IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

---o0o---

STATE OF HAWAIʻI, Petitioner/Plaintiff-Appellee,

vs.

PAMELA L. TAYLOR, Respondent/Defendant-Appellant.

SCWC-30161

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. 30161; CR. NO. 08-1-0331)

August 2, 2013

CONCURRING AND DISSENTING OPINION BY ACOBA, J.

I would hold, first, that if weak, inconclusive, or unsatisfactory evidence going to a particular defense is adduced (such evidence by definition being apparent from the record), the court must instruct the jury on that defense, even if the defendant does not request such an instruction, in order that the jury may arrive at an informed and just verdict.[1] Second,

[1] The majority concludes that there was evidence presented by Respondent/Defendant-Appellant Pamela L. Taylor (Taylor) at trial supporting a mistake of fact defense, but that such evidence was "not credible" and
(continued...)

respectfully, the majority's holding that an instruction on a defense will not be given unless requested, except where there is "credible evidence" of such a defense and, "a reasonable juror could harbor a reasonable doubt," inter alia, elevates trial strategy over the public interest in arriving at an even result, shifts the law-giving function of the judge to the parties, encroaches on the jury's role, and contravenes the defendant's constitutional right to a jury trial, the right to an impartial judge, the presumption of innocence, and the right to a fair trial.[2] Third, in my view, in accordance with State v. Nichols, 111 Hawaiʻi 327, 141 P.3d 974 (2006), where the court has erred in giving jury instructions and the defendant failed to object at trial, an appellate court need not first consider whether the error is plain error, but instead shall proceed to harmless error review.

---

[1](...continued)
therefore omission of the mistake of fact jury instruction at trial was not plain error. Majority's opinion at 31. The majority further concludes that, even if, arguendo, there was plain error, the error was harmless beyond a reasonable doubt because there is no reasonable possibility that the omission of a mistake of fact instruction contributed to the conviction. Id. at 32.

I concur that Taylor adduced evidence in this case regarding the mistake of fact defense, however weak, but that the failure by the Circuit Court of the First Circuit to provide a mistake of fact defense instruction under the circumstances was harmless beyond a reasonable doubt.

[2] According to the majority's rule, an appellate court will determine (1) whether evidence of facts constituting the defense was adduced, see majority's opinion at 29-30; (2) whether the evidence adduced was "credible", id.; (3) whether plain error has occurred, see majority's opinion at 31; and (4) whether the error was not harmless beyond a reasonable doubt, majority's opinion at 32.

The majority's holding conveys to trial courts that in all cases where defense instructions are unrequested by the defendant, that before giving such an instruction the trial court must determine (1) that evidence of the particular defense has been adduced; (2) that such evidence is "credible"; and (3) that "a reasonable juror could harbor a reasonable doubt" as to the defendant's guilt, majority's opinion at 30.

I.

This court has not previously been presented with the exact circumstances of the instant case, namely where a jury instruction as to a defense is unrequested at trial. However, based on State v. Stenger, 122 Hawaiʻi 271, 226 P.3d 441 (2010), and this court's precedent with respect to the court's duty to properly instruct the jury, it logically follows that if any evidence is adduced at trial going to a particular defense that is weak, inconclusive, or unsatisfactory, the court must instruct the jury on that defense, even if the defendant does not request such an instruction.

A.

Preliminarily, the principles underlying the holding in Stenger must be reviewed. The majority notes that there has been "apparent confusion" regarding the actual holding of Stenger. Majority's opinion at 1. This confusion has resulted from the ICA's adoption of a test from one of the two dissenting opinions in Stenger. See e.g., State v. Yue, No. 29141, 2010 WL 3705983, at *3 (App. Sept. 23, 2010) (SDO); State v. Mabson, No. 29386, 2011 WL 4496532, at *1 (App. Sept. 28, 2011) (SDO); State v. Metcalfe, No. 30518, 2012 WL 1071503, at *8 (App. Mar. 30, 2012) (mem.). The ICA's departure from the precedent of this court should not be encouraged. In each of the above unpublished dispositions, the ICA cites to the dissenting opinion in Stenger authored by former Chief Justice Moon.

Plainly, it is the duty of the ICA to follow precedent.[3] The ICA states that "[w]hile the multiple opinions [in Stenger] differ regarding the applicable standard, it is at least clear that four of the five members of [the Hawaiʻi supreme] court agree that a trial court has a duty to sua sponte instruct the jury on a particular defense if: '(1) it appears that the defendant is relying on such a defense, or (2) if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.'" Yue, 2010 WL 3705983, at *3 (citing Stenger, 122 Hawaiʻi at 298, 226 P.3d at 468 (Moon, C.J., dissenting)) (emphases added); see also Mabson, 2011 WL 4496532, at *1; Metcalfe, 2012 WL 1071503, at *8.

This was an incorrect application of Stenger for at least three reasons. First, the ICA did not recognize that the issue before it in Yue, Mabson, and Metcalfe, namely whether the court had a duty to instruct the jury on defenses that were entirely unrequested by the defendant, but for which evidence was

[3] In State v. Hinton, 120 Hawaiʻi 265, 204 P.3d 484 (2009), for example, this court noted that the ICA's addition of a "separation of powers" analysis into the six-factor test to determine when to dismiss an indictment with prejudice following one or more deadlocked juries, as this court set out in State v. Moriwake, 65 Haw. 47, 56, 647 P.2d 705, 712 (1982), "was a departure from this court's precedent, which the ICA is bound to follow." Hinton, 120 Hawaiʻi at 277 n.8, 204 P.3d at 497 n.8. This court stated that "[w]hen the ICA fails to follow precedent it casts the law in disarray, creating uncertainty for trial courts, the prosecution, and the defense[,]" and that "[i]n light of the fact that Hawaiʻi Rules of Appellate Procedure Rule 25 (2008) now permits SDOs to be cited for persuasive value, it is especially important for the ICA to consistently follow precedent[.]" Id.

adduced at trial, was not directly determined by the holding in Stenger, as discussed below. Second, the ICA misread Judge Kim's concurring opinion to reach a result different from that of the majority in Stenger, despite Judge Kim's statement that he joined with two other justices in the opinion of the court: "I concur with the majority in both the holdings and the analysis supporting them on all issues in this case." Stenger, 122 Hawaiʻi at 296, 226 P.3d at 466 (Kim, J., concurring) (emphasis added). Indeed, Judge Kim signed the majority opinion. The majority opinion did not address the dissents. See id. at 271-96, 226 P.3d at 441-66. Judge Kim wrote separately "only to comment briefly on" a point made in Justice Nakayama's dissenting opinion. Id. at 296, 226 P.3d at 466 (Kim, J., concurring). Third, the "substantial evidence" standard from Chief Justice Moon's dissent, Stenger, 122 Hawaiʻi at 298, 226 P.3d at 468 (Moon, C.J., dissenting), which the ICA applied, was never adopted by the majority in Stenger, and manifestly violates this court's precedent, as discussed later in Appendix A attached hereto.

B.

It has long been held that it is the judge's duty to ensure that all jury instructions cogently explain the law applicable to the facts in the case before it. This court has repeatedly stated that "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 [the jurors] may have a clear and correct understanding of what it is [the jurors] are to decide, and he [or she] shall state to them fully the law applicable to the facts." State v. Feliciano, 62 Haw. 637, 643, 618 P.2d 306, 310 (1980) (quoting People v. Henry, 236 N.W.2d 489, 492 (Mich. 1975)). 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) (citations omitted). Thus, the ultimate responsibility properly to instruct the jury lies with the court.

C.

State v. Haanio, 94 Hawaiʻi 405, 16 P.3d 246 (2001), reaffirmed this principle. The issue in that case was whether the court erred when it instructed the jury on a lesser-included offense against the defendant's wishes. Id. at 409-10, 16 P.3d at 250-51. It was explained that in State v. Kupau, 76 Hawaiʻi 387, 879 P.2d 492 (1994), an exception to the court's "ultimate responsibility and duty properly to instruct the jury[,]" (emphasis in original), had been carved out "where the prosecution ha[d] not sought included offense instructions and the defendant ha[d] expressly objected, for his or her own tactical reasons, to the submission of such instructions to the jury[.]" Haanio, 94 Hawaiʻi at 414, 16 P.3d at 255. Haanio overruled Kupau and held that courts must instruct juries as to

any included offenses when "there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense[,]" despite the wishes of the defendant or defendant's counsel. Haanio, 94 Hawaiʻi at 413, 16 P.3d at 254 (emphasis added) (internal citation omitted).

Haanio declared that there was "no constitutional or substantial right of a defendant not to have the jury instructed on lesser included offenses." Id. at 414-15, 16 P.3d at 255-56. Similarly, this court could "conceive of no right of the prosecution to prevent the jury from considering included offense instructions supported by the evidence." Id. at 415, 16 P.3d at 256. We emphasized that, "[r]ather, in our judicial system, the trial courts, not the parties, have the duty and ultimate responsibility to insure that juries are properly instructed on issues of criminal liability.[4]" Id. (emphasis added) (citing Kupau, 76 Hawaiʻi at 395, 879 P.2d at 500; State v. Nakamura, 65 Haw. 74, 79, 648 P.2d 183, 187 (1982); Feliciano, 62 Haw. at 643, 618 P.2d at 310).

D.

Subsequently, in State v. Locquiao, this court reaffirmed that it was the court's duty to properly instruct the

[4] The term "liability" is defined as "[t]he quality or state of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment." Black's Law Dictionary 977 (9th ed. 2009).

jury on applicable defenses[5]:

> This court has consistently held 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. Moreover, it is the trial judge's duty to insure that the jury instructions cogently explain the law applicable to the facts of the case and that the jury has proper guidance in its consideration of the issues before it.

100 Hawaiʻi 195, 206, 58 P.3d 1242, 1253 (2002) (internal quotation marks and citations omitted) (emphasis added). In Locquiao, defense counsel proposed an ignorance or mistake of fact jury instruction at trial, which the court declined to give, without explanation. Id. at 201, 58 P.3d at 1248. This court held that, in accord with the court's duty described above, "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[.]" Id. at 208, 58 P.3d at 1255.

Thus, Locquiao stands for the proposition that when requested by a defendant, a court must give instructions as to any defenses having "any support in the evidence. . . no matter how weak, inconclusive, or unsatisfactory that evidence may be."

[5] Pursuant to the Hawaiʻi Penal Code, "[t]he elements of an offense are such (1) conduct, (2) attendant circumstances, and (3) results of conduct, as: (a) Are specified by the definition of the offense, and (b) Negative a defense []." Hawaiʻi Revised Statutes (HRS) § 702-205 (1993). The Hawaiʻi Penal Code further states that "[a] defense is a fact or set of facts which negatives penal liability." HRS § 701-115 (1993). As such, if a defendant has a defense to an offense, then the defendant has no penal liability with respect to that offense.

Id. at 206, 58 P.3d at 1253. Hence, no matter the weight of the evidence, the defendant is still entitled to instructions on those defenses. State v. Lira, 70 Haw. 23, 29, 759 P.2d 869, 873 (1988), reconsideration denied, 70 Haw. 662, 796 P.2d 1005 (1988). Lira stated that "[t]he applicable test [with respect to the trial court's duty to instruct the jury on defenses] is one of a presence or an absence of evidentiary support for a defense, not one of a consistency of defenses." Id. (emphasis added).

E.

Following Locquiao, in Nichols, this court was faced with the issue of whether the court should have given a "relevant attributes" instruction that went to one of the elements of the offense of terroristic threatening, even though defense counsel failed to request the instruction. Nichols, 111 Hawaiʻi at 338, 141 P.3d at 985. The defendant in Nichols was charged with the offense of Terroristic Threatening in the first degree, HRS § 707-716(1)(c) (1993)[6]. Id. at 328, 141 P.3d at 976. The defendant did not object to the jury instructions at trial, id. at 332, 141 P.3d at 979, but on appeal, the defendant argued that the circuit court erred in failing to instruct the jury that it could consider whether the complainant's fear of bodily injury induced by threat was objectively reasonable under the

[6] HRS § 706-716(1)(c) provides:

> A person commits the offense of terroristic threatening in the first degree if the person commits terroristic threatening . . . [a]gainst a public servant[.]

circumstances, based on the complainant's status as a police officer. Id. at 333, 141 P.3d at 980. This court held in State v. Valdivia, 95 Hawaiʻi 465, 24 P.3d 661 (2001), inter alia, that a "true threat" meant a threat "objectively susceptible to inducing fear of bodily injury." Id. at 479, 24 P.3d at 675. Hence, "the particular attributes of the defendant and the subject of the threatening utterance [the complainant] are surely relevant in assessing whether the induced fear of bodily injury, if any, is objectively reasonable." Id. Applying the law as set forth in Valdivia, Nichols held that the court erred in failing to give a jury instruction on the "relevant attribute" of the complainant as a police officer. Id.

Thus, Nichols stands for the proposition that the court has a duty to give jury instructions on all considerations relevant to the elements of a particular offense, even if the defendant does not request an instruction at trial.[7] As will be discussed subsequently, this court also held that "the same standard of review is to be applied both in cases in which a timely objection to a jury instruction was made and those in which no timely objection was made." Nichols, 111 Hawaiʻi at 335, 141 P.3d at 982 (emphasis added).

[7] The majority notes that Haanio did not necessarily compel the holding in Nichols, because "[t]here is a clear difference between requiring sua sponte jury instructions on lesser included offenses versus defenses, in terms of the burden upon the trial court, and in terms of the effect upon trial strategy." Majority's opinion at 22, n.9 (citing State v. Auld, 114 Hawaiʻi 135, 148-49, 157 P.3d 574, 587-88 (App. 2007) (Nakamura, C.J., concurring and dissenting)). However, as observed infra, the court may not abrogate its duty to properly instruct the jury, whether the instruction is with respect to a lesser included offense or a defense.

F.

In Stenger, the question was whether the defendant was entitled to an instruction on the mistake of fact defense, although defense counsel did not request one at trial, but did request an instruction on the claim of right defense. 122 Hawaiʻi at 271, 226 P.3d at 441. The defendant was convicted of Theft in the First Degree after failing to report changes in her household, income, and assets to the Department of Human Services (DHS), from whom she was receiving welfare benefits. Id. at 276-77, 226 P.3d at 446-47. During her testimony, the defendant stated that she did in fact provide timely notice to DHS of her household and income change, and that she believed that she had complied with DHS regulations. Id. at 282, 226 P.3d at 452.

Defense counsel orally requested that the jury be instructed on claim of right pursuant to HRS § 708-834 (Supp. 1997),[8] because the defendant "'believed she was entitled to the benefits that she obtained and exerted control over[.]'" Id. at 276, 226 P.3d at 446 (brackets in original). The court denied the request. Id. On appeal, the defendant alleged, inter alia, that the court erred (1) in denying her requested claim of right instruction, and (2) in not sua sponte giving her a mistake of

[8] HRS § 708-834 provides, in relevant part:

> (1) It is a defense to a prosecution for theft that the defendant:
> . . .
> (b) Believed that the defendant was entitled to the property or services under a claim of right or that the defendant was authorized, by the owner or by law, to obtain or exert control as the defendant did.

fact instruction under HRS § 702-18 (1993). Id. The ICA held that the court should have given the claim of right instruction, but that the facts did not fit a mistake of fact situation. State v. Stenger, No. 27511, 2008 WL 5413898, at *1 (App. Dec. 31, 2008). Instead, the ICA concluded that the defendant had made a mistake of law and thus no instruction was required as to mistake of fact. Id. at *4.

On certiorari, this court concluded that the ICA had erred in determining that the defendant was entitled to an instruction on the claim of right defense, but that she was entitled to a mistake of fact instruction, which would encompass the defense of a claim of right.[9] Stenger, 122 Hawaiʻi at 283, 226 P.3d at 454 ("[T]he Commentary [to HRS § 708-834] confirms that claim of right is a particular type of mistake of fact that would be logically encompassed under a general mistake of fact instruction.").

With respect to whether the defendant had been entitled to a mistake of fact instruction despite requesting a claim of right instruction at trial, Stenger held that, "we must determine

[9] Contrary to the majority's continuing reference to Stenger, and the ICA's interpretation of the case, discussed supra, as a plurality opinion, it is in fact a majority opinion. To reiterate, Judge Kim agreed with the majority and signed onto the majority opinion, stating that "I concur with the majority in both the holdings and the analysis supporting them on all issues in this case." Stenger, 122 Hawaiʻi at 296, 226 P.3d at 466 (Kim, J., concurring). "Plurality" is defined as "[a]n opinion lacking enough judges' votes to constitute a majority, but receiving more votes than any other opinion." Black's Law Dictionary 1201. Including Judge Kim's vote, the Stenger opinion garnered three votes and thus was a majority opinion.

(1) whether [the defendant] presented any evidence, 'no matter how weak,' that would have supported the jury's consideration of a mistake of fact defense and, if so, (2) whether the court's failure to instruct on mistake of fact was harmless beyond a reasonable doubt." Id. at 281, 226 P.3d at 452. Applying the facts to (1), this court stated that "[b]ased on the evidence presented, [the defendant] provided some basis for the jury to believe [] that she was mistaken as to the reporting requirements, . . . and/or [] that [the defendant] was mistaken as to certain factual matters regarding her personal situation which caused her to misreport[.]" Id. at 282, 226 P.3d at 453. In other words, inasmuch as the defendant pursued a subspecies of the mistake of fact theory at trial and presented evidence to support that defense, she had effectively raised the mistake of fact defense at trial, and it followed that she was entitled to an instruction on that defense.

Stenger thus stands for the proposition that, where the defendant effectively requested an instruction on a mistake of fact defense at trial, the court has a duty to instruct the jury on that defense, so long as the defendant "presented any evidence, 'no matter how weak,' that would have supported the jury's consideration of a mistake of fact defense."[10] Id. at 281, 226 P.3d at 452. Therefore, the failure to instruct the

[10] It must be noted that, contrary to the State's contention, the majority opinion in Stenger does not say that the courts have a duty to sua sponte instruct on "nearly every conceivable defense."

jury as to the mistake of fact defense was not harmless beyond a reasonable doubt. Id. at 282-83, 226 P.3d at 452-53.

II.

Whether or not the defendant requests a defense instruction should make no difference in whether the court must instruct the jury on a defense. All of the State's arguments in its Application, and the majority's rule with respect to credible evidence, as discussed infra, suggest that such a distinction should be made.

Under the majority's holding, if a defendant fails to request a jury instruction on a particular defense, the defendant and/or the prosecution must have adduced "credible evidence"[11] as to that defense before a jury instruction will be given. See majority's opinion at 25 (where a jury instruction "is not requested by the defense and not given by the trial court, plain error . . . exists if the defendant has met his or her initial burden at trial of adducing credible evidence of facts constituting a defense") (emphasis added). Where a defendant has

[11] The majority's opinion defines "credible evidence" as "evidence 'offering reasonable grounds for being believed.'" Majority's opinion at 25, n.10 (quoting Webster's Ninth New Collegiate Dictionary 305 (9th ed. 1988)). However, "credible" must mean not incredible, that is, not "too extraordinary and improbable to be believed[.]" Merriam Webster's Collegiate Dictionary 590 (10th ed. 1993). Such a meaning would not exclude weak, inconclusive, or unsatisfactory evidence, just evidence that is utterly fantastical.

The majority defines credible as "plausible," majority's opinion at 25 n. 10 (citing State v. Maelega, 80 Hawaiʻi 172, 178 n.9, 907 P.2d 758, 764 n.9 (1995)). "Plausible" is defined as, among other things, "appearing worthy of belief[.]" Merriam Webster's Collegiate Dictionary 892. Thus, the majority opinion suggests to courts that they should make a typical credibility determination, in other words, that they should determine whether the evidence was "trustworthy." See Black's Law Dictionary 636. Such a directive would, as discussed infra, raise a number of serious concerns.

requested an instruction, or effectively requested an instruction at trial, then, the defendant must only adduce "evidence," of a particular defense, "no matter how weak, inconclusive, or unsatisfactory the evidence may be." Id. at 17 (quoting Stenger, 122 Hawaiʻi at 281, 226 P.3d at 451). However, according to the majority, in cases where the defendant does not request an instruction on a particular defense at trial, the defendant must have adduced "credible evidence" of that defense at trial. Id. at 25.

But where there is evidence abrogating or mitigating penal liability the court should not be relieved of the duty to give an instruction as to an applicable defense where the defendant has not requested an instruction, but on the other hand, be required to give an instruction, pursuant to Locquiao, only where it has been requested. With respect to criminal liability, both defendants should have the benefit of an appropriate instruction. Yet, in the State's and the majority's view, the defendants should be treated differently. That approach is antithetical to basic notions of fairness, and our solemn obligation to obtain just results and guard against erroneous outcomes. See Haanio, 94 Hawaiʻi at 414, 16 P.3d at 255 ("The judicial objectives within the context of the criminal justice system are to assess criminal liability and to determine appropriate punishment if and when warranted.").

Indeed, the principle underlying Stenger and Locquiao is that it would be wrong to uphold a defendant's conviction when no instruction was given to the jury on an apparent defense that existed in the evidence, and there is a reasonable possibility that the failure to instruct the jury on that defense contributed to the conviction. See Locquiao, 100 Hawaiʻi at 206, 58 P.3d at 1253. This is consistent with Haanio, which holds that instructions as to lesser included offenses that would reduce the severity of the charged offense must be given even if not requested or opposed by the parties.[12] 94 Hawaiʻi at 415, 16 P.3d at 246. The jury must therefore be instructed on defenses having any support in the evidence. A different conclusion would run the risk of wrongful convictions in cases where the defendant could have established a defense to the charges.

III.

Furthermore, a view that would sanction the disavowal

[12] Since Haanio was decided, it has become apparent that the fact that a jury finds a defendant guilty of the charged offense does not mean that the failure to give instructions on lesser included offenses is harmless. The practical effect of the failure to give lesser included offense instructions leaves the jury with the same "all or nothing" choice that ignores the public interest in reaching a result that best conforms to the facts. The absence of lesser-included offense instructions is not harmless because like an "all or nothing" "gamesmanship" approach, see Haanio, 94 Hawaiʻi at 414, 16 P.3d at 256, it presents the jury with only two options -- guilty of the charged offense or not guilty -- when in fact the evidence may admit of an offense of lesser magnitude than the charged offense. Accordingly, the qualification that "[t]he error is harmless because . . . under [] standard jury instructions, the jury, 'in reaching a unanimous verdict as to the charged offense [or as to the greater included offense, would] not have reached, much less considered' the absent lesser offense," is in fact wrong. Haanio, 94 Hawaiʻi at 416, 16 P.3d at 257 (quoting State v. Holbron, 80 Hawaiʻi 27, 47, 904 P.2d 912, 932 (1995)).

of jury instructions for strategic purposes is at odds with our precedent. This is the State's argument, echoed by the majority, that a distinction should be made between requested and unrequested defense instructions. However, respectfully, the argument that, for example, a defendant may not request a self-defense instruction because of concerns that it would hurt his credibility or distract the jury's attention from his best defense, see Auld, 114 Hawaiʻi at 148, 157 P.3d at 587 (Nakamura, C.J., concurring and dissenting), ignores the fact that the jury instructions are designed to instruct the jury, not to distract or confuse the jury, and it is the court's role, not the defendant's, to ensure that those instructions are proper and provide the jury with all the information determinative of an outcome that comports with fairness and justice. See Haanio, 94 Hawaiʻi at 415, 16 P.2d at 256 (holding that courts have the duty to properly instruct the jury on issues of criminal liability).

What proponents of this "strategic purpose" approach fail to realize is that jury instructions are by their nature outside the scope of the "adversary system." It is each party's role to develop for the jury its view of the facts, but the court's role is to instruct the jury on the law notwithstanding the parties' arguments to the jury or their view of the evidence. Id. As such, the court must instruct the jury on all defenses inhering in the evidence, in order to ensure that the jury is fully aware of the law applicable in the case. Thus, the

majority in Auld properly held 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." Auld, 114 Hawaiʻi at 145, 157 P.3d at 584.

By distinguishing jury instructions with respect to defenses because of the defendant's right to develop his or her trial strategy, the majority would, in effect, allow the parties to delineate what the law is. Instead, trial strategy must take second place to the public interest in an intelligent and informed result, whether a case is decided by a judge or jury. The fact finder's role is to search for truth within the framework of the law, and it is in the best interest of society that we not allow parties to manipulate that process or withhold from the jury knowledge that a judge in a judge-only trial would have, inasmuch as the jury in a jury trial and the judge in a judge trial occupy the same role of ultimate decision-maker.

IV.

A.

"[C]redibility" is a matter solely for the fact finder to decide, and by imposing a credibility determination onto the jury instruction process, the majority effectively usurps the jury's role.[13] Our court's precedent has mandated that a court

[13] In the context of determining whether there is substantial evidence to support a conviction, a reviewing court will consider whether particular evidence is "credible," however, in this context, priority is given (continued...)

should not weigh the evidence when determining whether or not to give a particular jury instruction, to avoid this dilemma. Thus, the majority's mandate that a defendant adduce "credible evidence" to the satisfaction of the judge as a prerequisite to a jury instruction is wrong, even where the defendant has failed to request the instruction. The standard of "weak, inconclusive, or unsatisfactory" evidence as sufficient for a jury instruction on a defense, rather than "credible evidence," dates back to Territory v. Alcantara, 24 Haw. 197, 208 (Haw. Terr. 1918). In Alcantara, the Supreme Court of the Territory of Hawaiʻi quoted "an early English case" stating that,

> If there was any evidence, it was my duty [as judge] to leave it to the jury, who alone could judge of its weight. The rule that governs a judge as to evidence applies equally to the case offered on the part of the defendant, and that in support of the prosecution. It will hardly be contended, that if there was evidence offered on the part of the defendant, a judge would have a right to take on himself to decide on the effect of the evidence, and to withdraw it from the jury. Were the judge so to act, he might, with great justice, be charged with usurping the privileges of

[13](...continued)
to the fact finder's credibility determination. For example, in reviewing a motion for judgment of acquittal, this court considers whether there is substantial evidence as to every material element of the offense charged, and substantial evidence, in turn is defined as "credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." State v. Aplaca, 96 Hawaiʻi 17, 21, 25 P.3d 792, 796 (2001). However, "[u]nder such a review, we give full play to the right of the fact finder to determine credibility, weigh the evidence, and draw justifiable inferences of fact." Id.

The appellate court thus defers to the fact-finder, i.e., the jury or the judge, as to matters of "credibility" in making its determination as to whether there was substantial evidence. Id. Moreover, "credibility" cannot be determined on appeal because the appellate court does not observe the demeanor of the witnesses, only the jury can. In this context, "credible" must mean evidence that is not "incredible." See discussion, supra. Under the majority's test, however, the court is required to make the credibility determination, based on whether a reasonable juror could harbor a "reasonable doubt." See majority's opinion at 30. A court could only make this determination if it itself viewed the evidence from the juror's point of view, thus necessarily weighing the evidence itself -- a function of the jury only.

> the jury, and making a criminal trial, not what it is by our law, a trial by jury, but a trial by the judge.

Id. at 208 (citing Best, J., The King v. Burdett, (1820) 3 Barn. & Ald. 717; 4 Barn. & Ald. 95) (emphases added). Alcantara has been cited by this court numerous times for the proposition that "[t]he court should not invade the jury's province of making factual determinations." Riveira, 59 Haw. at 154, 577 P.2d at 797. See State v. Unea, 60 Haw. 504, 509, 591 P.2d 615, 619 (1979) ("To refuse to so instruct the jury would be to invade its province in the trial of a case."); Stenger, 122 Hawaiʻi at 302 n.2, 226 P.3d at 472 n.2 ("The jurors, and they alone, are to judge of the facts, and weigh the evidence."); see also State v. Quitog, 85 Hawaiʻi 128, 145, 938 P.2d 559, 576 (1997) ("This court has adhered for over 140 years to the fundamental principle, which lies at the foundation of jury trial in every country blessed with that institution, that the jury is to pass upon the facts and the court upon the law.") (internal quotation marks and citations omitted) (brackets omitted).

The Alcantara standard ensures that judges will not usurp the jury's role by precluding it from considering legal theories that exist in the evidence even if the judge believes evidence supporting the theory is weak, inconclusive, or unsatisfactory. This is because the jury, of course, may view the significance of certain evidence differently from the judge. See Stenger, 122 Hawaiʻi at 302 n.2, 226 P.3d at 472 n.2 ("'The law has established [the jury] because it 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 . . . .'") (quoting Alcantara, 24 Haw. at 207 (citation omitted)).

Under Alcantara and subsequent cases, it is the jury's prerogative to decide the weight and effect of the evidence. This captures the essence of their separate roles: the weight and effect of the evidence is for the jury to decide, i.e., whether it is weak or not, while the legal options in the evidence must be identified by the judge in order that the jury may assess the relevance and significance of the evidence presented. See Quitog, 85 Hawaiʻi at 145, 938 P.2d at 576 (1997) (noting that "'the jury is to pass upon the facts and the court upon the law'") (quoting State v. Kelekolio, 74 Haw. 479, 515, 849 P.2d 58, 75 (1993)). The "no matter how weak, inconclusive, or unsatisfactory" standard stems from this rationale, and has been confirmed in a multitude of cases in this jurisdiction. See Maelega, 80 Hawaiʻi at 172, 178-79, 907 P.2d at 758, 764-65 (emphasis omitted) (quoting State v. Pinero, 75 Hawaiʻi 282, 304, 859 P.2d 1369, 1379 (1993)).[14]

[14] See Kikuta, 125 Hawaiʻi at 90, 253 P.3d at 651; Stenger, 122 Hawaiʻi at 281, 226 P.3d at 451; State v. Roman, 119 Hawaiʻi 468, 478, 199 P.3d 57, 67 (2008); State v. Mainaaupo, 117 Hawaiʻi 235, 251, 178 P.3d 1, 18 (continued...)

The jury can only perform its task if it is fully informed of the law -- including defenses the judge may find unworthy of consideration if it were the judge's decision to make. The existing standard recognizes the jury's paramount role in weighing the effect of the evidence. See Riveira, 59 Haw. at 154, 577 P.2d at 797 ("The rule requiring the submission of factual determinations to the jury if there is any evidence upon which the jury may act is based on the principle that credibility of witnesses and weight of the evidence are for the jury to decide.").

This proposition was reiterated in State v. Kikuta, 125 Hawaiʻi 78, 253 P.3d 639 (2011). In that case this court considered whether the court erred in failing to instruct jurors on the parental discipline defense after defense counsel had asked for the instruction. 125 Hawaiʻi at 84, 235 P.3d at 645. In consonance with Maelega, Kikuta held that, "[i]n order to invoke the parental discipline defense, a defendant is required

[14](...continued)
(2008); Locquiao, 100 Hawaiʻi at 205, 58 P.3d at 1253; State v. Hironaka, 99 Hawaiʻi 198, 204, 53 P.3d 806, 812 (2002); State v. Jones, 96 Hawaiʻi 161, 168, 29 P.3d 351, 359 (2001); State v. Pacheco, 96 Hawaiʻi 83, 103, 26 P.3d 572, 592 (2001); State v. Stocker, 90 Hawaiʻi 85, 95, 976 P.2d 399, 409 (1999); State v. Cabrera, 90 Hawaiʻi 359, 370, 978 P.2d 797, 808 (1999); State v. Sawyer, 88 Hawaiʻi 325, 333, 966 P.2d 637, 645 (1998); Lira, 70 Haw. at 27, 759 P.2d at 871; State v. Kaiama, 81 Hawaiʻi 15, 24, 911 P.2d 735, 744 (1996); State v. Moore, 82 Hawaiʻi 202, 210, 921 P.2d 122, 130 (1996); State v. McMillen, 83 Hawaiʻi 264, 265, 925 P.2d 1088, 1089 (1996); State v. Agrabante, 73 Haw. 179, 196, 830 P.3d 492, 501 (1992); State v. O'Daniel, 62 Haw. 518, 527-28, 616 P.2d 1383, 1390 (1980); Riveira, 59 Haw. at 153, 577 P.2d at 797; Unea, 60 Haw. at 509, 591 P.2d at 619; State v. Santiago, 53 Haw. 254, 271, 492 P.2d 657, 667 (1971); State v. Irvin, 53 Haw. 119, 120, 488 P.2d 327, 327 (1971); Territory v. Kaeha, 24 Haw. 467 (Haw. Terr. 1918).

to make a showing that the record contained some evidence supporting the [] elements [of the defense,]" id. (emphasis added), "'no matter how weak, inconclusive, or unsatisfactory it might be, which was probative of the [] elements [of the defense].'" Id. at 90, 235 P.3d at 651 (quoting Roman, 119 Hawaiʻi at 478, 199 P.3d 67) (citation omitted). Kikuta further stated that "the court's duty is to consider whether the defendant has raised any evidence supporting the instruction, not to determine whether such a defense has merit -- that is for the jury to decide." Id. at 92, 253 P.3d at 653 (emphasis added). It is not for the judge, then, to decide whether a "reasonable juror could have a reasonable doubt" before giving an instruction regarding a defense, because that would encroach upon the jury's evaluation of the evidence.

B.

On the other hand, the majority's test undermines the jury's function, inasmuch as the court must weigh the evidence first, i.e., predict whether based on the evidence a reasonable jury might consider acquittal, before allowing the jury to consider evidence upon which a theory of defense is based. This is in direct conflict with the principle that the judge not "take on himself [or herself] to decide on the effect of the evidence" and thus "withdraw it from the jury." Alcantara, 24 Haw. at 208. For the law recognizes the jury may have a different view of the

evidence than the judge, and it is the jury's, not the judge's role to weigh the evidence and determine its effect.

The Alcantara standard is substantiated by the law since it imposes a duty on the court to advise the jury of the defenses adduced in the evidence that would not otherwise be known to lay persons. The majority's test, on the other hand, requires the judge to weigh the evidence before the jury may consider it via the instructions, thus withdrawing the jury's prerogative, and depriving the parties of "a trial by jury" and substituting "a trial by the judges." Id. The "no matter how weak, inconclusive, or unsatisfactory" standard thus safeguards the jury's function of deciding what evidence is significant in arriving at the outcome of the trial, confines the court's role to informing the jury of the possible defenses raised in the evidence, and leaves the evaluation of whether the evidence supports any defenses to the jury.

V.

Several problems are engendered by the "credible evidence" standard.

A.

In a bench trial, the judge, by training and experience, should know of and thus be informed of all the available defenses, no matter how weak the evidence is, that supports such defenses. Therefore, in a judge trial, the judge would be aware of the full panoply of defenses adduced in the

evidence.[15] In a judge-only trial, those defenses would be considered in the judge's deliberation toward his or her ultimate decision. In contrast, under the majority's approach, in a jury trial, the jury would be fully instructed on the applicable defenses only if the judge decides that "a reasonable juror could harbor a reasonable doubt" to the defendant's guilt based on a particular defense. Such a result is indefensible in the context of this court's precedent, which has established that the court has a duty to give instructions regarding lesser-included offenses, Haanio, 94 Hawaiʻi at 409-10, 16 P.3d at 250-51, regarding elements of the offense, Nichols, 111 Hawaiʻi at 335, 141 P.3d at 982, and for all defenses where requested by the defendant, Locquiao, 100 Hawaiʻi at 206, 58 P.3d at 1253. Hence, although a judge would know of all apparent defenses, the jury would only know of what a judge determined "a reasonable juror" should know.

However, the jury, as the trier of fact, should be informed of all legal theories that are supported by the facts in the evidence. If the court is aware that there is a basis in the evidence for a defense instruction, the court should not keep

[15] The majority asserts that weak, inconclusive, or unsatisfactory evidence going to a particular defense would not necessarily be apparent to the trial court without defense counsel having drawn the attention of the court to it by requesting an instruction. Majority's opinion at 30 n.12. Respectfully, there should be few cases where the trial court, trained and experienced in the law and viewing the evidence at trial, would not recognize an applicable defense adduced in the evidence, but that an appellate court would in reviewing the written record on appeal. It is the function of the trial court as the manager of the trial process to be aware of the significance of the evidence and the trial courts should be credited with such competence.

those instructions from the jury. The effect of holding otherwise is that the jury in a jury trial will be kept ignorant of defenses that are apparent to the judge from the evidence. This will directly impact the integrity of the trial and resulting verdicts and ultimately demean the role of the juror.

Defendants who exercise their right to jury trials then, would not be afforded the same treatment as a defendant in a bench trial, because the jury would be less informed as to applicable defenses.[16] This would create an unacceptable disparity between jury trials and bench trials that would unduly burden the right to a jury trial. See U.S. Const. amend. VI; Haw. Const. Art. I, § 14 "([i]n all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the district wherein the crime shall have been committed. . . .")[17]; see also HRS § 806-60 (1993) ("Any defendant charged with a serious crime shall have the right to trial by a jury of twelve members."). This court has held that the right to a jury trial is "firmly ingrained in the American scheme of justice, [and] should be jealously protected against unjust intrusion." State v. Olivera, 58 Haw. 551, 554, 497 P.2d 1360, 1362 (1972),

[16] Under the majority's "credible evidence" rule, a defendant would also be at a disadvantage in a jury trial scenario, because there is no corresponding right to a judge-only trial. See Singer v. United States, 380 U.S. 24, 36 (1965); Mehau v. Reed, 76 Hawaiʻi 101, 111, 869 P.2d 1320, 1329 (1994) ("we note that there is no constitutional right to a non-jury trial under either the Hawaiʻi or United States constitutions").

[17] The analysis herein relies on the right to a jury trial as set forth by the Hawaiʻi constitution, Article I, Section 14.

overruled on other grounds by State v. Young, 73 Haw. 217, 221, 830 P.2d 512, 515 (1992).

B.

In evaluating whether a juror would harbor a reasonable doubt, the judge's view of what outcome could be "harbored" by a reasonable juror will necessarily control. The judge will thus withhold from the jury legal defenses that exist in the evidence unless they are consonant with his or her view of the evidence. The court's instructions ultimately, then, will reflect the court's evaluation of the evidence in arriving at what a reasonable juror would believe and thus, what the jury will be allowed to consider. In thus preempting the jury's evaluation of the evidence, the court will have shaped the contours of the case that will be deliberated on by the jury. In this way, the court will influence the jury's verdict by giving only instructions that conform to the court's view of the weight of the evidence, i.e., whether based on the evidence, a reasonable juror would harbor a belief of reasonable doubt as opposed to whether "any evidence" supports a defense instruction.

The court must remain impartial and cannot suggest to the jury the outcome that it should reach. State v. Silva, 78 Hawaiʻi 115, 117, 890 P.2d 702, 704 (App. 1995) abrogated on other grounds by Tachibana v. State, 79 Hawaiʻi 226, 235, 900 P.2d 1293, 1302 (1995) ("[T]he right to an impartial judge [] inheres in section 5 of article I of the Hawaiʻi Constitution.")

Yet, in directing the judge to decide on whether the reasonable juror could harbor a reasonable doubt, the majority's test accomplishes just that. In describing "credible evidence" as evidence based on whether "a reasonable juror could harbor a reasonable doubt," the judge's instructions will implicate the ultimate verdict in the case - namely whether in the judge's view a reasonable jury could believe that the defense abrogates or mitigates the defendant's criminal liability.

Such a determination would have a further adverse impact. By requiring the judge to evaluate the evidence as a condition to giving defense instructions, the majority's test contravenes a defendant's constitutional right to the presumption of innocence. See State v. Samonte, 83 Hawaiʻi 507, 519, 928 P.2d 1, 12 (1996) ("[A] criminal defendant has a constitutional right to a presumption of innocence.") In directing that, in order to be entitled to a defense instruction, evidence that would create doubt as to the defendant's ultimate guilt must be produced, the majority preemptively shifts the burden of persuasion to the defendant at a point in the litigation where the defendant is only required to satisfy the burden of production. See HRS § 701-115(2) (1993) (stating that the defendant has the burden of production before a defense may be considered by the trier of fact). Thus, under the test employed by the majority, the defendant ultimately must overcome through at least somewhat persuasive evidence, the hurdle of

demonstrating that a "rational jury could harbor a reasonable doubt" as to his or her guilt. In effect, this means the defendant must demonstrate his or her ultimate innocence in order to be entitled to a defense instruction.

C.

The majority's "credible evidence" standard also raises additional due process concerns, by impermissibly altering the structure of a jury trial, in violation of the fair trial and due process provisions of the Hawaiʻi constitution, article I, section 5. Here, applying the standard set forth by the majority effectively reverses the role of the judge and the jury, by requiring the judge to first determine the credibility of particular evidence, see majority's opinion at 29-30, before the jury may consider it. Instead of the jury, as fact-finder, weighing the evidence, the judge must conduct his or her own preliminary weighing of the evidence before deciding whether or not the jury should be instructed on the law relevant to that evidence. Where the jury's role as fact-finder is "usurped," the defendant's constitutional right to a fair trial is impermissibly burdened. For example, in State v. Crail, 97 Hawaiʻi 170, 35 P.3d 197 (2001), this court held that, where the court made improper comments in the jury instructions as to the location of certain evidence, the "essential duty of the jury was usurped . . [,]" and thus there was a reasonable possibility that the defendant's constitutional right to a fair trial by jury was

impinged by the court's erroneous comments. 97 Hawaiʻi at 181-82, 35 P.3d at 208-09. Similarly, where a court decides not to give a defense instruction based on what it thinks a "rational juror" would do, the jury's role has been "usurped" by the court, thus impinging on the defendant's right to a fair trial.

VI.

Respectfully, the majority's basis for its credible evidence standard is erroneous.

A.

The majority mistakenly draws the "credible evidence" standard from HRS § 701-115(2)[18] and its Commentary. See majority's opinion at 25, 29-30. However, HRS § 701-115(2) provides only that "[n]o defense may be considered by the trier of fact unless evidence of the specified fact or facts has been

[18] HRS § 701-115 provides:

> (1) A defense is a fact or set of facts which negatives penal liability.
> (2) No defense may be considered by the trier of fact unless evidence of the specified fact or facts has been presented. If such evidence is presented, then:
> (a) If the defense is not an affirmative defense, the defendant is entitled to an acquittal if the trier of fact finds that the evidence, when considered in the light of any contrary prosecution evidence, raises a reasonable doubt as to the defendant's guilt; or
> (b) If the defense is an affirmative defense, the defendant is entitled to an acquittal if the trier of fact finds that the evidence, when considered in light of any contrary prosecution evidence, proves by a preponderance of the evidence the specified fact or facts which negative penal liability.
> (3) A defense is an affirmative defense if:
> (a) It is specifically so designated by the Code or another statute; or
> (b) If the Code or another statute plainly requires the defendant to prove the defense by a preponderance of the evidence.

(Emphasis added.)

presented." The statute, therefore, contains no "credible evidence" requirement for a particular defense to be considered by the fact finder, but rather distinguishes between affirmative and non-affirmative defenses. It is only in the Commentary[19] that the term "credible evidence" is used. However, if as the Commentary suggests, "credible evidence" is required before the trier of fact may even consider a particular defense, then the Commentary would conflict with HRS § 701-115, which states quite simply that "evidence of the specified fact or facts" must be presented. The Commentary is not binding on this court, however, and thus the statute, HRS § 701-115, must control. See Maelega, 80 Hawaiʻi at 178, 907 P.2d at 764 ("Although the commentary may be used as an aid in understanding the provisions of the Hawaiʻi

---

[19] The Commentary to HRS § 701-115 provides, in relevant part:

> The Code establishes two classes of defenses. As to both, it places the initial burden on the defendant to come forward with some credible evidence of facts constituting the defense, unless, of course, those facts are supplied by the prosecution's witnesses.
>
> As to the burden of persuasion, two different rules are codified. In the case of defenses which are not affirmative, the defendant need only raise a reasonable doubt as to the defendant's guilt. The other side of the coin is that the prosecution must prove beyond a reasonable doubt facts negativing the defense. The prosecution in fact does this when the jury believes its case and disbelieves the defense.
>
> In the case of affirmative defenses, the burden on the defendant increases. Now the defendant must prove by a preponderance of the evidence facts which negative the defendant's penal liability. Subsection (4) defines "affirmative defense," making it clear that this type of defense needs special legislative prescription. Unless the Legislature has made a particular defense affirmative, the defendant's burden is only to raise a reasonable doubt.

(Emphasis added.)

Penal Code, it may not be used as evidence of legislative intent.") (citing HRS § 701-105 (1993)) (internal quotation marks omitted) (brackets and alterations omitted).

Moreover, the conflict concerning the use of the term "credible" in the Commentary to HRS § 701-115 and HRS § 701-115(2) was resolved in Maelega, 80 Hawaiʻi at 177-79, 907 P.2d at 763-765, contrary to the majority's position, see majority's opinion at 27-29. In Maelega, this court expressly overruled State v. Nobriga, 10 Haw. App. 353, 873 P.2d 110 (1994), which relied on the same Commentary to HRS § 701-115 as the majority. Nobriga had held that the defendant bore the initial burden of "com[ing] forward with some credible evidence of facts supporting the defense" before he was entitled to a jury instruction on that defense. Maelega, 80 Hawaiʻi at 178, 907 P.2d at 764 (quoting Nobriga, 10 Haw. App. at 357, 873 P.2d at 113) (emphasis in original).

> The defense of extreme mental or emotional disturbance places the initial burden on the defendant to come forward with some credible evidence of facts constituting a defense unless those facts are supplied by the prosecution's witnesses. If this occurs, the prosecution must then prove beyond a reasonable doubt that the defendant was not at the time of the offense under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation.

Id. at 176, 907 P.2d at 762 (first emphasis in original, second emphasis added). This court concluded that the jury instructions given by the court were erroneous in stating that the defendant had the initial burden of producing credible evidence of the

Extreme Mental or Emotional Disturbance (EMED) defense. Id. a 177, 907 P.2d at 763.

Maelega held in reference to the term "credible," that "the court [had] impliedly instructed the jury that the burden under HRS § 701-115(2) was a question of fact for the jury to decide." Id. "In other words," Maelega observed, "the jury may have reasonably, but impermissibly interpreted the court's [EMED] instruction as requiring Maelega to convince it that the evidence tending to support his claim was credible . . . before considering whether the prosecution had disproved this defense beyond a reasonable doubt." Id. at 178, 907 P.2d at 764 (first emphasis added, second emphasis in original). Consequently, "there was a substantial risk that the jury may have reached its verdict by improperly shifting the burden of proof from the prosecution to Maelega. . . ." Id.

Hence, contrary to the majority's interpretation of Maelega, majority's opinion at 27-29, the issue in the case was not simply that the burden of production was included as part of the jury instruction, but that the term "credible" was wrongly used in connection with the defendant's initial burden of production. See Maelega, 80 Hawaiʻi at 178-79, 907 P.2d at 764-65. This court's decision in Maelega indicates that the term "credible," as included in the Commentary to HRS § 701-115(2), should not be employed as a condition of giving jury instructions under any circumstances. Maelega explicitly invalidated the use

of the term "credible", as it is used by the majority and reaffirmed that if "evidence would support consideration of [a defense] by the jury, no matter how weak, inconclusive, or unsatisfactory the evidence may be" the instruction must be given:

> The Nobriga court clearly relied upon the commentary to HRS § 701-115 when it stated that a defendant bears the initial burden of "com[ing] forward with some credible evidence of facts supporting the defense [.]" 10 Haw. App. at 359, 873 P.2d at 113 (emphasis added). Although "[t]he commentary ... may be used as an aid in understanding the provisions of [the Hawai'i Penal] Code, ... [it may] not [be used] as evidence of legislative intent." HRS § 701-105 []. Our cases have firmly established 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." Pinero, 75 Haw. at 304, 859 P.2d at 1379 (emphases added) (internal quotation marks and citations omitted). See also [] Lira, 70 Haw. [at] 27, 759 P.2d [at] 871 []; []O'Daniel, 62 Haw. [at] 527-28, 616 P.2d [at] 1390 [].

Id. (emphases added). Further, this court expressly rejected the condition espoused by the majority in the instant case, that an instruction must be supported by credible evidence before it is given:

> Accordingly, we read Nobriga to state the obvious: If there is no evidence in the record to support a separate and distinct defense, then the defendant is not entitled to an instruction on that defense. To the extent that Nobriga's reference to credible evidence is inconsistent with Pinero II, supra, it is hereby overruled.

Id. (emphasis added).

Consequently, as evidenced in the quoted passage above, Maelega rejected the majority's use of the term "credible" from the Commentary to HRS § 701-115, as in conflict with this court's settled case law on giving defense instructions. Id.

B.

Maelega states that "[b]y giving the EMED instruction to the jury, the circuit court implicitly acknowledged that, based on the record, a reasonable juror could harbor a reasonable doubt as to whether Maelega acted while under extreme emotional disturbance. . . ." Id. at 177, 907 P.2d at 763. The majority garners from this its definition of "credible evidence," namely that "a reasonable juror could harbor a reasonable doubt" as to the defendant's guilt. Majority's opinion at 30. However, the statement about a "reasonable juror" from Maelega has nothing to do with whether the evidence is credible or not or whether the judge should give the instruction in the first place.

Instead, Maelega simply applied HRS § 701-115(2)(a), which provides that, with respect to non-affirmative defenses (i.e., EMED), "the defendant is entitled to an acquittal if the trier of fact finds that the evidence, when considered in the light of any contrary prosecution evidence, raises a reasonable doubt as to the defendant's guilt[.]" Id. Maelega's statement that the court, by giving an instruction, "implicitly acknowledged that, based on the record, a reasonable juror could harbor a reasonable doubt . . . ." is made in dicta, and the case cited after that sentence does not use the language "reasonable juror could harbor a reasonable doubt," but instead, supports the view that "evidence" must be adduced before an instruction on a defense can be considered. See id. (citing State v. Russo, 69

Haw. 72, 76, 734 P.2d 156, 158 (1987)). This statement from Maelega, then, does not support the majority's transformation of a "reasonable juror could harbor a reasonable doubt" statement into a test for the trial court to apply as a condition to giving a defense instruction where unrequested by the defendant.

C.

The majority focuses on the fact that Locquiao and Stenger both cited to the Commentary to HRS § 701-115. See majority's opinion at 26-27 n.11 ("As recently as Locquiao and Stenger, we continued to favorably cite to the Commentary to HRS § 701-115."). However, in extracting the "credible evidence" standard from those cases, for use in determining when particular jury instructions should be given, the majority misconstrues the purpose for which the Commentary was quoted in Locquiao and Stenger.

In Locquiao, as noted, defense counsel had requested an ignorance-or-mistake-of-fact defense, and the court refused the instruction. 100 Hawaiʻi 201, 58 P.3d at 1248. Locquiao first reiterated that "[t]his court has consistently held 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." Id. at 206, 58 P.3d at 1253 (citations and internal quotation marks omitted). Since the instruction

requested in Locquiao was a defense instruction, this court then explained the background as to how defenses operate to negate penal liability, using HRS § 702-204 (1993), HRS § 702-205, HRS § 701-115 and its Commentary, and case law. Id.

Locquiao concluded that the defendant was entitled to an instruction on the mistake of fact defense and the prosecution bore the burden of disproving the defense. No mention whatsoever was made of whether the evidence adduced by the defendant, "that he was unaware that the 'glass material' recovered [] was an 'ice pipe' and that the 'glass material' contained methamphetamine[,]" was, in fact, credible. Id. Although this court in Locquiao briefly quoted the Commentary to HRS § 701-115, the purpose was only to explain how the burden shifted with respect to defenses, and the "credible evidence" requirement was not actually applied by this court. See id.

In Stenger, the State had argued that "the [court] did not commit plain error in failing to give the jury an instruction on the defense of mistake-of-fact where there was no credible evidence to warrant such an instruction." 122 Hawaiʻi at 277, 226 P.3d 447. Stenger quoted from Locquiao, including the Commentary to HRS § 701-115, again, explaining how defenses operate in negating penal liability. Id. at 280, 226 P.3d at 450. Then, Stenger reviewed the holding in Locquiao, emphasizing the fact that the defendant in Locquiao was entitled to an instruction on the ignorance-or-mistake of fact defense. Id.

Stenger explicitly rejected the "credible evidence" standard proposed by the State. Id. at 281, 226 P.3d at 441. It concluded that "[t]hus, we must determine [] whether Petitioner presented any evidence, "no matter how weak," that would have supported the jury's consideration of a mistake of fact defense . . . ." Id. (Emphasis added.)

Respectfully, it is therefore incorrect to say that "[a]s recently as Locquiao and Stenger, [this court] continued to favorably cite to the Commentary to HRS § 701-115." Majority's opinion at 26-27 n.11. Instead, both Locquiao and Stenger rejected the requirement that a defendant adduce "credible evidence" before being entitled to a jury instruction, and instead held in favor of the well-established "no matter how weak," standard. Stenger, 122 Hawaiʻi at 281, 226 P.3d at 461 (citing Locquiao, 100 Hawaiʻi at 205, 58 P.3d at 1252) (internal quotation marks omitted). Like Maelega, Locquiao and Stenger rejected the "credible evidence" term as used in the Commentary to HRS § 701-115.

D.

In sum, nothing in HRS § 701-115, its Commentary, Stenger, Locquiao, or in any other Hawaiʻi case supports the heightened burden imposed by the majority for defendants who fail to request a jury instruction to which they are otherwise entitled.

VII.

Unlike the majority, I would uphold Nichols, requiring that if the court erred in failing to properly instruct the jury, and the defendant did not object at trial, this court need not first undertake a plain error review, but will consider whether the error was harmless beyond a reasonable doubt. 111 Hawaiʻi at 337, 141 P.3d at 984. Accordingly, I disagree with the majority's holding that adherence to the precedent set forth in Nichols does not require the merger of the plain error and harmless error standards of review.

A.

Generally, if a party fails to make a timely objection at trial, this court will note error "where plain error has been committed and substantial rights have been affected thereby." State v. Miller, 122 Hawaiʻi 92, 100, 223 P.3d 157, 165 (2010) (quotation marks omitted). Hawaiʻi Rules of Penal Procedure (HRPP) Rule 52(b) states that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Indeed, an appellate court "will apply the plain error standard of review to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights." State v. Ho, 127 Hawaiʻi 415, 431, 279 P.3d 683, 699 (2012) (citing Miller, 122 Hawaiʻi at 100, 223 P.3d at 165) (emphasis added) (citations

omitted). Under plain error review, if the substantial rights of the defendant are implicated, then "the error may be corrected on appeal unless it was harmless beyond a reasonable doubt." Id.

Regardless of whether defense counsel requested a specific jury instruction at trial, however, as discussed, this court has held the duty to properly instruct the jury lies with the trial court. Since the ultimate responsibility for the jury instructions lies with the court, an error in such instructions does not represent the type of error that, if not objected to at trial, requires a plain error determination. At trial, it is each party's role to provide to the jury its view of the facts, the court's role to instruct the jury on the law, and the jury's role to render true verdicts based on the facts presented. See Haanio, 94 Hawaiʻi at 415, 16 P.2d at 256. Where the court errs in giving the jury proper instructions, the court, in effect, undermines the jury's delegated function. Id. (citing State v. Bullard, 389 S.E.2d 123, 124 (1990)).

B.

The incongruity between plain error review and the court's duty with respect to jury instructions was first recognized by the ICA in State v. Astronomo, 95 Hawaiʻi 76, 82, 18 P.3d 938, 944 (App. 2001). There, the ICA reasoned that because the ultimate responsibility to instruct the jury lies with the court, counsel did not have a duty to object, and thus the harmless error standard of review applied to erroneous jury

instructions regardless of whether or not an objection was made at trial.

In Nichols, this court explicitly affirmed Astronomo, and held that "'with respect to jury instructions, the distinction between harmless error and plain error is a distinction without a difference.'" 111 Hawaiʻi at 336, 141 P.3d at 983 (quoting Astronomo, 95 Hawaiʻi at 82, 18 P.3d at 938). This court noted that it had "granted certiorari primarily to address [the defendant's] contention that the ICA misstated the standard of review for erroneous jury instructions in this jurisdiction." Id. at 329, 141 P.3d at 976.

Nichols agreed with the defendant that "in light of our consistent precedent regarding the duty of the trial court to instruct the jury, the ICA gravely erred in concluding that the duty of the trial court is limited to avoiding plain error." Id. at 335, 141 P.3d at 982:

> Consequently, we hold 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 fo review because it is the duty of the trial court to properly instruct the jury. As a result, 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. at 337, 141 P.3d at 984 (emphasis added).

C.

With respect to the application of the standard of review in Nichols, the majority notes that "despite its 'merger'

holding, [the Nichols court] continued to engage in a two-step, plain-error-then-harmless error review in analyzing instructional error." Majority's opinion at 23. However, although Nichols did engage in a two-step review, the analysis was consistent with its holding quoted above and did not implicate plain error review. Nichols first determined that "[b]ecause the prosecution's confession of error is not binding upon the appellate court, we must still first determine whether the circuit court erred in failing to give the relevant attributes instruction." 111 Hawaiʻi at 337, 141 P.3d at 985. On this point, as noted supra, Nichols concluded that the instruction was defective under Valdivia, in which this court had held, under similar facts, that failure to instruct the jury that the threatened person's status and training as a police officer was relevant to the charge of terroristic threatening was reversible error. Nichols, 111 Hawaiʻi at 338, 141 P.2d 985 (citing Valdivia, 95 Hawaiʻi at 470, 24 P.3d at 666).

Thus, Nichols first concluded that the failure to give a relevant attributes instruction was an error. The majority characterizes this as a "plain error" determination, seemingly based solely on the fact that the Nichols opinion states, prior to its analysis, that the "failure to give a 'relevant attributes' instruction was plain error." Majority's opinion at 23 (quoting Nichols, 111 Hawaiʻi at 338, 141 P.3d at 985). However, Nichols' holding on the standard of review, discussed

supra, and the portion of the opinion where Nichols applies its standard of review holding to the facts indicates that the term "plain error" in the section quoted by the majority is not indicative of the standard of review but rather is simply an acknowledgment that the court made an error. Nichols, 111 Hawaiʻi at 338, 141 P.3d at 985 (responding to the defendant's argument that "the circuit court plainly erred.")

Because this court made a determination that an error took place does not imply that this court engaged in "plain error" review. Rather, it indicates that this court was determining whether, as the defendant posited, the court had in fact made an error.[20] In order to genuinely determine whether the error was "plain" error, the Nichols court would have needed to determine whether "'the substantial rights of the defendant have been affected adversely,'" or the error would "'affect the fairness, integrity, or public reputation of judicial proceedings . . . .'" Id. at 335, 141 P.3d at 981 (quoting Sawyer, 88 Hawaiʻi at 330, 966 P.2d at 642). It did not. Therefore,

[20] The majority states that Nichols first determined that the court's failure to give the "relevant attributes" instruction was plain error because "under [] Valdivia, the failure to instruct on relevant attributes in a terroristic threatening case is reversible error in any event, whether or not the relevant attributes instruction is requested (as it is in Valdivia) or unrequested (as it was in Nichols)." Majority's opinion at 23. In Valdivia, the "relevant attributes" instruction was requested at trial, and this court held that such an instruction "applies in the context of prosecution for terroristic threatening." 95 Hawaiʻi at 479, 24 P.3d at 661. Valdivia then determined that "we cannot say that the failure of the circuit court to so instruct the jury in the present matter did not contribute to [the defendant's] conviction of first degree terroristic threatening[.]" Id. Thus, respectfully, by citing Valdivia, it does not follow that the Nichols court was engaging in plain error review.

Nichols did not "engage in a two-step, plain-error-then-harmless error review in analyzing instructional error." See majority's opinion at 23.

D.

Respectfully, the majority improperly describes plain error review in its application to the facts of this case. The majority states that "[i]n the case of a jury instruction on mistake of fact that is not requested by the defense and not given by the trial court, plain error affecting substantial rights exists if the defendant had met his or her initial burden at trial of adducing credible[] evidence of facts constituting the defense (or those facts are supplied by the prosecution's witnesses)." Majority's opinion at 25 (citations omitted) (emphasis added). However, by determining whether a defendant had met his or her initial burden of adducing credible evidence of facts constituting the defense, the majority is not determining whether there is "plain error," but rather, whether the court erred in the first place. Thus, as in its analysis of Nichols, respectfully, the majority unduly implicates "plain error" review into an appellate court's determination of whether any error has occurred. Instead, true plain error review occurs subsequent to an initial determination that an error has occurred and that the error was not objected to at trial. Only then will

an appellate court conduct plain error review to determine whether to address the error on appeal.

In the interests of upholding this court's precedent in Nichols, recognizing the duty of the court to properly instruct the jury, and clarifying the standard for future cases, I would reaffirm that, once an appellate court determines that the court erred in failing to give a defense instruction, that court need not consider whether the error satisfies the "plain error" standard described above, but can proceed directly to an analysis of whether the error was harmless beyond a reasonable doubt. Thus, in accord with Nichols, where the court erred in failing to give proper jury instructions, plain error and harmless error review are merged.

VIII.

In its Application to this court, the State argues that Stenger should be overturned. The State's arguments are discussed in Appendix A, attached hereto, inasmuch as not all of the State's arguments are germane to the majority's holding.

IX.

Our trial courts are capable of adhering to the standard of administering the law that has been established with respect to unrequested instructions. On the other hand, in our role as the reviewing court, we have the ultimate responsibility for ensuring that cases are properly tried on the applicable law. Respectfully, the diminishment of the trial court's obligation

and of our oversight under the majority's rule will ultimately be reflected in a lower standard of justice in our state. For the foregoing reasons, I respectfully concur in part and dissent in part.

/s/ Simeon R. Acoba, Jr.

APPENDIX A TO CONCURRING AND DISSENTING OPINION BY ACOBA, J.

I.

A.

First, the State takes issue with the law that courts have a duty to instruct on a defense founded in the evidence, no matter how weak, even if such an instruction was not requested. It argues that such a holding places a duty on the court to identify every defense supported by some evidence, no matter how attenuated. This argument rests on a basic misapprehension of the court's role. Obviously, the court must assess the evidence in order to determine what instructions to give. But to impose that duty on the court is not improper. The rule that the court is responsible for properly instructing the jury precedes State v. Stenger, 122 Hawaiʻi 271, 226 P.3d 441 (2010), as noted, and has been repeatedly affirmed by this court. State v. Haanio, 94 Hawaiʻi 405, 415, 16 P.3d 246, 256 (2001) (holding that "the trial courts, not the parties, have the duty and ultimate responsibility to insure that juries are properly instructed on issues of criminal liability"); State v. Kupau, 76 Hawaiʻi 387, 395, 879 P.2d 492, 500 (1994), overruled on other grounds by Haanio, 94 Hawaiʻi at 414, 16 P.3d at 246 (same). See also State v. Nakamura, 65 Haw. 74, 79, 648 P.2d 183, 187 (1982) (noting that trial court's instructions fully apprised jury in easily understandable language of law to be applied); State v. Feliciano, 62 Haw. 637, 643, 618 P.2d 306, 310 (1980) ("[I]t is

well settled that the trial court must correctly instruct the jury on the law . . . . This requirement is mandatory to insure the jury has proper guidance in its consideration of the issues before it.").

Further, as discussed before, the fact that the defendant did not ask for the instruction should make no difference. By limiting the court's duty to instruct only on those defenses requested by the defendant, even when the evidence supports other defenses, the State's position increases the risk of improper convictions.

B.

Second, the State argues that it is not the responsibility of the court to implement defense strategy, and the prosecution should not be penalized where defense counsel fails to request a defense instruction. The State proffers that the prosecution must identify and submit instructions omitted by the court or else risk the result of "virtually automatic retrial." The State's concern in this instance is insupportable, inasmuch as it misidentifies the duty of the court as the law-giver, independent of the parties' trial strategy. Haanio, 94 Hawaiʻi at 415, 16 P.3d at 256. Furthermore, any argument on appeal that the court erred in failing to provide a defense instruction is subject to harmless error review. See State v. Nichols, 111 Hawaiʻi 327, 337, 141 P.3d 974, 984 (2006). Thus, if the defense theory is, for example, a "barely glimpsed theory

on the margins," Stenger, 122 Hawaiʻi at 297, 226 P.3d at 467 (Kim, J., concurring), and a defense instruction on such a theory would not have been material to the case, it will be deemed harmless beyond a reasonable doubt.

C.

Third, the State argues that unrequested defense instructions would interfere with a defendant's right to determine his or her own defense. The State cites to the concurring and dissenting opinion in State v. Auld, 114 Hawaiʻi 135, 148, 157 P.3d 574, 587 (App. 2007), which suggests that there are "sound reasons why a trial court should not be required to give a self-defense instruction that a defendant, for strategic reasons, does not want." 114 Hawaiʻi at 148, 157 P.3d at 587 (Nakamura, C.J., concurring and dissenting). It contends "[t]hat the defendant and his counsel are in a better position than the trial court to know how to most effectively defend against the charges." Id. Although the State correctly points out that the defendant has the right to determine his or her defense, respectfully, what the concurrence and dissent in Auld and the State apparently choose to ignore is our precedent announcing that this court has already come down on the side of a public interest in fair trials that overrides any desire of the parties to strategically avoid complete and correct jury instructions based in the evidence.

The search for the truth, and a "trial court's ultimate obligation to promote justice in criminal cases[,]" Haanio, 94 Hawaiʻi at 414, 16 P.3d at 256, is furthered by leaving it to the jury to determine what happened based on the evidence adduced, instead of speculating that "[a] defendant's choice not to assert self-defense may be based on the defendant's knowledge of why he or she acted or what really happened." Auld, 114 Hawaiʻi at 148, 157 P.3d at 587 (Nakamura, C.J., concurring and dissenting). The same justice and truth-seeking rationales raised in Haanio in opposition to allowing a defendant to tactically forego an included offense instruction are applicable in the instant case.

Respectfully, by permitting the defendant or prosecution to limit the applicable law the jury can consider, despite the evidence adduced, the State and the majority enhance the risk that the jury would not reach the result that best accords with justice in a particular case, or would not arrive at an outcome that best serves the public interest in a jury that is fully and accurately informed. This would subject our system of justice to the vicissitudes of advocates or to credibility predeterminations by a court.[21] As Haanio notes, "[o]ur courts are not gambling halls but forums for the discovery of truth. . . . " Id. (quoting People

[21] Allowing the defendant to waive instructions as to a particular defense could also allow the defendant to "game" the system. A defendant could "obliquely" raise evidence relevant to a particular defense at trial, "while avoiding the court's instruction that would enable the jury to properly evaluate the defense, thereby evading the affirmative evidentiary requirements" that must be satisfied for that defense. People v. DeGina, 533 N.E.2d 1037, 1042 (N.Y. 1988) (Alexander, J., dissenting).

v. Barton, 906 P.2d 531, 541 (Cal. 1995) (stating that "neither the defendant nor the People have a right to incomplete instructions")). Indeed, if evidence supporting a legal defense is introduced at trial, what can the justification be for keeping that defense from the jury? As discussed supra, a justification based on parties' trial strategy is not warranted in light of the importance of jury instructions in the truth-seeking function of trial and the potential for resulting inequality between defendants in jury trials and defendants in bench trials.

Furthermore, nothing precludes defense counsel from submitting proposed defense instructions. The situation addressed in the instant case only arises where defense counsel has not requested a jury instruction as to a particular defense. On this point, Haanio stated, "[o]f course, the prosecution and the defense may, as they do in the ordinary course, propose particular included offense instructions, and our holding is not to be taken as discouraging or precluding their desire or felt obligation to do so." 94 Hawaiʻi at 415, 16 P.3d at 256.

Chief Justice Moon's dissent to Stenger adopts a theory from the Supreme Court of California, stating that, "'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.'"

Stenger, 122 Hawaiʻi at 298, 226 P.3d at 468 (quoting Barton, 906 P.2d at 536) (internal quotations omitted) (emphases added).

Chief Justice Moon's standard is obviously inconsistent with our own precedent, however. First, it is not necessary that the defense "rely" on a defense for the court to issue an instruction on other defense theories evident in the evidence This is the lesson of Haanio. 94 Hawaiʻi at 415, 16 P.3d at 256 ("A trial court's failure to inform the jury of its option to find the defendant guilty of the lesser offense would impair the jury's truth-ascertainment function.") (citation omitted). Next, Chief Justice Moon's standard is plainly wrong in light of this court's precedent holding that a defendant may present inconsistent defenses and the court still must instruct the jury on those defenses. See State v. Lira, 70 Haw. 23, 29, 759 P.2d 869, 873 (1988).

Finally, this court has never imposed a "substantial evidence" standard to support the giving of an unrequested instruction on a defense adduced in the evidence. "Substantial evidence" is defined by Black's Law Dictionary, in relevant part, as "[e]vidence that a reasonable mind could accept as adequate to support a conclusion; evidence beyond a scintilla." Black's Law Dictionary 640. As discussed, requiring that the defendant have adduced more than "some evidence, no matter how weak," State v. Kikuta, 125 Hawaiʻi 78, 90, 253 P.3d 639, 651 (2011), in order to be entitled to a jury instruction on a defense would usurp the

jury's role in a trial. Application of the "substantial evidence" standard as a basis for giving an instruction is particularly troubling in cases of unrequested jury instructions because, where an attorney has focused on one defense, that attorney may not have attempted to adduce substantial evidence of other defenses on which the jury should be instructed. Cf. Stenger, 122 Hawaiʻi at 282, 226 P.3d at 452 ("Merely because the court provided an instruction as to the requisite state of mind for theft in the first degree by deception does not render the failure to instruct on mistake of fact harmless. Under the facts presented here, there is a reasonable possibility that the jury, if provided with the separate mistake of fact instruction, could have found that [the Petitioner did not knowingly commit the crime].").

D.

Fourth, the State argues that requiring the court to provide jury instructions on all applicable defenses would somehow allow a defendant "two bites at the same acquittal apple." Related to its second argument, the State's position appears to be that the defendant will be encouraged not to object to the omission of a defense instruction. Again, this assumes that the court has abrogated its duty to correctly instruct the jury as to applicable defenses that inhere in the evidence. Also, for the reasons discussed before, it is neither the role of the defendant nor the prosecution to correctly charge the jury; it is the

court's role, and any appeal based on the court's failure to properly instruct the jury is subject to harmless error review.

The State's reasoning was effectively rejected by the United States Supreme Court in Henderson v. United States, 133 S. Ct. 1121 (2013). In that case, the Court held that plain error could be recognized so long as the error was plain at the time of appellate review, even if it was not clear that the trial court erred under the applicable law at the time of trial. 133 S. Ct. at 1130. In its decision, the Supreme Court addressed the argument that such a holding would remove defense counsel's incentive to call attention to potential error at trial. Id. at 1128-29. The Court noted that "counsel normally has other good reasons for calling a trial court's attention to potential error - for example, it is normally to the advantage of counsel and his client to get the error speedily corrected." Id. at 1123.

The Court went on to reason that, "[i]f there is a lawyer who would deliberately forgo objection now because he perceives some slightly expanded chance to argue for 'plain error' later, we suspect that, like the unicorn, he finds his home in the imagination, not in the courtroom." Id. at 1129 (first emphases in original, second emphasis added). Similarly, it would be an "imagin[ed]" defense counsel, i.e., a "unicorn," who would deliberately forgo an objection to an instruction that could assist his or her client, because he or she would perceive some theoretical chance for retrial reliant on an appellate court's

determination that the court's failure to properly instruct the jury was not harmless beyond a reasonable doubt.

E.

Finally, the State argues that applying the "some evidence, no matter how weak" holding, see Kikuta, 125 Hawaiʻi at 90, 253 P.3d at 651, would overburden the appellate court with an increase in criminal appeals, and overburden the trial courts with "the nearly automatic retrial" that results from such a holding. Initially, it is not evident how the appellate courts would be more overburdened by a standard requiring them to review the record for some evidence supporting a particular defense rather than reviewing the record for "credible evidence," see majority's opinion at 29, or "substantial evidence," see Stenger, 122 Hawaiʻi at 299, 226 P.3d at 469 (Moon, C.J., dissenting), supporting that particular defense. Presumably a defendant would brief the issue on appeal, and the appellate court would need to determine whether there was any evidence apparent from the record in support of the defense.

Also, the State again presumes, without justification, that there would be "nearly automatic retrial," ignoring the fact that all such appeals are subject to harmless error review. Under harmless error review, if the court did not notice the defense for purposes of instructing the jury at trial, and there is only weak evidence in the record as to that defense, the error may be harmless. The "some evidence, no matter how weak" standard is

designed to provide the jury with information that it as a lay body would not readily ascertain, but that would be apparent to a judge. In the interest of justice, if a defense is applicable and its omission is not harmless beyond a reasonable doubt, then indeed the case should be retried to correct the error and to ensure that the jury was properly instructed on all applicable law.

F.

Accordingly, it is noted that the State's arguments in its Application contravene this court's long-standing precedent with respect to jury instructions, and that the practical difficulties that would allegedly result from adopting the "no matter how weak" standard for unrequested jury instructions are overstated.

/s/ Simeon R. Acoba, Jr.