant's claim that "the court should have instructed the jury, sua sponte, on the law of justification in defense of property" because "[s]uch action would have unlawfully interfered with defense strategy since 'a defendant unquestionably has the right to chart his own defense' . . . , and would, in any event, have been unsupported by a reasonable view of the evidence") (internal

citations omitted); Schwindling v. State, 602 S.W.2d 639, 639 (Ark. 1980) ("Even assuming arguendo that the defense was sufficiently raised by the evidence, the court is not required to give a specific instruction when, as here, none was requested." (citing Ark. Code Ann. § 43-2134 (Repl.1977); Tyler v. State, 581 S.W.2d 328 (Ark. 1979); Roberts and Charles v. State, 491 S.W.2d 390 (Ark. 1973)).

I am also mindful that a trial court sua sponte must "instruct juries as to any included offenses having a rational basis in the evidence without regard to whether the prosecution requests, or the defense objects to, such an instruction."[3] State

[3] I further recognize that this court has held that the circuit court plainly erred in failing to instruct the jury that the prosecution bore the burden of negativing defendant's mistake-of-fact defense. See State v. Eberly, 107 Hawai'i 239, 251, 112 P.3d 725, 737 (2005) (holding that the trial court plainly erred in failing to instruct the jury that the prosecution bore the burden of negativing defendant's mistake-of-fact defense); State v. Culkin, 97 Hawai'i 206, 35 P.3d 233 (2001) (holding that the trial court plainly erred by issuing jury instructions that included an instruction that "self-defense 'is a defense to any and all offenses brought against the Defendant,'" but did not specifically include, as an element of reckless manslaughter, an instruction that the prosecution had the burden of proving that defendant did not act in self-defense); State v. Maelega, 80 Hawai'i 172, 177, 907 P.2d 758, 763 (1995) (observing that, once a defendant had asserted and adduced evidence in support of the non-affirmative mitigating defense of EMED, "[t]he [circuit] court was then required to instruct the jury that the prosecution had the burden of disproving this defense beyond a reasonable doubt"); Raines v. State, 79 Hawai'i 219, 225, 900 P.2d 1286, 1292 (1995) ("[W]here . . . the jury has been given instructions on a defense other than an affirmative defense, but has not been instructed that the prosecution bears the burden of proof beyond a reasonable doubt with respect to negativing that defense, substantial rights of the defendant may be affected and plain error may be noticed."). However, the trial court errs under such circumstances because when the jury is only partially instructed as to the defense, the instructions are misleading. See Maelega, 80 Hawai'i at 179, 907 P.2d at 765 (holding that the trial court's instructions were reversible because they "were prejudicially erroneous and misleading"); Raines, 79 Hawai'i at 224, 900 P.2d at 1291 (explaining that "there is a substantial risk that the jury may have mistakenly concluded that Raines had the burden of proving that he acted under an extreme emotional disturbance"). The circuit court has a duty to correct defective instructions and ensure that the case goes to the jury in a

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v. Haanio, 94 Hawai'i 405, 407, 16 P.3d 246, 248 (2001) (emphasis added). In Haanio, this court rejected the view that the parties, as a matter of trial strategy or constitutional law, have any right to forego such an instruction as to any included offense having a rational basis in the evidence. Id. at 414-15, 16 P.3d at 255-56. Nevertheless, the question as to whether a trial court must instruct as to every defense, regardless of "how weak" though not requested, and thereby affect the defendant's defense strategy, is distinct from whether the defendant can prevent the jury from considering his or her guilt on included offenses. See Auld, 114 Hawai'i at 149, 157 P.3d at 588 (Nakamura, J., concurring and dissenting) ("the question of whether the defendant should have a say in how to defend against the charges presented to the jury by forgoing a self-defense instruction is different from the question decided in Haanio of whether the defendant can prevent the jury from considering his or her guilt on lesser included offenses"); People v. Barton, 12 Cal. 4th 186, 47 Cal. Rptr. 2d 569, 906 P.2d 531 (1995). In Barton, a case this court cited to in Haanio, the Supreme Court of California considered whether the trial court may instruct on included offenses sua sponte if (1) the evidence supporting the lesser included offense contradicts the defendant's theory of the case and (2) the defendant requests that the court not give the instruction, when it would not be obligated to instruct as to a defense under such circumstances. 12 Cal. 4th at 196, 47 Cal.

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clear and intelligent manner. Kupau, 76 Hawai'i at 395, 879 P.2d at 500.

Rptr. 2d at 574, 906 P.2d at 536. The court rejected the defendant's request that an instruction as to a defense and an included offense be treated the same, holding instead, that a trial court's duty sua sponte to instruct as to lesser included offenses differs from its duty to instruct as to defenses:

> [A] trial court must, sua sponte, or on its own initiative, instruct the jury on lesser included offenses "when the evidence raises a question as to whether all of the elements of the charged offense were present, but not when there is no evidence that the offense was less than that charged." . . . .
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> In contrast to lesser included offenses, a trial court's duty to instruct, sua sponte, or on its own initiative, on particular defenses is more limited, arising "only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case."

12 Cal. 4th at 194-95, 47 Cal. Rptr. 2d at 573, 906 P.2d at 535 (citations omitted). The court explained that

> [w]hen . . . the question is whether the trial court must, on its own initiative, instruct the jury on defenses not asserted by the defendant, different considerations arise. Failure to so instruct will not deprive the jury of the opportunity to consider the full range of criminal offenses established by the evidence. Nor is the prosecution denied the opportunity to seek conviction on all offenses included within the crime charged. Moreover, to require trial courts to ferret out all defenses that might possibly be shown by the evidence, even when inconsistent with the defendant's theory at trial, would not only place an undue burden on the trial courts but would also create a potential of prejudice to the defendant.

Id. at 197, 47 Cal. Rptr. 2d at 574, 906 P.2d at 536. For the same reasons, even though this court has held that a trial court must instruct as to included offenses having a rational basis in the evidence, it does not follow that a trial court must sua sponte issue a defense instruction that is supported by "weak" evidence.

As previously stated, in this jurisdiction, upon request, a defense instruction is required if it has "any support in the evidence," regardless of how "weak, inconclusive, or unsatisfactory the evidence may be." See, e.g., State v. Mainaaupo, 117 Hawai'i 235, 251, 178 P.3d 1, 17 (2008) (holding that, "[h]owever weak [defendants'] testimony may have been," the circuit court erred in declining to give defendants' requested mistake of fact instructions). I cannot conclude that the failure to instruct a jury as to every defense that is supported by merely "weak, inconclusive, or unsatisfactory" evidence violates the court's "duty" to "see to it that the case goes to the jury in a clear and intelligent manner, so that they may have a clear understanding of what it is they are to decide." Kupau, 76 Hawai'i at 395, 879 P.2d at 500 (citations omitted). As this court has also stated, "'[t]he standard of review for a trial court's issuance or refusal of a jury instruction is whether, when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading.'" Mainaaupo, 117 Hawai'i at 247, 178 P.3d at 13 (quoting State v. Balanza, 93 Hawai'i 279, 283, 1 P.3d 281, 285 (2000)).

Aside from my broader view that this court should hold that a party must request a defense instruction, there is additional support that a trial court is not required to issue a mistake of fact defense sua sponte. The trial court's duty to issue a mistake of fact defense is contingent on, in part, "the defendant's request." Locquaio, 100 Hawai'i at 208, 58 P.3d at

1255 (emphasis added). When determining whether a circuit court's error in refusing to instruct the jury on the mistake of fact defense was harmless beyond a reasonable doubt, this court decided to adopt the rule set forth by certain jurisdictions that the mistake of fact instruction is required, "when properly raised, in order to draw the jury's attention to the defendant's theory of the case." Id. at 206-07, 58 P.3d at 1253-54 (citations omitted) (emphases added).

Finally, if the defendant's rights were prejudiced by the trial counsel's failure to create or implement a defense strategy (that included requesting a particular defense instruction), the defendant is not without remedy. The defendant is entitled to argue in a post-conviction proceeding, that his or her trial counsel rendered ineffective assistance in failing to request a defense instruction. See State v. Uyesugi, 100 Hawai'i 442, 464, 60 P.3d 843, 865 (2002) (reviewing a defendant's claim that his trial counsel provided ineffective assistance of counsel for, among other things, failing to request an instruction on the law defining "appreciate"); Hawai'i Rules of Penal Procedure Rule 40 (providing in relevant part that "[w]here the petition alleges the ineffective assistance of counsel as a ground upon which the requested relief should be granted, the petitioner shall serve written notice of the hearing upon the counsel whose assistance is alleged to have been ineffective and said counsel shall have

an opportunity to be heard[]").[4] As further discussed infra, it is not the trial court's responsibility to implement defense strategy with a defense instruction when the defense counsel fails to do so. Cf. State v. Fox, 70 Haw. 46, 55-56, 760 P.2d 670, 675 (1988) (stating that the adversary system "presuppose[s] . . . that a party must look to his counsel to protect him and that he must bear the cost of the mistakes of his counsel" (quoting 3A Wright, Federal Practice and Procedure: Criminal 2d § 856 (1982) (footnote omitted))). Nor should it be plain error on the part of the trial court if it fails to instruct the jury as to this defense sua sponte if the defense counsel chooses not to request that it be given.

In light of the foregoing, I believe this court should hold that the trial court is not required to instruct the jury sua sponte as to every defense regardless of "how weak," and that such failure is not an "instructional error" warranting appellate review under Nichols.

2. Requiring the trial court to instruct as to every possible defense, regardless of "how weak," would burden the trial court and override the defense counsel's role in creating defense strategy.

As previously stated and worth repeating again, when requested by a defendant, a defense instruction is required to be given if the evidence fairly raises the issue, regardless of "how

[4] To meet this burden, an appellant must establish "'specific errors or omissions . . . reflecting counsel's lack of skill, judgment, or diligence' and that 'these errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense.'" State v. Uyesugi, 100 Hawai'i at 464, 60 P.3d at 865 (quoting Briones v. State, 74 Haw. 442, 462, 848 P.2d 966, 976 (1993)) (ellipses in original).

weak, unsatisfactory, or inconclusive" the evidence may be. State v. Irvin, 53 Haw. 119, 120, 488 P.2d 327, 328 (1971) (quoting Territory v. Alcantara, 24 Haw. 197, 208 (1918)) (holding that the trial court's refusal of the defendant-requested self-defense instruction was reversible error, even where this contradicted his theory of defense at trial). Because of the low standard governing defense instructions, it would be extremely problematic to require a court to instruct the jury sua sponte as to all defense instructions that may possibly be implicated by the facts. This requirement would (1) burden the trial court with the duty to examine every possible theory that may fit the entire body of evidence before the court, (2) restructure the adversary system contrary to the interests of both the prosecution and defendant, and (3) create incentives for a defendant not to request a defense instruction.

First, inasmuch as the defendant need not assert the theory of defense in order to be entitled to the defense instruction, it will not always be readily apparent to a trial court which defenses are minimally supported by evidence. See Auld, 114 Hawai‘i at 148-149, 157 P.3d at 587-88 (Nakamura, J., concurring and dissenting) ("It is not always apparent that sufficient evidence for a self-defense instruction has been introduced, especially where self-defense is not asserted as a theory of defense."); Barton, 12 Cal. 4th at 197, 47 Cal. Rptr. 2d at 574, 906 P.2d at 536 ("[T]o require trial courts to ferret out all defenses that might possibly be shown by the evidence, even when inconsistent with the defendant's theory at trial,

would not only place an undue burden on the trial courts but would also create a potential of prejudice to the defendant."). If the trial court was required sua sponte to instruct the jury on "every defense or theory" that is possibly applicable to the defendant's case, particularly, one that is merely supported by "weak" evidence, it would be burdened with reviewing the entire body of evidence and considering every defense that may be applicable to the facts. See Barton, 12 Cal. 4th at 197, 47 Cal. Rptr. 2d at 574, 906 P.2d at 536 ("'Appellate insistence upon sua sponte instructions which are inconsistent with defense trial theory or not clearly demanded by the evidence would hamper defense attorneys and put trial judges under pressure to glean legal theories and winnow the evidence for remotely tenable and sophistical instructions.'") (quoting People v. Sedeno, 10 Cal. 3d 703, 716-17, 112 Cal. Rptr. 1, 10, 518 P.2d 913, 921-22 (1974)).

The California courts have ruled, in recognition of this burden, that "'[a] legal concept that has been referred to only infrequently, and then with 'inadequate elucidation,' cannot be considered a general principle of law such that a trial court must include it within jury instructions in the absence of a request.'" People v. Watie, 100 Cal. App. 4th 866, 882, 124 Cal. Rptr. 2d 258, 269 (2002) (quoting People v. Bacigalupo, 1 Cal. 4th 103, 126, 2 Cal. Rptr. 2d 335, 345, 820 P.2d 559, 569 (1991)). In other words, the "trial court [is] under no obligation to sift through the evidence to identify [a defense] that conceivably could have been, but was not, raised by the

parties, and to instruct the jury, sua sponte, on that issue." People v. Montoya, 7 Cal. 4th 1027, 1050, 31 Cal. Rptr. 2d 128, 142, 874 P.2d 903, 917 (1994). Instead, in California, "[a] trial court's duty to instruct, sua sponte, on particular defenses arises 'only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.'"[5] People v. Maury, 30 Cal. 4th 342, 424, 133 Cal. Rptr. 2d 561, 631, 68 P.3d 1, 60 (2003) (citations omitted) (some internal quotation marks omitted); see also Montoya, 7 Cal. 4th at 1047, 31 Cal. Rptr. 2d at 140, 874 P.2d at 915 ("It is settled that, even in the absence of a request, a trial court must instruct on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case.") (citations omitted).

As the Court of Appeal of California reasoned in reviewing the trial court's failure to instruct sua sponte as to

[5] The Ninth Circuit Court of Appeals has reviewed whether the trial court's failure to sua sponte instruct the jury regarding mistake of fact was an error. See Byrd v. Lewis, 566 F.3d 855 (9th Cir. 2009) (holding that trial court's failure to sua sponte give mistake-of-fact instruction was not prejudicial). However, I find this case unpersuasive, inasmuch as Byrd did not discuss or cite to any cases that explained why the trial court is required to sua sponte instruct the jury as to a defense that is legally sound. Instead, citing to Beardslee v. Woodford, 358 F.3d 560, 577 (9th Cir. 2004) (citing United States v. Scott, 789 F.2d 795, 797 (9th Cir. 1986)), the Ninth Circuit stated that "'[f]ailure to instruct on the defense theory of the case is reversible error if the theory is legally sound and evidence in the case makes it applicable.'" However, Beardslee and Scott did not consider the failure to instruct on a defense theory sua sponte. See Beardslee, 358 F.3d at 577 (reviewing whether the trial court's defense instruction that was issued to the jury was proper); Scott, 789 F.2d at 797 (considering whether the trial court properly denied a defense instruction).

a lesser included offense,

> [T]he trial court cannot be required to anticipate every possible theory that may fit the facts of the case before it and instruct the jury accordingly. The judge need not fill in every time a litigant or his counsel fails to discover an abstruse but possible theory of the facts. . . . [The defendant's] theory . . . was not one that the evidence would strongly illuminate and place before the trial court. On the contrary, it was so far under the surface of the facts and theories apparently involved as to remain hidden from even the defendant until the case reached this court on appeal. The trial court need not, therefore, have recognized it and instructed the jury in accordance with it. Omniscience is not required of our trial courts.

People v. Wade, 53 Cal. 2d 322, 334-35, 1 Cal. Rptr. 683, 692, 348 P.2d 116, 125 (1959), overruled on other grounds in People v. Carpenter, 15 Cal. 4th 312, 381, 63 Cal. Rptr. 2d 1, 40, 935 P.2d 708, 747 (1997) (brackets and ellipses added) (emphases added). By holding that the trial court is required to instruct as to every defense sua sponte with even the slightest support in the evidence, trial courts would be required to be "omniscien[t]" and recognize every hidden defense available to the defense. See Wade, 53 Cal. 2d at 334-35, 1 Cal. Rptr. at 692, 348 P.2d at 125. It would be dangerously harmful to trial courts and judicial efficiency if trial courts were to be required to instruct as to every defense sua sponte.

The trial court is not responsible to create or implement a defense strategy -- this role is reserved for the defense counsel. See Shells v. State, 642 So.2d 1140, 1141 (Fla. Dist. Ct. App. 1994) ("To find fundamental error in this case[, where a trial court failed to sua sponte give a self-defense instruction,] would place an unrealistic burden on the trial judge concerning trial tactics and strategy that should be left

to defense counsel." (citing State v. Smith, 573 So.2d 306, 310 (Fla. 1990)) (emphasis added)). It is obvious that the trial court should not step into the role of advocate for the defendant over the entire course of the proceedings by considering and creating defenses and issuing defense instructions that are weakly suggested by the evidence, because this would contravene the essence of our adversarial system. As this court has stated, "[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." State v. Yamada, 108 Hawai'i 474, 484, 122 P.3d 254, 264 (2005) (quoting State v. Vliet, 91 Hawai'i 288, 295, 983 P.2d 189, 196 (1999) (quoting Herring v. New York, 422 U.S. 853, 862 (1975))). Inflicting defense instructions that were not requested would violate these established principles. Moreover, because the trial court would essentially serve as a quasi-agent for the defense counsel when it implements a defense through the issuance of a defense instruction, it would be grossly unfair to the prosecution.

In addition, increasing the trial court's duties as to defense instructions would restrict the defendant's ability to successfully present his or her strategic defense. Auld, 114 Hawai'i at 148, 157 P.3d at 587 (Nakamura, J., concurring and dissenting) ("Forcing an unwanted self-defense instruction on a defendant would take control of the defense away from the defendant and impair the defendant's ability to present his or her defense."). The defense counsel may have valid strategic

(though unobvious) reasons not to request a particular defense instruction. Yet, if this court were to hold that a trial court is required sua sponte to issue every defense instruction warranted by "any support in the evidence," these reasons would be trumped by the court's unwarranted duties. As the New York's Supreme Court, Appellate Division stated: "[A] defendant is entitled to establish his own defense, and it is impermissible for the trial court to foist upon him an affirmative defense which, while arguably supportable by the prosecution's case, is in direct conflict with the course he has charted." People v. Maldonado, 175 A.D.2d 698, 699, 573 N.Y.S.2d 662, 664 (N.Y. App. Div. 1991). The issuance of a sua sponte defense instruction, therefore, can prejudice the defendant and constitute error. See People v. Jackson, 258 N.W.2d 89, 91 (Mich. Ct. App. 1977) (holding that the trial court's failure to sua sponte instruct on a defense was not plain error, where, among other things, the defense instruction would have contradicted the defendant's main defense).

Further, this court has held in the context of an ineffective assistance of counsel claim, that "matters presumably within the judgment of counsel, like trial strategy, will rarely be second-guessed by judicial hindsight." State v. Richie, 88 Hawai'i 19, 39-40, 960 P.2d 1227, 1247-48 (1998) (quoting State v. Smith, 68 Haw. 304, 311, 712 P.2d 496, 501 (1986)) (ellipses added, internal quotation marks omitted). Moreover, "[s]pecific actions or omissions alleged to be error but which had an obvious tactical basis for benefitting the defendant's case will not be

subject to further scrutiny." State v. De Guair, 108 Hawai'i 179, 187, 118 P.3d 662, 670 (2005) (quoting Briones v. State, 74 Haw. 442, 462-63, 848 P.2d 966, 976 (1993) (emphases in original)). Other courts have similarly held that "counsel's strategic choice to pursue one line [of defense] to the exclusion of others is rarely second-guessed on appeal." United States v. Balzano, 916 F.2d 1273, 1294 (7th Cir. 1990) (citations omitted, formatting altered, brackets added); United States v. Adamo, 882 F.2d 1218, 1227 (7th Cir. 1989); Quilling v. United States, 243 F. Supp. 2d 872, 884 (S.D. Ill. 2002). Requiring the trial court sua sponte to instruct the jury on every defense will result in that court actively second-guessing the defendant's strategies.

Finally, demanding that a trial court issue every defense instruction whenever slight evidence warrants it would encourage defense counsel not to request defense instructions, in order to receive an automatic retrial. Auld, 114 Hawai'i at 149, 157 P.3d at 588 (Nakamura, J., concurring and dissenting). Because the standard for a defense instruction is set so low, the defendant can easily argue on appeal that the circuit court committed reversible error in failing sua sponte to issue every defense instruction regardless of "how weak." Moreover, in order to prevent the defendant from profiting from his or her own counsel's decision not to request a defense instruction, the prosecution would then be coerced to request the court to instruct the jury as to a defense.

If the defense is truly a part of defense strategy, it should be requested by defense counsel. It is not the

responsibility of the prosecution or the trial court to ensure that the jury is instructed as to every possible defense.

With all due respect, in my view this court should overturn Auld and hold that the right to the mistake of fact instruction accrues after the defendant or prosecution requests the defense instruction, and therefore, a trial court is not required sua sponte to instruct the jury as to this defense. Moreover, for the reasons expressed above, a trial court should not be required sua sponte to issue every defense instruction that is merely supported by "weak" evidence. Accordingly, in light of the foregoing, I cannot conclude that the circuit court committed prejudicial error when it failed to instruct the jury on the defense of mistake of fact sua sponte.

B. Error, If Any, In Failing To Instruct the Jury Sua Sponte On the Mistake Of Fact Defense Was Harmless.

Even assuming that the circuit court was required to instruct the jury sua sponte on the mistake of fact defense, I also respectfully dissent from the majority's holding that the trial court's failure to give the mistake of fact instruction was not harmless.[6] The majority holds that "it cannot be concluded

[6] For the same reason, even if trial courts have a duty to instruct the jury sua sponte on defenses supported by "substantial evidence," the circuit court's duty was not triggered in this case. For instance, California courts have required trial courts to instruct the jury sua sponte on a defense "only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." People v. Barton, 12 Cal. 4th 186, 195, 47 Cal. Rptr. 2d 569, 573, 906 P.2d 531, 535 (1995) (emphasis added) (citations omitted) (quoting People v. Sedeno, 10 Cal. 3d 703, 716, 112 Cal. Rptr. 1, 9-10, 518 P.2d 913, 921 (1974)); People v. Burnham, 176 Cal. App. 3d 1134, 1140 n.3, 222 Cal. Rptr. 630, 635 n.3 (1986) (holding that a defendant must produce substantial evidence supporting a

(continued...)

that the court's failure to instruct on the defense of mistake of fact was harmless beyond a reasonable doubt" because "there is a reasonable possibility that the jury, if provided with a separate mistake of fact instruction, could have found that Petitioner believed that she complied with the reporting requirements, and thus, did not knowingly deceive DHS." Majority opinion at 23. I respectfully dissent from this part of the majority's opinion, because, in my view, there was overwhelming evidence negating Stenger's potential mistake of fact defense. Therefore, any error in failing to give a mistake of fact instruction was harmless beyond a reasonable doubt.

The standard for whether the failure to give a jury instruction is harmless is "whether there is a reasonable possibility that error might have contributed to conviction." State v. Nichols, 111 Hawai'i 327, 334, 141 P.3d 974, 981 (2006) (quoting State v. Gonsalves, 108 Hawai'i 289, 292-93, 119 P.3d 597, 600-01 (2005)). In evaluating whether there is a reasonable possibility that the error contributed to the conviction, the error "must be examined in the light of the entire proceedings and given the effect which the whole record shows it to be entitled." Id. Erroneous "instructions are presumptively harmful and are a ground for reversal unless it affirmatively appears from the record as a whole that the error was not

[6](...continued)
defense before a trial court is required to issue a sua sponte instruction on the defense). In my view, trial courts do not have a duty to issue sua sponte defense instructions. See supra at 1-14. However, even if trial courts must instruct the jury sua sponte on defenses supported by substantial evidence, the circuit court did not breach this duty because Stenger did not adduce substantial evidence in support of her mistake of fact defense.

prejudicial." State v. Locquiao, 100 Hawai'i 195, 203, 58 P.3d 1242, 1250 (2002) (quoting State v. Valentine, 93 Hawai'i 199, 203, 998 P.2d 479, 483 (2000)).

In this case, the trial court's error, if any, was its failure to instruct the jury on the mistake of fact defense. This error is harmless if there is no reasonable possibility that the court's failure to separately instruct the jury on the mistake of fact defense contributed to the conviction. Stenger claims, and the majority holds, that the trial court's failure to separately instruct the jury on the mistake of fact instruction prejudiced her because Stenger "provided some basis for the jury to believe (1) that she was mistaken as to the reporting requirements, i.e., that she believed the reporting she provided was sufficient to receive assistance, and/or, (2) that Petitioner was mistaken as to certain factual matters regarding her personal situation which caused her to misreport, i.e., that Keana had not in fact moved out of her home permanently." Majority Opinion at 22-23. I respectfully dissent from this part of the majority's opinion because I do not believe that a jury could possibly have found that Stenger was mistaken as to the reporting requirements or mistaken as to her family situation for two reasons.

1. There is overwhelming evidence that Stenger knew the reporting requirements.

There was overwhelming evidence negating Stenger's mistake of fact defense, and therefore, it is not reasonably possible that a jury would have found that Stenger thought she had correctly reported information to DHS. For instance, the

application for Financial and Food Stamps Assistance that Stenger submitted to DHS specifically stated:

> **(3) YOUR RESPONSIBILITIES:**
> REPORT ANY CHANGES IN YOUR HOUSEHOLD OR FAMILY WITHIN 10 DAYS OF THE TIME YOU LEARN OF THE CHANGE. If you are only receiving Food Stamps and you are required to submit a Monthly Eligibility Report Form (MERF), you must report all changes on the MERF.

The application provides examples of changes that Stenger needed to report. Two of the examples are "lump sum" payments and "Receipt, increase, decrease or termination of money from any source." The application uses "Earnings" and "Inheritance" as examples of income that Stenger needed to report. Thus, the application that Stenger completed informed her of her obligation to report all changes in her income.

Furthermore, the Monthly Eligibility Report Forms ("MERF") that Stenger filled out contained similar warnings. For instance, the MERFs stated that:

> **NOTE: IF YOU ARE RECEIVING FINANCIAL ASSISTANCE, YOU MUST REPORT ALL CHANGES WITHIN 10 DAYS THAT THE CHANGE BECOMES KNOWN TO YOU.**

The MERFs also ask three pertinent questions. First, the MERFs ask whether "anyone in your household receive[d] income[.]" Second, the MERFs ask whether there has "been a change in your households [sic] total assets (bank accounts, checking/savings accounts . . .)[.]" Finally, the MERFs ask whether "anyone [has] moved in or out of your household[.]" The MERFs warned Stenger that if "you are not truthful, or if you do not report changes within 10 days of the time you learn of the change, the Department can take back any money overpaid to you,

and you may be taken to court." Stenger submitted ten MERFs containing these warnings. Thus, the MERFs also warned Stenger that she needed to report all changes in her income and household.

Additionally, Terri Cambra, an eligibility supervisor for DHS, testified that she interviewed Stenger when Stenger applied for financial assistance and told Stenger of her obligation report all changes in her financial situation or household composition within ten days. Cambra testified:

> Q. Now, as part of the interview, did you also go over her responsibilities and the penalties for failing to abide by those responsibilities?
> A. Yes. As I said, on the last two pages of the application itself is a complete listing of rights and responsibilities to report changes. And we do review that with each interview in detail almost line for line and confirm that their signature certifies that they understood this is their rights and responsibilities. These are the type of changes to report. These are the penalties for giving false information or doing anything dishonest in order to get the benefits.
> Q. All right. And did you advise her that she must report any changes either in her household composition or financial situation within ten days?
> A. Yes . . . .

Following Cambra's explanation of the rights and responsibilities of accepting financial assistance, Stenger signed her application which certified that she had "been informed of [her] rights and responsibilities by [Cambra] and [agreed] to heed these responsibilities."

Stenger knew she needed to report all changes in her income and family composition within ten days to DHS because the applications, MERFs, and Cambra told her.

Thus, although the majority holds that it is possible that Stenger thought she correctly reported her information to

DHS, overwhelming evidence supports the conclusion that Stenger knew she was required to report all changes in her income and household on her MERF forms, and failed to do so.

2. There is no reasonable possibility that a jury would have found that Stenger's testimony negated the overwhelming evidence against her mistake of fact defense.

The evidence Stenger produced for her mistake of fact defense was weak in comparison to the overwhelming evidence negating her defense. Stenger essentially makes four arguments supporting her mistake of fact defense: (1) that she provided timely notice that Kaelin moved out of the house and thought Keana was returning in a "few weeks[;]" (2) that she did not work at the Hawai'i Surf Academy ("HSA") because it was "seasonal[;]" (3) that she failed to attach her Department of Education ("DOE") pay stubs to her MERFs because she was not working regularly, and (4) that she "did not report the $5000 check that was dated in April 2003, but submitted a written request in May 2003 that she be removed from public assistance." These contentions do not negate the overwhelming evidence that Stenger knew the proper reporting requirements and failed to report properly to obtain more benefits from DHS.

First, Stenger's assertion that she thought Keana was moving back with Stenger in a "few weeks" does not negate her obligation to report that information to DHS within ten days. Luisa Himphill, Eric Himphill's mother, testified that Eric Himphill obtained physical custody of Keana in January 2003, and that she took Keana from Stenger on the same day. Stenger did

not report that Keana had moved out of her household until she submitted her MERF on May 7, 2003. Outside of her own testimony, there is no evidence in the record supporting Stenger's argument that she believed it was acceptable not to report Keana had moved out of her home until three months had passed. Rather, as discussed above, her MERFs, application, and interview with Cambra, told her that she needed to report all changes in her household to DHS within ten days. She failed to do this. Thus, I do not believe a separate mistake of fact instruction could possibly have affected Stenger's conviction.

Second, Stenger's assertion that she mistakenly thought she accurately reported her DOE income is also unconvincing. The State and Stenger stipulated that she received income from the DOE on March 20, April 4, April 17, May 5, and May 20 of 2003. None of this income was reported on Stenger's MERFs. Stenger asserts that she did not report her income on her MERFs because the income was not "regular." However, as discussed above, the applications and MERFs Stenger completed informed her of her obligation to report all changes in income. The MERFs further required Stenger to attach pay stubs. Thus, outside of her testimony, there is no support for Stenger's assertion that she believed that it was acceptable to omit reporting income because it was not "regular."

Stenger also asserts that she "had reported to DHS that she started working" at the DOE by writing Lyn Cardenas ("Cardenas"), a DHS eligibility worker, a letter on February 28, 2003. The letter Stenger wrote to Cardenas stated:

> Mrs. Cardenas,
> I started working and need to get my child care taken care of for Jadelyn + Jolene, do I need 2 applications for child care? Please call . . . + leave message[.]

Stenger asserts that this letter shows she believed she properly reported her DOE income. However, Cardenas testified she called Stenger and Stenger told her that the DOE employment was "on call" and the DOE had not yet called her. Additionally, Cardenas testified:

> Q. But if she was called, you would have expected some sort of indication of that in one of the MERFs, maybe a call in some other kind of way?
> A. Yes. And even on the MERFs, it asked did you receive any income? And the one dated for February that was dated for March the 3rd, she indicated no. And then the March MERF that was dated April 1st, she also said no on top of it.

Cardenas also testified that Stenger was required to submit pay stubs with her MERFs. Thus, it is not reasonably possible that Stenger believed her one-sentence letter satisfied her reporting requirement, which included attaching pay stubs to her MERFs and notifying DHS of any changes in income within ten days. Therefore, any failure to separately instruct the jury on Stenger's mistake of fact defense did not contribute to her conviction.

Third, Stenger was the sole signatory on HSA's bank account, and the account history reflects that Stenger received income from her HSA business between July 2002 (when Stenger applied for financial assistance) and May 2003 (when she requested to stop receiving assistance). Majority Opinion at 7. Stenger testified that she did not work at HSA because it was "seasonal" and she "previously reported the business to DHS."

In my view, these arguments are unpersuasive because Stenger knew she needed to report new income to DHS. The applications and MERFs do not list "seasonality" as an exception to reporting income. Cardenas testified that:

> Q. [W]ith the business, Hawai'i Surf Academy, if she had received income from that business, what would you have expected to see?
> A. I would have expected to see the pay stubs or verification of her income.
> Q. And was there any kind of verification like what you described submitted by Angela Stenger?
> A. No, there was none.

The applications and MERFs also make it clear that Stenger was required to report all income she received to DHS. Stenger failed to do this. Thus, it is not reasonably possible that a jury, if given a separate instruction on mistake of fact, would have found that Stenger did not know she was required to report her income from HSA.

Finally, Stenger asserts that she "did not report the $5,000 check that was dated in April 2003, but submitted a written request in May 2003 that she be removed from public assistance." In my view, Stenger's argument is unpersuasive because there is no reasonable possibility that a jury could have concluded that Stenger mistakenly believed her letter complied with the reporting requirements. Stenger never testified that she thought her letter properly reported her income from the $5,000 check. Furthermore, she filed a MERF on May 7, 2003, stating that she had not received any income in the month of April and that her household's total assets had not changed. Finally, despite Cambra's testimony that she told Stenger of her obligation to report changes in income to DHS, Cardenas testified

that Stenger did not report any of the $5,000 to DHS. In light of the overwhelming evidence that Stenger knew the proper reporting requirements and her failure to testify that she mistakenly believed that her request to no longer receive assistance was tantamount to properly reporting, any error by the trial court in failing to sua sponte instruct the jury on the mistake of fact defense was harmless with respect to the $5,000 check Stenger received.

In conclusion, the trial court's failure to instruct sua sponte on the mistake of fact defense was harmless because it was not reasonably possible that the issuance of a separate mistake of fact instruction could have supported a finding that Stenger did not knowingly deceive DHS. Therefore, error, if any, in failing to instruct the jury on the mistake of fact defense sua sponte was harmless. For the foregoing reasons, I respectfully dissent.