DISSENT BY ACOBA, J., IN WHICH DUFFY, J., JOINS

I respectfully disagree with the conclusion of the Intermediate Court of Appeals (ICA) that the failure of the Circuit Court of the Second Circuit (the court) to sua sponte instruct the jury that it may find Petitioner/Defendant-Appellant, Curtis Pang (Petitioner), not guilty on the basis that he acted in self-defense "was harmless beyond a reasonable doubt[.]" State v. Pang, No. 29003, 2010 WL 1226334, at *1 (App. Mar. 31, 2010) (SDO). Rather, 1) the testimony adduced at trial demonstrates that he was entitled to a jury instruction on self-defense, pursuant to this court's decision in State v. Stenger, 122 Hawai‘i 271, 226 P.3d 441 (2010), and 2) "there is a reasonable possibility that" the court's failure to give that instruction "may have contributed to [Petitioner's] conviction[,]" State v. Locquiao, 100 Hawai'i 195, 203, 58 P.3d 1242, 1250 (2002) (citation omitted). Therefore, this case deserves further review and for that reason I would accept the Application for a writ of certiorari.

I.

A.

This court's holding in Stenger makes clear that trial courts are required to sua sponte instruct the jury as to a defense when the defendant "present[s] any evidence, no matter how weak," to support such an instruction. Stenger, 122 Hawai‘i at 281, 226 P.3d at 451 (citation omitted). Here it is

undeniable that Petitioner was entitled to an instruction on self-defense. The following summary of Petitioner's testimony reveals that it could support the self-defense justification to the charge of terroristic threatening in the first degree.

On the morning of the confrontation, Petitioner saw complainant's car parked near the tent where he was living and approached the passenger side of the car, calling out complainant's name and telling him to leave. Petitioner testified that when he saw complainant begin to exit the vehicle, complainant was holding a metal object. Although he could not directly identify the object, Petitioner perceived it to be a weapon of some kind. He said that "[i]t could have been a pipe, or it could have been a bat or could have been a barrel of a gun." Fearing for his life, he slammed the door shut as complainant tried to exit his car. According to Petitioner, when he slammed the car door to prevent complainant from exiting, whatever complainant had in hand "blew the window out."

Petitioner described shouting at complainant to leave, but complainant "was fumbling with something" in the car and tried to get out on the driver's side of the car. Petitioner ran over to the driver's side and slammed the door shut as complainant tried to get out, and again, whatever complainant had in his hand hit the window and shattered it. At that point, Petitioner picked up a kiawe branch and hit the roof of the car, telling complainant to "just get the fuck out" of there.

On cross examination, when Petitioner was asked how large the kiawe branch he used to hit to roof of the car was, he asserted that it was about "[t]hree inches in diameter" and about "two feet long." He also explained that prior to the incident, Petitioner had heard from his friends as well as other people, including complainant's girlfriend and friends, that complainant had been threatening to beat Petitioner up. Respondent/Plaintiff-Appellee State of Hawai‘i (Respondent) asked Petitioner, "You wanted to hit the stick or bat or whatever you had in your hand over that roof to make him scared enough to leave[,]" to which Petitioner responded that he just wanted to make complainant leave. (Emphasis added.) In response to Respondent's question, "And you're saying that the reason why you hit the top of the car while he's still in it is because -- let me see if I get this correctly, you were in fear for your life[,]" Petitioner responded, "Yeah, I wanted him to leave." Throughout the questioning, Petitioner asserted that his actions toward complainant, including the use of the kiawe branch, constituted a defensive attempt to get complainant to leave before he harmed Petitioner. Nothing supports the conclusion that Petitioner regarded the use of the branch as separate and distinct from his attempts at self-defense. The record indicates that Petitioner's theory of self-defense was an integral part of

his testimony and argument at trial.[1] Therefore, he was entitled to an instruction on that theory and the court's failure to do so was plain error.[2]

B. Harmless Error

Having established that the court plainly erred, it must be determined whether the failure of the court to instruct the jury on self-defense was harmless. With regard to harmless error, this court has stated:

> [E]rror is not to be viewed in isolation and considered purely in the abstract. It must be examined in light of the entire proceedings and given the effect which the whole record shows it to be entitled. In that context, the real question becomes whether there is a reasonable possibility that error might have contributed to conviction.

State v. Kaiama, 81 Hawai'i 15, 22-23, 911 P.2d 735, 742-43 (1996) (quoting State v. Holbron, 80 Hawai'i 27, 32, 904 P.2d 912, 917 (1995)) (emphasis added). "If there is such a reasonable possibility in a criminal case, then the error is not harmless beyond a reasonable doubt, and the judgment of

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[1] Further support for Petitioner's theory is found in the testimony of Sergeant Wright, the police officer who took Petitioner's statement. His testimony recounting that statement was substantially the same as Petitioner's testimony inasmuch as it reiterated facts regarding how the windows shattered when they made contact with what complainant had in his hand.

[2] It should be noted that the obligation of courts to instruct juries as to defenses found in the record is no more of an encumbrance on the court as the obligation to instruct jurors as to lesser included offenses. See State v. Haanio, 94 Hawai'i 405, 413, 16 P.3d 246, 254 (2001) (holding "that trial 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'. . ." (quoting Hawai'i Revised Statutes (HRS) § 701-109(5) (1993))). Inasmuch as Petitioner testified that he perceived what looked like a weapon of some sort, he repeatedly stated that he acted out of a fear for his life, and he was trying to make complainant leave, his self-defense theory was plainly discernable. Although the trial was held before this court's decision in Stenger, the instant case highlights the fact that the standard set forth in Stenger is not more demanding than the obligation to instruct on lesser included offenses.

conviction on which it may have been based must be set aside." State v. Gano, 92 Hawai‘i 161, 176, 988 P.2d 1153, 1168 (1999) (internal quotation marks and citation omitted) (emphasis added).

The proper analysis for harmless error must focus on the evidence relating to each charge in order to determine whether there is a reasonable possibility that the error contributed to the defendant's conviction. This court's recent decision in State v. Mark, 123 Hawai‘i 205, 231 P.3d 478 (2010), supports such an approach. In Mark, the trial court's jury instruction erroneously mixed principles of self-defense with defense of others, as well as erroneously instructed the jury to consider the defendant's ability to retreat. Id. at 224-27, 231 P.3d at 497-500. Mark concluded that the erroneous instructions were harmless because the record did not contain any evidence to support findings that the defendant could have retreated or that he could have reasonably used deadly force in defense of others. Id.

The trial court's instruction with regard to the defendant's duty to retreat was harmless because none of the testimony supported the conclusion that "[the defendant] knew that he could avoid the necessity of using deadly force by retreating." Id. at 226, 231 P.3d at 499. Similarly, Mark concluded that there was no evidence indicating that the petitioner could have reasonably believed that those he claimed to be protecting (his daughter and ex-girlfriend) were justified

in using deadly force. Id. at 228, 231 P.3d at 501 ("Because under the circumstances as [the defendant] believed them to be, a reasonable person would not believe that Martin or Daughter would be justified in using deadly force, [the defendant] was not justified in using deadly force, purportedly in their defense.").

In contrast to Mark, an examination of the error in the instant case indicates that there is a reasonable possibility that the failure to instruct the jury on self-defense contributed to Petitioner's conviction. To begin with, there were only two accounts of the incident on which the jury could rely in reaching its verdict, i.e., Petitioner's and complainant's. Complainant's testimony portrayed Petitioner as the aggressor commencing their exchange with deadly force. In contrast, all of Petitioner's testimony was offered to establish that he 1) believed he had heard threats made against him by complainant, 2) approached Petitioner only to get him to leave because he did not want trouble, and 3) only began to use defensive force after he saw complainant attempting to get out of his car with what Petitioner perceived to be a weapon. The assertions of self-defense were integral to the evidence at trial. By not submitting an instruction regarding self-defense, the court effectively prevented the jury from considering a relevant and seemingly patent basis for Petitioner's defense.

HRS § 703-304 (Supp. 2001) provides in relevant part:

> (1) Subject to the provisions of this section and of section 703-308, the use of force upon or toward another person is justifiable when the actor believes that such

> force is immediately necessary for the purpose of protecting himself against the use of unlawful force by the other person on the present occasion.
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> (2) The use of deadly force is justifiable under this section if the actor believes that deadly force is necessary to protect himself against death, serious bodily injury, kidnapping, rape, or forcible sodomy.
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> (3) Except as otherwise provided in subsections (4) and (5) of this section, a person employing protective force may estimate the necessity thereof under the circumstances as he believes them to be when the force is used without retreating, surrendering possession, doing any other act which he has no legal duty to do, or abstaining from any lawful action.

(Emphases added.)[3] Petitioner's testimony established that 1) he believed he had heard from credible sources that complainant had been threatening him; 2) in the course of telling complainant to leave, Petitioner perceived what appeared to be a weapon of some sort; 3) he believed it was immediately necessary to use force to prevent complainant from exiting the vehicle and using a weapon against him; and 4) he was residing at that beach in a tent, making retreat difficult. Manifestly, this testimony could support a jury finding that Petitioner's actions in slamming the door shut and hitting the roof of the car were justifiable and done in self-defense.

This court's decision in Locquiao also supports the conclusion that there is a reasonable possibility Petitioner was convicted because the jury was not permitted to separately consider his self-defense argument. In Locquiao, this court concluded that the trial court's failure to give a mistake-of-fact instruction was not harmless error, even though the

[3] HRS § 703-300 (1993) provides, in part, that "'[b]elieves' means reasonably believes."

mistake-of-fact defense was subsumed within instructions on the requisite mental state for a guilty verdict. Locquiao, 100 Hawai‘i at 207, 58 P.3d at 1254. The defendant in Locquiao was arrested for possession of drugs and drug paraphernalia. Id. at 201, 58 P.3d at 1248. The defendant asserted that somebody gave him the contraband to hold shortly before he was arrested, and that the defendant did not know what it was. Id. The trial court denied the defendant's request for a mistake-of-fact instruction and the defendant was subsequently convicted. Id. at 202, 58 P.3d at 1249. The ICA affirmed his conviction, concluding that, although he was entitled to the mistake-of-fact instruction, the denial constituted harmless error. Id. The ICA reasoned that, if the jury had found that the defendant was ignorant as to what the contraband was, it would have acquitted him because he did not have the requisite mental state to sustain a conviction. Id.

Nevertheless, this court reversed, concluding that it was not sufficient that the jury's finding with regard to the defendant's state of mind necessarily meant it rejected the mistake-of-fact defense. Locquiao stated, "Inasmuch as the jury was not given the opportunity expressly and separately to consider [the defendant's] defense of ignorance or mistake of fact at trial, there is a reasonable possibility that the circuit court's error may have contributed to [the defendant's] conviction." Id. at 208, 58 P.3d at 1255 (internal quotation

marks, citation, and brackets omitted) (emphases in original). In the instant case, similar concerns are raised because "the jury was not given the opportunity expressly and separately to consider" Petitioner's theory of self-defense. Id. (emphases in original).

Furthermore, unlike Locquiao, the instruction to which Petitioner was entitled was not subsumed in any of the other elements of the crime. In other words, it does necessarily follow that because the jury convicted Petitioner of threatening complainant "by word or conduct, to cause bodily injury. . . in reckless disregard of the risk of terrorizing[,]" HRS § 707-715(1), the jury would have rejected Petitioner's contention that he was justified in using such force because it was "immediately necessary for the purpose of protecting himself against the use of unlawful force by" complainant, HRS § 703-304. Rather, that possibility was never submitted to the jury for consideration. Consequently, "there is a reasonable possibility that error may have contributed to [Petitioner's] conviction." Locquiao, 100 Hawai'i at 203, 58 P.3d at 1250 (quoting State v. Hironaka, 99 Hawai'i 198, 204, 53 P.3d 806, 812 (2002)).

II.

A.

It could be argued that the words "baseball bat" in the indictment support the conclusion that review of the facts should be limited to only those facts pertaining to Petitioner's use of

a baseball bat as a weapon. The indictment for Count Three stated:

> That on or about the 7th day of March, 2007, in the County of Maui, State of Hawai‘i, [Petitioner], with the intent to terrorize, or in reckless disregard of the risk of terrorizing [complainant], did threaten, by word or by conduct, to cause bodily injury to [complainant] with the use of a dangerous instrument, to wit, a baseball bat, thereby committing the offense of Terrroristic Threatening in the First Degree in violation of Section 707-716(1)(d) of the [HRS].

(Emphasis added.)

Although the indictment specifically identifies a baseball bat as the "dangerous instrument," questions posed by the jury indicate that it considered evidence of Petitioner's use of the kiawe branch as a "dangerous instrument." Jury Question No. 1 stated, "We need a definition of the words in instruction [sic] 18. #2 includes did so [']with the use of a dangerous instrument[,] to wit[,] a baseball bat.['] What does to wit imply? Is it only a baseball bat that we can consider?" The court's response stated, "To [w]it is defined as 'That is to say; namely.'" Not satisfied with that response, the jury asked again, "Can we consider only a baseball bat as the dangerous weapon?" (Emphasis added.) The court responded to this question by referring the jury back to instruction number 20, which provided:

> "Dangerous instrument" means any firearm, whether loaded or not, and whether operable or not, or other weapon, device, instrument, material, or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury.

(Emphases added.) Obviously, the jury's questions show it was

considering more than just the baseball bat as "the dangerous weapon" that Petitioner brandished. (Emphasis added.) Rather, the jury was considering whether some other instrument satisfied the "dangerous weapon" element of terroristic threatening in the first degree. The only other item mentioned in the course of the testimony that could possibly qualify as such was the kiawe branch.

The court's response to the question directed the jury to the instruction defining "dangerous weapon," and in doing so, conveyed to the jury that it could consider an object other than the baseball bat as the instrument involved in the terroristic threatening. In this regard, Petitioner's testimony is exceedingly relevant. Petitioner described the branch as being about three inches in diameter and about two feet long. Given this description, the jury could have reasonably concluded that the kiawe branch was a dangerous weapon capable of causing "serious bodily injury." Because the court's instruction to the jury allowed it to consider evidence of Petitioner's use of the kiawe branch, the harmless error analysis must also consider such evidence.

B.

Nor can it reasonably be argued that on appeal Petitioner has abandoned his principal argument that the use of the kiawe branch was part of his self-defense. The arguments in Petitioner's briefs speak in general terms, but specify that his

use of the kiawe branch was part of his "effort to convince [complainant] to leave the area[.]" His arguments leave no doubt that Petitioner contends he used the kiawe branch in attempting to defend himself against complainant and to make complainant leave. Nothing in Petitioner's brief suggests that the incident can be divided into different parts and examined individually and out of context.

With regard to Petitioner's Application, the summary of the facts does contain a description of Petitioner's use of the kiawe branch, although that specific fact is not incorporated in the argument section. Indeed, the Application consists primarily of citations to Hawai‘i cases in which the failure to properly instruct the jury was not harmless error. In particular, the Application cites to the ICA's decision in State v. Auld, 114 Hawai‘i 135, 145, 157 P.3d 574, 584 (App. 2007), which concluded that the trial court's failure to sua sponte instruct the jury on self-defense was "instructional error [that] was not harmless beyond a reasonable doubt."

In Auld, the self-defense instruction the defendant advocated for on appeal actually conflicted with the defendant's theory of the case at trial. However, the ICA concluded that he was nevertheless entitled to it. Id. at 146, 157 P.3d at 585. Petitioner argues that under this reasoning he was entitled to the instruction because it was completely consistent with his testimony. According to Petitioner, "[i]n the instant case,

however, [Petitioner's] testimony clearly indicated that he was relying on the justification of self-defense." Although there is a minimal discussion of facts, the Application does not support the assumption that Petitioner abandoned the argument that he maintained throughout his testimony, specifically, that the kiawe branch was part of his self-defense.

Nor does Petitioner's closing argument at trial support the contention that Petitioner did not believe his use of the kiawe branch was in self-defense. In closing argument, defense counsel stated, "Now you may feel that [Petitioner] should be held criminally responsible for something and if he should be held for anything, it should be any damage that was caused to the roof of the car by the kiawe branch striking the roof of the car." To construe this statement to mean that Petitioner did not intend that his use of the kiawe branch be considered part of his defensive actions would be taking defense counsel's closing argument out of context.

The very next sentence to the jury after the above-quoted portion states, "You know there is a charge that could support this, and that's criminal property damage in the fourth degree." Immediately thereafter Respondent objected to defense counsel's statement on the ground that the court had not instructed the jury it may find Petitioner guilty of that offense.

Indeed, a closer examination of the closing argument indicates that the use of the kiawe branch was part of his defense. In the context of explaining Petitioner's actions, defense counsel stated:

> He told you that he went over to [complainant's] car and he told you why. He was straightforward about that. He also told you that he picked up the kiawe branch and hit the roof of the car and he didn't try to hide that. Again, he told you there was no bat.

(Emphases added.) Defense counsel's reference to the use of the kiawe branch can only be construed in relation to Petitioner's reason for approaching complainant, i.e., wanting him to leave because he was afraid. Thus, an instruction on self-defense would not have been inconsistent with Petitioner's arguments at trial.

Finally, it cannot reasonably be argued that the scope of this court's review of the evidence should be limited to only evidence relating to the use of a baseball bat because that is what Respondent argued. Such an approach would entirely reverse the proper analysis. Rather, this court must examine all of the testimony with regard to the charged offenses in determining whether there was "a reasonable possibility that the error contributed to [Petitioner's] conviction[.]" State v. Nichols, 111 Hawai‘i 327, 337, 141 P.3d 974, 984 (2006); see also Mark, 123 Hawai‘i at 227, 231 P.3d at 500.

III. Conclusion

Inasmuch as the court's failure to instruct the jury on self-defense was not harmless error, this court should accept

Petitioner’s Application for writ of certiorari. Therefore, I respectfully dissent.