IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI, Respondent/Plaintiff-Appellee,

vs.

KEVIN C. METCALFE, Petitioner/Defendant-Appellant.

SCWC-30518

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. 30518; CR. NO. 09-1-0215)

March 19, 2013

DISSENTING OPINION BY ACOBA, J., IN WHICH CIRCUIT JUDGE SAKAMOTO, ASSIGNED BY REASON OF VACANCY, JOINS

In my view, Respondent/Plaintiff-Appellee State of Hawaiʻi (Respondent) failed to lay an adequate foundation to qualify either Dr. Anthony Manoukian (Dr. Manoukian) or Detective Walter Ah Mow (Ah Mow) as experts in the appropriate fields under the circumstances of this case, and, respectfully, the Circuit Court of the Third Circuit (the court) should have formally qualified both experts and established their areas of expertise

on the record or in the jury instructions.[1] I believe that the court acted conscientiously. However, because the court did not qualify these witnesses, see Hawaiʻi Rules of Evidence (HRE) Rule 702,[2] and did not establish for the jury these witnesses' fields of expertise, see id., the jury could not properly evaluate their testimony under the court's instruction on opinion testimony. Inasmuch as the testimony of these witnesses directly contradicted the testimony of Petitioner/ Defendant-Appellant Kevin C. Metcalfe (Petitioner), these errors substantially affected Petitioner's right to a fair trial and in my view constituted plain error. Therefore, I respectfully dissent.

I.

A.

Petitioner was charged with, inter alia, one count of

[1] The majority holds that "Dr. Manoukian's and [Ah Mow's] testimony satisfied the foundational requirements for expert testimony set forth in HRE Rule 702," Majority opinion at 45, and that "nothing in the HRE would preclude [the court] from declining to qualify a witness as an expert in front of the jury." Id. at 44.

[2] HRE Rule 702 provides:

> **Rule 702 Testimony by Experts.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. In determining the issue of assistance to the trier of fact, the court may consider the trustworthiness and validity of the scientific technique or mode of analysis employed by the proffered expert.

(Emphasis added.)

Murder in the Second Degree Hawaiʻi Revised Statutes (HRS) § 707-701.5(1) (1993).[3] Petitioner testified to the following matters. At approximately 10:30 p.m. on May 6, 2009, an alarm and a video surveillance monitor indicated someone was on his property cutting through a shade cloth in the greenhouse. Petitioner approached the area with his shotgun, which was loaded with birdshot. He then confronted decedent Larry Kuahuia (Decedent) and told him that he had a gun and to "get on the ground." However, Decedent "was low to the ground" and "crab walked," towards Petitioner until he was five feet away from Petitioner. Decedent then "all at once just [] jumped towards [Petitioner]," and "hollered [] real loud." According to Petitioner, he then shot Decedent in self-defense.[4] However, Decedent continued to move towards Petitioner, who then "stepped back," and shot Decedent again.

In closing argument, Defense Counsel's explanation as to why Decedent was shot in the back was that Decedent was "down

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[3] HRS § 707-701.5(1) (1993 Repl.) provides, in relevant part:

> (1) Except as provided in section 707-701, a person commits the offense of murder in the second degree if the person intentionally or knowingly causes the death of another person.

[4] Petitioner was convicted of the lesser included offense of Manslaughter in violation of HRS § 707-702(1)(a) (Supp. 2009), which provides:

> (1) A person commits the offense of manslaughter if:
> (a) The person recklessly causes the death of another person[.]

in that crab-walk position" and "charged" at Petitioner. Petitioner "stepped back" and "as he stepped back [Decedent] spun around to the left[,]" and Petitioner shot Decedent in his back "from a very close range." Defense Counsel also argued that "these shots were fired at a distance of probably [ten] to [fifteen] feet or less," because of the downward "slope" of the driveway after ten to fifteen feet, the straight angle of entry of the shots, the inability of the pellets to penetrate cardboard at sixty feet away, and there being a moving target and a moving shotgun.

B.

In contrast, Respondent presented evidence seeking to show that Petitioner shot Decedent in the back and from a distance of approximately sixty feet. Dr. Manoukian testified that he was a "forensic pathologist" and a "coroner's physician" licensed in the State of Hawaiʻi.[5] He also related that he had "some specialized training in . . . ballistics[6] with the Maryland State Crime Lab." He had performed "in excess of 3,000" autopsies, including "in excess of a hundred" cases in which the

[5] Dr. Manoukian further testified that a forensic pathologist uses "the general principles of [] pathology to [] determine through the study of human tissues and human fluids [] how someone was injured or how they died."

[6] "Ballistics" is defined as (1) "[t]he science of the motion of projectiles, such as bullets," or (2) "the study of a weapon's firing characteristics, especially as used in criminal cases to determine a gun's firing capacity and whether a particular gun fired a given bullet." Black's Law Dictionary 163 (9th ed. 2009).

cause of death was the result of an injury caused by a firearm. Dr. Manoukian testified that based on the diameter of the pellet injury, "the distance from the gun to [Decedent] [at the time of firing was] approximately [sixty] feet." When asked how he could calculate the approximate range of the distance between a gun and a victim of a gunshot wound, Dr. Manoukian cited to a "general rule of thumb" from "the textbooks of forensic pathology for a shotgun using birdshot[.]" However, under cross-examination, Dr. Manoukian admitted, "I'm not a firearms or a ballistic expert."

Ah Mow testified that he was a firearms instructor for the Criminal Investigative Section of the Hawaiʻi Police Department who had trained with the FBI on how to "conduct and view" basic shotgun training, including how to handle, maintain, and clean a weapon. Ah Mow related that his initial assignment in the investigation was to "be in charge of the scene" and "direc[t] our . . . evidence specialist at the scene on the 7th of May[.]" However, he had later conducted a shotgun pattern test to "determine the distance of . . . the shotgun as the pellets go through the barrel and make a spread pattern onto a target."

In closing argument, Respondent argued that Petitioner shot Decedent after "Decedent ran past him and down the driveway." According to Respondent "it [was] a straight-on shot in the back," and Decedent was "at least [forty] feet away from

[Petitioner] while running down a driveway." To support his contention, Respondent cited Dr. Manoukian's testimony and the spread pattern test conducted by Ah Mow to establish that "[Decedent] was past [Petitioner forty] feet down the driveway or more when he got shot."

C.

Prior to closing arguments, the court issued the following jury instructions regarding expert testimony:

> During the trial, you heard the testimony of one or more witnesses who are [sic] allowed to give opinion testimony.
>
> Training and experience may make a person qualified to give opinion testimony in a particular field. The law allows that person to state an opinion about matters in that field. Merely because such a witness has expressed an opinion does not mean, however, that you must accept this opinion. It is up to you to decide whether to accept this testimony and how much weight to give it. You must also decide whether the witness's opinions were based on sound reasons, judgment, and information.

(Emphases added).

II.

Petitioner maintains that the testimonies of Dr. Manoukian and Ah Mow were improperly admitted, because the witnesses were neither designated as lay witnesses under Hawaiʻi Rules of Evidence (HRE) Rule 701[7] nor as expert witnesses under

[7] HRE Rule 701 provides:

> **Rule 701 Opinion Testimony by Lay Witnesses.** If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness, and (2) helpful to a

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HRE Rule 702. He argues first that the admission of these testimonies into evidence "violated both HRE Rules 701 and 702, because [the witnesses] were both proffered as lay opinion witnesses," and a modified jury instruction "substituting the [term] 'opinion testimony' for the word 'expert,' makes clear, that the trial court viewed [the witnesses] as lay opinion rather than expert witnesses."

Second, Petitioner suggests that Respondent failed to qualify the two witnesses as expert witnesses under HRE 702, because "although both witnesses may have been 'qualified . . . as evidenced by their testimony on direct examination[,]'" (quoting State v. Metcalfe, No. 30158, 2012 WL 1071503, at *4 (App. Mar. 30, 2012), there was "no determination of the fields in which these witnesses would be considered experts and hence no guidance to the jury on the parameters for considering such testimony."

Respondent replies that "both [witnesses are] qualified by their knowledge, skill, experience, training, or education, as evidenced by their testimony on direct examination." (Quoting Metcalfe, 2012 WL 1071503, at *8-9.) Also, Respondent argues

[7](...continued)
clear understanding of the witness' testimony or the determination of a fact in issue.

(Emphasis added.)

that it did not proffer the witnesses as experts by identifying them as "experts" at trial because "[t]he trend around the country and in Hawaiʻi County is to avoid the use of the term 'expert.' . . . The use of the term 'expert' is rapidly disappearing in many courts around the country." Finally, before the Intermediate Court of Appeals (ICA), Respondent further argued that by failing to object to the testimony or seeking to voir dire the witnesses, Petitioner had "waived [the issue] unless the court committed plain error."

III.

Neither Dr. Manoukian nor Ah Mow were qualified to give expert testimony regarding the circumstances of Decedent being shot by Petitioner. Both witnesses were experts in a particular field. Dr. Manoukian was an expert in the field of forensic pathology, and Ah Mow was an expert in the field of firearms training. However, neither possessed expertise in the relevant field -- that of ballistics -- to render an expert opinion on the various scenarios offered at trial as to how Decedent came to be fatally wounded. Petitioner cited to State v. Torres, 122 Hawaiʻi 2, 28-31, 222 P.3d 409, 435-438 (App. 2009) (hereinafter Torres), in which the ICA vacated a murder conviction because testimony stating that a gun retrieved from the defendant's car "had been recently fired" was improperly admitted. Specifically, the ICA held that only an expert could have testified that the

gun had been recently fired, and the federal agent who rendered that opinion was not an expert. Id. at 31. In Torres, the agent had twenty-five years of experience as a criminal investigator with the Naval Criminal Investigative Service and the United States Navy and significant experience and training in the use and maintenance of firearms. Id. However, the agent acknowledged that he had never before testified as a firearms expert or rendered an opinion on whether a firearm had been recently fired, he did not have extensive training in the forensic arts, and he had not done laboratory work examining firearms or obtained special schooling in the analysis of firearms discharges. Id. Moreover, the agent admitted that he was "not an expert." Id. The ICA concluded that the State did not meet the foundational requirements under HRE Rule 702 for qualifying the agent to render an opinion on whether or not the gun had been recently fired. Id. at 31, 222 P.3d at 438.

A.

Despite Dr. Manoukian's admission that he was not a firearms or ballistics expert, he was permitted to give testimony on the probable distance between Petitioner's gun and Decedent, which he determined to be approximately sixty feet. This distance was a pivotal fact in determining whether Petitioner acted in self-defense. As in Torres, Dr. Manoukian did not indicate whether he had previously testified as a ballistics

expert or rendered an opinion on the probable distance between a weapon and a victim. His testimony suggested that he had minimal training in the field of ballistics -- he had attended "some classes" at the Maryland State Crime Lab. He did not identify himself as a ballistics expert or one qualified to give an opinion on the distance between the firearm and Decedent under the possible scenarios presented regarding the shooting. Dr. Manoukian testified that his field of expertise, forensic pathology, covered "the study of human tissues and human fluids [to determine] how someone was injured or how [] [he or she] died." Dr. Manoukian's testimony regarding the distance between Petitioner and Decedent under the circumstances presented by this case, however, did not rely on either an analysis of human tissues or fluids.

The majority argues that although Dr. Manoukian conceded that he was "not a ballistics" expert, this case is distinguishable from Torres, 122 Hawaiʻi at 31, 222 P.3d at 438, because Dr. Manoukian had "observed in excess of a hundred cases in which the cause of death was injury caused by a firearm." Majority opinion at 50. However, performing autopsies where the cause of death was "injury caused by a firearm" would not qualify Dr. Manoukian to testify as to the competing scenarios of the shooting raised by the evidence at trial. The record does not indicate that such questions were present in any of Dr.

Manoukian's other autopsies. Thus, the number of autopsies in which a firearm was involved does not establish that he was qualified to testify about the circumstances presented in the instant case.

The majority also distinguishes this case from Torres because Dr. Manoukian had "received ballistic and firearm related autopsy training." Id. However, the record does not demonstrate that Dr. Manoukian received "ballistic and firearm related autopsy" training, but that he "attended classes" at the Maryland State Crime Lab, where, inter alia, he had "some specialized training in [] ballistics." Receiving a minimal amount of training in a field does not qualify a witness as an expert -- the training must be sufficient to allow the witness to gain expertise. See Taylor Pipeline Construction, Inc. v. Directional Road Boring, Inc., 438 F. Supp. 2d 696, 706 (E.D. Tex. 2006) (holding that a witness was not qualified as an expert although he "attended four, two-day construction law seminars over the course of his career"). Given that Dr. Manoukian specifically testified that he was "not a firearms or a ballistics expert," it appears that he himself acknowledged his lack of expertise in those fields.

Finally, the majority contends that Dr. Manoukian stated that the formula used to determine the distance from the shotgun to the target was "taken from textbooks of forensic

pathology," majority opinion at 50, demonstrating that Dr. Manoukian could determine "the approximate distance of [Decedent] from the shotgun at the time it was fired." Majority opinion at 50-51 (internal citations and punctuation omitted). Pursuant to HRE Rule 703,[8] however, opinions may be based on facts not in evidence (such as textbooks) only if those facts are "of a type reasonably relied upon by experts in the particular field." HRE Rule 703. Here, Dr. Manoukian did not testify that experts in his field commonly rely on the formula he cited or the textbook he examined. Therefore, a proper foundation for the introduction of the formula Dr. Manoukian testified to was not laid. Since Respondent failed to establish the necessary foundation for Dr. Manoukian to provide an opinion on this issue under HRE Rule 702, his testimony on that subject must be treated as that of a lay-witness under HRE Rule 701. However, such testimony in the area of ballistics would exceed the common knowledge of a lay

[8] HRE Rule 703 provides:

> **Rule 703 Bases of Opinion Testimony by Experts.** The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. The court may, however, disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.

(Emphasis added.)

person, and thus Dr. Manoukian's resulting opinion testimony was improper lay testimony and so inadmissible under HRE Rule 701.

B.

Additionally, Respondent did not establish that Ah Mow was qualified to give testimony on the circumstances of the shooting. Although Ah Mow testified that he was a firearms instructor, he did not indicate whether he had testified as a firearms expert or rendered an opinion on the probable distance between a weapon and a victim before. His testimony suggested that he had not had training in forensics, done laboratory work examining firearms, or obtained special schooling in the analysis of firearms discharges. He did not identify himself as a ballistics expert or one qualified to give an opinion on the distance between the firearm and Decedent under the different circumstances portrayed of the shooting, and neither Respondent nor the court qualified him as such.

The majority argues that this case is distinguishable from Torres because "here, the test that [Ah Mow] performed did not involve specialized technical expertise beyond the scope of his knowledge concerning the operation of shotguns." Majority opinion at 53. Ah Mow testified that he had received training in "handling," "basic field stripping," and "maintaining and cleaning" shotguns. His background provided no basis for discerning whether the spread pattern test was a "scientific

test,"[9] see Torres, 122 Hawaiʻi at 28, 222 P.3d at 435, which was what Ah Mow implied when he testified that the spread pattern "measures the distance between the muzzle and the target." This determination required expertise not in the field of firearms, but in the field of ballistics. Although a firearms expert could recognize, for example, that the weapon was properly functioning at the time of the test performed by Ah Mow, only a ballistics expert could establish whether or not results from the test retained external validity when transferred to the crime scene.[10]

Indeed, Ah Mow's testimony went beyond that of the use and operation of firearms.[11] Nothing in Ah Mow's testimony

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[9] The majority maintains that Torres does not require an expert to use a "scientific test." Majority opinion at 53 n.17. In Torres, the investigator testified that he believed that a gun was probably fired eight hours before he examined it, based on "the moistness of the gunpowder residue and the absence of rust in the gun." 122 Hawaiʻi at 27, 22 P.3d at 434. However, he was not aware of a "scientific test" to determine when a gun was fired, and the court had "not been cited any authority verifying that the observations made by Agent Robbins would provide a reliable basis for determining the time frame in which a gun had previously been fired." Id. at 31, 22 P.3d at 438. Similarly, in the instant case, Ah Mow lacked the expertise to establish that the spread pattern test constituted a reliable basis for determining the distance at which Petitioner shot Decedent.

[10] "'External validity' considers the question, '[h]ow far are we justified in taking the data, assuming them to be accurate in their own terms, and in drawing implications or conclusions in other contexts either very closely related . . . or much further away?'" Tuli v. Brigham & Women's Hospital, Inc., 592 F. Supp. 2d. 208, 215 n.6 (D. Mass. 2009) (citations omitted); see also United States v. Purvis, 2010 WL 1816336 at *2 (D. Kan. May 4, 2010) (noting that the "external validity" of a test indicates whether the results of that test can be "carried over into the real world").

[11] Ironically, in its brief and at oral argument, Respondent itself questioned Ah Mow's expertise in the field of ballistics, maintaining that at least part of Ah Mow's trial testimony -- his assertion that "moving the barrel of shotgun while discharging it could cause a distortion of the shot pattern" -- was inaccurate. Respondent argued in its Response that this was "an enduring myth about shotguns." Accordingly, Ah Mow was allowed to render

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suggested that he was qualified to testify as a ballistics expert or to determine whether the test was "scientific." Due to his lack of expertise, Ah Mow was not qualified to give an opinion in the field of ballistics, and therefore his testimony lacked foundation under Rule 702.[12] Further, like Dr. Manoukian, such

[11](...continued)
an opinion for the jury despite the fact that Respondent maintains that he was unqualified to do so in part.

[12] The majority contends that Ah Mow "did not testify to the ultimate issue in this case, i.e., that he did not conclude at what distance [Petitioner] shot [Decedent]." Majority opinion at 53 n.17. Instead, according to the majority, Ah Mow "testified only that he conducted a test, which involved firing a shotgun under 'ideal laboratory conditions' at eight targets placed at various distances." Id. Respectfully, this misconstrues the palpable prosecutorial purpose of Ah Mow's testimony.

Ah Mow's testimony indicated that the distances calculated by the spread pattern test were transferrable to the crime scene. When police examined the crime scene, they recovered two shotgun shells and a hacksaw. The two shotgun shells were 47.8 and 51.1 feet from the hacksaw, respectively. Ah Mow testified that he included these distances of 47.8 feet and 51.1 feet in the spread pattern test to "show the distance between the spent shotgun shell[s] and the [] hacksaw." Therefore, Ah Mow's testimony indicated that the spread pattern results could be applied to the crime scene in the instant case.

Moreover, if the test conducted by Ah Mow did not apply to the distance at which Petitioner shot Decedent, that test would have been irrelevant, and inadmissible under HRE Rule 402, which provides that "[e]vidence which is not relevant is not admissible." The majority appears to acknowledge that Ah Mow's testimony was introduced "to rebut [Petitioner's] theory of self defense." Majority opinion at 46 n.15. The record demonstrates that the only way in which Ah Mow's testimony could have rebutted Petitioner's theory of self-defense was by establishing the distance at which Petitioner shot Decedent. Indeed, in closing argument, Respondent cited Ah Mow's testimony as evidence that Petitioner was forty feet away from Decedent when shots were fired.

The majority argues that the prosecutor in closing argument is permitted to draw reasonable inferences from the evidence, see majority opinion at 53 n.17, thus seemingly conceding that Ah Mow's testimony was used to address the ultimate issue of distance between Petitioner and Decedent at the time of the shooting. Indeed, Respondent used Ah Mow's testimony to draw an "inference" regarding the distance between Petitioner and Decedent for the jury. This demonstrates that the purpose of Ah Mow's testimony was to address the "ultimate issue" in the case. The majority's position is thus contradicted by the record. Accordingly, Respondent was permitted to argue these matters before the jury even though Ah Mow was unqualified to testify as to the distance between Petitioner and Decedent at the time of the shooting.

testimony in the area of ballistics would exceed the common knowledge of a lay person, and thus Ah Mow's resulting opinion testimony was improper lay testimony and so inadmissible under HRE Rule 702.

IV.

Moreover, even if Dr. Manoukian and Ah Mow were qualified to give expert testimony in the field of ballistics, admitting the testimonies of these witnesses into evidence without establishing on the record and for the jury that they were qualified to render an "expert" opinion and to do so in a specific field was plain error.[13]

A.

Pursuant to Rule 104(a),"[p]reliminary questions concerning the qualification of a person to be a witness . . . shall be determined by the court." (emphasis added). Whether "[e]xpert testimony is admissible under [HRE Rule] 702" is "governed by Rule 104(a)." Addison M. Bowman, Hawaiʻi Rules of Evidence Manual § 104-1. Hence, in the instant case, the court

[13] The majority argues that "nothing in the HRE would preclude the trial court from declining to qualify as a witness as an expert in front the jury, so long as the requisite foundation for the witness's testimony is established." Majority opinion at 44-45. According to the majority, "[t]he plain language of HRE Rule 702 . . . does not indicate that the trial court must formally qualify a witness as an expert in front of the jury before the witness's testimony can properly be admitted." Id. at 42. However, as discussed infra, the court must qualify an expert for the jury so that the jury may "consider the qualifications of the witness in determining the weight to be given to his testimony." Commentary to HRE Rule 702.

was required to determine whether Dr. Manoukian and Ah Mow were qualified to testify as experts.

Under the HRE, witnesses who give testimony in the form of an opinion fall into one of two categories. All witnesses may testify as to their opinions if the testimony is "(1) rationally based on the perception of the witness, and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." HRE Rule 701. However, if the jury requires "scientific, technical, or other specialized knowledge" to "understand the evidence or determine a fact in issue," only a "witness qualified as an expert by knowledge, skill, experience, training, or education" may provide the required opinion testimony. HRE Rule 702; see also Neilsen v. American Honda Motor Co., 92 Hawaiʻi 180, 188; 989 P.2d 264, 272 (App. 1999) ("[A] witness may qualify as an expert if he or she possesses a background in any one of the five areas listed under HRE Rule 702: knowledge, skill, experience, training, or education."). However, the HRE clearly contemplate that the experts will have a specific field of expertise, and limit their opinion testimony to matters within that field. See Commentary to HRE Rule 702 ("'The determination of whether or not a witness is qualified as an expert in a particular field is largely within the discretion of the trial judge.'") (quoting State v. Torres, 60 Haw. 271, 277, 589 P.2d 83, 87 (1978) (emphasis added); cf.

State v. Vliet, 95 Hawaiʻi 94, 111, 19 P.3d 42, 49 (2001) ("[T]he trial judge must determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline.") (emphasis added).

Hence, according to the HRE, the trial court retains the ultimate responsibility to qualify experts and to establish their fields of expertise. The determination that a witness is qualified must be made on the record and for the jury, because a "determination by the court that a witness qualifies as an expert is binding on the trier of fact." Commentary to HRE Rule 702 (emphasis added).[14] Without a determination on the record that a witness is qualified to give opinion testimony, the jury cannot know that the witness' status as an expert is binding on it. Unless this initial decision by the court is made known to the jury, the jury will not know what testimony it is bound to consider as opinion testimony. Hence, the qualifications of an expert must be established so the jury may properly perform its function in evaluating the expert's testimony.

[14] The majority also cites HRE Rule 1102 in support of its argument that "nothing in the HRE would preclude the trial court from declining to qualify a witness an an expert in front of the jury, so long as the requisite foundation for the witness's testimony is established." Majority opinion at 44-45. HRE Rule 1102 provides that "[t]he court shall instruct the jury regarding the law applicable to the facts of the case, but shall not comment upon the evidence. It shall also inform the jury that they are the exclusive judges of all questions of fact and the credibility of witnesses." However, informing the jury that a witness is qualified to testify does not amount to commentary on any specific piece of evidence or on the credibility of the expert. The purpose of qualification is to inform the jury that the witness may provide testimony which must be considered as evidence.

Once expert testimony is admitted by the court and "is binding on the trier of fact," the jury may "consider the qualifications of the witness in determining the weight to be given to his [or her] testimony." Commentary to HRE Rule 702. Consequently, if the judge does not establish, on the record or in instructions to the jury, that a witness's qualifications entitle him or her to give opinion testimony, the jury cannot know that it may "consider the qualifications of the witness in determining the weight to [] give[]" to the witness's testimony, as contemplated by Rule 702. Commentary to HRE Rule 702.[15]

In the opinion testimony instruction, the jury was told that "[i]t is up to you to decide whether to accept this testimony [of expert witnesses] and how much weight to give it." Respectfully, because the court did not make a determination on

[15] The majority maintains that "the commentary to HRE Rule 702 does not require the court to state in front of the jury that an individual is an expert in a particular field." Majority opinion at 42 n.10. To the contrary, it should be evident that the court must so instruct the jury orally or in written instructions, for, as pointed out supra, if the court does not inform the jury that a witness is qualified to give an opinion in a particular field, the jury will be unable to weigh the testimony of an expert or opinion witness as envisioned by the commentary. Thus, inhering in the commentary is the requirement that the court communicate to the jury that an opinion witness is qualified in the relevant field so as to render an appropriate opinion.

The majority also asserts that under its approach, a party offering an expert witness is required to establish "the requisite foundation for the witness's testimony," i.e., the party offering an expert witness must establish that he or she is qualified. Majority opinion at 44. The majority contends that such foundational testimony can "assist the jury in determining the weight to be given to the witness's testimony." Id. at 45. Respectfully, the jury can only be assisted if the fact of qualification is made known to it, i.e., if the court informs the jury that a witness is qualified to give an opinion in a particular field. The jury cannot otherwise know that foundational testimony is pertinent to weighing the expert's testimony as intended by the commentary.

the record regarding the qualifications of Dr. Manoukian and Ah Mow, or issue instructions with respect to the qualifications of these witnesses, the jury could not know which qualifications to consider when following the court's instruction and in determining the weight to assign to the two witnesses' testimony.[16]

B.

To reiterate, the court must also establish for the jury the field in which the witness possesses expertise. As discussed supra, experts must limit the opinion testimony they provide as experts to their field of expertise. See Vliet, 95 Hawaiʻi at 111, 19 P.3d at 49 ("[T]he trial judge must determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline.") (emphasis added); Yap v. Controlled Parasailing of Honolulu, Inc., 76 Hawaiʻi 248, 253, 873 P.2d 1321, 1326 (1994) ("Initially, it is for the circuit

[16] The majority also argues that "federal courts have held that a court's failure to formally qualify a witness as an expert is harmless error if the record establishes that the witness would have been qualified as an expert under the Federal Rules of Evidence (FRE) Rule 702." Majority opinion at 45 n.14; see also United States v. Figueroa-Lopez, 125 F.3d 1241, 1247 (1997) ("[The expert] was qualified to deliver the opinion testimony disputed in this case, and the failure formally to go through the usual [qualification] process -- although an error -- was clearly harmless.") (emphasis added). But, unlike the FRE, the commentary to HRE Rule 702 states that the jury may "consider the qualifications of the [expert] witness in determining the weight to be given to his testimony." Significantly, the Advisory Committee Note to FRE Rule 702 does not contain similar language. Therefore, as explained supra, under the HRE, the failure to qualify an expert on the record or via instructions and to do so with respect to a relevant field is not harmless because the jury would otherwise be prevented from carrying out its assigned function. Additionally, as noted herein, the error was not harmless.

court to decide whether an expert witness has such skill, knowledge, or experience in the field in question such that his or her opinion or inference-drawing would probably aid the trier of fact in arriving at the truth.") (emphasis added); Larsen v. State Savings and Loan Ass'n, 64 Haw. 302, 304, 640 P.2d 286, 288 (1982) ("[T]he expert witness must have such skill, knowledge, or experience in the field in question.") (emphasis added). If the judge does not state, on the record and for the jury, an expert's field of expertise, then the jury cannot determine what testimony is relevant to the disputed issues. See Commentary to Rule 702.

The problem faced by juries when the court fails to determine, on the record, an expert's field of expertise are accentuated in cases such as the instant case where expert witnesses provide testimony in multiple fields. In such cases, qualifications are meaningless without context, because the jury must know which qualifications are relevant to establishing expertise with respect to the several fields in which an expert may be deemed to have testified. If the court does not clearly delineate the fields in which a witness possesses expertise, the jury cannot relate the witnesses' qualifications to the relevant issues at trial. See Commentary to Rule 702 ("The trier of fact may nonetheless consider the qualifications of the witness in determining the weight to be given to his testimony.")

C.

As noted, here the jury was instructed[17] that "[t]raining and experience may make a person qualified to give opinion testimony in a particular field. The law allows that person to state an opinion about matters in that field." However, the court did not establish the "particular field" in which Dr. Manoukian and Ah Mow were deemed to be experts or whether such fields encompassed expertise in determining the distance between the firearm discharged and a victim under the circumstances of this case. Both Dr. Manoukian and Ah Mow were allowed to testify outside of their fields of expertise.

In the case of Dr. Manoukian, for example, it is possible that the jury used the testimony establishing Dr. Manoukian's expertise in the field of forensic pathology, and not ballistics, when ascertaining the weight to attach to his testimony. The same possibility exists regarding Ah Mow's testimony -- the jury may have weighed his testimony based on his qualifications in the field of firearms, and not in the field of ballistics.

Hence, the jury was without necessary guidance as to the fields of expertise relevant to encompass the distance issue and whether these witnesses were qualified in those fields. It

[17] Respondent notes in its Response to Petitioner's Application that Petitioner "did not object to [this jury instruction] at trial."

is possible that the jury assigned equal weight to both witnesses's testimony or substantial weight to Dr. Manoukian's testimony. Without the aforesaid guidance, a juror would not know what training or expertise was appropriate to qualify a witness to render an opinion about the shooting. Consequently, the jury did not have a sufficient basis for accepting or rejecting the opinions or for determining the weight to assign the opinions of the witnesses.

D.

Respondent maintains that Petitioner challenges the replacement of the term "expert" in the jury instructions, and cites in response, the proposal of Judge Charles Richey, that advocates the replacing the term "expert" with the term "opinion witness" in court proceedings. See Charles R. Richey, Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules Of Evidence in Civil and Criminal Trials, 154 F.R.D. 537, 541 (1994) (hereinafter Richey, Use of the Word "Expert") (arguing that "any reference to 'expert witness'" should be deleted from the Federal Rules of Evidence and replaced with "opinion witness" to diminish the "aura of special reliability" that juries attach to experts)). Similarly, the majority contends that the instructions, which "substitut[ed] the words 'opinion testimony' for the word 'expert,' . . . accurately stated the law." Majority opinion at 54. In my view,

there is no error when the jury instructions refer to an expert qualified to render an opinion under Rule 702 as an "opinion witness," rather than an "expert."

The majority, however, also cites Judge Richey's proposal as support for its position that its was not error for the court to "declin[e] to qualify a witness as an expert in front of the jury." Majority opinion at 44. To the contrary, Judge Richey's proposal does not eliminate the necessity of establishing for the jury the qualifications of an opinion witness and the field in which that witness possesses expertise.[18] Instead, Judge Richey endorsed further judicial supervision over opinion witnesses through mechanisms such as pre-trial hearings to determine the admissibility of opinion testimony (and to place such findings on the record). See Richey, Use of the Word "Expert" at 551 ("[T]he bench and bar

[18] The concern of Judge Richey and the other authorities cited by the majority appears limited to the use of the term "expert witness." Richey, Use of the Word "Expert" at 541 ("The use of the term 'expert witness' in civil and criminal jury trials is prejudicial.") (emphasis added); see also 1 McCormick on Evidence, § 13, at 69 n.14 (noting that by "accept[ing] the witness as an expert in a particular field," a judge "increases the witness's credibility in the jurors' eyes.") (emphasis added); Barbee v. Queen's Medical Center, 119 Hawaiʻi 136, 154, n.12, 194 P.3d 1098, 1116 n. 12 (App. 2008) (citing authorities which state that "when a court certifies that a witness is an expert," it "inordinately enhances the witness's stature"); People v. Lamont, 21 A.D.3d 1129, 1132 (N.Y. App. Div. 2005) (noting that "explicitly declar[ing] a witness an expert" may "improperly bolster[] the witness" and "grant the witness the imprimatur of the court") (emphasis added). These authorities do not address the necessity of explaining to the jury that an opinion witness is qualified to render an opinion and to do so in the field in which he or she is allowed to testify, so that the jury can appropriately weigh the testimony of that witness as required by the commentary to HRE Rule 702. Obviously, referring to such a witness as an opinion witness rather than as an expert has nothing to do with properly instructing a jury on evaluating that witness's testimony.

should insist on the bases and reasons for opinion testimony in advance of trial - in addition to the witness' qualifications."). Judge Richey also noted that "trial courts must emphasize by way of limiting instructions that it is solely within the province of the jury to accept or reject opinion testimony and to give it such weight as they deem appropriate in light of the evidence presented." Id. at 555 (emphasis added). Thus, Judge Richey's proposal recognizes that irrespective of whether the court uses the term "expert," the jury requires further guidance to properly evaluate the testimony of opinion witnesses.[19]

[19] Contrary to the position of the majority, we do not "impl[y] that Judge Richey's procedure requires the court to make a finding in front of the jury that an individual was qualified to render an opinion in a particular field." Majority opinion at 43 n.11. Instead, Judge Richey's article emphasizes the need for the jury to be properly guided in the evaluation of such testimony -- the point made herein.

Thus, Judge Richey advocated the use of limiting instructions to inform the jury that witnesses may testify in the form of an opinion when they "have acquired a certain specialized knowledge in some art, science, profession, or calling, to state an opinion as to relevant and material matters." Richey, Use of the Word "Expert", at 562. The limiting instruction proposed by Judge Richey then states that when weighing the testimony of opinion witnesses, the jury may "consider qualifications, opinions and reasons for testifying, as well as all other considerations that apply when you evaluate the credibility of any witness." Id. (emphasis added). If the court failed to explain to the jury which witnesses were qualified to testify as opinion witnesses, and did not establish the "art, science, profession, or calling" in which the witness possessed specialized knowledge, then the jury would be unaware of which witnesses were covered by the opinion testimony instruction.

Moreover, Judge Richey also proposed several other devices for exercising control over expert testimony, such as utilizing motions in limine to determine the admissibility of opinion testimony, holding pre-trial conferences and hearings, directing a court-appointed expert to examine scientific evidence, and employing more rigorous cautionary instructions when an expert witness also testifies as a fact witness. Id. at 549-551. These proposals all suggest concerns regarding the ability of the jury to properly evaluate expert testimony. Therefore, they reinforce the necessity of providing guidance to the jury, which is consistent with the position of this dissent.

Consequently, regardless of whether the testimony is termed "expert" testimony or "opinion" testimony, the presiding judge must still make a ruling on whether a witness is qualified to testify in a particular field. To reiterate, this ruling is a legal determination that is binding on the trier of fact. See Commentary to HRE Rule 702 ("Determination by the court that a witness qualifies as an expert is binding upon the trier of fact.") The contemplation of Rule 702 is that the jury will weigh the testimony of the expert based on the qualifications of that expert. See id. ("The trier of fact may nonetheless consider the qualifications of the witness in determining the weight to be given to his testimony."). However, jurors will be unable to consider the witnesses' qualification if they are unaware that the witness is qualified and in what field.

Respectfully, in the instant case, it does not appear that the court exerted supervision over the experts' testimony by qualifying them as opinion witnesses and designating their area of expertise for the jury. As discussed supra, without such information the jury cannot adequately evaluate an "expert's" testimony, whether the witnesses are designated as "experts" or as "opinion witnesses." Therefore, Dr. Manoukian's and Ah Mow's testimonies were not properly admitted.

V.

Respondent argues that it was a "legitimate trial

tactic" for Petitioner not to object to the qualifications of the two expert witnesses. According to Respondent, there were strategic reasons for Petitioner to avoid a determination by the court that Dr. Manoukian and Ah Mow were qualified as experts in a particular field. Contrary to Respondent's position, the Petitioner's "strategic decision," if it existed, to keep the jury from hearing the qualifications of an expert witness had no bearing on the court's obligation to enforce HRE Rule 702. Pursuant to HRE Rule 104(a), irrespective of any party's strategy, the determination of whether an expert is qualified is assigned to the court. See HRE Rule 104(a) ("Preliminary questions concerning the qualification of a person to be a witness . . . shall be determined by the court."). It is the court's finding, and not the parties' strategy, that allows opinion evidence to be admitted pursuant to HRE Rule 702. Rule 702 specifically directs the court to determine whether or not an expert will be of assistance to the jury and whether a witness is qualified to testify and to do so in what area.

Further, regardless of strategy, the court must make a finding on the record stating whether a witness is qualified and in what area so that the jury can preform its assigned function. See Commentary to HRE 702. It is "the trial courts, not the parties, [that] have the duty and ultimate responsibility to insure that juries are properly instructed." State v. Haanio, 94

Hawaiʻi 405, 415, 16 P.3d 246, 256 (2001); see also State v. Nichols, 111 Hawaiʻi 327, 335-36 141 P.3d 974, 982-83 (2006) ("The duty to instruct the jury ultimately lies with the trial court."). This duty is based on a recognition that if considerations of strategy preclude the court from properly instructing the jury, the "truth seeking function of the judicial system" is impaired. Haanio, 94 Hawaiʻi at 415, 16 P.3d at 256.

Additionally, the court's failure to make findings on the record regarding the expert's qualifications also prevents appellate courts from performing their function. If the court does not explain, on the record, its basis for permitting expert testimony, then "an appellate court cannot reasonably infer that the trial court has considered" the expert's qualifications and made a determination that the expert is in fact qualified. Cf. State v. Tierney, 127 Hawaiʻi 157, 171, 277 P.3d 251, 265 (2012) (holding that the court abused its discretion by failing determine, on the record, whether or not a defendant's refusal to cooperate with a mental examiner was the product of a physical or mental defect, as was required by statute). Appellate review is also hampered if the court fails to establish, on the record, the witness's field of expertise. If an appellate court does not know the field in which the court believed the expert to be qualified, it cannot determine whether individual statements by a witness fell within that field.

VI.

A.

Respondent relied on the testimonies of Dr. Manoukian and Ah Mow to rebut Petitioner's self-defense argument. In closing argument, Respondent maintained that "[i]t's not self-defense," because, inter alia, "[decedent] was shot in the back at least forty feet away from [Petitioner]." (Emphasis added.) Respondent justified this assertion by referring to the testimonies of Dr. Manoukian and Ah Mow. Respondent first reminded the jury that "the general range estimate of how far away the shooter would have been" given by Dr. Manoukian was "approximately [sixty] feet." Further, Respondent cited the spread pattern test conducted by Ah Mow to establish that "[Decedent] was past him [forty] feet down the driveway or more when he got shot." Because of Respondent's reliance on the testimony provided by Dr. Manoukian and Ah Mow to discredit Petitioner's assertion of self-defense, it cannot be said that the court's error in admitting the testimonies of Dr. Manoukian and Ah Mow was harmless,[20] and hence there is a reasonable

[20] The majority appears to assert that even if the Dr. Manoukian's testimony and Ah Mow's testimony should not have been admitted, the admission of that testimony was harmless. Majority opinion at 54. The majority states that because "the appearance of gunshot wounds only on [Decedent's] back substantially undermined [Petitioner's] theory of self-defense," it is "unclear what effect these witnesses' testimony with regard to distance may have had." Id. This directly contradicts the record, Respondent's theory as advanced in its case, and Respondent's closing argument.

As explained supra, the parties put forward two different theories (continued...)

possibility the erroneous admission of their testimonies contributed to Petitioner's conviction.[21] See Torres, 122 Hawaiʻi at 32, 222 P.3d at 439. The error in admitting such testimony plainly deprived Petitioner of his substantial right to a fair trial and thus constituted plain error. See State v. Marsh, 68 Haw. 659, 661, 728 P.2d 1301, 1303 (1986) (holding that error affecting a defendant's right to a fair trial constitutes plain error). Hence, this court may notice such error even though Petitioner's trial counsel failed to object to this error. State v. Kelekolio, 74 Haw. 479, 515, 849 P.2d 58, 75 (1993) ("[W]here plain error has been committed and substantial rights have been affected thereby, the error may be noticed even though it was not brought to the attention of the trial court."); see also Hawaiʻi

[20](...continued)
of the events leading to Decedent's shooting. Dr. Manoukian's testimony and Ah Mow's testimony were crucial in advancing Respondent's theory, namely, that Petitioner shot Decedent in the back, from a distance of forty feet or more. Because the Dr. Manoukian's testimony and Ah Mow's testimony played a pivotal role in supporting Respondent's theory, it cannot be said that the improper admission of their testimony was harmless. The jury would be substantially hampered in making a proper evaluation of these competing views if not properly instructed, as indicated supra.

[21] The majority's contention that the erroneous admission of evidence may have been harmless is based on its assertion that "the appearance of gunshot wounds only on [Decedent's] back substantially undermined [Petitioner's] theory of self-defense." Majority opinion at 54 (emphasis added). Given that there were two competing theories of how Decedent came to be shot in the back, it was the primary responsibility of the jury, and not we as appellate judges, to decide the evidence as to either theory. Cf. State v. Kikuta, 125 Hawaiʻi 78, 89, 253 P.3d 639, 650 (holding that "an assessment of the credibility of the witnesses and a weighing of the evidence" is "not within the province of an appellate court, but a function of the fact finder at trial"). Respectfully, it is not the role of this court to independently assess the evidence and endorse one theory over the other. Only the jury could resolve what actually occurred, but the jury could do so only if it was properly instructed.

Rules of Penal Procedure (HRPP) Rule 52 ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

B.

The majority argues that although "[Hawaiʻi Rules of Penal Procedure (HRPP) Rule 52(b)] provides that plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court," majority opinion at 40, "objections to the admission of incompetent evidence, which a party failed to raise at trial, are generally not subject to plain error review." Id. However, we have held that "this court may notice errors affecting a defendant's substantial rights" regardless of whether an objection was raised at trial, "even where the error may be related to the admissibility of evidence." State v. Schnabel, 127 Hawaiʻi 432, 461, 279 P.3d 1237, 1266 (2012); see also HRE Rule 103(a) ("Nothing in this rule [requiring the parties to object to improperly admitted evidence] precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.").[22]

[22] The majority argues that Schnabel is distinguishable from the instant case because "the evidentiary errors at issue in Schnabel implicated the defendant's right to testify." Majority opinion at 40 n.9. However, in Schnabel this court did not limit its ruling to circumstances where the right to testify was at issue. To the contrary, this court held that "plain error review does apply to erroneous evidentiary rulings that affect a defendant's (continued...)

Further, Schnabel rejected the proposition that the cases cited by the majority, State v. Wallace, 80 Hawaiʻi 382, 910 P.2d 695 (1996), and State v. Uyesugi, 100 Hawaiʻi 442, 60 P.3d 843 (2002), indicate that evidentiary errors are "generally not subject to plain error review." Schnabel, 127 Hawaiʻi at 462, 279 P.3d at 1267 n.67. Rather, "under the facts and circumstances" of those cases, "the defendant's substantial rights were not affected, and therefore plain error did not apply." Id. at 462, 279 P.3d at 1267. Wallace, for example, stated that evidentiary errors will be considered under HRPP 52(b) if "the ends of justice require it, and fundamental rights

[22](...continued)
substantial rights." 127 Hawaiʻi at 462, 279 P.3d at 1267 (emphasis added). Similarly, although the majority cites State v. Fields, 115 Hawaiʻi at 503, 528, 168 P.3d 503, 980 (2007), Fields declined to notice plain error because the defendant "ha[d] failed to demonstrate that his substantial rights have been adversely affected." Id. (emphasis added).

Moreover, Schnabel cited Cummings, which held that "[e]rroneous admission of evidence may constitute plain error if a fair trial of the accused was thereby impaired." 49 Haw. at 528, 423 P.3d at 442; see also State v. Estrada, 69 Haw. 204, 221, 738 P.2d 812, 824 (1987) (holding that improper admission of evidence constituted plain error because the defendant's "substantial due process rights to a fair trial [were] implicated"). As pointed out supra, in this case the admission of Dr. Manoukian's testimony and Ah Mow's testimony deprived Petitioner of his right to a fair trial, and therefore "affect[ed Petitioners'] substantial rights." Schnabel, 127 Hawaiʻi at 462, 279 P.3d at 1267.

Finally, the majority contends that in Schnabel, a majority of this court relied upon judicial notice in making its determination to vacate the conviction," and "referenced plain error only as an alternative argument." Majority opinion at 40 n.9. In Schnabel, this court stated that "alternatively, we also conclude that the court's failure to apply HRS § 571-84(h) was plain error." 127 Hawaiʻi at 447, 279 P.3d at 1252 (emphasis added). Therefore, Schnabel clearly "concluded" that plain error applied.

would otherwise be denied." 80 Hawaiʻi at 410, 910 P.2d 723 (citing HRPP 52(b) (other citations omitted)).[23] Wallace then concluded that "we find no such justification here." Id. (citations omitted). Similarly, State v. Uyesugi did not contain a blanket suggestion that plain error does not apply to evidentiary questions. In its brief discussion of an error not objected to by the defendant, it merely refused to find plain error given the specific facts presented. 100 Hawaiʻi 442, 462, 60 P.3d 843, 863 (2002). None of our cases propose a bar to noticing plain error because the error is an evidentiary one.[24] Thus, the introduction of the testimony of Dr. Manoukian and Ah Mow constituted plain error.

[23] Because Wallace cited HRPP 52(b) for this proposition, it implicitly held that its formulation of the rule was equivalent to the language in HRPP 52(b) stating that plain errors "affecting substantial rights may be noticed."

[24] Schnabel cited other Hawaiʻi cases that have noticed plain error based on erroneous evidentiary rulings. 127 Hawaiʻi at 461-62, 279 P.3d at 1266-67. See, e.g., State v. Domingo, 69 Haw. 68, 733 P.2d 690, 692 (1987) ("[S]ince the introduction of the evidence in question was prohibited by statute, it constituted plain error and is noticeable by this court."); State v. Pastushin, 58 Haw. 299, 302, 568 P.2d 504, 506 (1977) ("[W]here inadmissible hearsay is so prejudicial as to deprive the defendant of his constitutional right to a fair trial, its admission will constitute ground for reversal, although defense counsel has failed to object."); State v. Santiago, 53 Haw. 254, 261, 492 P.2d 657, 662 (1971) (finding plain error because the prosecution's introduction of the defendant's prior convictions to impeach his credibility violated his constitutional right to testify in his own defense); State v. Cummings, 49 Haw. 522, 528, 423 P.2d 438, 442 (1967) ("Erroneous admission of evidence may constitute plain error if a fair trial of the accused was thereby impaired, or if it substantially prejudiced the accused.").

VII.

For the reasons set forth herein, I would vacate Petitioner's conviction and remand for a new trial.

/s/ Simeon R. Acoba, Jr.

/s/ Karl K. Sakamoto