DISSENTING OPINION BY ACOBA, J.

I believe certiorari should be granted to clarify certain matters in the decision of the Intermediate Court of Appeals (ICA): (1) that indecent exposure is not a lesser offense of sexual assault in the fourth degree; (2) that the ICA erred in applying State v. Haanio, 94 Hawai‘i 405, 16 P.3d 246 (App. 2001), to this case; and (3) that the failure to give an included offense instruction as required by Haanio is not foreclosed by State v. Holbron, 80 Hawai‘i 27, 904 P.2d 912, reconsideration denied, 80 Hawai‘i 187, 907 P.2d 773 (1985), subject to the discretion to recognize plain error.

After a jury trial in the Circuit Court of the First Circuit[1] (the court) Petitioner/Defendant-Appellant Gary Gilbert Gunson (Petitioner) was convicted of the misdemeanor offense of sexual assault in the fourth degree, Hawai‘i Revised Statutes (HRS) § 707-733(1)(b) (1993). Petitioner appealed his March 12, 2001 judgment of conviction and argued that "the court plainly erred in not instructing the jury on the offense of indecent exposure under [HRS §] 707-734 (1993), which [Petitioner] maintains is a lesser included offense of sexual assault in the fourth degree . . . ." State v. Gunson, 101 Hawai‘i 161, 166, 64 P.3d 290, 295 (App. 2003). The ICA,[2] relying upon Haanio, affirmed the judgment of the court and held that any error in

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[1] The Honorable Karl K. Sakamoto presided over this case.

[2] The Honorable John S.W. Lim authored the opinion, joined by Acting Chief Judge Corinne K.A. Watanabe and Associate Judge Daniel R. Foley.

this regard "is harmless when the jury convicts the defendant of the charged offense or of an included offense greater than the included offense erroneously omitted from the instructions." Id.

On March 10, 2003, Petitioner filed an application for a writ of certiorari and framed the issue as follows: "whether dicta in Haanio is a basis upon which to hold harmless the omission of an included offense instruction whenever the jury convicts on the charged offense, regardless of whether the trial court erroneously forced the jury to choose between convicting as charged or acquitting outright." This court granted certiorari on April 10, 2003.

I.

In his petition, Petitioner argues that the ICA erred in affirming his conviction because the court committed plain error in failing to instruct the jury that indecent exposure is a lesser included offense of the charged offense of sexual assault in the fourth degree. As such, he requests that this court vacate his conviction. In Petitioner's supplemental brief, Petitioner additionally contends that "the ICA . . . mistakenly appl[ied] dicta it culled from State v. Haanio," and that "once the defendant establishes that instructional error occurred, the error is presumptively prejudicial, and the burden shifts to the prosecution to rebut the presumption by demonstrating that the error was, in fact, harmless beyond a reasonable doubt."

Respondent/Plaintiff-Appellee State of Hawai'i (the

prosecution) did not address Petitioner's contention that indecent exposure is a lesser included offense of sexual assault in the fourth degree. Rather, the prosecution responded that assuming, arguendo, that the court erred in not giving an indecent exposure instruction, the error was harmless beyond a reasonable doubt. The prosecution also filed a supplemental brief and argued that the ICA correctly applied Haanio in finding harmless error in this case.

II

As a logical beginning point, it must be decided whether indecent exposure, HRS § 707-734(1), is a lesser included offense of sexual assault in the fourth degree, HRS § 707-733(1)(b). This is a question of first impression, and it "is a question of law reviewed de novo by this court under the right/wrong standard." State v. Rumbawa, 94 Hawai'i 513, 516, 17 P.3d 862, 865 (App. 2001) (citing State v. Friedman, 93 Hawai'i 63, 68, 996 P.2d 268, 273 (2000) (whether Assault in the Third Degree committed in mutual affray is an included offense of family abuse presents a question of law, reviewed under the right/wrong standard)).

HRS § 701-109(4) subsections (a) and (c) (1993) set forth the relevant tests for determining whether an offense is a lesser included offense, and they provide as follows:

> **§701-109 Method of Prosecution when conduct establishes an element of more than one offense.**
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> . . . .
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> (4) A defendant may be convicted of an offense included in an offense charged in the indictment of the information. An offense is so included when:
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> (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
>
> . . . .
>
> (c) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a different state of mind indicating lesser degree of culpability suffices to establish its commission.

The offense of sexual assault in the fourth degree, as pertinent to this case, is defined in HRS § 707-733, which provides in relevant part as follows:

> **§707-733 Sexual assault in the fourth degree.** (1) A person commits the offense of sexual assault in the fourth degree if:
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> . . .
>
> (b) The person knowingly exposes the person's genitals to another person under circumstances in which the actor's conduct is likely to alarm the other person or put the other person in fear of bodily injury[.]
>
> . . . .
>
> (2) Sexual assault in the fourth degree is a misdemeanor.

HRS § 707-733(1)(b) and (2) (emphases added). HRS § 707-734 defines indecent exposure, and provides as follows:

> **§707-734 Indecent exposure.** (1) A person commits the offense of indecent exposure if, the person intentionally exposes the person's genitals to a person to whom the person is not married under circumstances in which the actor's conduct is likely to cause affront.
>
> (2) Indecent exposure is a petty misdemeanor.

(Emphases added.)

I would apply the test under both subsections (a) and (c) of HRS § 701-109(4).

A.

"Under HRS § 701-109(4)(a), 'the general rule is that an offense is [a lesser] included [offense] if it is impossible to commit the greater [offense, or charged offense,] without also committing the lesser [offense].'" Rumbawa, 94 Hawai'i at 519, 17 P.3d at 868 (quoting Friedman, 93 Hawai'i at 72, 996 P.2d at 277 (internal quotation marks omitted)). This court has previously held that "[i]n applying HRS § 701-109(4)(a), . . . several factors may be considered in determining if an offense is a lesser included offense of another: (1) the degree of culpability; (2) the legislative statutory scheme; and (3) the end result." Friedman, 93 Hawai'i at 72, 996 P.2d at 277 (citing State v. Alston, 75 Haw. 517, 533, 865 P.2d 157, 166 (1994)); see also Rumbawa, 94 Hawai'i at 519, 17 P.3d at 868; State v. Matautia, 81 Hawai'i 76, 82, 912 P.2d 573, 579 (App. 1996).

As to the first factor, "[i]n determining degree of culpability, this court has adopted the rule that a lesser included offense cannot have a mental state greater than or different from that which is required for the offense charged." State v. Burdett, 70 Haw. 85, 87, 762 P.2d 164, 166 (1988) (citing State v. Kupau, 63 Haw. 1, 7, 620 P.2d 250, 253 (1980) (citing People v. Moyer, 265 N.E.2d 535 (N.Y. 1970))); see also Friedman, 93 Hawai'i at 72, 996 P.2d at 277; Alston, 75 Haw. at 534, 865 P.2d at 166; Rumbawa, 94 Hawai'i at 519, 17 P.3d at 868. "The Commentary to HRS § 702-208 [(1993)] states that intent, knowledge, recklessness, and negligence are [listed] in

descending order of culpability." Burdett, 70 Haw. at 89, 762 P.2d at 167.

Sexual assault in the fourth degree under HRS § 707-733(1)(b) requires that "the person knowingly exposes the person's genitals to another person." (Emphasis added). Contrastingly, indecent exposure under HRS § 707-734(1) requires that "the person intentionally exposes the person's genitals to a person to whom the person is not married." (Emphasis added.) As such, indecent exposure requires a different, and greater mental state than sexual assault in the fourth degree. Therefore, indecent exposure cannot be a lesser included offense of sexual assault in the fourth degree, under HRS § 701-109(a), because the mental state of indecent exposure is both different and greater than that of sexual assault in the fourth degree.

As to the second factor, both offenses are classified as "offenses against the person" in HRS chapter 707. See, e.g., Burdett, 70 Haw. at 89, 762 P.2d at 167 (noting that a different "classification indicates that different societal interests were intended to be protected" and that one offense would not be the lesser included of another); cf. State v. Freeman, 70 Haw. 434, 439, 774 P.2d 888, 891 (1989) (holding that theft in the second degree is not a lesser included offense of fraudulent use of a credit card even though they are included in the same penal chapter, as "the legislature intended to protect different societal interests in enacting these statutes"). In fact, the offense of indecent exposure, with some other changes, was

previously denominated as sexual assault in the fifth degree. See State v. Kalama, 94 Hawai‘i 60, 63, 8 P.3d 1224, 1227 (2000) (citing 1986 Haw. Sess. L. Act 314 § 57, at 618).

However, "[a] lesser included offense should produce the same end result as the greater charged offense." Alston, 75 Haw. at 535, 865 P.2d at 166-67. The end result of sexual assault in the fourth degree is "alarm" or "fear of bodily injury," HRS § 707-733(1)(b), whereas the end result of indecent exposure is "affront," HRS § 707-734(1). The terms "alarm" and "affront" are similar in meaning, but not identical. See State v. Whitney, 81 Hawai‘i 99, 104 n.4, 912 P.2d 596, 601 n.4 (App. 1996) ("The term 'affront' has been defined to mean '[a]n insult or indignity; assault, insolence.' *Black's Law Dictionary* 60 (6th ed. 1990). 'Alarm' means to disturb, excite, or 'to strike with fear[.]' *Merriam Webster's Collegiate Dictionary* 26 (10th ed. 1993)."). Accordingly, the end results of the two offenses differ.

Considering the degree of culpability, the legislative statutory scheme, and the end result, I would hold that because the offense of indecent exposure requires a higher degree of culpability than sexual assault in the fourth degree, and the end result is different, it is not a lesser included offense of sexual assault in the fourth degree under HRS § 701-109(4)(a).

B.

"HRS § 701-109(4)(c) expands the doctrine of lesser

included offenses to include crimes that require a lesser degree of culpability or a less serious injury or risk of injury." Burdett, 70 Haw. at 89, 762 P.2d at 167. This covers two situations, (1) "where the included offense has a lesser degree of culpability than the offense charged[,]" or (2) "where the lesser offense differs from the offense charged only in that a less serious injury or risk of injury is necessary to establish its commission." Id. at 90, 762 P.2d at 167 (emphasis added). Also, under subsection (c), unlike subsection (a), "there may be some dissimilarity in the facts necessary to prove the lesser offense, but the end result is the same." Id. Thus, "the following factors are considered in determining whether an offense is included in another [under HRS § 701-109(4)(c)]: [(1)] the degree of culpability[;] [(2) the] degree of injury or risk of injury[;] and [(3)] the end result." Id. (citing Kupau, 63 Haw. at 7, 620 P.2d at 253). Having discussed factors (1) and (3), supra in section A, I examine the second factor.

The degree of injury or risk of injury must be, inter alia, "to the same . . . public interest . . . ." HRS § 701-109(4)(c); see also Alston, 75 Haw. at 536, P.2d at 167. Therefore, for indecent exposure to be a lesser included offense of fourth degree sexual assault, there must be "a less serious injury to the same public interest." Friedman, 93 Hawai'i at 73, 996 P.2d at 278 (emphasis added). The offenses do not affect the same public interest. Sexual assault in the fourth degree involves the public interest in preventing harm to an individual.

The indecent exposure offense is aimed at community morals and was "intended to deal with behavior such as nude sunbathing or streaking, that does not cause alarm or fear of bodily harm, in circumstances where it is likely to be an affront to a substantial part of the community." Kalama, 94 Hawai'i at 64, 8 P.3d at 1228 (quoting Sen. Com. Rep. No. 1000, in 1991 Senate Journal, at 1103) (emphasis omitted). Therefore, the same public interest is not involved.

Consequently, the degrees of culpability, the degree or risk of injury, and the end results as between fourth degree sexual assault and indecent exposure differ. Indecent exposure, then, is not a lesser included offense.

III.

Based upon the foregoing, I must conclude that the ICA erred in reaching the question of whether the court erred in failing to give an indecent exposure instruction without first determining whether indecent exposure, in fact, is a lesser included offense of sexual assault in the fourth degree. If the ICA had done so, the ICA should have affirmed the judgment of conviction. But, the ICA went on to "conclude that the absence of an included offense instruction in this case, if error, was harmless beyond a reasonable doubt." Gunson, 101 Hawai'i at 165, 64 P.3d at 294 (citing Haanio, 94 Hawai'i at 415-16, 16 P.3d at 256-57).

I believe the ICA's statement requires us to clarify this court's opinion in Haanio, and to hold that the ICA relied upon dicta in deciding the present case. First, however, I would point out that the rule announced in Haanio was that, "in jury trials beginning after the filing date of this opinion, the trial courts shall [sua sponte] instruct juries as to any included offense having a rational basis in the evidence without regard to whether the prosecution requests, or the defense objects to, such an instruction." Haanio, 94 Hawai'i at 407, 16 P.3d at 248 (emphasis added). The filing date of Haanio was January 31, 2001. In the present case, the jury trial began on January 10, 2001. Thus, Haanio would not apply to this case. As such, State v. Kupau, 76 Hawai'i 387, 879 P.2d 492 (1994), overruled in part by Haanio, 94 Hawai'i 405, 16 P.3d 246, were it to apply, and not Haanio, was the relevant case law in existence at the time.

IV.

HRS § 701-109(5) (1993) provides that "[t]he court is not obligated to charge the jury with respect to a[] [lesser] included offense unless there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the [lesser] included offense." (Emphasis added.) Thus, it follows that if there is "a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the [lesser]

included offense[,]" the court is obligated to charge the jury with respect to that lesser included offense. Id.

In Kupau, this court held that in a jury trial, the judge "must bring all included offense instructions that are supported by the evidence to the attention of the parties."[3] 76 Hawai'i at 395, 879 P.2d at 500. "The trial judge must then give each such instruction to the jury unless (1) the prosecution does not request that included instructions be given and (2) the defendant specifically objects to the included offense instruction for tactical reasons." Id. If the "defense makes a tactical objection," and "the prosecution does not make a request" for a lesser included offense instruction, the trial judge is to "exercise his or her discretion as to whether the included offense instructions should be given." Id. at 395-96, 879 P.2d at 500-01.

In Haanio, this court reversed Kupau in part and held, as indicated supra, that "the trial courts shall [sua sponte] instruct juries as to any included offense having a rational basis in the evidence without regard to whether the prosecution requests, or the defense objects to, such an instruction." Haanio, 94 Hawai'i at 407, 16 P.3d at 248. The Haanio mandate to the trial courts was rooted in the proposition that "in our judicial system, the trial courts, not the parties, have the duty

[3] As indicated previously, Kupau would not apply in the instant case because indecent exposure is not a lesser included offense of sexual assault in the fourth degree, but the ICA apparently incorrectly assumed that it would apply.

and ultimate responsibility to insure that juries are properly instructed on issues of criminal liability." Id. at 415, 16 P.3d at 256. We said 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." Id. (citing State v. Bullard, 389 S.E.2d 123, 124 (1990)). Failing to allow the jury to consider lesser included offenses "impairs the truth seeking function of the judicial system" in that the jury is then left with an all or nothing choice -- convict or acquit. Id. This court quoted, with approval, the following language from People v. Barton:

> Our courts are not gambling halls but forums for the discovery of truth. . . . A trial court's failure to inform the jury of its option to find the defendant guilty of the lesser offense would impair the jury's truth-ascertainment function. Consequently, neither the prosecution nor the defense should be allowed, based on their trial strategy, to preclude the jury from considering guilt of a lesser offense included in the crime charged. To permit this would force the jury to make an "all or nothing" choice between conviction of the crime charged or complete acquittal, thereby denying the jury the opportunity to decide whether the defendant is guilty of a lesser included offense established by the evidence.

Id. (quoting People v. Barton, 906 P.2d 531, 536 (Cal. 1995)) (emphases added). Hence, after Haanio, a trial judge lacks discretion as to whether to give lesser included offense instructions or not, because "the failure to give appropriate included offense instructions requested by a party constitutes error, as does the trial court's failure to give an appropriate included offense instruction that has not been requested." Id.

V.

In this case, the ICA relied upon dicta in Haanio in concluding that "the absence of an included offense instruction in this case, if error, was harmless beyond a reasonable doubt." Gunson, 101 Hawai'i at 165, 64 P.3d at 294 (citing Haanio, 94 Hawai'i at 415-16, 16 P.3d at 256-57). The ICA relied upon the language indicating that "the trial court's failure to give appropriate included offense instructions . . . constitutes error . . . . Such error, however, is harmless when the jury convicts the defendant of the charged offense . . . ." Id. at 163, 64 P.3d at 292 (quoting Haanio, 94 Hawai'i at 415-16, 16 P.3d at 256-57). This reasoning was based upon the proposition that "jurors are presumed to follow the court's instructions, and, under the standard jury instructions, the jury, in reaching a unanimous verdict as to the charged offense [. . . would] not have reached, much less considered, the absent lesser offense . . . ." Id. (internal citation and quotation marks omitted) (quoting Haanio, 94 Hawai'i at 415-16, 16 P.3d at 256-57).

This language in Haanio was dicta because (1) it was not necessary to the holding of that case, and (2) it conflicts with the requirement that trial judges must sua sponte instruct juries on all lesser included offenses having a rational basis in the evidence.

A.

In Haanio, the defendant was charged with one count of

robbery in the first degree, and the defendant was ultimately convicted of the lesser included offense of robbery in the second degree. 94 Hawai‘i at 410, 16 P.3d at 251. The court found a rational basis in the evidence for lesser included offenses, and sua sponte, gave jury instructions for robbery in the second degree, assault in the first degree, and assault in the second degree, over the defendant's objections. Id. at 409, 16 P.3d at 250. The defendant appealed his conviction of robbery in the second degree and argued, inter alia, that the circuit court erred in "giving the second degree robbery instruction over his objection and in the absence of the prosecution's request[.]" Id. at 410, 16 P.3d at 251. The ICA applied the Kupau decision and ruled that the circuit "court did not abuse its discretion in instructing on the included offense[]" of second degree robbery. Id. at 411, 16 P.3d at 252. It thus affirmed the defendant's conviction. See id. The defendant sought certiorari from this court.[4]

This court reexamined Kupau, and "conclude[d] that the better rule is that trial courts must instruct juries on all lesser included offenses as specified by HRS § 701-109(5), despite any objection by the defense, and even in the absence of

[4] In Haanio, as to the instructions regarding assault in the first degree and assault in the second degree, the ICA held that under certain circumstances, assault in the first or second degree may, or may not be lesser included offenses of robbery in the first degree, but the ICA "concluded that these instructions were harmless beyond a reasonable doubt because the jury did not reach the issue of assault in the first or second degree." Haanio 94 Hawai‘i at 410-11, 16 P.3d at 251-52. The defendant did not seek certiorari on this issue. See id.

a request from the prosecution." Id. at 414, 16 P.3d at 255. We then went further and stated that

> [t]o the extent that *Kupau* held that the failure to give an included offense instruction was plain error even when the defendant was convicted of the charged offense, see 76 Hawai'i at 396, 879 P.2d at 501, it conflicts with the rationale of *Holbron*, which we reaffirm here and, in that aspect, can no longer be regarded as controlling.

Id. at 416, 16 P.3d at 257. Haanio did not involve a situation in which there was a failure to give an included offense instruction in the context of a conviction on the charged offense. Rather, Haanio sustained the trial court's giving of all lesser included offense instructions over the objection of the defendant.

In Holbron, the defendant was charged with attempted murder in the second degree. See 80 Hawai'i at 30, 904 P.2d at 915. The court gave a number of lesser included offense instructions that were requested by the defendant, and the prosecution requested an instruction on attempted reckless manslaughter. See id. at 31, 904 P.2d at 916. The defense objected to the instruction, claiming that "there's no such animal in the law." Id. Nevertheless, the court gave the jury the attempted reckless manslaughter instruction over defense counsel's objection. See id. at 32, 904 P.2d at 917. The jury was instructed that "if it was unable to agree that the prosecution has proven beyond a reasonable doubt that [the defendant] had committed the offense of Attempted Murder, the jury could then go on to consider the lesser included offense of

Attempted Manslaughter (Reckless Conduct)." Id. at 46, 904 P.2d at 931 (brackets and internal quotation marks omitted).

The jury found defendant guilty of attempted second degree murder and the defendant appealed. See id. The defendant claimed, inter alia, that because the jury was "required to consider the non-existent offense of attempted reckless manslaughter before it considered the included offense of assault in the first degree, . . . the jury was wrongly deprived of the opportunity fairly to consider whether he was guilty of the latter." Id. at 29, 904 P.2d at 914. The case was assigned to the ICA, and the ICA affirmed the circuit court. Id. On certiorari, this court held that

> [b]ecause, under the circumstances of this case, in reaching a unanimous verdict as to the charged offense of attempted murder in the second degree, the jury could not have reached, much less considered, the disputed instruction that erroneously described a nonexistent offense, there is no reasonable possibility that the error might have contributed to [defendant's] conviction.

Id. at 47, 904 P.2d at 932 (brackets, quotation marks, and citation omitted). The ICA and this court based the harmless error ruling upon the jury instructions that were actually given, and a "sound presumption of appellate practice." Id. at 46, 904 P.2d at 931. Holbron did not stand for the proposition that the failure of the court to instruct on all included offenses having a rational basis in the evidence was harmless error.

B.

Hence, in this case, the ICA relied upon dicta in

Haanio to "conclude that the absence of an included offense jury instruction . . . , if error, was harmless beyond a reasonable doubt." Gunson, 101 Hawai'i at 165, 64 P.3d at 294 (citing Haanio, 94 Hawai'i at 415-16, 16 P.3d at 256-57). To reiterate, in Haanio, this court mandated that "trial courts shall instruct juries on all included offenses having a rational basis in the evidence[,]" 94 Hawai'i at 420, 16 P.3d at 261, because "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," id. at 415, 16 P.3d at 256 (citing State v. Bullard, 389 S.E.2d 123, 124 (1990)).

If Haanio were to stand for the proposition that the failure of the trial court to instruct the jury on a lesser included offense that was rationally based on the evidence is harmless error any time a defendant is convicted of the charged offense, the central holding of Haanio would be rendered meaningless. For if such were the case, Haanio's mandate could be violated at will. For example, if a defendant is convicted of the charged offense, any error in failing to give an included instruction would be effectively unreviewable. As such, this court would have no means of enforcing Haanio. Thus, the failure to give a lesser included instruction that has a rational basis in the evidence must be viewed as plain error, subject to our discretion not to apply the rule under the circumstances of a particular case.