CONCURRING OPINION BY ACOBA, J.,
IN WHICH RAMIL, J., JOINS

The primary issue in this case was whether Defendant-Appellant Byran K. Uyesugi (Defendant) lacked substantial capacity, i.e., an extremely limited capacity, see State v. Nuetzel, 61 Haw. 531, 550-51, 606 P.2d 920, 932 (1980), to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. Under the circumstances of this case, the challenged instructions did not result in substantial prejudice to Defendant. In light of the burden on Defendant to prove by a preponderance of the evidence that he lacked substantial capacity and ample evidence that he did not, I believe the errors were harmless beyond a reasonable doubt. Accordingly, I concur in the result reached.

However, inasmuch as similar issues will likely arise in future cases, I register my position as it differs from the majority's view on the following matters: (1) the lack of a definition for the term "appreciate" in the jury instructions relating to the insanity defense[1]; (2) the majority's adoption of a subjective/objective test for the term "wrongfulness" in the same instruction; (3) the failure to include a jury unanimity clause in the "insanity" instruction; (4) the lack of a unanimity requirement in the mitigating manslaughter instruction; and (5) the giving of the manslaughter instruction before the

[1] For convenience, I refer to Hawai'i Revised Statutes (HRS) § 704-400 (1993), the defense of "physical or mental disease, disorder or defect[,]" as the "insanity" defense.

instruction concerning insanity. Because this opinion is published and, thus, establishes precedent in our jurisdiction, see Appendix A attached hereto, the rules of law involved extend beyond this case alone.

I.

The insanity defense, HRS § 704-400 (1993),[2] precludes responsibility for otherwise criminal conduct if "the person lacks substantial capacity either to appreciate the wrongfulness of the person's conduct or to conform the person's conduct to the requirements of the law." (Emphasis added.). In that regard, the jury was instructed as follows:

> [] Defendant is not criminally responsible for his conduct if it is more likely than not or more probable than not that, at the time of the charged offense(s) and as a result of a physical or mental disease, disorder or defect, [] Defendant lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.
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> A person "lacks substantial capacity" either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law if his capacity to do so has been extremely limited by physical or mental disease, disorder or defect. The phrase "lack of substantial capacity' does not mean a

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[2] HRS § 704-400 sets forth the defense as follows:

> **Physical or mental disease, disorder, or defect excluding penal responsibility.** (1) A person is not responsible, under this Code, for conduct if at the time of the conduct as a result of physical or mental disease, disorder, or defect the person lacks substantial capacity either to appreciate the wrongfulness of the person's conduct or to conform the person's conduct to the requirements of the law.
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> (2) As used in this chapter, the terms "physical or mental disease, disorder, or defect' do not include an abnormality manifested only by repeated penal or otherwise anti-social conduct.

(Boldfaced font in original.) (Emphasis added.)

> total lack of capacity. It means capacity which has been impaired to such a degree that only an extremely limited amount remains.

(Emphases added.) Defendant did not request a definition of the term "appreciate" or "wrongfulness" as used in HRS § 704-400. However, on appeal, Defendant raises as error the court's failure to define them. The court did advise the jury that "[u]nless otherwise provided, the words used in these instructions shall be given their ordinary meaning, taken in their usual sense, and in connection with the context in which they appear."

In rendering instructions, trial judges are vested with the responsibility of providing jurors with cogent instructions and definitions to ensure that a jury will consider a case in a logical and intelligent manner. See State v. Kinnane, 79 Hawai'i 46, 50, 897 P.2d 973, 977 (1995). Thus, it is the role of the court, not the witnesses or the parties, to provide the pertinent definitions of law to the jury so that the jury may properly apply the facts to the law. Indeed, the court's responsibility includes acting "'as the jury's guide to the law.'" State v. Kupau, 10 Haw. App. 503, 514, 879 P.2d 559, 564 (1994) (quoting People v. Wickersham, 650 P.2d 311, 319 (Cal. 1982), overruled on other grounds by People v. Barton, 906 P.2d 531, 539 (Cal. 1995)). This principle governs our overview of a trial court's instructions.

II.

A.

In that regard, this court reviews jury instructions given by the trial court to determine whether "when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent or misleading." State v. Valentine, 93 Hawai'i 199, 203, 998 P.2d 479, 483 (2000). Inasmuch as several experts testified as to different meanings of the term, it would have been preferable for the court to have instructed the jury as to the definition of "appreciate." Under other circumstances, the failure to do so may constitute reversible error.

The prosecution and its witnesses defined "appreciate" in terms of Defendant's ability to know right from wrong. To illustrate the point, prosecution expert witness Dr. Thomas Cunningham, indicated that, "[i]n a case like this, [he] generally look[s] for certain types of evidence that would indicate that a person is not able to recognize the difference between right and wrong." Similarly, Dr. James Tom Greene, another prosecution expert, testified that, "[o]n the test I gave [Defendant], he's clear. There's absolutely no bad judgment. . . . Judgment has to do with the ability to differentiate and determine a right from wrong behavior." Dr. Leonard Jacobs, also testifying for the prosecution, related that he did not "find anything that satisfied [him] that [Defendant] in fact did not

know right from wrong[.]" During cross-examination, Dr. Jacobs further clarified that, as he understood the term, "appreciate" means "to know." In addition, a prosecution rebuttal witness, Dr. Harold Hall, defined "appreciate" as "to know or to realize[,]" although during cross examination he conceded that "appreciate" "goes beyond a simple knowing what's legally right or wrong[.]" Similarly, another prosecution expert witness, Dr. Michael Welner, testified that "appreciate" meant "to recognize[.]"

Contrastingly, the defense experts testified that "appreciate" essentially means "to accurately weigh." Dr. Park Dietz clarified that "[a] person can know that something is right or know that it is wrong. To appreciate how wrong something is means that things vary in how wrong they are, and an individual needs to be able to gauge the severity, the degree of wrongfulness of some action." Dr. Dietz concluded that, under Hawai'i law, Defendant was insane because, "although he knew that it was against the law to do it and he knew it was wrong, because of his illness, he could not accurately estimate how terrible what he did was."

Dr. Daryl Matthews, another defense expert witness, similarly testified that he "take[s] the term appreciate to mean to be able to set a right value on it to be able to accurately appraise a situation." Defense witness Dr. Robert Marvit also defined "appreciate" as being able to weigh the significance of

something, by explaining that "[s]o to appreciate means being able to look beyond some kind of narrow focus of either or, good or bad, right or wrong, this or that. It's being able to look at the consequence of a behavior."

B.

The term "appreciate" is not defined by statute.[3] This court may "resort to legal or other well accepted dictionaries as one way to determine the ordinary meaning of certain terms not statutorily defined[.]" State v. Kalama, 94 Hawai'i 60, 63 n.6, 8 P.3d 1224, 1227 n.6 (2000) (internal quotation marks and citation omitted). The common definition of the term "appreciate," taken in its usual sense, is "to grasp the nature . . . or significance of." Miriam Webster's Collegiate Dictionary 57 (10th ed. 1993). Thus, an appropriate jury instruction, in the context of an insanity defense instruction, HRS § 704-400(1), would also have defined the term "appreciate" as the ability to grasp the nature or significance of the wrongfulness of the defendant's conduct.

[3] I observe that the majority discusses the terms "appreciate" and "wrongfulness" separately, as Defendant advocates. The case it relies on for its definition of "wrongfulness," Wilson, 700 A.2d at 643, concerned the application of the entire phrase "appreciate the wrongfulness[.]" While largely a semantical point, the majority's definition of "wrongfulness" is likely to engender jury confusion as it utilizes a "subjective/objective" test that is only appropriate when placed in context of the entire phrase "appreciate the wrongfulness[.]"

C.

Here the court informed the jury that it was to apply words in their usual sense in the context in which they were used. The term "appreciate," as it is employed in HRS § 704-400(1), is consonant with the common meaning attributed to it. See discussion infra, section II.D. The court also advised the jury that the opinions of the experts and, thus, presumably their views of the word appreciate, were not binding on the jury.[4] In light of this, and considering the other instructions, the absence of an instruction defining "appreciate," under the circumstances of this case, did not render the instructions given "prejudicially insufficient, erroneous, inconsistent or misleading." Valentine, 93 Hawai'i at 203, 998 P.2d at 483.

D.

The ordinary reading given to the term "appreciate" is supported by legislative history. Hence, the view that "appreciate" simply means to distinguish between right and wrong

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[4] The court read the jury an instruction on expert testimony as follows:

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

(Emphasis added.)

has been rejected by our legislature. This court had earlier stated that under the so-called "right/wrong test," or M'Naghten Rule, for establishing insanity, the defendant must prove that he or she was mentally or physically incapacitated so "as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." State v. Moeller, 50 Haw. 110, 114 n.5, 433 P.2d 136, 140 n.5 (1967) (quoting M'Naghten's Case, 10 Clark & Fin. 200, 210, 8 Eng. Rep. 718 (1843)). Subsequent to Moeller, the legislature concurred that the M'Naghten rule was outdated. See Hse. Stand. Com. Rep. No. 227, in 1971 House Journal, at 785 (agreeing with the Hawai'i Supreme Court in Moeller that the M'Naghten rule was not in "accord with the enlightened state of modern medicine and psychiatry.").

It adopted the American Law Institute (A.L.I.) "substantial capacity" formulation of the insanity definition instead, see Commentary to HRS § 704-400(1), that is that a "defendant is not criminally responsible for his acts if he lacks substantial capacity either to appreciate the wrongfulness of the person's conduct or to conform the person's conduct to the requirements of the law." See also Nuetzel, 61 Haw. at 536, 606 P.2d at 924 (noting that the A.L.I. insanity definition was a more "realistic" formulation and that it "conforms with the practical experience of psychiatrists[.]"). Thus, a construction

of the term appreciate as merely referring to knowing right from wrong would oversimplify its meaning.

III.

A.

With respect to Defendant's contention that the court should have instructed the jury on the term "wrongfulness," the majority apparently concludes that Defendant would be entitled to receive a specific definition as to that term if he had established "the dual components of knowing that the conduct in question is criminal and honestly but mistakenly believing that conduct to be morally justified." Majority opinion at 23 (citing State v. Wilson, 700 A.2d 633, 643 (Conn. 1997) (emphasis added). In embracing both the majority and concurring positions in Wilson, the majority devises its own subjective/objective test for the term "wrongfulness."[5] However, the majority decides in this case that an instruction is unnecessary because "[Defendant did not] adduce[] sufficient evidence at trial to entitle him to a specific instruction on this point" because "[a]t trial, [Defendant]'s experts never testified that [Defendant] believed his conduct to be morally justified." Majority opinion at 25. Of course, at the time of this trial the rule set forth in

[5] The subjective/objective test is described as "[f]irst, in satisfying the subjective portion, the record must reflect the circumstances as the defendant believed them to be. Second, in satisfying the objective portion, the record must support a reasonable explanation or excuse for the actor's disturbance." Majority opinion at 24 (quoting State v. Sawyer, 88 Hawai'i 325, 333, 966 P.2d 637, 545 (1998) (internal quotation marks omitted).

Wilson, its grounding in a "moral justification" explanation, and nomenclature to that effect was not adopted in this state.

B.

While the defense expert witnesses may not have discussed Defendant's conduct expressly in terms of moral justification, they suggested that Defendant believed he was morally justified in his acting as he did. For example, Dr. Dietz testified that "[i]t's [his] opinion that [Defendant] was not capable of accurately gauging how wrong his actions were the day that he killed th[ose] seven people." (Emphasis added.) Dr. Dietz also referred to Defendant's belief "that because of all that had been done to him on purpose and maliciously putting him and his family at risk, ruining the only peace he had, that they all deserved to die." Dr. Matthews opined that "[Defendant] could not adequately appreciate [the decedents] as people. And his view of them were so distorted by his delusions that he couldn't appreciate the wrongfulness of his conduct." Moreover, Dr. Marvit determined that there was evidence "that [Defendant] was not only misperceiving reality, but reacting to the misperception of reality" and thus "to this day, [Defendant] has maintained a belief system . . . in terms of [a] lack of . . . belief that anything that was done was, in fact, inappropriate."

Thus, under Wilson, the defense in this case offered "sufficient evidence from which a jury reasonably could have found, by a preponderance of the evidence, that due to a mental

disease [disorder] or defect, . . . [D]efendant misperceived reality and, in acting on the basis of that misperception, did not substantially appreciate that his actions were contrary to societal morality[.]" Wilson, 700 A.2d at 645 (citation omitted). Hence, following the majority's view, the court should have provided the jury with an instruction concerning the majority's subjective/objective standard. The presence of evidence to the contrary adduced by the prosecution would not preclude such an instruction. See id. at 645 (explaining that, where there was evidence that the defendant the did not substantially appreciate that his actions were immoral, other evidence showing the defendant was motivated by simple retribution "goes to the weight of the defendant's proof, and not to whether the defendant was entitled to a jury instruction correctly defining the term 'wrongfulness.'").

IV.

In contrast to the majority, I do not believe the term "wrongfulness" needs be defined so as to include the situation in which a defendant suffers under the delusion that he was morally right. The term "wrongfulness" itself precludes a meaning restricted only to criminal conduct.[6] If it were otherwise, this cognitive prong of HRS § 704-400(1) would have been couched in terms of "unlawfulness," as the second "volitional" prong of the

[6] With all due respect, it is difficult to ascertain how this test advances the evaluation of "wrongfulness."

substantial capacity test states ("or to confirm the person's conduct to the requirements of the law").[7] Wrongfulness is a noun form of "wrongful." "Wrongful" means "full of or characterized by wrong: unjust or unfair." Random House Collegiate Dictionary at 1521 (rev. ed. 1984).[8] The definition of wrongful as unjust or unfair is widely understood and broad enough to enable a jury to comprehend that a delusion, whether based on a mistaken moral justification view or some other false perception that was acted upon by a defendant, is subsumed by the term.

A "delusion" is a "false personal belief based on incorrect inference about external reality and firmly maintained in spite of incontrovertible and obvious proof or evidence to the contrary[.]" Dorland's Illustrated Medical Dictionary 355 (25th ed. 1981); see Diagnostic and Statistical Manual of Mental Disorders §297.1 at 323-24 (4th ed. 2000) (defining the different criteria for a "delusional disorder" and noting that it may result in "substantial" impairment). A delusion relied on by a defendant as an excusing psychiatric condition would plainly be encompassed in the term wrongfulness.

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[7] The "substantial capacity" test involves two parts. "Cognitive capacity," where it is lacking, means "the defendant must not know the nature and quality of the defendant's act or that what the defendant is doing is wrong." Commentary on HRS § 704-400. Volitional capacity "is put in terms of whether the defendant lacked substantial capacity to confirm the defendant's conduct to the requirements of the law." Id. In regard to the test, "[t]he Code does not demand total incapacity; it requires substantial incapacity." Id.

[8] This is "the most frequently encountered meaning [and] appears as the first definition for each part of speech." Random House Collegiate Dictionary at XXVIII.

Delusions, obviously, need not be based only in a fixed immutable view of moral correctness. The failure to appreciate the wrongfulness of one's conduct may arise from a delusion that does not necessarily rest on moral justification grounds. In positing that its specific wrongfulness test and instruction is intended to account for cases in which the defense is based on an overweening belief in moral superiority, the majority impliedly restricts the concept of wrongfulness. I would not so limit its breadth. To define wrongfulness further would simply produce confusion and intrude on the evidence. For, proving or disproving the capacity to appreciate wrongfulness in a particular case would assumably encompass all pertinent psychological disorders relevant to that case, including delusions, whether the delusion rested on a mistaken belief that the defendant's conduct was morally correct or some other false belief not rooted in some moral rationalization.[9]

The necessity for a specific instruction was lacking in this case. There was no dispute in recognizing a delusion as a mental disorder. During trial, both the prosecution and defense arrived at a common understanding of the concept consistent with the accepted description of the condition.[10] See Dorland's

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[9] The majority's position rests in part on "our legislature's reliance on Freeman when it enacted HRS § 704-400." Majority opinion at **27.** Respectfully, there is nothing to indicate in the legislative history that the legislature adopted the Freeman rationale, as later embodied in Wilson, or that the plain meaning of the term would not cover a psychiatric condition such as a delusion.

[10] Dr. Cunningham, a prosecution expert witness, defined the term "delusion" as

(continued...)

Illustrated Medical Dictionary 355 (25th ed. 1981). Similarly, there was no disagreement that Defendant's delusion was relevant to proving or disproving Defendant's defense of lack of capacity. At trial, a total of eleven psychologists and psychiatrists testified that Defendant suffered from "delusions and hallucinations."

Hence, as this case demonstrates, the question of wrongfulness as it relates to a mental disease, disorder, or defect is fact based and case specific, resting on the content of the evidence and expert opinions in any particular case. Thus, no further definition of the term wrongfulness would be appropriate in this case.

V.

In my view the conclusion that error, if any, was

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[10](...continued)

> a false belief that a person has that is unshakable. No matter how much evidence you provide them with and no matter how much they see that other people don't believe them, you cannot convince them that this false idea is wrong.

Dr. Dietz, a defense expert, defined Defendant's delusion as follows:

> Delusional disorder is an unusual mental illness. It's one of the serious mental illnesses, . . . one has one of the worst symptoms a person can have psychiatrically; namely, delusions, fixed, false beliefs that they cannot be talked out of. No proof, no evidence, no reasoning can ever touch the delusion.
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> And yet at the same time that they have extremely warped view of the world, other parts of them remain largely intact . . . unlike schizophrenia where most often people . . . are deteriorated . . . in the way they look and their hygiene and the ability to communicate and their ability to look you in the eye or talk to you, all those tend to be impaired in schizophrenia.

harmless also rests on the burden of proof placed on Defendant. The phrase "substantial capacity" in HRS § 704-400 is deliberately imprecise, because of the need for flexibility in evaluating the particular facts and circumstances of each case. See Commentary on HRS §704-400 ("An expert witness, called upon to assess a defendant's capacity at a prior time . . . , can hardly be asked for a more definitive statement even in the case of extreme conditions." (Citations omitted.)).

In Nuetzel, 61 Haw. at 536, 606 P.2d at 924, a pre-affirmative defense case, this court held that a jury instruction defining "lack of substantial capacity" as "capacity which has been impaired to such a degree that only an extremely limited amount remains" was acceptable in view of the rationale of HRS § 704-400." Id. at 548, 606 P.2d at 930. Acknowledging that it was difficult to define "substantial" "with any degree of precision[,]" Nuetzel noted that the A.L.I. test was designed to encourage "maximum informational input from the expert witnesses while preserving to the jury its role as trier of fact[.]" Id. at 549, 606 P.2d at 931.

Accordingly, the "degree of 'substantial' impairment required is essentially a legal rather than a medical question[,]" id. at 549-550, 606 P.2d at 931 (quoting State v. Johnson, 399 A.2d 469, 477 (R.I. 1979)) and "[b]ecause impairment is a matter of degree, the precise degree demanded is necessarily governed by the community sense of justice as represented by the trier of fact." Id. Thus, in Nuetzel, the term "extremely

limited" used by the trial court "conveyed the necessary meaning of the word "substantial[.]" Id. at 550, 606 P.2d at 932.

As Defendant notes, in an instruction, the court defined "lacks substantial capacity" as "extremely limited amount" as approved in Nuetzel. Additionally, under HRS § 704-402 (1993),[11] Defendant had the burden of proving the insanity as an affirmative defense. See State v. Miller, 84 Hawai'i 269, 277, 933 P.2d 606, 614 (1997) (noting that this statute was amended to make the insanity defense an affirmative one). Thus Defendant was required to establish, by a preponderance of the evidence, that he had only an "extremely limited" capacity. Applying these instructions, the jury was given wide discretion in determining whether Defendant lacked the requisite degree of capacity.

VI.

A.

With regard to the court's unanimity instructions, I concur that "the jury instructions, as given, did not contribute to [Defendant]'s conviction." Majority opinion at 34. However, I differ on the rationale to reach this conclusion.

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[11] This statute states, in pertinent part:

> **Physical or mental disease, disorder, or defect excluding responsibility is an affirmative defense; form of verdict and judgment when finding of irresponsibility is made.** (1) Physical or mental disease, disorder, or defect excluding responsibility is an affirmative defense.

(Boldfaced font in original.) (Emphasis added.)

The court's general instruction as to the affirmative defense of insanity was arguably misleading insofar as it did not itself direct that, to convict Defendant as charged, the jury was required to unanimously reject that defense. Specifically, the instruction read, in part:

> You must return a verdict of not guilty by reason of physical or mental disease, disorder or defect which excludes criminal responsibility if you find by a preponderance of the evidence, that is, that it is more likely or more probable than not, that, at the time of the charged offense, 1) [ ] Defendant was suffering from a physical or mental disease, disorder, or defect, and 2) that as a result of such physical or mental disease, disorder, or defect, he lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.
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> If [ ] Defendant has proved both of these elements by a preponderance of the evidence, then you must find [ ] Defendant not guilty of the offense(s). If [ ] Defendant has not proved both of these elements by a preponderance of the evidence, then you must find that this defense does not apply.

(Emphases added.)

Advisedly, the court should have instructed the jurors that, if they were not unanimous in their rejection of the insanity defense, then a verdict should not be returned. See State v. Miyashiro, 90 Hawai'i 489, 499, 979 P.2d 85, 95 (App. 1999) (explaining that "if the jurors unanimously agreed that all the elements of the charged offense have been proved beyond a reasonable doubt but are unable to reach unanimous agreement as to the affirmative defense of entrapment, no unanimous verdict can be reached as to the charged offense . .. [and] a mistrial would have to be declared"); Hawai'i Pattern Jury Instructions (HAWJIC) 7.06 (general affirmative defense pattern instruction advising, in part, that, if jurors are not unanimous with regard

to the proof of the affirmative defense, "then a verdict may not be returned"); HAWJIC 7.07 (insanity pattern instruction mirroring, in part, unanimity paragraph in HAWJIC 7.06).[12]

However, the use of the phrases, "you must return," "you must find," and "if you find" in the elements instruction for the insanity defense imparted a direction collectively to the jury itself. As set forth supra in this instruction, the jury was told that "if the Defendant had not proved both of these elements . . . then you must find that this defense does not apply." (Emphasis added.) Whereas "you," as reasonably understood in the instruction, referred to the jury itself, the instruction directed that the declination of Defendant's insanity defense must be a unanimous one.

Also, in arriving at decisions as to the possible outcomes to be considered by the jury, the collective connotation of the word "you" as referring to the jury as a body was reinforced in the instruction setting forth the several options on the verdicts for each count.[13] After listing the possible

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[12] As pointed out by the majority, these pattern instructions reflect amendments which became effective on June 29, 2000, see majority opinion at **33** n.19, but they merely reflect the prior existing law as set forth in Miyashiro.

[13] For example, the court in the verdicts instruction advised:

> As to Count I, Murder in the First Degree, you may bring in one of the following verdicts:
> 1. Not guilty; or
> 2. Guilty as charged; or
> 3. Guilty of the included offense of Manslaughter based on extreme mental or emotional disturbance; or
> 4. Not guilty by reason of physical or mental disease, disorder, or defect.

(continued...)

verdicts, the court cautioned, "Your verdicts must be unanimous." (Emphases added.)

While not reversible error in this case, the preferable and appropriate manner of instructing as to the insanity defense or any affirmative defense is as set forth in Miyashiro and incorporated in HAWJIC 7.06 and 7.07. Trial courts, therefore, should, in all cases, adhere to these precepts.

B.

Additionally, I do not read the majority opinion as stating that the Miyashiro holding is limited to the facts in that case. The majority states that "[Defendant] completely ignores that part of the Miyashiro reasoning that expressly states that it was not the instructions, standing alone, that were prejudicially insufficient or misleading, but was the circuit court's answer to the jury communication in conjunction with the instructions that resulted in the plain error." Majority opinion at 33.

While I agree that the facts of this case differ from those of Miyashiro, Miyashiro should not be read to mean that a court's failure to include a unanimity clause in an affirmative defense instruction was only prejudicial under the facts of Miyashiro (i.e., where a court's answer to a jury communication suggested that a split vote on an affirmative defense would

[13](...continued)
. . . .

result in a conviction of the crime charged).[14] In fact, Miyashiro is not so narrow and advises judges that they should instruct jurors on affirmative defenses in a manner that specifically states that unanimity is required. See id. at 500 n. 13, 96 n. 13.

VII.

While it was not correct, we are not required to dwell on the court's instruction on the mitigating defense of emotional disturbance manslaughter [hereinafter manslaughter]. I note that that instruction similarly did not direct the jury that its decision on such a defense must be unanimous; the court's failure

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[14] Miyashiro states:

> The circuit court should have instructed the jury, in relevant part, that its deliberative process should include the following steps:
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> (1) For each count, decide whether all the elements of the charged offense have been established beyond a reasonable doubt.
>
> (2) If the jury unanimously agrees that all the elements of the charged offense have not been established beyond a reasonable doubt, the jury must acquit Defendant of the charged offense and consideration of the affirmative defense [ ] is not required.
>
> (3) If the jury unanimously agrees that all the elements of the charged offense have been established beyond a reasonable doubt, then the jury must consider the affirmative defense [ ]. In such event,
>
> > (a) If the jury unanimously agrees that Defendant has proved, by a preponderance of the evidence, that entrapment occurred for a charged offense, the jury must acquit Defendant of that offense; and
> >
> > (b) If the jury unanimously agrees that Defendant has not proved, by a preponderance of the evidence, that entrapment occurred for a charged offense, the jury must find Defendant guilty of the charged offense.

Id. at 500 n. 13, 96 n. 13.

to do so should not be viewed as correct.[15] See State v. Yamada, No. 22456, 2002 WL 31521572 (2002) (Acoba, J., concurring) (As "[c]riminal defendants are entitled to a unanimous verdict under the Hawai'i Constitution and pursuant to court rule[,]" a court is required "to inform the jury that it must unanimously agree the prosecution had failed to disprove the manslaughter defense beyond a reasonable doubt.")

Nowhere in the manslaughter defense instruction did the court advise the jury that it needed to be unanimous with regard to the proof of the defense. The instruction, standing alone, would have allowed the jury to convict Defendant of manslaughter without a unanimous decision. Absent unanimity, the jury would have been hung, entitling Defendant to a mistrial. See Yamada, 2002 WL 31521572 *21 (Acoba, J., concurring) (without unanimity "the jury should have hung, entitling Defendant to a mistrial").

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[15] Specifically, the instruction read:

> As to Count I, if and only if you find, beyond a reasonable doubt, that [ ] Defendant intentionally or knowingly caused the deaths of more than one person in the same or separate incident, you must then determine whether, at that time, [ ] Defendant was under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation. The reasonableness of the explanation shall be determined from the viewpoint of a person in [ ] Defendant's situation under the circumstances of which [ ] Defendant was aware or as [ ] Defendant believed them to be.
>
> The prosecution must prove beyond a reasonable doubt that [ ] Defendant was not, at the time that he caused the deaths of more than one person in the same or separate incident, under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation. If the prosecution has done so, then you must return a verdict of guilty of Murder in the First Degree. <u>If the prosecution has not done so, then you must return a verdict of guilty of Manslaughter based upon extreme mental or emotional disturbance</u>.

(Emphasis added.)

However, as in the instruction on insanity, the court referred throughout the instruction to "you," reasonably conveying that the mandate involved applied to the jury as a whole. Of course, the preferable and appropriate manner of instructing the jury on manslaughter is to expressly set forth that the decision of the jury must be unanimous with respect to the proof or disproof of this mitigating defense, and trial courts should so instruct in every case.

In any event, the court's instructions, as a whole were not prejudicially erroneous. The manslaughter instruction advised the jurors that the prosecution bore the burden of proving beyond a reasonable doubt that Defendant was not under the influence of extreme mental or emotional disturbance at the time he committed the acts. See State v. Maelega, 80 Hawai'i 172, 178, 907 P.2d 758, 764 (1995) (explaining that manslaughter instruction was prejudicially erroneous because it suggested that the defense, not the prosecution, bears burden of proof). The court further directed that if the prosecution had "done so, then [the jury] must return a verdict of guilty of murder in the first degree."

In this connection, the jury was also told that in order to return a verdict of guilty of murder in the first degree or attempted murder in the second degree, its verdict must be unanimous. Because the jury returned verdicts of murder in the first degree and attempted murder in the second degree under the direction that such verdicts must be unanimous, a fortiori it had

to have determined that the prosecution had proved beyond a reasonable doubt that Defendant was not acting under extreme mental or emotional distress. See State v. Webster, 94 Hawai‘i 241, 248, 11 P.3d 466, 473 (2000) ("A jury is presumed to follow the court's instructions." (Citations omitted.)).

VIII.

I also observe that the court did not instruct the jury with regard to the order in which it was to consider the defenses of insanity and emotional disturbance. The court's instructions suggested that the insanity defense was to be considered after the emotional disturbance mitigating defense.[16]

"[T]he jury was required to decide the insanity defense which would exclude responsibility for first degree murder, before proceeding to consider the mitigating defense of manslaughter," Yamada, 2002 WL 31521572 at *20 (Acoba, J., concurring), inasmuch as the insanity defense completely negates guilt, while the emotional disturbance defense only mitigates guilt. See id.; State v. Nizam, 7 Haw. App. 402, 407 n.4, 771 P.2d 899, 904 n.4 (1989) ("[Section] 704-402 (1985) delineates

[16] For example, in the court's general verdict instructions, the verdict of not guilty by reason of insanity was listed after the emotional disturbance verdict:

> As to Count I, Murder in the First Degree, you may bring in one of the following verdicts:
>
> 1. Not guilty; or
> 2. Guilty as charged; or
> 3. Guilty of the included offense of Manslaughter based on extreme mental or emotional disturbance; or
> 4. Not guilty by reason of physical or mental disease, disorder, or defect.

the affirmative defense of physical or mental disease, disorder or defect excluding responsibility."), cert. denied, 70 Haw. 666, 796 P.2d 502 (1989); State v. Aganon, 97 Hawai'i 299, 302, 36 P.3d 1269, 1272 (2001) (referring to the emotional disturbance manslaughter defense as a "mitigating defense"). Thus, because proof of the defense of insanity could result in a not guilty verdict, the jury must consider that defense before the emotional disturbance defense. That being said, in light of the fact that the jury found Defendant guilty as charged, it cannot be concluded that any error in the court's instructions with regard to the order in which the defenses were to be considered was prejudicial.

IX.

For the foregoing reasons, I concur.

APPENDIX A

The lack of published opinions of this court has been cited as a "problem" by the legal community. See Report of the [Hawai'i] AJS Committee Reviewing Unpublished Opinions at 4 [hereinafter, "the Report"] and discussion infra. Views regarding that issue have been largely relegated to unpublished opinions, which are generally unavailable. Accordingly, I have included the following discussion as part of my concurrence. See N.K. Shimamoto, Justice is Blind, But Should She be Mute?, 6 Hawai'i B.J. 6, 7 (2002) [hereinafter Justice is Blind] ("The publication debate is currently a catch-22 for some judges and justices: if a judge or justice believes that an opinion should be published, and it is, there is no dispute over publication; if, however, a judge or justice believes that an opinion should be published, *and the majority votes not to publish*, then the judge or justice's work product (including why that particular case should be published) is simply relegated to a dissent or concurrence in an *unpublished* opinion." (Italicized emphases in original.)).

I.

It is in the nature of stare decisis that, when this court in effect decides matters of first impression, we in fact establish precedent and, therefore, should publish our opinion. When we fail to publish, we depart from the established procedure which lends legitimacy to our decision-making process and also

neglect our responsibility to provide guidance to courts, attorneys, and parties. The import of such an act is to make law for one case only, singling it out from all others, a process that can only be described as arbitrary. When there are fundamental reasons for publishing and we are given the opportunity to do so but fail to, we also compel our trial courts and counsel to rely on and employ the precedent established in other jurisdictions when trying cases in our own state.

II.

Unless we publish questions presented to us, they will continue to go unaddressed in any authoritative manner, and error may compound in other, similar cases leaving counsel and the trial courts to guess at the law to apply. Therefore, the fact that a majority of the court votes not to publish should not be determinative of the publication question. It is in the order of case law development that discourse on issues not covered in any existing published opinion should be disseminated and made available for examination, consideration, and citation by those similarly affected or interested. Only in the light of open debate can the dialectic process take place, subject to the critique of the parties, the bar, the other branches of government, legal scholars, and future courts. The resulting process of analysis and critique hones legal theory, concept, and rule.

Consequently, it should not matter whether such discourse is set forth in a majority, concurring, or dissenting opinion. Justice Ramil has suggested adoption of a rule like that of the First Circuit Court of Appeals that would require publication of a case (1) when the case is unanimously decided by a single opinion without a dissent, if, "[a]fter an exchange of views," any single justice votes for publication; or (2) with "a dissent or with more than one opinion[,] . . . unless all participating judges decide against publication." Doe v. Doe, 99 Hawai'i 1, 15, 52 P.3d 255, 269 (2002) (Ramil, J., dissenting, joined by Acoba, J.) (quoting United States Court of Appeals of the First Cir. R. 36(b)(2)). See, N.K. Shimamoto, Justice is Blind, supra at 12 (Adoption of a "'one justice publication' rule, unlike the 'majority rules' rule, faithfully abides by the premises upon which SDOs and memorandum opinions were based, promotes judicial accountability, and facilitates a judge or justice's role in the legal system -- without sacrificing judicial economy."). Similar rules have been adopted in other jurisdictions.[17]

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[17] See, e.g., 6th Cir. R. 206 ("The following criteria shall be considered by panels in determining whether a decision will be designated for publication in the Federal Reporter: . . . (4) whether it is accompanied by a concurring or dissenting opinion . . . . An opinion or order shall be designated for publication upon the request of any member of the panel."); 8th Cir., App. I, 28 U.S.C.A. ("The Court or a panel will determine which of its opinions are to be published, except that a judge may make any of his [or her] opinions available for publication."); 9th Cir. R. 36-2 ("A written, reasoned disposition shall be designated as an OPINION only if it: . . . [i]s accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression." (Capitalization in original.)); Ala. R. App. P. 53 ("[I]f in a 'No Opinion' case a Justice or Judge writes a special opinion, either concurring with or dissenting from the action of the court, the reporter of decisions shall publish that special opinion, along with a (continued...)

III.

Justice Ramil and I have agreed and will continue to agree to any recommendation by any of the other justices to publish a case even if the majority will not adhere to such a policy. We do so because we support and respect the opinion of any one of our colleagues that a decision warrants publication and that the views raised in the opinion should be disseminated. This is not an automatic and blind decision, but, instead, the recognition that every member of the judiciary, chosen to sit on the bench because of his or her expertise, has distinct and valuable viewpoints to offer in each case. Simply put, disagreement with a justice should not be a reason to limit the reach of that justice's comments. See N.K. Shimamoto, Justice is Blind, supra, at 7 ("A glance back through time reminds us that not only is this a country founded on the belief that we can voice our opinions against the majority, but that we have on numerous occasions embraced those opinions in the wisdom of a future day.")

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[17](...continued)
statement indicating the action to which the special opinion is addressed."); Ariz. Sup. Ct. R. 111(b)(4) ("Dispositions of matters before the court requiring a written decision shall be by written opinion when a majority of the judges acting determine[s] that it involves a legal or factual issue of unique interest or substantial public importance, or if the disposition of matter is accompanied by a separate concurring or dissenting expression, and the author of such separate expression desires that it be published, then the decision shall be by opinion." (Internal section numbering omitted.)); N.D. Sup. Ct. Admin. R. 27, § 14(c) ("The opinion may be published only if one of the three judges participating in the decision determines that one of the standards set out in this rule is satisfied. The published opinion must include concurrences and dissents." (Emphasis added.)). For these, as well as other jurisdictions' rules, see Doe, 99 Hawai'i at 15 n.6, 52 P.3d at 269 n.6 (Ramil, J., dissenting, joined by Acoba, J.) (collecting similar rules in other jurisdictions).

IV.

By contrast with the "one justice" rule suggested by Justice Ramil and which had once been the custom of this court,[18] the current "policy" in this court follows a "majority rules" approach, which the majority insists is the better course. The majority appears to assert that publication guidelines other than "majority rules" would result in our appellate process grinding to a halt. With all due respect, I submit that the majority's arguments against any one justice of this court calling for the publication of a particular case miss the mark.

We favor the use of summary disposition orders for the vast majority of cases in which they are currently appropriately utilized. Numerous such orders have been filed which we have signed. We also do not propose that every case in which a dissenting or concurring opinion is filed necessarily requires publication. A number of summary disposition orders have been filed with a separate opinion.[19] We did not urge that these cases be published, as we do here.[20]

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[18] My understanding is that the majority rule regarding publication was recently adopted in 1996. As related by Justice Ramil, the custom of this court previously was to concur with a justice's recommendation to publish.

[19] See, e.g., State v. Irvine, No. 24193 (Hawai'i Jul. 12, 2002) (unpublished) (Acoba, J., dissenting); Saito v. Fuller, No. 23913 (Hawai'i Jun. 8, 2002) (unpublished) (Ramil, J., concurring; Acoba, J., dissenting); Ng. v. Miki, No. 24267 (Hawai'i May 28, 2002) (unpublished) (Moon, C.J. and Nakayama, J., dissenting); State v. Iha, Nos. 23083, 23156, 23157, 23158, 23161, 23177, 23178, 23189, 23190, 23191, 23192, 23193, 23213, 23234, 23235, 23236, 23237, 23238, 23239, 23240, 23242, 23253, 23254, 23255, 23256, 23257, 23258, 23259, 23260, 23274, 23326, 23327, 23328, 23329, 23330, 23347, 23359, 23363, 23364, 23365, 23366, 23371, 23436, 23437, 23438, 23452, 23453, 23561, 23596 (Hawai'i Aug. 27, 2001) (Nakayama, J., dissenting, joined by Ramil, J.).

[20] The majority's refusal to address issues of first impression has little to do with numbers. See, e.g., State v. Bush, No. 24808 (Oct. 11, (continued...)

We believe that in some cases, however, a decision must be published. Guidance to litigants and the trial courts would be provided, where none exists. The analysis would be available by litigants for citation in pending or subsequent cases. The public and the legal community would be informed of the developing law in this area.

By ignoring, as it does, the views of other justices after a simple majority is obtained, the majority invites avoidable error. As we must all concede, error will occur under any system; the relevant inquiry is on which side error would weigh the least. I submit that there is more to be gained in a jurisprudential sense, and in the present legal milieu, from a policy which shares the decision to publish with each justice.

V.

Long-term dangers lurk in the silencing of discourse and debate. It has been found that unpublished opinions too easily hide hidden agendas or a lack of reasoning behind an opinion. See M.H. Weresh, The Unpublished, Non-Precedential Decision, 3 J. App. Prac. & Process 175, 181 (2001) ("The foremost [criticism of unpublished decisions] appears to be the

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[20](...continued)
2002) (SDO) (Acoba, J., dissenting); State v. Makalii, No. 24833 (Oct. 2, 2002) (SDO) (Ramil, J., dissenting, joined by Acoba, J.); State v. Lopes, No. 24187 (Sept. 6, 2002) (SDO) (Acoba, J., concurring, joined by Ramil, J.); State v. Hauanio, No. 23034 (Aug. 30, 2001) (SDO) (Acoba, J., dissenting). The majority's approach will likely engender more such cases.

Moreover, as observed, from July 2000 through December 2000, "the Supreme Court wrote 106 opinions: 56 cases (52.8%) were disposed of via SDO, 20 cases (18.9%) by memorandum opinion, and 30 cases (28.3%) by published opinion." N.K. Shimamoto, Justice is Blind, supra, at 6. Thus, only 28.3% of Hawai'i Supreme Court cases were published during this time period.

arguable effect the practice has on judicial accountability."). Moreover, a rule that grants a majority of justices the power to determine that a case will not be published serves to quash the alternative views expressed in a dissenting or concurring opinion. See M. Hannon, A Closer Look at Unpublished Opinions, 3 J. App. Prac. & Process 199, 221 (2001) ("[T]he existence of dissenting opinions in unpublished opinions cuts against the premise that unpublished opinions are used only in 'easy' cases. . . . [C]ases containing dissents and concurrences are, by definition, controversial[.]" (Internal quotation marks and citations omitted.)); S.L. Wasby, Unpublished Decisions in the Federal Courts of Appeals: Making the Decision to Publish, 3 J. App. Prac. & Process 325, 329 (2001) (discussing a 1989 report which reflected findings "that a significant portion of non-unanimous rulings [in the Eleventh Circuit] were not published, [and] that the ideology of judges . . . played a role in what got published" and which concluded that "publication of opinions in the Eleventh Circuit is much more subjective than the circuit courts would have us believe." (Internal quotation marks and citation omitted.)).

A majority's decision not to publish an opinion can be wielded as a punitive measure against those justices choosing to dissent, or who question the majority rule. See, e.g., People v. Para, No. CRA 15889, slip op. at 34 (Cal. Ct. App. Aug. 1979) (Jefferson, J., dissenting) (objecting to the majority's reversal of its earlier decision to publish a case after the dissenting

opinion had been circulated). Such dangers are not hypothetical, but pose real threats to the integrity and efficacy of this court's institutional role in a democratic system.

VI.

But nothing highlights the inefficacy of the "majority rules" approach to publication or undermines the majority's rationalization of its position more than the proposal submitted to this court to amend HRAP Rule 35 to permit (1) citation to unpublished opinions as persuasive authority and (2) petitions for publication of unpublished cases. On June 14, 2002, the Hawai‘i Chapter of the AJS submitted the Report to the justices of the Hawai‘i Supreme Court for our consideration. The proposal recommends that this court adopt an amendment to HRAP Rule 35,[21]

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[21] The AJS recommendation, inter alia, suggests an amendment to HRAP Rule 35. See The Report at 18, 20. The suggested amendment adds a new subsection c and re-alphabetizes and supplements the current subsection c as follows:

> (c) Application for Publication. Any party or other interested person may apply for good cause shown to the court for publication of an unpublished opinion.
>
> [(c)] (d) Citation. A memorandum opinion or unpublished dispositional order shall not be considered nor shall be cited in any other action or proceeding as controlling authority, except when the opinion or unpublished dispositional order establishes the law of the pending case, re [sic] judicata or collateral estoppel, or in a criminal action or proceeding involving the same respondent.
>
> In all other situations, a memorandum opinion or unpublished dispositional order may be cited in any other action or proceeding if the opinion or order has persuasive value. A party who cites a memorandum opinion or unpublished dispositional order shall attach a copy of the opinion or order to the document in which it is cited, as an appendix, and shall indicate any subsequent disposition of the opinion or order by the appellate courts known after

(continued...)

because "[t]here is a problem perceived by the legal community with the continued use of summary disposition orders and, particularly, the inability to cite memorandum opinions despite the fact that these opinions appear to be of substantial length and content and often cite other case law as precedent for the conclusions." The Report at 4 (emphasis added). The consequences of not publishing have thus become a concern to the bench and the bar. A core function of this court is to interpret the law, to set forth our analysis, and to announce it for the education and guidance of the public. We abandon that function when we take a crabbed view of publication.

VII.

The dissatisfaction with the number of unpublished opinions is also one reason why the State legislature was prompted to authorize two additional judges on the Intermediate Court of Appeals (ICA) level. The 1996 backlog is reflective of a fundamental lack of resources. In 2001, the legislature authorized two additional judges to be appointed to the ICA, in view of the appellate case load. See 2001 Haw. Sess. L. Act 248, § 1, at 646 (amending Hawai'i Revised Statutes (HRS) § 602-51 to indicate that the number of judges on the ICA would be increased

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[21](...continued)

> diligent search. If an unpublished decision is cited at oral argument, the citing party shall provide a copy to the court and the other parties. When citing an unpublished opinion or order, a party must indicate the opinion's unpublished status.

The Report at 22 (underscoring, indicating additions, and brackets, indicating deletions, in original).

by two). In considering whether such a measure was necessary, the legislature viewed the additional judges as one remedy for the burgeoning use of summary disposition orders, which apparently prompted some parties "to question whether [they were] getting due process[]":

> Attempts to deal with the appellate case load have evolved into procedures and processes that have been viewed as controversial, causing some litigants to question whether the parties are getting due process. For example, a large number of cases were decided by summary disposition orders instead of opinion, and oral argument has become rare. . . . [I]f the State is to maintain an effective appellate justice system that disposes of cases in a timely manner and provides litigants with a fair hearing process, the number of ICA judges must be increased.

Stand. Comm. Rep. No. 1460, in 2001 House Journal, at 1495 (emphasis added). The legislators further indicated that such a measure would "improve the functioning and efficiency of the appellate judicial process." Conf. Comm. Rep. No. 166, in 2001 House Journal, at 1129.

However, as for funding for the two ICA judicial positions, the legislature reported that "[t]he Judiciary also testified that no appropriation is needed for the 2001-2002 fiscal year." Conf. Comm. Rep. No. 166, in 2001 House Journal at 1129. "[T]his bill will allow the Judiciary to begin the process of recruiting two new judges for the ICA. It is the intent of your Committee that no new additional funds be provided for this purpose for fiscal year 2001-2002." Stand. Comm. Rep. No. 976, in House Journal at 1495. The determination of whether these two ICA positions could have been funded under past or present judiciary budgets or at what point requests for legislative appropriations should be made is obviously subject to the

exercise of the judiciary administration's discretion.

The reports also indicate that "[t]estimony of the Judiciary on this measure in this session indicated that expansion of the intermediate court is preparatory for later reorganization of the appellate system, which could be the subject of bills for the 2002 Session." Conf. Comm. Rep. No. 166, in 2001 Senate Journal at 944. A search of the 2002 legislative bills has not revealed any such reorganization plan.

What is stated is from the public record and we certainly do not intend to misrepresent the record. We are not privy to internal administrative decisions made by the judiciary administration. Obviously, we wholeheartedly agree with any and all efforts made to expand the current number of judges on the ICA.

VIII.

Any implication that the adoption of a one-justice rule would have a far-reaching adverse impact in criminal cases, child custody and parental termination cases, and for business and property owners in civil cases, would be a decidedly exaggerated one. A one-justice rule would not result in a rash of publication requests or a significant delay. The "one justice" approach has been adopted and implemented in many jurisdictions. Taking into account the expertise of all members of this court regarding the necessity of clarifying the law in any area makes the best use of our collective judicial wisdom.

It is evident that the number of cases on appeal, and the resulting hardship faced by litigants, may be in part due to the lack of clear legal precedent in an area of practice. Non-meritorious appeals are pursued by litigants when the law is murky, because the result is unpredictable. Thus, by not publishing and clarifying the law when such need is evident, we contribute to the uncertainty, and, thus, contribute to our backlog.

IX.

The possibility of unintended consequences resulting from establishing precedent should not, in my view, alter publication when warranted. We cannot hide behind the fear that, in deciding a case, we may be creating precedent. That is the nature of our common law system. See Anastasoff v. United States, 223 F.3d 898, 904-05 (noting that the common law doctrine of precedent directed that all cases decided contributed to the common law, and, thus, retained precedential value, even if those cases were not "published" in official reporters), vacated as moot on other grounds, 235 F.3d 1054 (8th Cir. 2000) (en banc). Common law is developed through the accumulation of cases, allowing application of rules of law to varying factual situations. A rule of law changes and is refined as time and the circumstances warrant, or may be abandoned altogether. If a case is fraught with contingent problems, it is our job to see to it that our decisions have the clarity and foresight to convey the

effect intended, not to take refuge in the expedient cover of an unpublished decision.

Furthermore, as the court of last resort in this state, we are duty bound to decide hard issues presented to us and to render our best judgment in all cases. To allow a concern for unintended consequences to govern our decisions is to abandon our common law tradition altogether. To remain silent because we are afraid of what we might say undermines our role as the highest state court and the reason that we are here.

X.

A.

The Judiciary's website, is not the answer, and the fallacy of arguing it is, is transparent. If the searcher knows the specific name and date of filing of the case, the case can be located among numerous dispositions, including orders, listed chronologically and grouped by year and month, by date of decision. See State of Hawai‘i Judiciary, Hawai‘i Appellate Court Opinions and Orders, at http://www.state.hi.us/jud/ctops.htm (last updated Aug. 14, 2002). However, researching is another matter, entirely. The research capabilities are extremely limited, if not practically non-existent. The Judiciary home page is a repository of our recent dispositions; it is not a research tool.

B.

In any event, the reality is that, primarily, only published opinions are considered by lawyers and judges in researching the law with respect to a point of law or a specific issue. Only those dispositions that are accessible via the seventeen established case law search engines, such as found in the reporter system, are used by this state's Judiciary. The "publication by majority" rule then, for all practical purposes, suppresses dissenting and concurring theories from that body of law that would be consulted in any serious inquiry.

C.

Additionally, because the current HRAP Rule 35 prohibits citation to unpublished opinions, when a majority of this court votes against publication of a case, the dissenting and concurring opinions in those cases cannot be cited as authority by attorneys who hope to urge a similar view or a reexamination of a majority position, or by attorneys and trial judges who consider the separate opinions helpful in deciding related issues. Ultimately, in those situations, the value of dissenting and concurring opinions to practitioners and judges is nil.

XI.

Limited resources and a backlog do not warrant summary disposition of cases that should be published. This concept was

recently expressed by the Eighth Circuit Court of Appeals, which strongly objected to the over-use of non-published cases as a panacea for judicial backlog and emphasized our obligation to spend the time necessary to do a competent job on each case:

> It is often said among judges that the volume of appeals is so high that it is simply unrealistic to ascribe precedential value to every decision. We do not have time to do a decent enough job, the argument runs, when put in plain language, to justify treating every opinion as a precedent. If this is true, the judicial system is indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only. The remedy, instead, is to create enough judgeships to handle the volume, or, if that is not practical, for each judge to take enough time to do a competent job with each case. If this means that backlogs will grow, the price must still be paid.

Anastasoff, 223 F.3d at 904 (emphasis added). Also, as one Court of Appeals judge has noted with regard to various plans in response to a growing backlog in the federal courts,

> [t]he frequently noted solution of reducing our caseload could reverse a series of salutary developments. The heavier caseload in large part reflects better access to the courts and more legal protections and benefits for less-favored members of society. I resist any wholesale surrender of these hard-fought victories to "reformers" rallying under the banner of judicial efficiency.

Patricia M. Wald, Symposium, The Legacy of the New Deal: Problems and Possibilities in the Administrative State (Part 2) Bureaucracy and the Courts, 92 Yale L.J. 1478, 1478 (1983).

XII.

Cases which require focused review, especially those that deal with matters of first impression or which should be published on other grounds, are not susceptible to disposition according to limited time lines as may be determined by a majority. Not all cases present simple and previously decided

questions of law. The critical examination and review necessary inevitably and inescapably requires time to accomplish. See Anastasoff, 223 F.3d at 904. Such examination and review spawn many instances where separate opinions and positions may result in major modifications and even reversals of original positions agreed to by a majority of this court. Insistence upon a contrary approach can only have a deleterious effect on the parties affected, the outcome of cases, and the development of case law.

Moreover, even the ultimate resolution of some apparently simple cases through summary disposition may take more time then initially estimated. Issues not initially raised or addressed by the majority may be pointed out by a dissent or concurrence. The "majority" may change several times as justices grapple with the law and facts posed within a case, and with other considerations and compromises. The decision of whether the case should be published or not may also change several times during the course of consideration. Accordingly, the end result of a lengthy dissent or concurrence by a justice attached to a summary disposition order may have had an earlier incarnation as a majority published decision. See N.K. Shimamoto, Justice is Blind, supra, at 7 n.12 ("In the case of the Justice or Judge who pens the majority opinion but does not garner the votes for publication, the Judge or Justice may be forced to write a concurring [or dissenting] opinion to . . . express disagreement with the decision of the majority not to publish.")

Thus, a majority rule decision regarding publication does not necessarily mean that more time and resources are saved. That time and effort may already be invested. This is exemplified, as the AJS Hawaii Chapter points out, by the fact that unpublished opinions of this court have been "of substantial length and content." The Report at 4. Also, denying "publication does not somehow deposit that time and energy back into the pool of resources so that it can be used on other cases." N.K. Shimamoto, Justice is Blind, supra, at 11.

More importantly, the expenditure of the court's resources in filling out the analysis of what was previously thought an "easy case" cannot be labeled a waste of resources, when a justice believes that justice is not being served by a superficial treatment of an appeal. Thus, we do not operate as a "committee," and our views, while opposed by the other justices, is certainly not intended to impugn their integrity. Case counts and statistics should not drive our disposition or deliberative process. In a conflict between the two, our primary duty lies in giving a case and the litigants involved the time they deserve. See Anastasoff, 223 F.3d at 904.

XIII.

The rallying cry for those who raise the specter of backlogs as the justification for the expedient disposition of cases is "justice delayed is justice denied." As one judge has noted, speedy disposition is not to be equated with justice:

> To suggest that justice delayed is justice denied is not the answer. Justice delayed is not always justice denied, and speedy justice is not always justice obtained. Increased pressures on the judiciary resulting from increased litigation because of increased use of the courts by our society is an increased burden which must be met by the judiciary alone, without sacrificing the quality of the justice dispensed. The resulting pressures should and must be assumed by the judiciary without complaint. . . . If justice delayed is justice denied, then justice without quality is also justice denied, a result for which the judiciary alone will be held accountable without reference to collateral pressures from whatever source.

Graver v. Secretary of Health, Ed. & Welfare, 405 F. Supp. 631, 636-37 (E.D. Pa. 1975) (emphases added).

I agree that cases should be decided as promptly as possible. But there is no justice in a rush to judgment that is mandated by internal policies and procedures embracing summary decisions. Too often the administration of formulaic approaches for expediting cases becomes the focus of the time and energy of the court, which should otherwise be spent on our fundamental function of deciding cases. I see no virtue in a race to rubber stamp a circulating draft of a decision so that it may be issued quickly by the court. Such approaches detract the public's attention from a prominent reason for such delays, that is, the lack of resources. See supra Section V.

But other internal administrative obstacles cause inefficiencies that delay resolution of cases. Obstacles such as the lack of objective criteria as to whether an opinion should be published, see State v. Tauʻa, 98 Hawaiʻi 426, 441 n.1, 49 P.3d 1227, 1242 n.1 (2002) (Acoba, J., dissenting, joined by Ramil, J.) (opinions which depart from existing law should be published); Zanakis-Pico v. Cutter Dodge, Inc., 98 Hawaiʻi 309, 326, 47 P.3d 1222, 1239 (2002) (Acoba, J., concurring) (opinions which apply new rules of law should be published), and disputes

concerning the publishability of an opinion, would be easily resolved by the rule adopted in some jurisdictions that the vote of one justice is sufficient to mandate publication. See Doe, 99 Hawai‘i at 15 n.6, 52 P.3d at 269 n.6 (Ramil, J., dissenting, joined by Acoba, J.) But even the adoption of objective criteria and alternative measures such as proposed by the Hawai‘i AJS will not cure the lack of published opinions, inasmuch as a majority disfavoring publication in the first place is unlikely to actually change its position even in the face of such objective standards or alternative measures. Hence, in our view, a single justice rule is necessary.

XIV.

Moreover, although a case that should be published exacts deliberation and, thus, time to complete, over the long-term, publication has the effect of decreasing the backlog and saving ourselves, trial courts, and attorneys needless expense of time, effort, and resources. When we do not publish and address the questions squarely presented to us, there are wide-ranging systemic effects.

Each party for whom the issue subsequently arises is faced anew with an error that is "novel," because we have not yet addressed it. Trial courts must guess at what law should be applied, further delaying the resolution of trials. Law clerks, judges, and justices must in effect "reinvent the wheel." See John v. State, 35 P.3d 53, 64 (Alaska Ct. App. 1989) (Manheim, J., concurring) ("[S]o many of our decisions are unpublished that, given enough time and enough change of personnel, the court

'forgets' we issued those decisions."). Appellants and appellees must do the same. Thus, over the long-term, publication will reduce our backlog, by removing issues from our appellate treadmill.

Failing to publish decisions that should be published has a substantial impact on the public. When this court postpones for an indefinite time the resolution of issues presented before it, the result is to leave parties -- whether they are prosecutors and defendants in criminal cases, parents and children in family court cases, business entities, government, or the public at large -- and their attorneys to guess at what the law is in this jurisdiction, at the risk of guessing wrong. By the time the matter is brought again to this court, much time and events may have passed. It is no wonder that representatives of both the bench and the bar recommend the recourse of citing to the only body of law oftentimes available to them -- unpublished opinions.

XV.

In our view, the balance is to be struck in the context of our role as the court of last resort in this state and the long range perspective we must take. The litigants in each case deserve the considered judgment of each justice. Our obligation to the rule of law is to apply it assiduously, evenly, and justly; expediency should play no part in the task in which we are engaged. In that regard, more, not less, authoritative guidance strikes the right balance in our present legal milieu. By satisfying our obligation in individual cases, we fulfill our

duty as stewards of the judicial power, to all parties and to the public at large without favoring any one party or the interests of one litigant over another.