IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

---o0o---

STATE OF HAWAIʻI,
Respondent/Plaintiff-Appellee

vs.

ANGELA STENGER,
Petitioner/Defendant-Appellant

NO. 27511

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CR. NO. 04-1-1460)

MARCH 4, 2010

ACOBA, AND DUFFY, JJ., AND CIRCUIT
JUDGE KIM ASSIGNED DUE TO A VACANCY;
WITH SUBSTITUTE JUSTICE KIM CONCURRING SEPARATELY;
AND MOON, C.J., DISSENTING; AND NAKAYAMA, J.,
DISSENTING, WITH WHOM MOON, C.J., JOINS

OPINION OF THE COURT BY ACOBA, J.

We hold that (1) Petitioner/Defendant-Appellant Angela Stenger (Petitioner) was entitled to a mistake of fact instruction under Hawaiʻi Revised Statutes (HRS) § 702-218 (1993)[1]; (2) based on that holding, it would be inappropriate for

[1] HRS § 702-218 provides that

[i]n any prosecution for an offense, it is a defense that
(continued...)

the circuit court of the first circuit (the court)[2] to also give a claim of right instruction pursuant to HRS § 708-834(1) (Supp. 2002)[3]; (3) under the circumstances of this case, first-degree theft by deception under HRS §§ 708-830(2) and 708-830.5(1)(a) (1993)[4] is a continuing offense, and thus, the court was right in rejecting Petitioner's request for a specific unanimity instruction as to the charged offense of Theft in the First

---

[1](...continued)

> the accused engaged in the prohibited conduct under ignorance or mistake of fact if:
>
> (1) The ignorance or mistake negatives the state of mind required to establish an element of the offense; or
>
> (2) The law defining the offense or a law related thereto provides that the state of mind established by such ignorance or mistake constitutes a defense.

[2] The Honorable Richard K. Perkins presided.

[3] HRS § 708-834(1) states that

> [i]t is a defense to a prosecution for theft that the defendant:
>
> (a) Was unaware that the property or service was that of another; or
>
> (b) Believed that the defendant was entitled to the property or services under a claim of right or that the defendant was authorized, by the owner or by law, to obtain or exert control as the defendant did.

(Emphasis added.)

[4] HRS § 708-830(2) provides in relevant part that "[a] person commits theft if the person . . . obtains, or exerts control over, the property of another by deception with intent to deprive the other of the property." (Emphasis added.) HRS § 708-830.5(1)(a) states that "[a] person commits the offense of theft in the first degree if the person commits theft [o]f property or services, the value of which exceeds $20,000[.]" HRS § 708-800 (Supp. 2002) provides, in relevant part that

> "[d]eception" occurs when a person knowingly:
>
> (1) Creates or confirms another's impression which is false and which the defendant does not believe to be true;
>
> (2) Fails to correct a false impression which the person previously has created or confirmed[.]

Degree; (4) however, Petitioner was entitled to a unanimity instruction as to the included offense of Theft in the Second Degree under HRS § 708-831 (Supp. 2002)[5]; and (5) Petitioner was entitled to jury instructions on the lesser included offenses of Theft in the Third Degree under HRS § 708-832 (1993)[6]; and Theft in the Fourth Degree under HRS § 708-833 (1993)[7]; additionally, assuming Respondent/Plaintiff-Appellee State of Hawaiʻi (Respondent) presents its case in the same way, Petitioner will be entitled to such instructions upon remand. For those reasons, the judgment of the Intermediate Court of Appeals (ICA) filed on January 30, 2009, pursuant to its December 31, 2008 Summary Disposition Order (SDO),[8] State v. Stenger, No. 27511, 2008 WL 5413898 (App. Dec. 31, 2008), vacating the August 24, 2005 Judgment filed by the court, convicting Petitioner of first-degree theft by deception under HRS §§ 708-830(2) and 708-830.5(1)(a) (1993), is vacated in part, the court's judgment is

---

[5] HRS § 708-831(1) provides, in relevant part, that

> [a] person commits the offense of theft in the second degree if the person commits theft:
>
> . . . .
>
> (b) Of property or services the value of which exceeds $300[.]

[6] HRS § 708-832(1) states in pertinent part that

> [a] person commits the offense of theft in the third degree if the person commits theft:
>
> (a) Of property or services the value of which exceeds $100[.]

[7] HRS § 708-833(1) provides that "[a] person commits the offense of theft in the fourth degree if the person commits theft of property or services of any value not in excess of $100."

[8] The SDO was filed by Presiding Judge Daniel R. Foley, and Associate Judges Craig H. Nakamura and Alexa D.M. Fujise.

vacated, and the case is remanded for a new trial consistent with this opinion.

This is the second application for writ of certiorari in this case. In the first application, Respondent[9] asked this court to review the ICA's January 30, 2009 judgment, on the ground that the ICA gravely erred in ruling that Petitioner was entitled to the claim-of-right defense instruction where she did not have sufficient interest in the welfare benefits. By a 3-2 vote this court rejected the application. See State v. Stenger, No. 27511, 2009 WL 2171562 (Haw. April 23, 2009) (Acoba, J., dissenting separately, and Kim, J., dissenting separately).

In the second application for writ of certiorari, filed by Petitioner on April 30, 2009 (Application), Petitioner seeks review of the ICA's judgment and SDO, on the basis that the ICA gravely erred in holding (1) "that the [court] did not err in refusing to give a specific unanimity instruction[,]" and (2) "that [Petitioner] was not entitled to a mistake of fact jury instruction."

I.

In June 2002, Petitioner, due to a high-risk pregnancy, ceased her work as a substitute teacher with the Department of Education (DOE), and also for the Hawaiʻi Surf Academy (HSA), a business owned and operated by Petitioner. Petitioner thereafter applied for financial aid, medical coverage, and food stamps

[9] In that proceeding the State was actually the Petitioner, but for ease of reference, this opinion refers to the State as Respondent throughout, inasmuch as the State is the Respondent for purposes of the instant application.

(public assistance), from the Department of Human Services (DHS). At the time she applied for aid, Petitioner had two children, Kaelin Himphill (Kaelin) and Keana Himphill (Keana).

On June 21, 2002, Terri Cambra (Cambra), an eligibility supervisor for DHS, interviewed Petitioner, and reviewed her applications to determine whether she was eligible for public assistance. Petitioner reported that she had a Bank of America account with $300, and an American Savings checking account. She received monthly child support of $570, and last worked for the DOE in June 2002.

Upon meeting with Petitioner, Cambra went over the responsibilities and penalties associated with receiving public assistance, which are listed on the application, including the penalties for providing false information, and the requirement that all changes be reported within ten days. Petitioner signed a statement on the application stating that her answers were true and correct, and that she understood the penalties for giving false information. At that time, Petitioner did not qualify for public assistance, because she exceeded the income limit.

On July 2, 2002, Petitioner reapplied for public assistance, and was found to be eligible.

On August 22, 2002, Petitioner gave birth to twins, Jadelyn and Jolene Stenger (the twins). In October of 2002, two sisters, Pearlinda Aea (Aea) and Sheila Ann Geiger (Geiger) [collectively, the sisters], began assisting Petitioner with the twins' care. According to Petitioner, the sisters cared for the twins a couple of days a week between October 2002 and May 2003.

According to Aea, she cared for Jolene 16 days or more per month. According to Geiger, she cared for Jadelyn three to four days per week in October 2002, which escalated thereafter. Geiger claimed that after December 2002, Jadelyn did not stay overnight with Petitioner. The sisters were not paid for this service. On December 16, 2002, Petitioner informed her DHS public assistance case worker Lyn Cardenas (Cardenas) in writing that the sisters were watching the twins two to three days per week, and that Petitioner's mother occasionally watched Kaelin and Keana.

In January 2003, Petitioner sent Kaelin and Keana to live with their father in Oregon, and transferred custody of both children over to him. However, Petitioner claimed that she intended the arrangement to be only temporary. In January, Petitioner reported that Kaelin had moved out, but waited until April to report that Keana had moved out, because she had believed that Keana was to return in a few weeks.

In March 2003, Petitioner made efforts to return to work, and wrote a letter to Cardenas informing her that she started working, as she intended to begin substitute teaching. However, Petitioner had a difficult time finding child care, and, although she worked intermittently, she did not report the income because it was not "regular." Petitioner and Respondent stipulated that Petitioner received the following unreported wages as a substitute teacher during the time she was receiving public assistance:

October 18, 2002: $232.62
March 20, 2003 : $359.40
April 4, 2003 : $599.00
April 17, 2003 : $119.80
May 5, 2003 : $119.80
May 20, 2003 : $239.60

In 2003, Petitioner's grandfather passed away, leaving Petitioner a check for $5,000, which Petitioner gave to her mother. Petitioner's mother placed a portion of the money in a trust account at Bank of Hawaii, which, upon her death, would go to Petitioner. Scott Takahashi (Takahashi), custodian of records for Bank of Hawaii, testified that a $5000 check payable to Petitioner was deposited into three different accounts, for which Petitioner was either the signatory or the beneficiary. According to Petitioner, she divided the $5000 into three accounts, depositing $1000 into the HSA account, $500 into her personal account, and $3,500 into the trust account. Petitioner never reported the $5000 to DHS.

Takahashi further testified that Petitioner opened a checking account for her business, HSA, on July 25, 2000, for which Petitioner was the sole authorized signer. The HSA account's July 2002 statement showed an opening balance of $3,090.21 and a closing balance of $191.48. Activity for July included a check payable to Petitioner for $285 from the State of Hawaiʻi Child Support Enforcement Agency (CSEA) and a money order for $200 also payable to Petitioner. Takahashi further testified that in September 2002, there were credit card deposits to that account for $2,532.63, and $1,950.00. There was another credit card deposit to the HSA account in January 2003 for $747.

In May 2003, Petitioner informed Cardenas that she wanted to be removed from public assistance because she had started working more frequently and the twins were staying with the sisters full time.

A DHS Welfare Fraud Investigator, Terrence Miyasato (Miyasato), investigated Petitioner based on anonymous tips. Miyasato conducted interviews and obtained information about the HSA. Nina Vallejo (Vallejo), an eligibility worker with the State's Investigation Office, worked with Miyasato on Petitioner's case to determine the amount of overpayment. Vallejo determined that Petitioner's (1) income and assets from the HSA, (2) income from DOE, and (3) failure to report that her children were not living with her, disqualified Petitioner from receiving public assistance, and evaluated separately how each of those factors related to the financial, food stamp, and medical assistance that Petitioner received between July 2002 and May 2003. Vallejo considers household size, monthly income, financial resources, and income guidelines when determining whether an individual is eligible for public assistance. She testified that without the children in the house, Petitioner was not eligible for any financial assistance on their behalf, but Petitioner could still receive assistance if she qualified in her own right. Vallejo based her calculation of Petitioner's overpayment amount on Miyasato's report, trial testimony, and bank statements. According to Vallejo, Petitioner was overpaid $7,350.00 in financial assistance, $5,598.00 in food stamps, and $10,086.00 in medical, totaling $23,034.00. That amount was

based on the assumption that the testimony and reports were true and Vallejo conceded that if any items were not true, the calculations would change.

II.

On July 27, 2004, Petitioner was charged by indictment with Theft in the First Degree in violation of HRS §§ 708-830(2) and 708-730.5(1)(a). At trial, the defense submitted a proposed unanimity instruction pursuant to State v. Arceo, 84 Hawaiʻi 1, 30, 928 P.3d 843, 872 (1996), and also an instruction on the defense of claim of right. With regard to the unanimity instruction, Petitioner argued that "[Petitioner's] position is [the jury] need[s] to be unanimous on which months she wrongfully obtained these benefits[.]" Respondent argued that a unanimity instruction was not appropriate because the offense constituted a continuing offense. In agreement with Respondent, the court denied Petitioner's request.

With regard to claim of right, defense counsel orally requested that the jury be instructed on claim of right pursuant to HRS § 708-834, because Petitioner "'believed she was entitled to the benefits that she obtained and exerted control over[.]'" Respondent countered that "[Petitioner] did not 'meet the conditions precedent for a claim of right'" because there was testimony that Petitioner both withheld relevant information and provided false information in order to obtain the benefits. The court denied the request for a claim of right instruction.

The court, by agreement of both Petitioner and Respondent, provided instructions on Theft in the First Degree, and the included offense of Theft in the Second Degree.

III.

Following the trial, on June 7, 2005, the jury found Petitioner guilty of Theft in the First Degree.

On appeal, Petitioner

> assert[ed] that the [court] erred by: 1) refusing to give an instruction, as requested by [Petitioner], on the claim-of-right defense; 2) failing sua sponte to give a mistake-of-fact instruction; 3) giving instructions, to which [Petitioner] had agreed, which failed to properly instruct the jury on the material elements for first-degree theft; and 4) refusing to give a specific unanimity instruction as requested by [Petitioner].

Stenger, 2008 WL 5413898, at *1. The ICA held (1) "that the [court] erred in refusing to instruct the jury on the claim-of-right defense" because Petitioner "did not obtain the welfare benefits by deception" but "honestly believed she had complied with the reporting requirements[,]" id. at *3[10]; (2) "[Petitioner's] claims do not support a mistake-of-fact defense[,]" because "[t]he only 'mistake' claimed by [Petitioner] was that she did not believe she was required to report certain of the undisputed events[,]" and "a mistake concerning what was required to be reported was a mistake of law, not a mistake of fact[,]" id. at *4; (3) the court's instructions on the first-degree theft offense "were not prejudicially insufficient or erroneous[,]" id.; and (4) the court did not err by refusing to give a specific unanimity instruction, because "[i]n this

[10] The ICA's disposition of the claim of right issue is discussed at length infra.

case, the charged first-degree theft offense can be proven as a continuous offense[,]" and Respondent "treated [Petitioner's] charged theft offense as a continuous offense in its prosecution of [Petitioner,]" id. at *6.

Because the ICA "agree[d] that the [court] erred in denying [Petitioner's] request that the jury be instructed on the claim-of-right defense," it "vacate[d Petitioner's] conviction and remand[ed] for a new trial." Id. at *1.

IV.

Petitioner presents the following questions in her Application:

> 1. Whether the ICA gravely erred in holding that the [court] did not err in refusing to give a specific unanimity instruction.
> 2. Whether the ICA gravely erred in holding that [Petitioner] was not entitled to a mistake of fact jury instruction.[11]

Respondent did not file a memorandum in opposition.

V.

A.

As to her second question, Petitioner argues that "[t]he ICA's conclusion that [Petitioner's] testimony supported a mistake of law, rather than a mistake of fact, is wrong[,]" because "[Petitioner's] testimony as to the allegations of the DOE income, the HSA income, and Keana's absence from the household all supported a mistake of fact defense." Petitioner urges that Respondent had to prove that she acted "by deception, specifically, knowingly creating, confirming, or failing to

[11] We address Petitioner's second question, regarding mistake of fact, first.

correct a false impression[,]" (citing HRS §§ 708-800, 708-830(2), and 708-830.5), and that "[Petitioner's] testimony that she did not believe she had to report the changes relates directly to her mistake as to whether she created a false impression." Thus, Petitioner argues that if she "mistakenly believed that she did not need to report the changes, then she mistakenly believed that she did not create any false impressions[,] which is a material element[.]" Although Petitioner failed to request a mistake of fact instruction at trial, she maintains that "[t]he evidence adduced at trial supported the instruction and the [court's] failure to give [it] constituted substantial error that cannot be deemed harmless[,]" because, "[i]f the trier of fact believed that [Petitioner] was mistaken as to a single allegation . . . , it would have afforded [Petitioner] a mitigating defense by reducing the class of the offense."

B.

Respondent counters that "the [court] did not commit plain error in failing to give the jury an instruction on the defense of mistake-of-fact where there was no credible evidence to warrant such an instruction." According to Respondent,

> [t]he conduct that led to [Petitioner's] conviction, and the conduct against which her mistake-of-fact claim must be judged, was [Petitioner's] use of deception to obtain welfare funds to which she was not entitled, by failing to report that: (1) her children were not living with her, (2) she received a $5,000.00 lump sum payment, (3) she received income from the DOE, and (4) she received income from HSA.

Respondent maintains that "[Petitioner's] rebuttal to [Respondent's] evidence that she intentionally withheld

information about the children" consisted of the following:

> (1) the twins, Jadelyn and Jolene, were always living with her, (2) neither of her two older children . . . were living with her mother at any time, and (3) she did report Kaelin leaving the household, but did not report Keana moving out until sometime later because she believed Keana would return to her home in a few weeks.

In Respondent's view, "[n]one of these explanations related to any mistake made by [Petitioner,]" but simply represent a "denial that she misrepresented the custody status of [her] children[,]" or "another form of deception[.]"

As to Petitioner's failure to report income, Respondent argues that her "explanations" are not "mistakes," but "excuses." As to any potential "mistake" Petitioner may have made in failing to report income, Respondent urges that "[t]he significance of the relationship between a person's income to eligibility should not have been lost on [Petitioner] because her own application for welfare assistance was at first rejected . . . due to her income exceeding the eligibility limit."

Respondent also points out that "the warnings in the applications that [Petitioner] signed and completed to become eligible for welfare were very explicit[,]" stating that the recipient must "report any changes in your household or family within 10 days of the time you learn of the change[,]" including "receipt of a lump sum payment[,]" and "receipt . . . of money from any source." Respondent essentially argues that none of the evidence presented supports a conclusion that Petitioner was acting under a "mistaken belief," and thus, "[t]he [court] did not commit plain error in refusing to give a mistake-of-fact instruction under such facts."

VI.

A.

As to the first question, Petitioner argues that "a unanimity instruction was necessary because [Respondent] adduced evidence of multiple acts and one or more than one combination of those acts could constitute the charged crime." (Citing State v. Jones, 96 Hawaiʻi 161, 170, 29 P.3d 351, 360 (2001).) Petitioner points out that

> [i]n "multiple act" cases, the defendant's constitutional right to a unanimous jury verdict guaranteed under [a]rticle I, [sections] 5 and 14 of the Hawaiʻi Constitution require that the jury be unanimous as to which act or incident constituted the crime[:]
>
> > In a multiple acts case, . . . several acts are alleged and any one of them could constitute the crime charged. In these cases, the jury must be unanimous as to which act or incident constituted the crime. To ensure jury unanimity in multiple acts cases, we require that either the State elect the particular criminal act upon which it will rely for conviction, or that the trial court instruct the jury [sic] that all of them must agree that the same underlying criminal act has been proved beyond a reasonable doubt.

(Quoting State v. Shinyama, 101 Hawaiʻi 389, 399, 69 P.3d 517, 527 (2003).) According to Petitioner, "[i]n this case, a unanimity instruction was required because [Respondent] argued for criminal liability based on multiple acts[,]" and, therefore, "[w]ithout a unanimity instruction, it is impossible to know whether the jury was unanimous as to the conduct that constituted the crime." Petitioner asserts that the evidence was presented at trial such that "if the jury disbelieved even one of [Respondent's] allegations, the amount of the [total] calculation would vary." According to Petitioner, "a combination of various allegations or even a sole allegation would have been sufficient

to sustain the conviction[,]" inasmuch as "it was [not] necessary for the jury to find all allegations true in order to find that the value exceeded $20,000." Thus, Petitioner argues that "it is impossible to determine whether the jury was unanimous on conduct[.]"

Petitioner concedes that unanimity instructions are not required where Respondent relies on one course of conduct. However, Petitioner maintains that "the problem here is that [Respondent] did not elect to submit to the jury that it had to find that all of the acts of deception of which it adduced evidence at trial occurred in order to convict."

B.

Respondent argues to the contrary that "the [court] correctly refused to give the jury a unanimity instruction where the instant offense is a continuing offense." According to Respondent,

> [w]hat distinguishes conduct consisting of separate acts from a continuous course of conduct is (1) whether the conduct involved falls within the definition of a continuous offense, and (2) whether the prosecution alleged, adduced evidence, and argued that the accused's conduct was a continuous course of conduct in the presentation of its case.

(Citing State v. Hironaka, 99 Hawaiʻi 198, 207, 53 P.3d 806, 815 (2002).) (Emphases added.)

As to the first requirement, Respondent maintains that "the instant offense was a continuing offense[,]" because (1) under State v. Martin, 62 Haw. 364, 616 P.2d 193 (1980), "it is well established that a continuous offense can consist of a theft based on a series of acts involving welfare fraud[,]" and

(2) "the statutory construct for theft offenses in this State is favorable to treating thefts as a continuous offense[,]" inasmuch as "[HRS §] 708-801(6) plainly states that, 'amounts involved in thefts committed pursuant to one scheme or course of conduct, . . . may be aggregated in determining the class or grade of the offense.'"

As to the second requirement, Respondent avers that "the record is clear that the instant indictment charged [Petitioner's] conduct as a continuous offense[,]" stating that

> [b]eginning on or about [July 2, 2002] and continuing through to on or about [May 31, 2003], . . . [Petitioner] did obtain and exert control over the property of [Respondent], the value of which exceeded $20,000.00, by deception, with intent to deprive [Respondent] of its property, thereby committing the offense of Theft in the First Degree in violation of [HRS §§ 708-830(2) and 708-830.5(1)].

(Bold emphasis omitted.) Additionally, Respondent maintains that it argued the crime as a continuous offense in its closing argument, by stating that the "amounts of theft committed pursuant to one scheme or course of conduct can be aggregated . . . in determining the class or grade of the offense[,]" and "you can add up all the different instances where she committed theft and coming [sic] up with a final total which will be the determination of what kind of theft occurred in this case[.]"

VII.

A.

The defense of mistake of fact is codified in HRS § 702-218, which, as stated supra, provides, in relevant part, that

> [i]n any prosecution for an offense, it is a defense that the accused engaged in the prohibited conduct under ignorance or mistake of fact if:

> (1) The ignorance or mistake negatives the state of mind required to establish an element of the offense[.]

The Commentary on HRS § 702-218 provides that

> [t]his section states the logical concomitant of the requirement that to establish each element of an offense a certain state of mind with respect thereto must be proven. Thus, if a person is ignorant or mistaken as to a matter of fact or law, the person's ignorance or mistake will, in appropriate circumstances, prevent the person from having the requisite culpability with respect to the fact or law as it actually exists. For example, a person who is mistaken (either reasonably, negligently, or recklessly) as to which one of a number of similar umbrellas on a rack is the person's and who takes another's umbrella should be afforded a defense to a charge of theft predicated on either intentionally or knowingly taking the property of another. Also, a person, mistaken as to the effect of a divorce decree erroneously purporting to sever the marital ties of his wife, who marries another woman should not be convicted of bigamy if bigamy requires knowledge by the defendant of the defendant's existing marital status. A reckless mistake would afford a defense to a charge requiring intent or knowledge--but not to an offense which required only recklessness or negligence. Similarly, a negligent mistake would afford a defense to a charge predicated on intent, knowledge, or recklessness--but not to an offense based on negligence.
>
> This section of the Code deals with ignorance or mistake of fact or law, but it is not intended to deal with the limited problem of the defense afforded a person who engaged in conduct under the mistaken belief that the conduct itself was not legally prohibited. That problem is dealt with exclusively by § 702-220.
>
> Previous Hawaii law recognized a defense based on ignorance or mistake of fact or law, but usually the law required that the ignorance or mistake be reasonable. The Code correlates the culpability required for commission of the offense with the culpability which will deprive ignorance or mistake of effect as a defense.

(Emphases added.)[12]

[12] Although the Commentary indicates that the defense of "mistake of law" might be available, the Supplemental Commentary on HRS § 702-218 clarifies that mistake of law is only available in very limited circumstances not prescribed in that section:

> The Legislature in dealing with § 702-218 deleted a defense based on mistake of law. The Legislature said that it was "thereby avoiding a major dilemma with respect to enforcement of the provisions of this Code. The defenses of ignorance of the law afforded by §§ 702-218 and 220 would have been available, to a degree, under any given set of circumstances and as such would have constituted a major

(continued...)

According to Petitioner, "[b]ased on the evidence adduced at trial, a juror could have found that [Petitioner] believed that her actions complied with the reporting requirements[,]" and, therefore, "[Petitioner's] mistaken belief would have negated the states of mind required to establish the offense." As noted by Petitioner, Respondent was required to prove that Petitioner committed theft "by knowingly creating, confirming or failing to correct a false impression." (Citing HRS § 708-800.) Petitioner's theory as to mistake of fact is essentially that, if she believed she was complying with the reporting requirements by virtue of the items she did report to DHS, then she could not have "knowingly" created or failed to correct a false impression.

B.

As this court stated in State v. Locquaio,

> [p]ursuant to HRS § 702-204 (1993), "a person is not guilty of an offense unless the person acted intentionally, knowingly, recklessly, or negligently, as the law specifies, with respect to each element of the offense." "The elements of an offense are such (1) conduct, (2) attendant circumstances, and (3) result of conduct" that are "specified by the definition of the offense" and that "negative a defense." See HRS § 702-205 (1993). With respect to defenses that negate penal liability, the

[12](...continued)

> encumbrance to enforcement of the substance and spirit of the Code." See Conference Committee Report No. 2 (1972).
>
> Although the Legislature did not provide for a defense based on mistake of law, the State Supreme Court has recognized that, in some instances, there must exist, as a necessary corollary to the definition to certain offenses, a defense based on this type of mistake. See State v. Marley, 54 Haw. 450, 476-477, 509 P.2d 1095, 1111-1112 (1973). The court cited § 702-220 of the Hawaii Penal Code as providing a defense to a state trespass prosecution in the case of honest and reasonable belief ("no matter how incorrect such a belief might be") that another law (American treaty law) afforded a defense to the trespass.

(Emphasis added.)

> defendant has the initial burden to adduce "credible evidence of facts constituting the defenses, unless those facts are supplied by the prosecution's witnesses." See Commentary to HRS § 701-115 (1993). . . . [I]f the defendant raises a non-affirmative defense, the prosecution must prove beyond a reasonable doubt facts negating the defense.

100 Hawaiʻi 195, 206, 58 P.3d 1242, 1253 (2002) (brackets and ellipsis omitted) (emphases added). In that case,

> Locquiao's sole defense at trial was that he was unaware that the "glass material" recovered by [the police] was an "ice pipe" and that the "glass material" contained methamphetamine. That being so, Locquiao was entitled to an instruction on the ignorance-or-mistake-of-fact defense, and the prosecution bore the burden of disproving the defense - it being an element of its case-in-chief-beyond a reasonable doubt.

Id. (emphasis added).

In determining whether a separate mistake of fact instruction was required in addition to the circuit court's instruction as to the requisite state of mind for the offense, this court considered the legislative intent of HRS § 702-218, explaining that

> [t]he Hawaiʻi legislature premised the enactment of HRS § 702-218 on the proposition that, "if a person is ignorant or mistaken as to a matter of fact, the person's ignorance or mistake will, in appropriate circumstances, prevent the person from having the requisite culpability with respect to the fact as it actually exists." See Commentary to HRS § 702-218 (1993). Consequently, the legislature intended that a jury consider, separate and apart from the substantive elements, whether a defendant's mistaken belief should negate the requisite culpability for the charged offense. That being the case, insofar as ignorance or mistake of fact is a statutory defense in Hawaiʻi, we . . . now hold that, where a defendant has adduced evidence at trial supporting an instruction on the statutory defense of ignorance or mistake of fact, the trial court must, at the defendant's request, separately instruct as to the defense, notwithstanding that the trial court has also instructed regarding the state of mind requisite to the charged offense. We believe that to hold otherwise would render HRS § 702-218(1) nugatory.

Id. at 208, 58 P.3d at 1255 (emphases added) (ellipsis omitted).

Under Locquaio, a defendant is entitled to a separate mistake of fact instruction when the defendant presents evidence, "no matter how weak," that he or she acted under a mistake of fact that negated an element of the offense:

> This court has consistently held that a defendant is entitled to an instruction on every defense or theory of defense having any support in the evidence, provided such evidence would support the consideration of that issue by the jury, no matter how weak, inconclusive, or unsatisfactory the evidence may be. Moreover, it is the trial judge's duty to insure that the jury instructions cogently explain the law applicable to the facts of the case and that the jury has proper guidance in its consideration of the issues before it. Thus, on review, we must ascertain whether the jury instructions given by the circuit court, when read and considered as a whole, are prejudicially insufficient, erroneous, inconsistent, or misleading. Erroneous instructions are presumptively harmful and are a ground for reversal unless the prosecution satisfies its burden of showing that the erroneous instructions were harmless beyond a reasonable doubt.

Id. at 205-06, 58 P.3d at 1252-53 (emphases added) (ellipsis, quotation marks, brackets, and citations omitted).

Although, unlike the defendant in Locquaio, Petitioner in this case did not specifically request a mistake of fact instruction at trial,[13] the "harmless beyond a reasonable doubt" standard set forth in Locquaio applies. See State v. Nichols, 111 Hawaiʻi 327, 337, 141 P.3d 974, 984 (2006) (holding "that, . . . in the case of erroneous jury instructions, [the plain error] standard of review is effectively merged with the [Hawaiʻi Rules of Penal Procedure] Rule 52(a) harmless error standard of review because it is the duty of the trial court to properly instruct the jury[,]" and, thus, "once instructional error is demonstrated, we will vacate, without regard to whether timely

[13] Petitioner did request a claim of right instruction, which is a subspecies of mistake of fact, and, therefore, argues that that request should be construed liberally to encompass a request for mistake of fact.

objection was made, if there is a reasonable possibility that the error contributed to the defendant's conviction, i.e., that the erroneous jury instruction was not harmless beyond a reasonable doubt"). Thus, we must determine (1) whether Petitioner presented any evidence, "no matter how weak," that would have supported the jury's consideration of a mistake of fact defense and, if so, (2) whether the court's failure to instruct on mistake of fact was harmless beyond a reasonable doubt.

C.

1.

Petitioner's argument is essentially that, "if [she] mistakenly believed that she did not need to report the changes," then she did not knowingly create any false impressions. Petitioner presents the following as examples of evidence presented in her trial testimony that could have supported a mistake of fact defense:

> During the trial, [Petitioner] claimed, both in a letter to Cardenas, and during her testimony[,] that the twins were living with her during the relevant time period. Similarly, [Petitioner] denied that Kaelin or Keana were living with her mother at anytime [sic]. [Her mother] also confirmed this fact. [Petitioner] provided timely notice that Kaelin moved out of her household and also explained that she did not report Keana had moved because she believed that Keana would return to her household in a "few weeks."
>
> With respect to the unreported income, [Petitioner] and Cardenas both testified that [Petitioner] had reported in writing that she "started working." [Petitioner] explained that she did not attach her DOE pay stubs because she was not working regularly. Similarly, [Petitioner] testified that she did not work at the HSA as it was "seasonal" and that she reported the business to DHS. Finally, [Petitioner] did not report the $5,000 check that was dated in April 2003, but submitted a written request in May 2003 that she be removed from public assistance.
>
> . . . .
>
> In this case, [] the evidence adduced at trial substantiated that in multiple instances, [Petitioner] reported her household changes to Cardenas. [Petitioner] also provided explanations regarding [Respondent's]

> accusations of later reporting, failure to report changes, and contradictory witness testimony.

Based on the foregoing, Petitioner argues that "[a] reasonable juror could have concluded that [Petitioner] believed that she reported her household changes and disclosed all material information as mandated."

The ICA rejected Petitioner's contention, stating that

> [Petitioner's] claims do not support a mistake-of-fact defense. The evidence presented by [Petitioner] did not show that she was mistaken about any material fact. Instead, [Petitioner] either disputed the facts alleged by [Respondent] or conceded the alleged facts but provided an explanation as to why she did not believe she was required to report them. The only "mistake" claimed by [Petitioner] was that she did not believe she was required to report certain of the undisputed events. However, a mistake concerning what was required to be reported was a mistake of law, not a mistake of fact.

Stenger, 2008 WL 5413898, at *4 (emphases added). However, in the course of "disput[ing] the facts . . . or conced[ing] the alleged facts but provid[ing] an explanation as to why she did not believe she was required to report them[,]" Petitioner presented evidence that could have supported the conclusion that she mistakenly believed that she in fact provided all of the required information, which would have been a factual mistake, and not a mistake as to any statutory law.

Based on the evidence presented, Petitioner provided some basis for the jury to believe (1) that she was mistaken as to the reporting requirements, i.e., that she believed the reporting she provided was sufficient to receive assistance, and/or (2) that Petitioner was mistaken as to certain factual matters regarding her personal situation which caused her to misreport, i.e., that Keana had not in fact moved out of her home

permanently. Although Respondent contends that Petitioner's explanations do not represent any mistake of fact, but are merely "excuses," that is a credibility issue for the jury.

2.

Hence, it cannot be concluded that the court's failure to instruct on the defense of mistake of fact was harmless beyond a reasonable doubt. Merely because the court provided an instruction as to the requisite state of mind for theft in the first degree by deception does not render the failure to instruct on mistake of fact harmless. Under the facts presented here, there is a reasonable possibility that the jury, if provided with a separate mistake of fact instruction, could have found that Petitioner believed she complied with the reporting requirements and, thus, did not knowingly deceive DHS. Thus, the ICA gravely erred in concluding that Petitioner was not entitled to an instruction on the mistake of fact defense.

VIII.

A.

The defense of a claim of right is set forth in HRS § 708-834, which, as set forth above, states in relevant part that "[i]t is a defense to a prosecution for theft that the defendant[] . . . . [b]elieved that the defendant was entitled to the property or services under a claim of right[.]" The ICA "conclude[d] that the circuit court erred in refusing to instruct the jury on the claim-of-right defense pursuant to HRS § 708-834(1)(b)[,]" because Petitioner "'believed that [she] was entitled to the property or services under a claim of right.'"

Stenger, 2008 WL 5413898, at *3 (quoting HRS § 708-834(1)(b)) (brackets omitted). That conclusion was based on the ICA's belief that "[t]he HRS § 708-834(1)(b) version of the claim-of-right defense . . . is broader than the [Model Penal Code (MPC)] version." Id. In that connection, the ICA explained that,

> [u]nlike HRS § 708-834(1)(b), the [MPC] version of the claim-of-right defense requires a link between the defendant's conduct and his or her claim of right. The MPC provides that "[i]t is an affirmative defense to prosecution for theft that the actor: . . . acted under an honest claim of right to the property or services involved or that he [or she] had a right to acquire or dispose of it as he [or she] did[.]" [MPC] § 223.1(3)(b) (1980) (emphasis added). [Petitioner] does not contend that she acted (failed to accurately disclose material information) because of a claim of right to welfare benefits. Instead, she asserts that she did not disclose the information that [Respondent] alleges she deceptively concealed because she did not believe or know she was required to report such information. Because there was no link between [Petitioner's] claim of right and her alleged unlawful conduct, [Petitioner] would not have a claim-of-right defense under the MPC.
>
> The HRS § 708-834(1)(b) version of the claim-of-right defense, however, is broader than the MPC version. HRS § 708-834(1)(b) does not require that the defendant's claim of right prompted his or her conduct, but provides a defense to a theft charge if the defendant "[b]elieved that [he or she] was entitled to the property or services under a claim of right." [Petitioner's] theory of defense was that she did not obtain the welfare benefits by deception because she honestly believed she had complied with the reporting requirements. [Petitioner] either disputed the information [Respondent] alleged she dishonestly concealed or contended that she did not believe or know she was required to report such information. In support of her defense, [Petitioner] introduced evidence that she had alerted the DHS to changes in her child care and employment situations, which she contended contradicted [Respondent's] allegations of deceptive concealment. We conclude that [Petitioner] adduced sufficient evidence to warrant an instruction on her claim-of-right defense.

Id. With all due respect, the ICA's discussion of the variation in wording between HRS § 708-834 and the MPC does not recount a material difference. Both statutes manifestly refer to the defendant's state of mind at the time he or she "acted," i.e., "obtain[ed]" or "exert[ed] control over" the property at issue.

See HRS § 708-830(2). Hence, both versions require a "link between [a defendant's] claim of right and [the] alleged unlawful conduct[,]" otherwise the defense could not negate the state of mind of "obtain[ing] . . . property . . . by deception." See id. The state of mind of deception is inextricably linked to the action of obtaining property and, accordingly, so must be any defense capable of negating that state of mind. Hence, the ICA's conclusion that "[b]ecause there was no link between [Petitioner's] claim of right and her alleged unlawful conduct, [Petitioner] would not have a claim-of-right defense under the MPC[,]" Stenger, 2008 WL 5413898, at *3 (emphasis added), applies under HRS § 708-834 as well. The ICA's conclusion that Petitioner should have had the benefit of a claim-of-right defense then, was based on an incorrect premise.

B.

First, assuming, arguendo, a claim of right instruction is necessary in this case, it is already subsumed within the mistake of fact defense. The Commentary on HRS § 708-834 recognizes that the claim of right defense is "probably unnecessary" when a mistake of fact instruction is given:

> Both the defenses allowed under § 708-834(1) are probably unnecessary in light of an informed reading of the substantive definitions of the various modes of theft. The existence of either condition (a) or (b) would relieve the actor of the culpability required to establish the offense: . . . a claim of right, assuming that it amounts to a belief that the actor is the true owner, would not only indicate that the actor did not have the requisite mental state, it would constitute a mistake of fact defense under § 702-218. The summary and restatement of this subsection is principally for purposes of clarity and emphasis.

(Emphases added.) Thus, the Commentary confirms that claim of right is a particular type of mistake of fact that would be

logically encompassed under a general mistake of fact instruction. A claim of right instruction, then, should only be given where the circumstances of the case require it "for purposes of clarity and emphasis." Id. Those circumstances are defined by the established meaning of claim of right, the Commentary on HRS § 708-834, and case law, all of which indicate that the instruction should be given only when the defendant expresses a belief in true ownership rights to specific identifiable property.

C.

Second, although Petitioner's "theory of defense [] that she did not obtain the welfare benefits by deception because she honestly believed she had complied with the reporting requirements[,]" Stenger, 2008 WL 5413898, at *3, warrants a general mistake of fact instruction, manifestly, she did not exercise such a belief "under a claim of right." HRS § 708-834 (emphasis added). Petitioner argued at trial that she "believed 'she was entitled to the benefits that she obtained and exerted control over,' based on the evidence that [Petitioner] reported household changes to her caseworker." However, the statute requires not only a belief of entitlement, but that the defendant was so entitled "under a claim of right." Id. If a mere belief of entitlement was enough, the "claim of right" language would be rendered a nullity. Hence, the phrase "claim of right" must carry a meaning distinct from "entitle[ment]." See County of Hawaiʻi v. C & J Coupe Family Ltd. P'ship, 119 Hawaiʻi 352, 362, 198 P.3d 615, 625 (2008) (holding that "an interpretation of a

statute must be rejected if it renders any part of the statutory language a nullity" (brackets, quotation marks, and citation omitted)).

1.

The term "claim of right" is not defined in the statute. Black's Law Dictionary states that a claim of right is "[a] criminal plea, usu[ally] to a theft charge, by a defendant asserting that the property was taken under the honest (but mistaken) belief that the defendant had a superior right to the property." Black's Law Dictionary 266 (8th ed. 2004) (emphasis added). In this case, Petitioner has not exhibited any belief that her "right" to the money received was somehow "superior" to that of Respondent's merely because she "reported household changes."

2.

The Commentary on HRS § 708-834 states that "a claim of right . . . amounts to a belief that the actor is the true owner[.]" (Emphasis added.) The "true owner" requirement connotes that ownership of the property must precede the actor's attempt to "deprive" another of that property. Petitioner does not claim that she was attempting to "recover" or "reclaim" property over which she had "ownership" rights, as required by the statute and the case law. Petitioner, on the other hand, repeatedly claimed that her belief was "based on the evidence that [she] reported household changes to her caseworker." Such action may provide evidence of a mistake of fact, i.e., that Petitioner believed she was in compliance with the reporting

requirements. But, it is not evidence that Petitioner acted based on any pre-existing belief that she had ownership rights in the benefits she received. Instead, receipt of the benefits was a direct result of what was reported by Petitioner. Thus, Petitioner was aware that benefits were conditioned on what she reported to the DHS, in contradistinction to a belief in "true ownership" that existed prior to the act of deprivation.

3.

In State v. Brighter, 62 Haw. 25, 30, 608 P.2d 855, 859 (1980) (per curiam), this court set forth that the claim must be to specific property, stating that

> "[i]t is vital to the defense, however, that the interest which the accused asserts under a claim of right must be to specific property, HRS [§] 708-834(1)(b); State v. Martin, [516 P.2d 753 (Or. App. 1973)], and the interest claimed by him must be in complete derogation of the victim's rights in and to the property which is the subject of the alleged robbery, HRS [§] 708-834(5).[14]

(Emphasis added.) See also State v. Brighter, 63 Haw. 105, 107-08, 621 P.2d 381, 384 (1980) (per curiam) ("This court has held that where no bona fide claim of right is made to specific property, the claim of right defense established by HRS § 708-834 is not available to a defendant charged with theft or robbery." (Emphasis added.) (Footnote and citation omitted.)). In Martin, the case upon which Brighter relied, the defendant attempted to assert a claim of right defense to robbery, where he attempted to recover a debt from another by force. 516 P.2d at 753-54. The Oregon Court of Appeals rejected that defense, emphasizing that

> it is important to distinguish between, on the one hand, situations where a person simply uses self-help to recover a

[14] Subsection (5) has been renumbered to subsection (4) in the present version of the statute, but the wording remains identical.

> specific chattel to which he has the right to immediate possession, and, on the other hand, situations where a person attempts to collect a debt out of another's money, with no pretense of ownership rights in the specific coins and bills.

Id. at 755 (emphases added). That court further recognized "that intent to steal is absent when a person retakes wrongfully held specific personal property to which he has the right to possession." Id. (citation omitted) (emphasis added). In this case, Petitioner has failed to show that the welfare benefits she claims were "specific property."

4.

A claim of right defense, then, must encompass (1) some form of pre-existing ownership or possession of (2) specific property. Here, Petitioner has not made any claim that she received the benefits in an effort to "retake[] wrongfully held specific personal property[,]" id., from Respondent. It would defy reason to attribute to Petitioner a belief that Respondent "wrongfully held" the benefits prior to distributing them to Petitioner.

Other courts have similarly viewed a claim of right defense as encompassing pre-existing ownership of specific property, holding, like Brighter and Martin, that a general claim that a debt is owed is not sufficient for a claim of right. For example, in State v. Winston, 295 S.E.2d 46, 50 (W.Va. 1982), the Supreme Court of West Virginia rejected a claim of right defense where the defendant "attempt[ed] to recover from the victim the $7750 debt that was claimed to be owed." It was deemed "important to note" that the previous cases where a claim of right defense had been allowed "involved the recovery of specific

property to which the owner claimed title." Id. (emphasis added). That court distinguished Winston from previous cases where a claim of right instruction had been given, stating that "[i]n the present case, we are not confronted with a defendant who has recovered specific property to which he has a bona fide claim of ownership." Id. (emphases added).

Significantly, the Winston court cited to Brighter, 62 Haw. 25, recognizing that, in Brighter, this court "limit[ed] the claim of right recovery . . . to the recovery of specific property." Id. at 51 (emphasis added); see also Woodward v. State, 855 P.2d 423, 427 (Alaska App. 1993) (relying on Brighter in rejecting defendant's claim because he "was not attempting to recover particular, identifiable property" (emphasis added)). The Winston court ultimately rejected the claim of right defense, concluding that "this defense is not available where the defendant took money or other property, to which he did not have a specific ownership claim, in satisfaction of a debt." 295 S.E.2d at 51 (emphasis added). In explaining why debt recovery does not support a claim of right defense, that court stated that "[t]he most commonly expressed rationale for this rule arises from the fact that in the debt recovery situation there is no identifiable property which is reclaimable[.]" Id. at 50 (emphasis added).

California has adopted a similar rationale in its claim of right cases, "limiting [the defense] to the perpetrator who merely seeks to effect what he believes in good faith to be the recovery of specific items of his own personal property." People

v. Waidla, 996 P.2d 46, 73 n.12 (Cal. 2000) (citation omitted) (emphasis added). In People v. Tufunga, 987 P.2d 168, 181 (Cal. 1999), the California Supreme Court allowed a claim of right defense in a debt collection situation because there was evidence that the two hundred dollars reclaimed by the defendant was actually the same bills he had just given to the victim. The Tufunga court required the instruction on claim of right because "if the jury, properly instructed, believed defendant's testimony, . . . defendant's actions in seeking to recover from the victim . . . what he believed in good faith was his specific property" would negate the requisite intent. Id. (first emphasis added and second emphasis in original). Petitioner has not argued any right to the "specific coins and bills," Martin, 516 P.2d at 755, that she received from the government, thereby failing to satisfy the requirement set forth in Brighter that the claim be to "specific property," 62 Haw. at 30, 608 P.2d at 859.

D.

1.

A claim of entitlement to welfare benefits from Respondent's coffers amounts to nothing more than a claim that "general money" is owed. Several cases have reaffirmed the proposition from Martin that a claim of right must be to "specific coins or bills." State v. Ramsey, 56 P.3d 484, 487 (Or. App. 2002), permitted the claim of right defense in a debt collection case because the "defendant's theory was that he was trying to recover the specific money that [the victim] had improperly taken from him[,]" and thus, "was not using force to

recover a debt; rather, he was using force to recover specific property."[15] (Emphases added.) In People v. Wooten, 44 Cal. App. 4th 1834, 1848-49 (Cal. App. 2. Dist. 1996), the California appellate court rejected the claim of right defense because there was insufficient evidence to support such a claim, and it was already covered by mistake of fact.[16] People v. Rosen, 78 P.2d 727, 729 (Cal. 1938), like Ramsey, requires that the defendant evince a belief that he or she took the property in an effort to recover specific currency, requiring that "the accused must intend in good faith to retake his own property."[17] (Emphasis

[15] Ramsey reaffirmed the distinction "between using force to collect a debt and using force to recover a specific chattel[,]" as set forth in Martin, 516 P.2d 753, an earlier case by that same court. 56 P.3d at 487. In that case, there was sufficient evidence for the claim of right instruction only because the defendant sought "to recover the money that [the victim] had wrongfully taken from him . . . which, in this case, could mean the specific currency he lost at the table[,]" and "[a]ccording to [the] defendant, he sought only to retrieve his own money[.]" Id. at 488 (emphases added). To the contrary, in this case, Petitioner cannot reasonably claim that she was seeking to "recover" or "retrieve" "specific money" that was "wrongfully" or "improperly" taken from her by Respondent, let alone that she believed she was seeking to recover "the specific currency" wrongfully taken from her by Respondent. Thus, Ramsey illustrates just how inapposite the claim of right defense is in this case.

[16] Wooten similarly does not support a claim of right defense in this case because, in that case, the appellate court affirmed the trial court's refusal of the requested claim of right instruction. See 44 Cal. App. 4th at 1848. In Wooten, "[t]he trial court refused appellant's requested instructions on [the claim of right] defense because it found them duplicative of instructions on mistake of law and fact." Id. The appellate court found "no error" because "the trial court had no obligation to give an instruction on the claim of right defense because there was no substantial evidence to support such a defense." Id.

[17] In Rosen, "the defendant [sought] the recaption of money lost by him at an illegal game[.]" 78 P.2d at 728. The California Supreme Court's decision in that case was based largely on the fact that the activity through which the defendant lost the money was illegal and thus, "the intent to steal is lacking in such a case, for the law recognizes no title or right to possession in the winner[,]" and, due to the illegality of the enterprise, "the winner gains no title to the property at stake nor any right to possession thereof; and that the participants have no standing in a court of law or equity." Id. (emphasis added). The theory is that "where the winner obtains no valid title or right to possession of the money won . . . , the

(continued...)

added.) In this case, it would be incongruous to say that Respondent obtained the benefits from Petitioner through illegal activity, and that she was thus attempting to "retrieve" or "retake" her "own money" or "own property" illegally held by Respondent. See Rosen, 78 P.2d at 729; Ramsey, 56 P.3d at 488. These cases confirm that claim of right cases are entirely inapposite to the case at bar. There appears to be no case in which claim of right is upheld as a defense to a charge of welfare benefits theft.

Under the rationale set forth in Brighter, 62 Haw. 25, and Martin, and affirmed by the foregoing cases, Petitioner cannot claim any "ownership rights in the specific coins and bills" distributed to her in the form of benefits. Property can only be "specific" where the defendant believes that the particular identifiable item seized is the same as that which was previously in the defendant's possession. See Martin, 516 P.2d at 755 (stating that a claim of right involves the use of "self-help to recover a specific chattel to which [a defendant] has the right to immediate possession" or "retak[ing] wrongfully held specific personal property to which [a defendant] has the right to possession" (emphases added)).

---

[17](...continued)
loser cannot have a felonious intent in taking it." Id. at 729 (ellipsis in original) (citations omitted). That court further held that "in resisting the charge of robbery by a showing that the intention was the recaption of money lost at an illegal game, it is not incumbent upon the defendant to prove that the money reclaimed was the identical money won from him," but "the accused must intend in good faith to retake his own property." Id. (emphases added). Thus, although the defendant was relieved from proving that the money he actually recovered was the same currency he lost, the claim of right defense nonetheless required that he believe in good faith that he was "retak[ing] his own property." Id. (emphasis added).

2.

Under Petitioner's seeming formulation of the claim of right defense, once the defendant has deprived another of certain property, that property somehow gains a "specific" character, regardless of the defendant's pre-existing relationship to that specific item of property. However, that interpretation of Brighter eviscerates any specificity requirement and, in conflict with Brighter, invites a claim of right instruction in cases where a defendant exhibits belief in a general entitlement to unspecified property that only gains its so-called "specific" character after it is in the defendant's possession. To the contrary, Brighter and Martin require that, prior to taking the property, the defendant must believe that he or she is acting to "recover" or "retake" "specific property" once held or owned by the defendant. Brighter, 62 Haw. at 30, 608 P.2d at 859; Martin, 516 P.2d at 755.

Petitioner did not have any ownership rights in the specific money distributed to her by Respondent. As far as Petitioner was concerned, any "bills or coins" would have satisfied her claim for benefits, not the particular coins and bills given her by Respondent. Thus, Petitioner's claim is not one of "true ownership" in "specific personal property" as required under claim of right, but is merely a belief in entitlement to some undefined future benefit that was never in her possession at any point prior to the alleged theft. The giving of a claim of right instruction in this case would remove the distinction between that defense and mistake of fact, which

was adopted by the penal code for the "purposes of clarity and emphasis." Commentary on HRS § 708-834.

E.

Based on the foregoing, the ICA gravely erred in "conclud[ing] that Petitioner adduced sufficient evidence to warrant an instruction on her claim-of-right defense." Stenger, 2008 WL 5413898 at *3. Thus, despite this court's previous order rejecting certiorari on the issue of claim of right, a claim of right instruction is not appropriate on this record, and should not be given.

IX.

With respect to Petitioner's first question, in Arceo, this court "h[e]ld that the right of an accused to a unanimous verdict in a criminal prosecution, tried before a jury in a court of this state, is guaranteed by article I, sections 5 and 14 of the Hawaiʻi Constitution."[18] 84 Hawaiʻi at 30, 928 P.2d at 872. Relatedly, Arceo held that, because "a general verdict embodies in a single finding the conclusions by the jury upon all questions submitted to it, . . . in criminal cases, this requirement of unanimity extends to all issues which are left to

[18] Article I, section 5 provides that "[n]o person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry."

Article I, section 14, states in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the district wherein the crime shall have been committed . . . Juries, where the crime charged is serious, shall consist of twelve persons."

the jury." Id. (quotation marks, brackets, ellipsis, and citation omitted).

A.

Based on those precepts, in Arceo, the defendant argued that,

> given the [victim's] testimony that Arceo committed multiple acts of sexual penetration and sexual contact within the context of single counts charging each - that either the prosecution was required to elect the specific acts upon which it was relying in seeking convictions of the charged offenses or the circuit court was required to give the jury a "specific unanimity" instruction as to each count.

Id. (emphases added). This court agreed, thereby

> hold[ing] that when separate and distinct culpable acts are subsumed within a single count charging a sexual assault - any one of which could support a conviction thereunder - and the defendant is ultimately convicted by a jury of the charged offense, the defendant's constitutional right to a unanimous verdict is violated unless one or both of the following occurs: (1) at or before the close of its case-in-chief, the prosecution is required to elect the specific act upon which it is relying to establish the "conduct" element of the charged offense; or (2) the trial court gives the jury a specific unanimity instruction, i.e., an instruction that advises the jury that all twelve of its members must agree that the same underlying criminal act has been proved beyond a reasonable doubt.

Id. at 32-33, 928 P.2d at 874-75 (emphases added). This court's holding in Arceo was based in part on its conclusion that sexual assault, as it is defined by the HRS, is not a "continuous offense." Id. at 12, 928 P.2d at 854. Arceo noted that

> [t]his court has defined a "continuing offense" as
>
> > a continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy, or an offense which continues day by day, or a breach of the criminal law, not terminated by a single act or fact, but subsisting for a definite period and intended to cover or apply to successive similar obligations or occurrences.

Id. at 18, 928 P.2d at 860 (quoting State v. Temple, 65 Haw. 261, 267 n.6, 650 P.2d 1358, 1362 n.6 (1982)) (brackets omitted).

Arceo also stated that "the test to determine whether a defendant intended to commit more than one offense in the course of a criminal episode is whether the evidence discloses one general intent or discloses separate and distinct intents. If there is but one intention, one general impulse, and one plan, there is but one offense." Id. (brackets and citation omitted) (emphasis added).

B.

This court subsequently characterized the test for whether an Arceo instruction is necessary in Hironaka as follows:

> Beyond the context of sexual assault charges, this court has held that an Arceo unanimity instruction is required, absent an election by the prosecution, when "at trial, the prosecution adduced proof of two or more separate and distinct culpable acts; and the prosecution seeks to submit to the jury that only one offense was committed." Accordingly, *Arceo* is not implicated if the prosecution adduces evidence of a series of acts by the defendant that constitute a "continuous course of conduct," and the prosecution "argues that the requisite conduct element is satisfied by the defendant's continuous course of conduct, albeit that the defendant's continuous course of conduct may be divisible into conceptually distinct motor activity."

99 Hawaiʻi at 207-08, 53 P.3d at 815-16 (citation, parenthetical, ellipsis, brackets, and footnote omitted) (emphases added). Thus, as long as evidence is adduced that the defendant engaged in a continuous "series of acts" constituting the crime charged, and the prosecution argues the case accordingly, a specific unanimity instruction is unnecessary.

C.

Relevant here, the Arceo court specifically noted that "theft of state property by deception, in violation of HRS § 708-830(2) (1993)[,]" among other offenses, is an example of a continuous offense. 84 Hawaiʻi at 19, 928 P.2d at 861 (citing

Martin, 62 Haw. at 367-69, 616 P.2d at 196-97). With regard to theft by deception, as well as the other examples provided by this court of continuous offenses, this court stated that "[e]ach of these offenses is statutorily defined as an uninterrupted and continuing course of conduct, or manifests a plain legislative purpose to be treated as such, or both." Id. (citation omitted).

In Martin, this court addressed the question of whether theft in the first degree constituted a continuing offense where the defendant "wrongfully obtained public assistance monies exceeding $200 from the State of Hawaii by deception[.]" 62 Haw. at 365, 616 P.2d at 195. Recognizing that the question of whether a crime constitutes a continuous offense was a matter of first impression, Martin applied the test set forth in People v. Howes, 222 P.2d 969 (Cal. 1950), requiring that the court consider "'whether the evidence discloses one general intent or discloses separate and distinct intents[,]'" and stating that, "if 'there is but one intention, one general impulse, and one plan, even though there is a series of transactions, there is but one offense.'" Martin, 62 Haw. at 368, 616 P.2d at 196 (quoting Howes, 222 P.2d at 976). Under that rationale, this court concluded that there was "but one intention and plan here and thus . . . there was one offense[,]" explaining that

> [w]e do not view each filing by defendant of a statement of facts supporting continued eligibility as necessarily constituting a new offense, since all statements were identical, representing that defendant was unmarried, unemployed, and not receiving social security benefits.

Id. at 369, 616 P.2d at 197.

D.

1.

Based on the foregoing, the ICA did not gravely err in concluding that, on the facts of this case, theft by deception constitutes a continuous offense. Although the facts are not exactly the same as in Martin, inasmuch as, in that case, the court based its conclusion in part on the fact that the defendant's "statements were identical," id., the same rationale applies here, because, based on Respondent's presentation of the case, Petitioner acted under "one general impulse," id. at 368, 616 P.2d at 196, and had "but one intention and plan," id. at 369, 616 P.2d at 197, i.e., to unlawfully procure public assistance from the government through a "series of acts," Arceo, 84 Hawaiʻi at 18, 928 P.2d at 860, all directed toward the same overarching goal.

2.

At trial, Respondent sought to prove that Petitioner committed theft in the first degree by deception, through a series of acts that occurred between July 2002 and May 2003, all directed toward receiving public assistance from Respondent. Although those acts were not identical, they all were closely related, inasmuch as each involved Petitioner's failure to report personal information to DHS that impacted her financial status. Respondent presented its case on the theory that all of those acts combined resulted in a total overpayment of $23,034.00, not that any of those acts individually, or any combination thereof, could have amounted to more than $20,000.00.

Respondent's closing argument reflected that its theory of the case was that a continuous "series of acts" committed by Petitioner between July 2, 2002, and May 31, 2003, resulted in theft in the first degree. In that connection, Respondent maintained that, "the offense of Theft in the First Degree [] was committed during the period from July 2nd of 2002 through May 31st 2003." (Emphasis added.) As to the total amount of overpayments, Respondent stated that

> [t]he next [element] is that the value of the property exceeded $20,000. And as the [c]ourt read you an instruction, amounts of theft committed pursuant to one scheme or course of conduct may be aggregated; in other words, added together in determining the class or grade of the offense. And what that simply means is that if you find that [Petitioner] had committed theft, you can add up all the different instances where she committed theft and coming [sic] up with a final total which will be the determination of what kind of theft occurred in this case; and what we're saying here is that it was over $20,000, and we know that by a set of calculations that the last witness, [Vallejo], calculated.

(Emphases added.)

Respondent further asserted to the jury that Petitioner engaged in a "pattern" of conduct resulting in the charge of theft in the first degree, stating, "[W]hat you'll see is a pattern of money going into th[e HSA] account, it may be small at some times, but at others it's significant, but the key point is, is that that information was never reported as it should have been[,]" (emphases added); "[t]he other kinds of things that we should look at would be is there a further pattern of not complying with welfare laws[,]" (emphasis added); and, finally

> the point is, is that if you look at this pattern, it is not simply a matter of isolated incident [sic] of mistakes being made. It is a pattern of something that was deliberately done, and it was done to get free money from [Respondent] that she did not deserve, and for that reason she committed

> this crime, and I would be asking you for a verdict of guilty.

(Emphases added.) Respondent's theory was manifestly that Petitioner committed the crime based upon a "pattern" of conduct.

3.

Hence, contrary to Petitioner's assertion, this is not a case in which "several acts are alleged and any one of them could constitute the crime charged[,]" and, thus, there was no need for Respondent to "elect the particular criminal act upon which it will rely for conviction, or [for] the [court to] instruct the jury [sic] that all of them must agree that the same underlying criminal act has been proved beyond a reasonable doubt." Shinyama, 101 Hawaiʻi at 399, 69 P.3d at 527 (citation omitted). By virtue of the manner in which the evidence was presented in this case, in order to convict Petitioner of first degree theft by deception, the jury would have had to be unanimous as to all of the conduct alleged.

As stated supra, Vallejo was the DHS eligibility worker who determined the amount of public assistance Petitioner was overpaid based on the allegedly false or incomplete information she provided from July 2002 to May 2003. Vallejo's testimony indicates she considered all of the evidence presented to her when determining the total amount of overpayment:

> [Respondent]: . . . so, I guess sort of the starting point is how much assistance has been received?
> [Vallejo]: Yes.
> Q. And then what kinds of further things do you look at in order to determine whether there were overpayments?
> A. I would have to look at what was not reported to [DHS] and see if she was entitled to the benefits that we provided to her on a monthly basis.
> Q. Okay. Now, in terms of the kinds of things that you discovered were disqualifying factors, let's say.

> A. Basically, we looked at her household composition, what was reported and not reported. We looked at income that was reported and not reported. And resources that she failed to report.
>
> So we look at everything, household -- I looked at everything when I did the overpayment. I look at household composition, earned income, resources.
>
> . . . .
>
> Q. So then the next thing that you have to look at would be the kind of income that individual would have received during a month?
>
> A. Yes.
>
> Q. And in terms of [Petitioner's] situation, what kinds of things did you find?
>
> A. I found that she, with her income, that she failed to report. Some months is eligible. Some months is not eligible. So I can give an example of -- let's say in her case she applied . . . July 2nd. And she reported two people in her household.
>
> The standard for three people is $712. She reported the child support. However, there is $200 that she failed to report from [HSA]. So her income of $774 exceeded the 712 standard; therefore, whatever she received for the month of July, she was totally ineligible. And I followed that [sic] steps when I did the August, September, October up to May, 2003. And it's the same thing with the food stamps.
>
> Q. Okay. So the kind of income that you were judging against were things like how much money that she was receiving from her business, [HSA], and from I guess employment from [DOE].
>
> A. Right, and plus whatever the child support. For the first two weeks, she was receiving child support that she reported. So anything that she reported, plus unreported income, were all considered on the amount that's available to her.
>
> . . . .
>
> Q. . . . Now, in terms of the calculations of overpayments that you made, did you total up the amount of overpayments for each category?
>
> A. Yes, I did.
>
> Q. And could you give that to the jury, please.
>
> A. For the financial assistance, the overpayment is 7,350. For the food stamps, it's 5,598. And for the medical $10,086 with a grand total of $23,034.

(Emphases added.) Thus, Respondent did not consider separately for each month whether Petitioner would have been eligible based on each item she failed to report, or on each of Petitioner's individual actions, but only performed the calculations based on a combination of all of the reported and unreported items, or on all of Petitioner's actions combined.

Contrary to Petitioner's assertion, then, there was no way that "one juror cold [sic] have found that one set of acts occurred that led to [Respondent] being deprived of more than $20,000, while another juror could have found that a different set of acts occurred that led to the deprivation of property valued at more than $20,000[,]" (emphasis in original), and thus, there was no unanimity issue.

X.

A.

Although Respondent presented its case with regard to Theft in the First Degree (Theft I) as a continuous offense, and therefore the ICA did not gravely err in concluding that the court was right in rejecting a requested unanimity instruction as to that count, we must conclude that the court gravely erred in failing to give a unanimity instruction as to the lesser included offense of Theft in the Second Degree (Theft II), on which it instructed the jury.

An instruction on Theft II was given by agreement of the parties. The court gave Supplemental Instruction No. 2, which outlined the lesser included offense of Theft II for theft of property in excess of $300, under HRS § 708-831.[19]

[19] The Court's Supplemental Instruction No. 2 stated:

> If and only if you find the defendant not guilty of the offense of Theft in the First Degree, or you are unable to reach a unanimous verdict as to that offense, then you must determine whether the defendant is guilty or not guilty of the included offense of Theft in the Second Degree.
>
> A person commits the offense of Theft in the Second Degree if she obtains or exerts control over the property of another, the value of which exceeds $300, by deception with intent to deprive the other of that property.

(continued...)

Respondent did not object to this instruction.[20] Thus, it can be assumed that it was agreed that there was a rational basis in the evidence for the Theft II instruction. The only way that the jury could conclude that the evidence adduced supported a conviction on the Theft II charge, but not Theft I, would be by rejecting some quantum of the evidence presented by Respondent.

In that connection, defense counsel argued during the settling of jury instructions that an Arceo instruction was required with respect to the Theft II charge:

> The second issue that I have that I feel a lot more strongly about is the [Arceo] issue. I know the [c]ourt's position is that this basically constitutes a continuous course of conduct. And normally in these type [sic] of theft cases, especially welfare cases where circumstances don't change from month to month for a period of say a year, I would agree with that. But in this case [Respondent] has introduced basically several different ways to disqualify [Petitioner] from the welfare benefits; and because in any given month they are given ways to disqualify her, it is very possible that jurors could find she obtained benefits in one month illegally and in one month she did not.
>
> And my main concern is should they come back -- because we're talking about an amount that is a little bit over the threshold amount. If they came back with a Theft II verdict, then it would be in violation of [*Arceo*] if some

---

[19](...continued)

> There are five material elements to the offense of Theft in the Second Degree, each of which the prosecution must prove beyond a reasonable doubt.
>
> These five elements are:
>
> 1. That the Defendant obtained and exerted control over the property of the State of Hawaii; and
> 2. That the Defendant did so by deception; and
> 3. That the Defendant did so with intent to deprive the State of Hawaii of the property; and
> 4. That the value of the property exceeded $300; and
> 5. That the Defendant believed that the value of the property exceeded $300.

(Emphasis added.)

[20] At oral argument on July 20, 2009, Respondent indicated that it made no objection to the court's Theft II instruction because Respondent believed it had a strong case for Theft I. However, if Respondent failed to object to a Theft II instruction, it cannot now contend a Theft II instruction should not have been given or was superfluous.

> of the jurors felt like -- if half the jurors, say felt like [Petitioner] obtained benefits for the first half of the year, but the other half felt like she obtained benefits for the second half of the year.

(Emphasis added.) As indicated by defense counsel, if the jury were to return a verdict on Theft II, by virtue of rejecting some quantum of the evidence presented by Respondent, absent a unanimity instruction, it would be impossible to know which "series of acts" resulted in the Theft II charge.

In concluding that an Arceo instruction was unnecessary, the court stated it believed that the case law was

> pretty much consistent with the finding that the Theft I charged in this case as well as the Theft II, which is a lesser included offense, that the [c]ourt is going to allow the [c]ourt to consider continuing offenses that involve from the evidence a continuing course of conduct.
>
> And as long as [Respondent] argues them as a continuing course of conduct, I think we are okay as far as [*Arceo*] is concerned, and so those are the reasons for the [c]ourt's rejecting [Petitioner's] instruction on the [Arceo] grounds.

(Emphases added.) The court's statement evinces that it may have overlooked the fact that Respondent never "argue[d Theft II] as a continuing course of conduct," but, instead, asserted that "what we're saying here is that it was over $20,000, and we know that by a set of calculations that the last witness, [Vallejo], calculated[,]" (emphasis added), and that Petitioner engaged in a pattern of conduct that resulted in a "grand total of $23,034[,]" (emphasis added). Thus, the second requirement from Hironaka, that "the prosecution argue[] that the requisite conduct element is satisfied by the defendant's continuous course of conduct," 99 Hawaiʻi at 208, 53 P.3d at 816 (citations omitted), was not satisfied as to the Theft II offense.

Based on the foregoing, if the evidence is presented in a similar manner upon remand, a unanimity instruction will be necessary as to the Theft II charge, in order to ensure that, in the event that a Theft II verdict is returned, the jury agrees unanimously upon the underlying conduct resulting in the Theft II conviction, thereby fulfilling "the purpose of an Arceo unanimity instruction[,]" which "is to eliminate any ambiguity that might infect the jury's deliberations respecting the particular conduct in which the defendant is accused of engaging and that allegedly constitutes the charged offense." State v. Kassebeer, 118 Hawaiʻi 493, 508, 193 P.3d 409, 424 (2008) (citation omitted).[21]

B.

Additionally, if it is undisputed that Petitioner was entitled to an instruction on Theft II, reason dictates that Petitioner was also entitled to jury instructions on the lesser included offenses of Theft in the Third Degree (Theft III) under HRS § 708-832 (1993), and Theft in the Fourth Degree (Theft IV) under HRS § 708-833 (1993).

1.

The Commentary on Hawaiʻi theft statutes, HRS §§ 708-830 to 708-833 (1993), establishes varying degrees of theft based on the value of the property or service.

[21] Based on the foregoing, it should be noted that, although theft by deception has been defined as a continuous offense in other contexts, where it does not satisfy the requirements for a continuous offense that have been set forth in our case law regarding specific unanimity instructions, the offense will not be considered continuous. Thus, Martin does not stand for the proposition that theft by deception is always a continuous offense, but only that it may be under certain circumstances, such as those presented herein with regard to Theft I. However, when the dangers of Arceo are implicated, i.e., when uncertainty exists over which specific acts of the defendant support a given offense, a specific unanimity instruction is necessary.

> The Code is in accord with the [MPC] and other recent revisions in grading the theft offenses according to the mode of the theft, the object involved, and the value of the property or services stolen. The gradation is based on the theory that theft from the person, or of a firearm, or of property or services of relatively high value presents greater social harm and that the actor in such cases may require greater rehabilitation efforts. Moreover, the ordinary person, insofar as value of the property or services is concerned, "feels a lesser repugnance to taking small amounts than large amounts."

(Footnote and citation omitted.) (Emphases added.) This court has stated that trial courts "must instruct juries as to any included offenses when 'there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense[.]" State v. Haanio, 94 Hawaiʻi 405, 413, 16 P.3d 246, 254 (2001) (citing HRS § 701-109(5) (1993)).

But, while the court provided jury instructions on the lesser included offense of Theft II, it refused jury instructions on lesser included offenses of Theft III (the "Court's Supplemental Instruction No. 3")[22] and Theft IV (the "Court's

[22] The "Court's Supplemental Instruction No. 3," which was refused over objection by Petitioner, states:

> If and only if you find the defendant not guilty of the offense of Theft in the First Degree, or you are unable to reach a unanimous verdict as to that offense, and you find the Defendant not guilty of the offense of Theft in the Second Degree, or you are unable to reach a unanimous verdict as to that offense, then you must determine whether the defendant is guilty or not guilty of the included offense of Theft in the Third Degree.
>
> A person commits the offense of Theft in the Third Degree if she obtains or exerts control over the property of another, the value of which exceeds $100, by deception with intent to deprive the other of that property.
>
> There are five material elements to the offense of Theft in the Third Degree, each of which the prosecution must prove beyond a reasonable doubt.
>
> These five elements are:
>
> 1. That the Defendant obtained and exerted control over the property of the State of Hawaii; and
> 2. That the Defendant did so by deception; and

(continued...)

Supplemental Instruction No. 4")[23] over objections by Petitioner.

During the settlement of jury instructions, Petitioner's counsel objected to Jury Instruction No. 8.04 as modified, which added the offense of Theft II to the jury's consideration. Instruction No. 8.04, as modified, states:

> You may bring in one of the following verdicts:
> 1. Not guilty; or
> 2. Guilty as charged; or

---

[22](...continued)

> 3. That the Defendant did so with intent to deprive the State of Hawaii of the property; and
> 4. That the value of the property exceeded $100; and
> 5. That the Defendant believed that the value of the property exceeded $100.

(Emphases added.)

[23] The "Court's Supplemental Instruction No. 4," which was also refused over objection by Petitioner, states:

> If and only if you find the defendant not guilty of the offense of Theft in the First Degree, or you are unable to reach a unanimous verdict as to that offense, and you find the Defendant not guilty of the offense of Theft in the Second Degree, or you are unable to reach a unanimous verdict as to that offense, and you find the Defendant not guilty of the offense of Theft in the Third Degree, or you are unable to reach a unanimous verdict as to that offense, then you must determine whether the defendant is guilty or not guilty of the included offense of Theft in the Fourth Degree.
>
> A person commits the offense of Theft in the Fourth Degree if she obtains or exerts control over the property of another, of any value not in excess of $100, by deception with intent to deprive the other of that property.
>
> There are five material elements to the offense of Theft in the Fourth Degree, each of which the prosecution must prove beyond a reasonable doubt.
>
> These five elements are:
> 1. That the Defendant obtained and exerted control over the property of the State of Hawaii; and
> 2. That the Defendant did so by deception; and
> 3. That the Defendant did so with intent to deprive the State of Hawaii of the property; and
> 4. That the property was of any value not in excess of $100; and
> 5. That the Defendant believed that the property was of any value not in excess of $100.

(Emphases added.)

> 3. Guilty of the included offense of Theft 2.
> Your verdict must be unanimous.
> After a verdict has been reached and your foreperson has signed and dated the verdict form, you will notify the bailiff, and court will be reconvened to receive the verdict.

However, Petitioner's counsel's objection was not to the essence of second degree theft, but to the refusal of the court to also instruct on the offenses of third degree and fourth degree theft:

> Judge, I guess this goes to the instruction we were about to talk about. I think that there is a scintilla of evidence that the jury could come back in an amount between $100 and $300 certainly, and even possibly less than $100 of an amount is likely, but I think a scintilla exists for both Theft III and IV.

(Emphases added.) Petitioner's counsel made the same objection to the court's refusal of the court's supplemental instructions nos. 3 and 4, noted above. In refusing the instruction, the court stated, "The [c]ourt does not think there's a rational basis in the evidence to convict of the lesser included offenses[.]" But the court did not explain why it determined there was a rational basis for giving a second degree theft instruction but not theft in the third and fourth degree instructions.[24]

[24] The court also refused Petitioner's Amended Requested Jury Instruction No. 1, which states in part:

> In order for you to find Defendant ANGELA STENGER guilty of Theft in any degree, you must unanimously answer at least one of the following questions with a "yes" response on the special interrogatory form which will be provided to you:
> Did you unanimously find beyond a reasonable doubt that Defendant ANGELA STENGER obtained and exerted control over the property of the State of Hawaii by deception and

(continued...)

2.

The court instructed the jurors that they were the exclusive judges of the "effect and value of the evidence" and "credibility of the witnesses":

> While you must consider all of the evidence in determining the facts in this case, this does not mean that you are bound to give every bit of evidence the same weight. You are the sole and exclusive judges of the effect and value of the evidence and of the credibility of the witnesses.

(Emphasis added.) The court also instructed the jury on the credibility and weight of testimony:

> It is your exclusive right to determine whether and to what extent a witness should be believed and to give weight to his or her testimony accordingly. In evaluating the weight and credibility of a witness's testimony, you may consider the witness's appearance and demeanor; the witness's manner of testifying; the witness's intelligence; the witness's candor or frankness, or lack thereof; the witness's interest, if any, in the result of this case; the witness's relation, if any, to a party; the witness's temper, feeling, or bias, if any has been shown; the witness's means and opportunity of acquiring information; the probability or improbability of the witness's testimony; the extent to which the witness is supported or contradicted by other evidence; the extent to which the witness has made contradictory statements, whether in trial or at other times; and all other circumstances surrounding the witness and bearing upon his or her credibility.
>
> Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony. In weighing the effect of inconsistencies or discrepancies, whether they occur within one witness's testimony or as between different witnesses, consider whether they concern matters of importance or only matters of unimportant detail, and whether they result from innocent error or deliberate falsehood.[25]

---

[24](...continued)
with the intent to deprive the State of Hawaii of the property during any of the following months:

(Emphasis added.) This requested jury instruction listed each month from July 2002 to May 2003, with spaces for the jury to "indicate the amounts which you unanimously agree Defendant obtained control over during this month" in financial benefits, food stamp benefits, and/or medical benefits.

[25] The court additionally instructed the jury that if "you find that a witness has deliberately testified falsely to any important fact or (continued...)

(Emphases added.)

The court's instructions that the jury may in effect reject part or all of a witness's testimony or other evidence allowed the jury to independently determine to what extent, if any, deception had been employed by Petitioner and, thus, countenanced not only an instruction as to second-degree theft, but also instructions on third-degree and fourth-degree theft. Because the jury was the exclusive judge of the "value of evidence" and "credibility of witnesses," it had the ultimate discretion to decide "to what extent a witness should be believed" and whether "to discredit" testimony. Hence, the jury could determine, based on its evaluation of the witnesses' testimony and evidence, that varying amounts of less than $20,000 had been obtained by deception.

Because the court instructed the jury that it could reject the testimony of any witness except for parts "which you nevertheless believe to be true," the jury could find Petitioner committed theft of not only less than $20,000, but less than $300 or less than $100, making the offenses of Theft III or Theft IV applicable. This is the only logic that can be applied to the giving of the second-degree theft instruction. If the jury could

[25](...continued)
deliberately exaggerated or suppressed any important fact, then you may reject the testimony of that witness except for those parts which you nevertheless believe to be true."

determine that Petitioner obtained less than $20,000 by deception but more than $300, it was free, on the same evidence, to determine alternatively that even less was obtained by deception.

Respectfully, the court's refusal to provide instructions on the lesser included offenses of Theft III and Theft IV was inconsistent with the giving of an instruction on Theft II inasmuch as, on the same evidence, the extent to which such evidence was credible was within the jury's exclusive discretion to determine. In light of the circumstances, as tried by Respondent, jury instructions on the lesser included offenses of Theft III and Theft IV should have been given.[26]

3.

It is established in this jurisdiction that "juries are obligated to render true verdicts based on the facts presented; hence, barring their consideration of lesser included offenses supported by the evidence undermines their delegated function. . . . Most significantly, an all or nothing approach impairs the truth seeking function of the judicial system." Haanio, 94 Hawaiʻi at 415, 16 P.3d at 256 (citation omitted). As was said in Haanio:

> The judicial objectives within the context of the criminal justice system are to assess criminal liability and to determine appropriate punishment if and when warranted. Acceding to an "all or nothing" strategy, albeit in limited circumstances, forecloses the determination of criminal liability where it may in fact exist. Thus, elevating a

[26] Based on the rationale set forth supra regarding Theft II, it would also be necessary that the specific unanimity instruction be applied to the lesser included offenses of Theft III and Theft IV.

> "winner take all" approach over such a determination is detrimental to the broader interests served by the criminal justice system.

Id. at 414, 16 P.3d at 255.

In light of the "all or nothing strategy" of Respondent, an omission of relevant lesser included offense instructions is contrary to the proposition that the jury must seek the truth. This critical jury function requires that its members be fully informed on the law as instructed by the court. Therefore, providing instructions on all lesser included offenses with a rational basis in the evidence is essential to the performance of the jury's function.

XI.

Based on the foregoing, the ICA's judgment is vacated in part, the court's judgment is vacated, and the case remanded for a new trial consistent with this opinion.

Karen Nakasone, Deputy
Public Defender
(Taryn Tomasa, Deputy
Public Defender, on the
briefs and application)
for petitioner/
defendant-appellant.

Lawrence A. Goya,
Deputy Attorney General
for respondent/
plaintiff-appellee.