CONCURRING OPINION BY CIRCUIT JUDGE KIM, J.

I concur with the majority in both the holdings and the analysis supporting them on all issues in this case. I write separately only to comment briefly on Justice Nakayama's belief that "this court should hold that the trial court is not required to instruct the jury sua sponte as to every defense regardless of 'how weak,' and that such failure is not an 'instructional error' warranting appellate review under [State v. ]Nichols[, 111 Hawai'i 327, 141 P.3d 974 (2006)]." Dissenting op. by Nakayama, J. at 15. I do not believe that the majority opinion stands for the proposition implicit in the foregoing statement. I do not believe that it necessarily follows from the majority opinion that, as a matter of law, a trial court is hereafter required to instruct the jury sua sponte as to every conceivable defense suggested by the evidence in a given case.

First of all, I would contend that, for all reasonable intents and purposes, the defense in the instant case did essentially request a jury instruction on the mistake of fact defense when it mistakenly requested one on claim of right. As is made clear by the majority, the claim of right defense is, in fact, completely subsumed within the mistake of fact defense, being "logically encompassed" by the latter. It is, therefore, unsurprising that the specific arguments proffered by the defense at trial in support of its request for the claim of right defense actually were more appropriate to a request for the more generic mistake of fact defense. In effect, the defense had the theory right, but the specific instruction wrong, and the trial court,

while correctly recognizing the latter, mistakenly failed to recognize the former; thus, the resulting confusion and the subsequent instructional error in the case, further compounded by the Intermediate Court of Appeals' (ICA) erroneous analysis and holding on the issue.

The specter raised by Justice Nakayama's dissent of trial courts hereafter being responsible as a matter of law for combing through the entire body of evidence in search of every possible defense theory that may fit is, in my view, not warranted by the specific holding of the majority in this case, based as it is on the specific facts of this case, especially where, as here, the theory at issue formed the very heart of the defense case, rather than some nebulous, barely glimpsed theory on the margins. The errors by both the trial court and the ICA at issue in the present case were substantial and required correction, and the majority has done so.

Justice Nakayama's dissent suggests that, by its decision here, the majority has provided a standard for defense instructions set so low that a defendant can now "easily argue on appeal that the circuit court committed reversible error in failing sua sponte to issue every [possible] defense instruction regardless 'how weak.'" Dissenting op. by Nakayama, J. at 22. With respect, I do not believe that the majority has done this, nor do I believe that the instant opinion will lend more than scant support, if any, to such a hypothetical future defendant/appellant.