DISSENTING OPINION BY ACOBA, J.

I respectfully dissent.

In my view, the convictions of Petitioner/Defendant-Appellant Robert James Behrendt, also known as Running Bear, (Petitioner) for three counts of sexual assault in the third degree, Hawai'i Revised Statutes (HRS) § 707-732 (Supp. 2002) (Counts 1-3), and one count of unlawful imprisonment in the first degree, HRS 707-721 (1993) (Count 4), should be vacated on the basis that the Circuit Court of the Third Circuit[1] (the court) improperly admitted evidence of Petitioner's prior bad acts in violation of Hawai'i Rules of Evidence (HRE) Rules 404(b) (Supp. 1994) and 403 (1993). Evidence of Petitioner's prior bad acts is not relevant, and assuming arguendo its relevance, the prejudicial effect of the evidence outweighs its probative value, the presentation of such evidence created a substantial risk that the evidence would confuse the jury as to the proper issue before it, and the evidence was needlessly cumulative. This case should be remanded for a new trial on all four counts for which Petitioner was convicted inasmuch as the evidence of prior bad acts likely interfered with the jury's deliberations as to all Counts. With regard to remanding Petitioner's case, although I agree with the majority that there was substantial evidence in

[1] The Honorable Elizabeth A. Strance presided.

the record to support convictions as to the lesser included offense of sexual assault in the third degree for Counts 1-3, I disagree with the majority's theory that the acts of sexual penetration of which Petitioner was acquitted support the inference that Petitioner engaged in sexual contact with the minor complaining witness (complainant). In sum, I would vacate the judgment of the Intermediate Court of Appeals (ICA) affirming the decision of the court, and remand the case for a new trial.[2]

I.

On March 24, 2007, the grand jury charged Petitioner with three counts of Sexual Assault in the First Degree, and with one count of kidnapping under HRS §§ 707-720(1)(d) (Supp. 2004) and 707-720(1)(e) (Supp. 2004).[3] Although the acts forming the basss for the charges occurred entirely in Hawai'i, Respondent/Plaintiff-Appellee State of Hawai'i (Respondent) submitted its Notice of Intent to Use Specified Evidence, consisting of allegations that Petitioner had engaged in

[2] Although I would remand for a new trial on all four counts on the basis that the court erroneously admitted evidence of prior bad acts, I agree with the ICA's conclusion that, with regard to Count 3, the court's failure to instruct the jury on the amended definition of sexual contact was not harmless error, and thus, Count 3 must be remanded. State v. Behrendt, No. 29191, 2009 WL 3653563, at *4 (Haw. App. Nov. 4, 2009) (SDO). See infra note 5.

[3] Although Petitioner was charged with the offense of kidnapping, HRS § 707-720, for Count 4, he was ultimately convicted of the lesser included offense of unlawful imprisonment in the first degree, HRS § 707-721. Petitioner does not challenge the sufficiency of the evidence to convict on that basis, but argues that the prejudice stemming from the admission of prior bad acts affected the jury's deliberations with regard to all counts. Because the facts relating to Petitioner's conviction for unlawful imprisonment in the first degree are not relevant to the issue of admitting the prior bad acts, those facts are not recounted in this opinion.

uncharged sexual acts with complainant outside of this state. Petitioner filed a Motion in Limine to exclude the evidence, arguing that the evidence did not go towards proving motive, purpose, or intent, but rather, only served to establish Petitioner's propensity to engage in such acts in violation of HRE Rule 404(b), and alternatively, that the prejudicial effect of such improper evidence outweighed its probative value and should have been excluded pursuant to HRE Rule 403.

After the court initially granted Petitioner's motion to exclude the evidence, Respondent filed an Amended Notice of Intent to Use Evidence Pursuant to HRE Rule 404(b) & Motion to Reconsider (Motion to Reconsider), which the court granted in part. In its written order, the court explained

> that the issue of "delayed reporting" is squarely before the jury, as well as possible issues of consent concerning the kidnapping charge. The [c]ourt finds that the "other bad acts" allegedly committed outside the State of Hawaii as described by [complainant, her sister (sister),] and Trista Borgwardt, are relevant to show motive, opportunity, and plan.

(Emphasis added.) The court further concluded that the prejudice in admitting such evidence did not outweigh its probative value, "and that a cautionary instruction ameliorates any prejudice." However, the transcripts of complainant's testimony do not indicate that the court gave a cautionary instruction to the jury before complainant testified.

The court's jury instruction regarding evidence of acts occurring outside of this state and the purposes for which it could be considered differed from the reasons given in the

court's written order granting the Motion for Reconsideration. In the written jury instruction, the court explained that the evidence could only be considered for the limited purposes of proving Petitioner's "motive, opportunity, or intent[.]" The instruction stated:

> You have heard evidence that [Petitioner] at one time, may have engaged in other wrongs or acts. You must not use this evidence to determine that [Petitioner] is a person of bad character and therefore must have committed the offenses charged in this case. Such evidence may be considered by you only on the issue of [Petitioner's] motive, opportunity, or intent and for no other purpose.[4]

(Emphasis added.) On February 13, 2008, the jury returned a verdict of guilty of the lesser included offense of sexual assault in the third degree as to Counts 1-3 and a verdict of guilty of the lesser included offense of unlawful imprisonment as to Count 4.

On appeal to the ICA, Petitioner raised eight points of error. Behrendt, 2009 WL 3653563, at *1. With regard to those points of error relevant to Petitioner's Application to this court, the ICA affirmed Petitioner's conviction on Counts 1, 2 and 4, but vacated his conviction for Sexual Assault in the Third Degree on Count 3 and remanded for a new trial on that count. Id. at *5.[5]

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[4] Clearly, it was plain error for the court to instruct on the issue of "intent," inasmuch as it did not grant the motion to use prior act evidence to prove "intent."

[5] The ICA explained that during the time period the acts in Count 3 allegedly took place, the legislature amended the HRS definitions for "sexual penetration" and "sexual contact." Behrendt, 2009 WL 3653563, at *3. It noted that the court had provided the jury with the same definitions for "sexual penetration" and "sexual contact" for all three of the related counts. However, the ICA concluded that the jury should have been instructed on the

(continued...)

In his Application to this court, Petitioner raises, inter alia, the question of "[w]hether the ICA gravely erred in affirming [Petitioner's] convictions for Sexual Assault in the Third Degree and Unlawful Imprisonment because . . . [a]t trial, the court erroneously admitted character evidence in violation of [HRE R]ules 404(b) and 403."

II. Testimony

A. Sister

Sister testified that when complainant moved to South Dakota to live with her and Petitioner, Petitioner took care of her after school, before sister got home from work.[6] According to sister, Petitioner said that he was showering with complainant at the indoor pool showers at their apartment, as well as taking showers together in the house. Sister related that she advised Petitioner that it was inappropriate to take showers with complainant. Prior to moving back to Hawai'i, sister observed Petitioner kissing complainant and "putting his arms around her

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[5](...continued)
amended definitions for Count 3 inasmuch as the definitions had changed during that time and that the failure to do so was not harmless error. Id. at *4.

[6] With regard to sister's testimony, the court gave the following cautionary instruction:

> Ladies and gentlemen of the jury, you are about to hear evidence that [Petitioner] may have engaged in other crimes, wrongs, or acts. You must not use this evidence to determine that [Petitioner] is a person of bad character and, therefore, must have committed the offenses charged in this case. Such evidence may be considered on the issues of [Petitioner's] motive, opportunity, and intent and for no other purpose.

. . . [acting] just like a boyfriend and girlfriend." Also, sister indicated that she, Petitioner, and complainant visited a cousin in Washington, and while there, all three slept in the same bed. According to sister, during the visit, she noticed that Petitioner and complainant were acting "weird with each other[,]" so she stayed up to observe them. While in bed, sister heard Petitioner tell complainant to "get on top" of him, to which complainant responded that she would not. However, sister then "saw [complainant] on top of [Petitioner]" and heard complainant say "ouch."

When asked if she confronted Petitioner that night, sister stated that she did not because she was "so nervous" that she "didn't know what to do" and "was scared of the fact of what was happening." The next morning sister asked complainant if there was "anything going on" between her and Petitioner, to which complainant responded that there was not.

According to sister, the sexual relationship between complainant and Petitioner continued while in Hawaiʻi. After moving back to Hawaiʻi, sister confronted Petitioner about his involvement with complainant, to which he responded that "it was his culture and that [sister] was ruining his culture because he's Native American. And that in the mainland, they used to do that all the time, hold hands and nobody said anything." Sister testified that, in Hawaiʻi, "[w]herever [Petitioner and complainant] went, they were always together. They were always

holding hands. You know, his arms was [sic] always around her or her arms around him. And they were still taking showers together." When she asked Petitioner about this, sister stated he became upset, "telling [her] that [she] was selfish and [she] was ruining everything . . . he wanted to do. And that [she] was interfering with both of them."

Sister also indicated that Petitioner had tried to "home school" complainant, and was taking complainant to work with him because, according to him, "she didn't want to be around the family." Sister observed that, at the Aloha Kona house, Petitioner would regularly go into complainant's area in the living room in the middle of the night to be with her.

B. Complainant

1.

Complainant recounted that she moved to South Dakota when she was eleven to live with sister and Petitioner. Her first sexual encounters with Petitioner occurred approximately four months after she moved to the mainland to live with Petitioner and sister. Initially Petitioner was the person who looked after her, picking her up from school and staying with her until sister came home. Complainant's testimony indicated that she and Petitioner began showering together, to which she acquiesced after he told her that sister "said it was okay."

When asked if complainant actually believed that sister had approved of her showering naked with Petitioner, she stated

that she did and that she "trusted him" when he told her that. Complainant said that while in the shower he asked her to touch his penis, and eventually inserted it into her vagina. According to complainant, Petitioner asked her if the penetration hurt, to which she responded that it had not hurt, despite asserting at trial that it did. When asked why she told Petitioner that it did not, complainant explained, "I was afraid if I told him the wrong answer, I guess." When asked if at the time she thought Petitioner's actions were similar to previous sexual abuse she experienced from her uncle, she answered, "Yes and no," and explained as follows:

> Yes because he was touching me, and it reminded me of what my uncle did. . . . And no because I was thinking it was okay. Still, it was in my mind that it was okay because he told me it was okay. . . . And I was still thinking about how[, according to Petitioner,] my sister was saying it was okay.

Complainant stated that, at that time, she felt like she "loved [Petitioner] as a brother[,]" but that there was something wrong about the relationship. According to complainant, Petitioner told her that, if she told anyone about their relationship, he would go to jail.

2.

Count 1 covered the time period in which complainant, sister, and Petitioner moved back to Hawai'i and lived in complainant's parent's house, also known as the Kamani Trees house. Complainant testified that at the time she had a close "[f]riendship" with Petitioner. She stated,

> I told him everything. [H]e [b]ought me stuff. If anytime there was an argument, like an argument between me and my sister or something, it seems like he stuck up for me. Or even when we got back to my parents, my parents -- all of us, we would argue about something or just have a disagreement, and he was always sticking up for me, like he was there for me.

(Emphasis added.) While staying in that house, complainant was sleeping in the same bed as sister and Petitioner and she recounted that her first sexual encounter with Petitioner in Hawai'i occurred while she was sleeping with Petitioner and sister. Complainant testified that she had sexual relations with Petitioner approximately three to five times per month in either the bedroom or the bathroom. She further related that any time she would have sexual intercourse with Petitioner, complainant would also "lick" or "suck" on Petitioner's penis to "get it wet with [her] saliva."

Count 2 related to the period of time when complainant lived with sister and Petitioner at the Aloha Kona house. At that time, complainant lived in a curtained off area in the living room. She testified that Petitioner had sex with her there "on more than one occasion[.]" Complainant reported that Petitioner would come into her curtained off area at night and ask if she wanted to have sex. She testified that Petitioner would also come into the area early in the morning before he left for work to have her braid his hair. According to complainant, during those times, he would talk to her, telling her "[h]ow much he loved [her]. What [sister] was doing, what they argued about, if they did. What -- how he [did not] like [complainant's]

parents, because sometimes [they] would bug [her] to go to school and [she] wouldn't." Complainant indicated Petitioner told her that her "parents [were] trying to take [her] away from him[,]" and that she believed him. She further recounted that she had sexual intercourse with Petitioner approximately once or twice a week, sometimes in complainant's area and sometimes in Petitioner's room. Complainant explained that at other times Petitioner would take her in the car to some other place to have sex with her.

Count 3 covered the period of time when complainant, sister, and Petitioner were living at the Pumehana house, again with complainant living in a curtained area. Petitioner's practice of driving complainant to other places to have sexual intercourse continued while they were living there, but the frequency of their sexual encounters had decreased. Complainant also testified that at that time, her relationship with sister deteriorated because they "were fighting for attention from [Petitioner]. Also, [sister] had a feeling of something [sic] was going between [complainant and Petitioner]." According to Complainant, she and sister rarely spoke to one another, and Petitioner was telling complainant that sister did not want her to be with Petitioner.

At trial, complainant indicated that she began to call Petitioner "[h]igna[,]" the Lakota Indian name for husband. Petitioner also told her that the men in the Lakota culture

typically "had two wives" who were sisters. When she tried to distance herself from him, complainant said she found it difficult because "[i]t still felt like [Petitioner] was in control of [her], like he was [her] dad or [her] brother[,] . . . an older person who was taking care of [her.]"

C. Petitioner

With regard to the allegations of prior bad acts occurring on the mainland, Petitioner testified that complainant came to live with him and sister when she was eleven. They enrolled complainant in a nearby school and Petitioner would pick complainant up after school each day and look after her in the afternoon. Petitioner described the swimming pool at their apartment complex in South Dakota, asserting that he and complainant would sometimes go with other friends and neighbors, but that he and complainant never went there by themselves. According to Petitioner, the showers at the pool were in the different bathrooms assigned for men and women, so they never showered together or at any other time.

Petitioner testified that when he, sister, and complainant moved back to Hawai'i, he wanted complainant to live with her parents, but complainant wanted to stay with him and sister. According to Petitioner, complainant did not feel close to her parents and they were not involved in her life. He also related that complainant wanted to be home schooled, and he and sister both helped her to do so. Petitioner testified to working

at several jobs, some of which required him to wake up early in the morning. He stated that sister braided his hair in the morning before he went to work, but that changed after her child was born, so Petitioner would go into complainant's room to have her do it. Petitioner denied having any "romantic liaison[s]" with complainant.

III.

As the commentary to HRE Rule 404 explains, the rule "operates to exclude generally evidence of a person's character 'for the purpose of proving that he acted in conformity therewith on a particular occasion.'" The reason for excluding character evidence is that it "'is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion.'" Commentary to HRE Rule 404 (quoting Advisory Committee's Note to Fed. R. Evid. Rule 404) (emphasis added). The HRE sets forth a two-step analysis for determining whether evidence of prior bad acts is admissible. "'Prior bad act' evidence under HRE Rule 404(b) is admissible when it is 1) relevant and 2) more probative than prejudicial. A trial court's determination that evidence is 'relevant' within the meaning of HRE Rule 401 (1993) . . . is reviewed under the right/wrong standard of review." State v. Fetelee, 117 Hawai'i 53, 62, 175 P.3d 709, 718 (2008) (quoting State v. Cordeiro, 99 Hawai'i 390, 403-04, 56 P.3d 692, 705-06 (2002)) (internal

citation, brackets, and ellipsis omitted) (emphasis added). The first step requires that the court determine whether the evidence is relevant. HRE 404(b)[7] provides, in part, that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." However, such evidence is admissible only when it is probative of a fact of consequence, i.e., a fact that is of importance to the determination of whether the crime occurred. Thus, if a defendant's motive, opportunity, intent or plan are not pertinent to whether the crime was committed, then proof of those facts is not relevant and the evidence may be excluded. If the evidence is relevant, i.e., probative of a fact of consequence, the second step is to determine, inter alia, whether the probative value outweighs the prejudicial effect of the evidence, the admission of the evidence would confuse the jury, or the presentation of such evidence was needlessly cumulative. Courts must balance the need for such evidence against the negative effects of its admission. In this regard, HRE 403 states:

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[7] HRE Rule 404(b) provides in relevant part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible where such evidence is probative of another fact that is of consequence to the determination of the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident.

(Emphases added.)

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(Emphases added.) As the commentary to HRE Rule 403 explains, "unfair prejudice" refers to "'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.'" (Quoting Advisory Committee's Note to Fed. R. Evid. Rule 403). This court has explained that

> a trial court's balancing of the probative value of prior bad act evidence against the prejudicial effect of such evidence under HRE Rule 403 . . . is reviewed for abuse of discretion. An abuse of discretion occurs when the court clearly exceeds the bounds of reason or disregards rules or principles of law to the substantial detriment of a party litigant.

Fetelee, 117 Hawai'i at 62-63, 175 P.3d at 718-19 (internal quotation marks and citations omitted) (ellipsis in original) (emphasis added). Moreover, this court looks to a number of factors in assessing the admissibility of evidence in determining whether its prejudicial effect outweighs its probative value.

> [I]n deciding whether the danger of unfair prejudice and the like substantially outweighs the incremental probative value, a variety of matters must be considered, including the strength of the evidence as to the commission of the other crime, the similarities between the crimes, the interval of time that has elapsed between the crimes, the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility.

State v. Castro, 69 Haw. 633, 644, 756 P.2d 1033, 1041 (1988) (brackets, internal quotation marks, and citation omitted).

IV.

In the instant case, the admission of Petitioner's uncharged prior bad acts was nothing more than evidence used to

show that Petitioner was a person of bad character. The testimony was admitted to establish that Petitioner had sexual relations with complainant prior to moving to Hawai'i, but was probative of nothing other than that fact. It permitted the jury to infer that Petitioner was predisposed to commit the offenses with which he was charged by placing before it evidence of prior incidents without establishing that the prior acts were probative of some other fact of consequence. As the commentary to HRE Rule 404 explains, evidence of this type "'distract[s] the trier of fact from the main question of what actually happened on the particular occasion.'" (Quoting Advisory Committee's Note to Fed. R. Evid. 404.) This "subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened." Id. (internal quotation marks and citations omitted). Inasmuch as such evidence presents the risk that the jury convicted Petitioner on an improper basis, it should not have been admitted.

As previously noted, the purposes for which the jury could consider evidence of prior bad acts as set forth in the court's written order differed from those in the jury instruction. The court's order granting Respondent's Motion to Reconsider in part concluded that the evidence of prior bad acts occurring outside of this state was relevant to show "motive, opportunity, and plan[.]" However, the court's instruction to

the jury stated it could consider the evidence of the prior bad acts for the purposes of establishing "motive, opportunity, and intent." The majority concludes that the evidence was a fact of consequence only with regard to Petitioner's opportunity to engage in sexual relations with complainant and does not address whether the evidence was relevant to proving motive, plan or intent. Majority opinion at 29. However, the jury could have convicted based on the erroneous view that motive, opportunity, and intent were relevant, and that the prior acts were probative of such matters. Because I conclude that the prior bad acts were not relevant to any of the aforementioned bases for admitting them, I briefly discuss motive, plan, and intent.

A. Motive

Motive was not a fact of consequence inasmuch as Petitioner's reasons for engaging in prior sexual acts with complainant, out of state, were not relevant to proving that the acts in Hawai'i occurred. "'[E]vidence of motive is admissible to prove the state of mind that prompts a person to act in a particular way; an incentive for certain volitional activity. Thus, proof of motive may be relevant in tending to refute or support the presumption of innocence.'" Fetelee, 117 Hawai'i at 84, 175 P.3d at 740 (quoting State v. Renon, 73 Haw. 23, 37, 828 P.2d 1266, 1273 (1992)) (emphasis added). In the instant case, the "volitional activity" alleged was that Petitioner engaged in a sexual relationship with a minor. Respondent does not identify

how Petitioner's motivation in committing the offenses in Hawai'i was a fact of consequence in determining his guilt and makes no discernable argument as to how Petitioner's alleged prior conduct was probative of motive. The issue at trial was whether Petitioner "knowingly engaged" in such conduct, see HRS §§ 707-730(1)(c) (Supp. 2006) and 707-732(1)(c) (Supp. 2006), and not Petitioner's underlying motivation or "incentive" to do so. Thus, the evidence was not relevant on that basis, and the court erred in allowing the jury to consider it for that purpose.

B. Plan

Plan was not a fact of consequence inasmuch as Petitioner's prior conduct out of state was not indicative of a design or scheme designed to culminate in the charged offenses in Hawai'i. Although the court's written order concluded that the evidence of prior bad acts was "relevant to show [a] plan[,]" the jury was not instructed that it might consider the evidence of Petitioner's prior conduct as part of an overall plan to commit the acts. Regardless of that fact, the evidence of prior bad acts was not probative of an overall plan and should not have been admitted on that basis.

This court has explained that evidence is relevant if it shows "a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others[.]" State v. Iaukea, 56 Haw. 343, 350, 537 P.2d 724, 730 (1975) (internal quotation marks and citation

omitted). In contrast, the evidence of prior sexual relations between Petitioner and complainant only served to establish that Petitioner acted in conformity with his prior conduct. Nothing in the evidence indicates that Petitioner's actions in South Dakota were part of an overall plan and preparation in order to commit the charged acts in Hawai'i. Nor was establishing any such plan on the part of Petitioner a necessary logical step to establishing that he committed the offenses in Hawai'i. Consequently, the court erred in admitting the evidence on that basis.

C. Intent

"Intent refers to the state of mind with which an act is done or omitted[.]" Renon, 73 Haw. at 36, 828 P.2d at 1272 (citing Black's Law Dictionary 810 (6th ed. 1990)). As discussed supra, the offenses relating to Petitioner's sexual relationship with complainant required that Petitioner "knowingly" engage in such conduct. Respondent maintains that the evidence of prior bad acts demonstrates that Petitioner had the intent to engage in sexual relations with complainant. (Citing State v. Torres, 85 Hawai'i 417, 945 P.2d 849 (App. 1997).) In Torres, the defendant was accused of subjecting a minor witness to sexual penetration with his finger while bathing her. Id. at 422, 945 P.2d at 854. Although he denied the penetration, the defendant did not deny touching the complaining witness's vagina while bathing her, but asserted that it was not done with any "'bad intentions.'" Id.

at 420, 945 P.2d at 852. The circuit court admitted evidence that the defendant had initiated physical contact of a sexual nature with the complaining witness on prior occasions to establish that the defendant had "knowingly" penetrated the victim, as was required by the statute. Id. The ICA affirmed the admission of such evidence, concluding that "the admitted bad acts were certainly relevant and probative to show" that the defendant had "prompted" the complaining witness to take a bath and had bathed her with the intent to engage in the prohibited conduct. Id. at 422, 945 P.2d at 854. Put another way, because the defendant denied having the requisite state of mind to commit the act, his intent was directly relevant to the determination of his guilt.

In the instant case, Petitioner did not deny having the requisite state of mind, but rather, he denied having engaged in sexual intercourse or any sort of sexual contact with complainant at all. He made no attempt to base his defense on an absence of the requisite state of mind. Therefore, intent was not a fact of consequence to the determination of whether the crimes in this case occurred and the court erred in allowing the jury to consider the evidence of prior bad acts for that purpose. See State v. Eastman, 81 Hawai'i 131, 141, 913 P.2d 57, 67 (1996) (citation omitted).

V. Opportunity

The majority maintains that opportunity was a fact of consequence in determining Petitioner's guilt. According to the majority, 1) the evidence of sexual relationship with complainant was "relevant to establish [Petitioner's] opportunity to engage in the sexual contacts in Hawai'i without being detected[,]" majority opinion at 30, and 2) despite an absence of relevant Hawai'i precedent, case law from other jurisdictions supports the conclusion that the evidence was relevant to prove opportunity[,] id. at 33.

A.

The majority asserts that the first instance of sexual contact between Petitioner and complainant while they were "sleeping in the same bed with" sister, id. at 29, was the culmination of the complainant being "acclimated to the sexual contact[,]" id. at 32. According to the majority, without the evidence of an already-established relationship, "it would be implausible that [Petitioner] could suddenly engage in sexual intercourse with [complainant] in a house they shared with her family while [] sister slept in the same bed, without [complainant] reporting it." Id. at 29. The majority's characterization of the situation is incorrect.

Complainant's testimony regarding her relationship with Petitioner at the time they moved back to Hawai'i renders their subsequent sexual relationship entirely explicable. As recounted

before, the Hawai'i evidence indicates Petitioner and complainant slept in the same bed, lived in the same homes, took showers together, and held hands in public. As complainant testified, "[she] told him everything." Petitioner ingratiated himself with her by buying her presents and supporting her in arguments with her family. Complainant testified that "if anytime there was an argument . . . between [complainant] and [] sister or something, it seem[ed] like he stuck up for [complainant]." Complainant felt like Petitioner was "there for [her]." Petitioner said having two sisters as wives was part of his culture, he took complainant to work with him, and complainant began to call Petitioner "higna," or husband.

The Hawai'i evidence amply explained how Petitioner was able to establish a submissive sexual relationship with complainant and thus avoided detection. Such evidence also "established [that] a relationship of trust and control," majority opinion at 38, had developed without any reference to prior out-of-state evidence. Under the evidence, Petitioner's "opportunity" to commit the offenses in Hawai'i arose because of his physical and familial proximity to complainant, complainant's difficult family relationships, complainant's dependence on Petitioner, and complainant's fear that Petitioner would be sent to jail if she told others of their relationship. Whether complainant became "acclimated" or not, id. at 32, (assuming the relevance of this) the Hawai'i evidence of proximity and

dependence was more than sufficient to explain the nature of the relationship.

Petitioner obviously could not have had a sexual relationship without the "opportunity" to do so. All that was required was complainant's close physical presence and her acquiescence stemming from the circumstances recounted above.[8] This made Petitioner's hesitance to report Petitioner plainly understandable. As discussed further infra, Respondent's expert witness, Dr. Alex Bivens (Dr. Bivens), also testified that in the majority of cases, those who are sexually abused by family members do not report such abuse. Obviously, complainant's hesitance to alert others was consistent generally with the behavior of abuse victims.

Ultimately, the only distinction between the sexual acts that occurred in Hawai'i and those in South Dakota and Washington is that they were located in different states. Both the acts that occurred in other states and those occurring within this state went undetected. That Petitioner was able to avoid detection in different states was not probative of Petitioner's ability to engage in similar acts while living with other family members in Hawai'i so much as it was a manifestation of the

[8] The majority's reference to a "false impression" that the first sexual contact took place at Kamani Trees, majority opinion at 36, seems unconnected to any material fact. That sexual contact took place at Kamani Trees is what was charged. Hence, whether the exclusion of prior acts would lead to such a "false impression" is not relevant to the charge and assumes what is in question -- the necessity of introducing prior bad acts.

syndrome common to sex abuse victims as described by Dr. Bivens. Prior act evidence was improper in that it only tended to indicate that Petitioner was acting in conformance with those acts. Thus, the evidence of prior bad acts was not probative of any fact of "consequence to the determination of" Petitioner's guilt. HRE Rule 404(b).

B.

The majority maintains that "cases from other jurisdictions" with similar evidence rules "have held that such evidence is admissible[.]" Majority opinion at 33. However, cases cited by the majority do not relate directly to opportunity. According to the majority, evidence may be admitted "to show that the defendant had a plan (to gain the child's trust and acquiescence), engaged in preparation (by seducing and testing the child) and did so in order to have the opportunity to engage in sexual conduct with the child without being detected." Id. at 34 n.22. Thus, the majority attempts to broadly apply otherwise inapposite cases by asserting that the factors in those cases, such as plan and preparation, "overlap[]" with opportunity. Id.

As previously explained, plan and preparation are not facts of consequence to Petitioner's guilt for the charged offenses. Moreover, as noted supra, the jury was not instructed that it may consider the evidence of prior bad acts for the purposes of plan and preparation. The court instructed the jury

that "[s]uch evidence may be considered on the issues of [Petitioner's] motive, opportunity, and intent and for no other purpose." (Emphasis added.) Yet, in citing these cases, the majority advances plan and preparation as legitimate bases for considering the evidence in connection with opportunity. Id. Finally, the cases apply the factors in ways that conflict with the prohibition in HRE Rule 404 against the use of character evidence.

The majority cites State v. Cox, 169 P.3d 806 (Utah Ct. App. 2007). Id. at 37. In that case, the Utah Court of Appeals's conclusion that "an ongoing behavior pattern which included [the defendant's] abuse of the victim" is admissible "to establish a specific pattern of behavior by the defendant toward one particular child, the victim[,]" Cox, 169 P.3d at 814 (internal quotation marks and citation omitted), runs directly counter to HRE Rule 404, which expressly prohibits evidence from being admitted simply to show that a defendant acted in conformity with previous acts. The "behavior patterns" that the majority refers to in Cox are little more than character evidence establishing that Petitioner was disposed to engage in such conduct. Indeed, in contrast to HRE Rule 404, Utah Rules of Evidence (URE) 404(c) expressly permits the admission of "[e]vidence of similar crimes in child molestation cases" to prove "a person's character or a trait of character[.]" This broad exception to the rule against character evidence directly

conflicts with HRE Rule 404. Inexplicably, the majority relies on a case that is clearly inimical to HRE Rule 404. Applying Cox, evidence of the out-of-state conduct would allow the jury to improperly decide that Petitioner had sexual relations with complainant in Hawai'i based on his allegedly having committed similar acts on prior occasions.

The majority also cites to the Utah Supreme Court's decision in State v. Reed, 8 P.3d 1025 (Utah 2000), majority opinion at 33, which concluded that the defendant's uncharged prior bad acts were admissible because it showed a "pattern" in which the defendant "intensely pursued the victim over a three-and-a-half-year period in order to gain opportunity to commit the unlawful sexual acts[,]" Reed, 8 P.3d at 1030. However, Reed also conflicts with the HRE in the same way that Cox did, inasmuch as it also concludes that a general "pattern of behavior[,]" including prior instances of sexual relations with the victim, was probative of the defendant's "opportunity" to engage in the charged offenses. Id. Reed reaches this conclusion by relying on URE Rule 404, which again directly conflicts with the HRE Rule 404 prohibition against character evidence.

The majority additionally cites State v. Baptista, 894 A.2d 911 (R.I. 2006), in which the Rhode Island Supreme Court admitted evidence of prior uncharged sexual relationship with the victim "'to show the defendant's intent and lewd disposition

toward the particular child victim[.]'" Majority opinion at 33 (quoting Baptista, 894 A.2d at 915-16) (emphasis added). However, as the discussion supra explains, Petitioner's intent in this case was not a fact of consequence. Furthermore, "disposition" is synonymous with "character." See Burton's Legal Thesaurus 70 (Regular ed. 1981). To reiterate, HRE Rule 404 prohibits the use of a defendant's "character or a trait of a person's character . . . for the purpose of proving action in conformity therewith on a particular occasion[.]" Yet, according to Baptista, a defendant's "lewd" character does not fall within the prohibition against character evidence provided that the evidence shows the character trait was being directed "toward the person alleging the acts of sexual assault." 894 A.2d at 915. Inasmuch as evidence in Baptista went to the defendant's character and his intent, that case is inapposite.

The majority finally cites State v. Paul, 769 N.W.2d 416 (N.D. 2009), which affirmed the "'trial court's admission of evidence that defendant made [the] complaining witness watch 'nasty movies' and engaged in sexual conduct with her in another state prior to the charged conduct as probative of plan and preparation[.]'" Majority opinion at 33-34 (quoting Paul, 769 N.W.2d at 425-26) (emphasis added). However, as explained supra, plan or preparation was not a fact of consequence in the instant case, inasmuch it cannot be said reasonably that Petitioner's prior uncharged instances with complainant demonstrate a plan to

engage in further sexual conduct with complainant in Hawai'i, and the court did not instruct the jury that it could consider the evidence for those purposes. Such evidence is a pretext for admitting prior bad acts to show that Petitioner later acted in conformity with that conduct.

VI.

Assuming, arguendo, the relevance of the evidence of prior bad acts, the risk of prejudice resulting from jury hostility, jury confusion and cumulativeness obviously outweigh its admission. The majority concludes that the probative value of the prior bad acts outweighed any prejudice. However, the majority asserts that absent the evidence of prior bad acts, it "would have been inexplicable" 1) for complainant to not cry out or report the first instance in Hawai'i where Petitioner engaged in sexual acts with her while sleeping in the same bed with sister, and 2) for Petitioner to "suddenly engage in such conduct after having lived in close proximity for three years." Majority opinion at 36-37. According to the majority, evidence of prior bad acts was necessary to explain Petitioner's relationship with complainant. However, an examination of such evidence in the context of HRE Rule 403 demonstrates that the majority overstates the need for that evidence and disregards the substantial prejudice in admitting such evidence.

A.

HRE Rule 403 provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" "This court has explained that '[u]nfair prejudice' 'means an undue tendency to suggest [a] decision on an improper basis, commonly, though not necessarily, an emotional one.'" State v. St. Clair, 101 Hawai'i 280, 289, 67 P.3d 779, 788 (2003) (quoting Tabieros v. Clark Equip. Co., 85 Hawai'i 336, 375 n.22, 944 P.2d 1279, 1318 n.22 (1997)) (emphasis added). In determining whether unfair prejudice substantially outweighs the probative value of evidence of prior bad acts,

> the trial court must weigh a variety of factors before ruling it admissible. These include "the strength of the evidence as to the commission of the other crime, the similarities between the crimes, the . . . time that has elapsed between [them], the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility.

State v. Pinero, 70 Haw. 509, 518, 778 P.2d 704, 711 (1989) (quoting E.W. Cleary, McCormick on Evidence § 190, at 565 (3d ed. 1984) (footnotes omitted)) (emphasis added). In the instant case, unfair prejudice against Petitioner plainly outweighed the probative value of the evidence.

The first factors do not weigh against exclusion of the evidence inasmuch as 1) "strength of the evidence" for both prior bad acts and acts occurring within this state is largely the same due to being provided by the same witnesses; 2) both sets of evidence were similar, pertaining to the same individuals and

relations; and 3) the time between the incidents was not great. However, the factors regarding "the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility[,]" id., compel the conclusion that the court abused its discretion in admitting the evidence.

B. Efficacy of Alternative Evidence

Evidence regarding uncharged prior bad acts occurring outside of this state was unnecessary inasmuch as the presence of alternative evidence, i.e., evidence of acts within this state, was more than ample to establish Petitioner's guilt for the charged offenses. Efficacy of alternative evidence refers to the "availability of other evidence on the same issues[.]" HRE Rule 403 cmt. In the instant case, the evidence relating to acts that occurred in Hawai'i satisfied this requirement, inasmuch as such evidence was far more probative of the charged offenses. The majority concedes that "the conduct in South Dakota was in substance the same as that in Hawai'i, i.e., alleged sexual contact between [complainant] and [Petitioner]." Majority opinion at 36. However, the Hawai'i evidence also explained how Petitioner was able to engage in sexual relations with complainant while living with others as to the acts actually charged. Assuming, arguendo, that it was necessary to show Petitioner's opportunity to obtain complainant's acquiescence and to avoid detection, the evidence relating to acts in Hawai'i was

far more effective in explaining Petitioner's ability to commit the charged offenses.

1. Kamani Trees House

As noted before, Count 1 covered the period when Petitioner, complainant, and sister lived at the Kamani Trees house with other members of complainant's family. Complainant testified that at the time that she, sister, and Petitioner moved back to Hawai'i and lived in the Kamani Trees house with complainant's parents, she had a close "[f]riendship" with Petitioner. She confided in Petitioner, he bought her presents, "and he was always sticking up for [her], like he was there for [her]." Manifestly, then, their relationship was one of trust, support, and confidence, positioning Petitioner as someone who was the central figure in her life. Complainant's failure to cry out or report the first time Petitioner sexually assaulted her in Hawai'i while sleeping in the same bed with sister was understandable when viewed in the context of how she felt towards Petitioner at that time. Complainant emphasized her need for Petitioner's affection, his help in coping with her troubled relationship with her parents, as well as his role as a supportive friend. The jury could easily infer from their close physical proximity of sleeping in the same bed and living in the same house, and their close personal relationship that she would submit to his advances and not inform others of their relationship. Moreover, the strained relationships she had with

her sister and parents made her unwillingness to report such conduct entirely comprehensible under the circumstances. The other instances of Petitioner's sexual relations with complainant were more surreptitious. Complainant testified that she had sexual relations with Petitioner approximately three to five times per month while living in the Kamani Trees house in either the bedroom or the bathroom while others were not present.

2. Aloha Kona House

Count 2 related to the period of time when the complainant lived with sister and Petitioner at the Aloha Kona house. Complainant's testimony relating to the Aloha Kona house shows how Petitioner continued his pursuit of complainant by lavishing her with attention and affection. She testified that Petitioner would come into her curtained off area early in the morning before he left for work to have her braid his hair and talk to her, telling her "[how much he loved [her]." Petitioner continued to create conflict between complainant and her family. According to complainant, Petitioner would tell complainant what "sister was doing, what they argued about, if they did," and that her "parents [were] trying to take [her] away from him[.]" The evidence for Count 2 also established that Petitioner would come into her curtained off area to have sex with complainant at night once or twice a week. Again, this evidence demonstrated how he obtained complainant's acquiescence to sexual acts and avoided detection.

3. Pumehana House

Count 3 covered the period of time when complainant, sister, and Petitioner were living at the Pumehana house, again with complainant living in a curtained off area. Complainant testified that as a result of her closeness with Petitioner, her relationship with sister deteriorated. Petitioner told complainant that sister did not want them to be together. At trial, complainant recounted that she began to call Petitioner "[h]igna[,]" the Lakota Indian name for husband. When complainant tried to distance herself from Petitioner, she found it difficult because "[i]t still felt like [Petitioner] was in control of [her], like he was [her] dad or [her] brother . . . [or] an older person who was taking care of [her.]" Given complainant's view of Petitioner, it would not be surprising that she did not report the abuse. Complainant's references to Petitioner as a companion and husband made her submission to Petitioner manifestly understandable to the jury.

4.

Underlying Counts 1-3 is the evidence that sister did little to prevent the abuse or act on her suspicions, creating the opportunity for Petitioner to engage in sexual acts with complainant. With regard to the Hawai'i evidence, sister testified that she confronted Petitioner about his behavior towards complainant. Sister recounted seeing Petitioner holding hands and kissing complainant, and asserted that they were taking

showers together. When sister approached Petitioner about his conduct, she said that he became angry with her. However, she maintained that Petitioner stopped showering with complainant after being confronted. She also knew that Petitioner was going into complainant's room in the middle of the night, but made no attempts to prevent this conduct. Petitioner continued treating complainant like a wife, sending her notes saying he loved her, and wearing rings they had given to each other. When sister asked Petitioner if she and Petitioner could move away but not take complainant with them, Petitioner refused.

Sister's testimony established an emotionally abusive relationship in which she was competing with complainant for Petitioner's affection. Moreover, it plainly explained how Petitioner's advances toward complainant were either ignored by sister or were met with no serious challenge. Sister related numerous instances of Petitioner's conduct that manifested Petitioner was having a sexual relationship with complainant, but sister made no meaningful attempt to curb the behavior, alert others, or separate the two. Plainly, sister's self denial in closing her eyes to Petitioner's behavior is probative of how Petitioner had the opportunity to commit the acts in Hawai'i. Because sister was not actively intervening further explains why complainant did not report the sexual acts. Petitioner was the principle authority figure in their household, and, as was apparent from her own testimony, sister's unwillingness to

address the issue was apparent. Obviously, then, the evidence of acts within this state constituted substantial alternative evidence of Petitioner's sexual relations and the circumstances that permitted Petitioner to avoid detection. Consequently, the efficacy of the evidence of acts occurring in Hawai'i would exclude prior bad acts evidence.

5.

Additionally, complainant's and sister's testimony regarding the circumstances in Hawai'i provided an abundance of evidence to explain how Petitioner was able to engage in sexual acts with complainant without being reported. It established that complainant had a close relationship with Petitioner and submitted to the sexual relationship. It also revealed that the difficulties complainant had in moving back to Hawai'i and living with her family contributed to fostering such a relationship. The efficacy of this evidence in establishing Petitioner's dominance over complainant and his ability to have unreported sexual relationships would appear self-evident.

Furthermore, the superiority of the Hawai'i evidence is clear because it related directly to the charged offenses. Evidence of conduct occurring within this state provided sufficient alternative evidence to the prior act evidence to support the convictions and to explain why complainant consented to Petitioner's sexual advances and did not resist or inform others. Such evidence was efficacious in and of itself. In

light of the foregoing, the majority's assertion that Petitioner's conduct of "suddenly engag[ing]" in sexual acts after having lived with complainant for three years would have been "inexplicable," majority opinion at 37, is incorrect.

The Hawai'i evidence detailed Petitioner's role as the central figure in complainant's life. The testimony regarding acts occurring outside of this state portrayed Petitioner in much the same way. Plainly, testimony relating to Petitioner's ability to take advantage of his position of influence in complainant's life while in Hawai'i was more than simply alternative evidence of the prior acts occurring outside of Hawai'i. The evidence of prior bad acts had no value other than to show that Petitioner had a propensity to engage in such acts in violation of HRE Rule 404.

C. Need for the Evidence

1.

According to the majority, there was a "strong need" for the evidence to explain complainant's failure to report her first sexual contact with Petitioner while "sister slept nearby" and to explain why Petitioner would suddenly engage in sexual acts with complainant. Id. at 36-37. In reaching this conclusion, the majority relies in part on the testimony of Dr. Bivens, to the effect that child sexual offenders establish a relationship by a process of "seduction and testing." Id. at

30.[9] The majority refers to Dr. Bivens's testimony that sexual abusers slowly acclimate their victims to increasing sexual contact prior to obtaining their submission. Id. at 30-31. According to the majority, evidence of prior bad acts was needed to demonstrate this pattern. Id. at 36-37. The majority asserts that if evidence of Petitioner's first sexual act with complainant in Hawai'i were presented without the context of their prior relationship, it would have been inexplicable and not fit the pattern explained by Dr. Bivens. Id.

However, Dr. Bivens testified only to general patterns and was not aware of the specific facts of the case, nor had he "heard any evidence" regarding what had "been alleged" against Petitioner. As a result, he was not in a position to explain Petitioner's actions, the nature of his relationship to complainant, or to discuss why complainant might have consented to Petitioner's first advances in Hawai'i, much less the necessity for prior act evidence. Nevertheless, Dr. Bivens did testify as to the tendency of victims to refrain from informing others about abuse. Dr. Bivens reported that approximately two-

[9] I note that the majority refers to this testimony primarily in its section on relevance. However, the majority's conclusion that the prior bad acts were relevant to show opportunity also relates to the majority's analysis as to why that evidence was needed to show opportunity. For the sake of avoiding repetition, Dr. Bivens's testimony is addressed with regard to the need for the evidence.

The majority's claim that evidence was needed to dispel "the false impression" that the first sexual contact took place at Kamani Trees, majority opinion at 36, is rebutted supra. Another "false impression" claim by the majority concerning "the actions" of the complainant, id. at 38, would appear to generally encompass all its contentions.

thirds of those who were sexually abused do not disclose the abuse until after they are eighteen years old, and that most of those who do disclose abuse, do so to a parent. According to Dr. Bivens, studies concluded that some of the primary reasons for delayed reporting were shame, repression, the belief that telling would not help, and fear of the impact that the disclosure would have on the family.

It is evident from Dr. Bivens's testimony that evidence of prior bad acts was not necessary to explain complainant's situation. Dr. Bivens's testimony provided support for the proposition that complainant's conduct was typical of many victims inasmuch they often do not report incidents of sexual abuse. As the majority's own recitation of facts discloses, complainant's relationship with Petitioner was one in which he was a loved and trusted authority figure whom she relied on for support. Id. at 35-36. Similarly, the discussion supra of Petitioner's efforts to exert influence over complainant account for her acquiescence. Viewed in the context of her relationship with Petitioner, complainant's failure to report the incidents of sexual intercourse in Hawai'i is entirely understandable and consistent with Dr. Bivens's testimony. Dr. Bivens's explanation of the reasons most child victims do not report provides a clear context for complainant's and sister's testimony on that subject. Complainant's age, her level of dependence on Petitioner, and the fear that Petitioner would go to jail, would explain how it was

possible for Petitioner to engage in the acts and avoid being reported.

Again, assuming the relevance of the prior bad acts to prove opportunity, there was no need for prior acts evidence to explain "sudden" sexual acts with complainant. Petitioner's opportunity to commit the acts alleged in Hawai'i was shown by his physical proximity to complainant and his relationship with her, proof of which was supplied by considerable evidence regarding the acts in Hawai'i. On the other hand, the prior act evidence would only result in an "undue tendency to suggest [a] decision on an improper basis[.]" St. Clair, 101 Hawai'i at 289, 67 P.3d at 788.

2.

The majority relies on this court's decision in Iaukea to support its conclusion that the need for the evidence in this case outweighed the prejudice of its admission. Majority opinion at 37. In Iaukea, the defendant was convicted of, inter alia, "rape in the first degree [and] sodomy in the first degree[.]" 56 Haw. at 345, 537 P.2d at 727. The complaining witness was a social worker who first came into contact with the defendant when the complaining witness worked on the defendant's previous rape case. Id. at 346, 537 P.2d at 727-28.

In the course of assisting the defendant, the complaining witness became familiar with the defendant's criminal record, including past assaults and the rape charge, "and

obtained a great deal of information about[] his family background and social problems." Id. at 346, 537 P.2d at 728. Iaukea concluded that the complaining witness's testimony regarding the defendant's prior bad acts was "essential" to help explain the complaining witness's "calm manner and lack of screaming" as well as "why the complaining witness offered to drive the defendant to his aunt's house, so as not to draw the erroneous conclusion that she was his voluntary social companion." Id. at 352, 537 P.2d at 731. In Iaukea, the "erroneous conclusion" that the testimony of prior bad acts was intended to dispel was that the complaining witness's actions in giving the defendant a ride and not screaming or struggling was the result of her consenting to have sexual relations. Id.

In contrast, the instant case does not present the need to admit evidence of prior conduct. Complainant's submission to Petitioner's sexual conduct was entirely comprehensible in light of their relationship. As already recounted, consent was not at issue inasmuch as Petitioner denied having sexual intercourse or sexual contact with complainant, and complainant's testimony indicated that the incidents occurring in Hawai'i were consensual.[10] Moreover, evidence of consent would have no

[10] In this case, consent is not a defense to either the charged offense of sexual assault in the first degree or the lesser included offense of sexual assault in the third degree. HRS § 707-730(1)(c) states in relevant part that "[a] person commits the offense of sexual assault in the first degree if . . . [t]he person knowingly engages in sexual penetration with a person who is at least fourteen years old but less than sixteen years old[.]" HRS § 707-732(1)(c) states in part that "[a] person commits the offense of sexual assault in the third degree if . . . [t]he person knowingly engages in (continued...)

probative value inasmuch as consent would not have negated any of the elements necessary to convict in Petitioner's case. On the other hand, the offenses in Iaukea required proof of "forcible compulsion" to convict, which could be negated by consent. Id. at 348 n.2, 537 P.2d at 729 n.2. Thus, there was no need for the evidence of Petitioner's prior bad acts that would outweigh the prejudice of its admission.

C. Rousing Overmastering Hostility

Here, the evidence of the conduct in Hawai'i, as the majority concedes, proved the same overall conduct of sexual relations with complainant. Majority opinion at 38-39. This abrogated the need for such evidence. However, assuming arguendo such need, the evidence of prior bad acts was highly prejudicial and likely to "rouse the jury to overmastering hostility." Pinero, 70 Haw. at 518, 778 P.2d at 711. Such evidence would interfere with the jury's ability to determine guilt solely on the basis of the acts that occurred in Hawai'i and not those occurring in other states. As the majority states, "The primary difference between the sexual conduct in Hawai'i and that in South Dakota was that the South Dakota conduct occurred while [complainant] was several years younger, and, according to [complainant], occurred more frequently than in Hawai'i."

(...continued)
sexual contact with a person who is at least fourteen years old but less than sixteen years old or causes the minor to have sexual contact with the person[.]"

Majority opinion at 39 (emphases added). Evidence of sexual intercourse with an eleven-year-old minor would appear more disturbing and inflammatory than evidence of sexual relations with an older person. Nevertheless, the majority attempts to minimize the inflammatory nature of such evidence by arguing that "[Respondent] did not argue in closing that [complainant's] age at the time of the South Dakota contacts made [Petitioner's] conduct more culpable or reprehensible[.]" Id.

The majority cites to nothing supportive of its view that the prejudicial effect of admitting such evidence was contingent on Respondent using it in closing argument. As previously explained, a large portion of complainant's and sister's testimony detailed acts of sexual abuse beginning when complainant was eleven years old. The prejudice occurred over the course of the testimony submitted at trial, and it is unreasonable to expect its impact to be limited to what was said in closing argument.

Nor can it be reasonably maintained that the effect upon the jury of the difference in complainant's age from when the acts began and the acts occurred in Hawai'i is negligible. "'[E]vidence of other sexual behavior is, by its very nature, uniquely apt to arouse the jury's hostility.'" State v. Haslam, 663 A.2d 902, 912 (R.I. 1995) (quoting State v. Jalette, 382 A.2d 526, 533 (1978)). Undoubtably, such evidence substantially increased the jury's hostility towards Petitioner and was likely

to "rouse the jury to overmastering hostility[.]" Pinero, 70 Haw. at 518, 778 P.2d at 711. Furthermore, the allegations that Petitioner engaged in sexual relations with complainant more frequently on the mainland were exceedingly prejudicial. Both the age of complainant and the frequency of the sexual assaults pertaining to the out-of-state acts would have "'an undue tendency to suggest decision on an improper basis[,]'" HRE Rule 403 cmt. (quoting Fed. R. Evid. Rule 403 advisory committee's note), inasmuch as such evidence suggests that Petitioner's prior sexual abuse of complainant was much more frequent when complainant was much younger.

Unlike the prior act evidence, the Hawai'i evidence avoided the risk that the jury would decide Petitioner's guilt on an improper basis, i.e., its visceral reaction to Petitioner's prior uncharged sexual acts with an eleven-year-old girl. Such evidence went only to prove Petitioner's character by showing that his actions in Hawai'i were in conformity with his acts in South Dakota and Washington, thereby violating the HRE prohibition against such evidence. In light of the minimal probative value of prior bad acts, and the substantial likelihood that Petitioner was unfairly prejudiced by evidence of the uncharged prior bad acts, the court abused its discretion in admitting that evidence.

D. Confusion of the Issues

HRE Rule 403 provides in part that "relevant[] evidence may be excluded if its probative value is substantially outweighed by the danger of . . . confusion of the issues[.]" During its deliberations, the jury submitted jury question 1, which asked, "To what purpose do we put the evidence and testimony from S. Dakota[?]" The court responded simply by referring the jury back to the instruction limiting the consideration of prior bad acts. The jury was given no further explanation with regard to that question. Transcripts of the proceedings do not indicate that the court gave the jury a cautionary instruction with regard to the purposes for which complainant's testimony of prior bad acts could be considered at the time she testified. The jury's confusion as to the introduction of prior bad acts is apparent from the jury's question even after it had been instructed on the use of such evidence.

Nevertheless, the majority maintains that Petitioner's "intensified efforts to maintain his relationship of trust and control with [complainant] after they returned from Hawai'i . . . would be likely to confuse rather than enlighten the jury absent the context provided by the prior conduct in South Dakota." Majority opinion at 38. To the contrary, the jury's question to the judge indicates that the prior act evidence was the cause of confusion. Details regarding the uncharged conduct were not

relevant to the charged offenses and obviously only served to distract the jury from the principle issue of Petitioner's guilt for the offenses that were charged.

Rather than confusing the jury as declared by the majority, Petitioner's "intensified efforts" to assert control over complainant established how Petitioner was able to assert himself as the central authority figure amidst complainant's dysfunctional family relationships. Petitioner's behavior, as testified to by complainant and sister, explained the matters that the majority maintains were inexplicable absent the evidence of prior bad acts. Given the minimal benefit derived from the evidence of prior bad acts and the disproportionate confusion it generated, as demonstrated by the jury's question to the court, the cost-benefit analysis plainly weighed in favor of excluding the evidence. "Evidentiary decisions based on HRE Rule 403, which require a 'judgment call' on the part of the trial court, are reviewed for an abuse of discretion." Walsh v. Chan, 80 Hawai'i 212, 215, 908 P.2d 1198, 1201 (1995) (citing Sato v. Tawata, 79 Hawai'i 14, 19, 897 P.2d 941, 946 (1995)). Hence, the court abused its discretion in admitting such evidence.

E. Cumulative Evidence

In addition to being highly prejudicial, evidence of prior bad acts was manifestly cumulative. Under HRE Rule 403, evidence that is needlessly cumulative of other evidence is excluded. "In order for evidence to be considered 'cumulative'

for HRE [Rule] 403 purposes, it must be substantially the same as other evidence that has already been received." State v. Pulse, 83 Hawai'i 229, 247, 925 P.2d 797, 815 (1996) (citing Aga v. Hundahl, 78 Hawai'i 230, 241, 891 P.2d 1022, 1032 (1995)). The majority's own discussion of the acts alleged makes it obvious that the prior bad acts and the charged offenses were "substantially the same[.]" Id. According to the majority, "[t]he conduct in South Dakota was of the same general type and involved the same complaining witness[,]" majority opinion at 38 (emphasis added), and "[t]he similarities between the crimes were strong, since the conduct in South Dakota was in substance the same as that in Hawai'i, i.e., alleged sexual contact between [complainant] and [Petitioner,]" id. at 36 (emphasis added). As noted supra, the evidence of uncharged prior bad acts and charged offenses both involved references to sexual relations between Petitioner and complainant in close proximity to a family member. Moreover, both the evidence of the uncharged prior bad acts and the charged offenses describe a situation in which Petitioner was the dominant figure exerting control in the lives of both complainant and sister. Inasmuch as evidence of acts in and out of state were "substantially the same[,]" Pulse, 83 Hawai'i at 247, 925 P.2d at 815 (citation omitted), presenting identical bases for explaining complainant's behavior was needlessly cumulative, and the court's failure to exclude the prior acts was an abuse of discretion.

VII.

Finally, Petitioner argues that the ICA gravely erred in affirming the court's conclusion that there was a rational basis to instruct the jury on the lesser included offense of sexual assault in the third degree. I agree that the ICA did not gravely err in ruling that there was a rational basis to instruct the jury on the lesser included offenses. In my view, however, the majority's assertion that the sexual contact underlying the sexual assault convictions may be inferred from evidence of sexual penetration is wrong.

The jury acquitted Petitioner of the greater offense of sexual assault in the first degree, which required proof that Petitioner "knowingly engage[d] in sexual penetration with" complainant, HRS § 707-730(1)(c) (emphasis added), and convicted on the basis that Petitioner "knowingly engage[d] in sexual contact with" complainant,[11] HRS § 707-732(1)(c) (emphasis

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[11] As noted by the ICA, an amendment to the definition of sexual contact took effect during the time period covering Count 3. Behrendt, 2009 WL 3653563, at *3. The definition of sexual contact prior to 2004 included "any touching of the sexual or other intimate parts of a person not married to the actor, or of the sexual or other intimate parts of the actor by the person, whether directly or through the clothing or other material intended to cover the sexual or other intimate parts." HRS § 707-700 (1993) (emphasis added). The amended definition of sexual contact states:

> "Sexual contact" means any touching, other than acts of "sexual penetration", of the sexual or other intimate parts of a person not married to the actor, or of the sexual or other intimate parts of the actor by the person, whether directly or through the clothing or other material intended to cover the sexual or other intimate parts.

HRS § 707-700 (Supp. 2004) (emphasis added). The amended definition of sexual contact applies to Count 3, whereas the prior definition applies to Counts 1 and 2. As the ICA explained, the legislative history behind the amendment to the definition of sexual contact

(continued...)

added). The majority concludes that Petitioner was guilty of engaging in sexual contact that occurred prior to the penetration for which Petitioner was found not guilty.

The jury's verdict of guilty of the lesser included offenses constitutes an implied acquittal for the greater offense. See, e.g., Green v. United States, 355 U.S. 184, 190 (1957). The only reasonable inference to be drawn from Petitioner's acquittals on the greater offenses of sexual assault in the first degree is that the jury determined that he did not penetrate complainant vaginally, anally, or orally.[12] Yet, the majority asserts that "a rational juror could have inferred that there was 'sexual contact' prior to the penetration[.]" Majority opinion at 45. This is impossible inasmuch as the jury's conclusion that Petitioner did not penetrate complainant would

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[11](...continued)
reveals an intent to overturn the result in State v. Mueller, 102 Hawai'i 391, 76 P.3d 943 (2003), and "to clarify the legislature's intent that the definition of 'sexual penetration' includes the acts of cunnilingus and anilingus whether or not actual penetration has occurred." 2004 Haw. Sess. Laws Act 61, § 2 at 302. Mueller prohibited the prosecution of sexual assault involving cunnilingus and anilingus as first-degree sexual assault absent proof of penetration. 102 Hawai'i at 394-97, 76 P.3d at 946-49.

Behrendt, 2009 WL 3653563, at *3.

[12] Complainant's testimony described numerous occasions falling within HRS § 707-700 (1993), which defined sexual penetration as "vaginal intercourse, anal intercourse, fellatio, cunnilingus, anilingus, deviate sexual intercourse, or any intrusion of any part of a person's body or of any object into the genital or anal opening of another person's body; it occurs on any penetration, however slight, but emission is not required." (Emphasis added.) An amendment to HRS § 707-700 in 2004, during the time period covered by Count 3 altered the definition of sexual penetration to include "[c]unnilingus or anilingus, whether or not actual penetration has occurred." HRS § 707-700 (Supp. 2004) (emphasis added).

preclude it from inferring that sexual contact occurred in the course of penetration.

Nevertheless, complainant did testify that, any time she and Petitioner had sexual intercourse, complainant would also "lick" or "suck" on Petitioner's penis to "get it wet with [her] saliva." Initially, the conduct appears to be fellatio inasmuch as that is defined as "the practice of obtaining sexual satisfaction by oral stimulation of the penis[,]" Webster's Third New Int'l Dictionary 836 (1966), and therefore falling under the definition of sexual penetration. However, inasmuch as licking would not constitute penetration, but rather is the "touching" of "sexual or other intimate parts[,]" it falls under the definition of sexual contact. HRS § 707-700. These conclusions would be consistent in that the jury may have disbelieved complainant's testimony with regard to intercourse but believed her statements regarding licking Petitioner's penis. Consequently, there was substantial evidence to support Petitioner's convictions for the lesser included offenses under Counts 1-3.

VIII.

In conclusion, the court erroneously admitted the evidence of uncharged prior bad acts inasmuch as the evidence only served to demonstrate that Petitioner was a person of bad character who "acted in conformity therewith." HRE Rule 404 cmt. Such acts were not relevant to Petitioner's motive, plan, intent, or opportunity; assuming, arguendo, their relevance, the

prejudice resulting from the evidence outweighed its probative value; the evidence likely resulted in juror confusion; and the evidence was unnecessarily cumulative. Furthermore, the convictions as to the lesser included offense of sexual assault in the third degree should not be inferred from sexual penetration. Therefore, I would vacate Petitioner's convictions and remand for a new trial on Counts 1-4.[13]

[13] I agree with Petitioner that there is a substantial likelihood that the unfair prejudice of admitting the evidence of uncharged prior bad acts also tainted the jury deliberations as to Count 4. It would be unreasonable that the prejudice engendered by the evidence of prior bad acts did not extend to the jury's deliberations on the charge of kidnapping. Thus, I would remand for a new trial on Count 4 also.