DISSENTING OPINION BY ACOBA, J.

I must respectfully disagree with the majority's holding that the Intermediate Court of Appeals (the ICA) committed grave error in requiring a new trial herein. On certiorari we review the ICA's decision for:

> (1) grave errors of law or of fact, or (2) obvious inconsistencies in the decision of the intermediate appellate court with that of the supreme court, federal decisions, or its own decision, and the magnitude of such errors or inconsistencies dictating the need for further appeal.

HRS § 602-59(b) (1993).

I.

To reiterate, on direct examination Respondent/ Defendant-Appellant Jason McElroy (McElroy) was questioned by his defense counsel as follows:

> Q: Why did you join the Navy?
> A: Because to make my family proud. And I was doing bad and wanted to change and stuff like that.

(Emphasis added.) After the defense completed its direct examination of McElroy, the deputy prosecuting attorney cross examined McElroy in the following manner:

> Q: You also told us you joined the Navy to change; is that correct?
> A: Yes.
> Q: Change from what?
> A: Well, when I was back home, I was doing bad. Well, I was hanging with the wrong people -- drugs and gang-banging and stuff like that. And I got tired of doing that.

At that point, defense counsel objected and moved for a mistrial. He also stated that Petitioner/ Plaintiff-Appellee State of Hawai‘i (the prosecution) had violated the motion in limine. On appeal, the prosecution argued that (1) "the question did not

naturally call for such a response nor did it infer such a response," and (2) McElroy volunteered the unfavorable information.

The ICA's majority responded appropriately to the prosecutor's argument as presented on appeal. The ICA stated that McElroy's answer was a relevant answer in reasonable response to the prosecutor's question and "that McElroy's answer was not a 'volunteered statement' because a defendant's relevant answer in reasonable response to a question is not a volunteered statement[.]" Slip op. at 17. The ICA's reading of the testimony is buttressed by a plain reading of the transcript and is not obviously wrong.

The majority agrees with the ICA dissent that the trial DPA's "general question," "Change from what?" "did not call for nor require the defendant to answer that he had been 'hanging with' people engaged in 'drugs and gang banging.' The defendant could have given a truthful answer that did not reveal the unfavorable details." Majority opinion at 12, n.1 (quoting ICA's dissent at 5) (citation omitted). But as the ICA majority demonstrated, the "general question" cannot be viewed in isolation.

The record reflects the prosecution knew of prior bad acts inasmuch as the "Bail Form" addressed to the Oahu Intake Service Center from the Department of the Prosecuting Attorney, stated, inter alia, "Defendant has a record in Illinois[,]"

majority opinion at 3, was dated November 2, 2001, and bore the name of the trial DPA, although unsigned. Apparently, in view of this information, the defense obtained an in limine order from the court "precluding from use at trial" "[t]estimonial or documentary evidence relating to any other 'bad acts' involving the defendant, or matters which should nevertheless be excluded as irrelevant under HRE 402, or as unfairly prejudicial under HRE 403."

As the ICA noted, the cross-examination elicited "the specifics of his 'doing bad' and those specifics included McElroy's prior criminal activity[;]" it "thereby created the strong likelihood of introducing evidence in violation of the [in limine] order." Slip op. at 21. This cannot be reasonably disputed. The ICA pointed out that this questioning would have had "no more than" two effects: "(a) repeating McElroy's 'doing bad' testimony; and/or (b) disclosing evidence that would violate the [in limine] order." Slip op. at 21. According to the ICA, as to "(a), the questioning was irrelevant, duplicative, and superfluous[,]" and as to "(b), it violated the [in limine] order[.]" Slip op. at 21-22. The ICA's conclusion that the prosecution's inquiry into the "change" from "bad stuff" was irrelevant and solicitous of bad acts evidence, was one that it could draw within its proper scope of review. In light of the foregoing, it cannot be said that the ICA's conclusion that such questioning was error was without a basis in law and fact.

II.

In vacating McElroy's conviction and sentence, the ICA held that the prosecutor's error leading to McElroy's statement about drugs and gangs was not harmless beyond a reasonable doubt. In concluding that "[a] reasonable possibility exist[ed] that the prejudicial testimony that resulted from the trial [DPA's] prosecutorial mistake/error could have contributed to McElroy's conviction and, therefore, denied [his] right to a fair and impartial trial[,]" slip op. at 26-27 (citing State v. St. Clair, 101 Hawai'i 280, 286, 67 P.3d 779, 785 (2003), the ICA applied the correct reasonable doubt standard: whether the error was harmless beyond a reasonable doubt in light of (1) the nature of the prosecutor's conduct, (2) the promptness or lack of a curative instruction, and (3) the strength or weakness of the evidence against the defendant. State v. Wakisaka, 102 Hawai'i 504, 513, 78 P.3d 317, 326 (2003).

Assessing the strength of the prosecution's case, the ICA pointed out that "the principal issue at McElroy's trial was whether C.E. [(the complaining witness)] consented to having sex with him," the case "revolve[d] around the credibility of the only two parties in the bedroom at the time the alleged sexual assault took place - C.E. and McElroy[,]" "there were no independent eyewitnesses to the alleged assault and the Prosecutor's case against McElroy depended heavily on C.E.'s testimony[,]" "the jury was only able to agree to one guilty

verdict – Count I in the lesser included third degree[,]" and "the jury found McElroy not guilty on Count V, and was unable to reach a verdict on Counts II, III, and IV." Slip op. at 25, 26 (internal quotation marks, citations, and brackets omitted). All of these are relevant matters contained in the record.

One may not necessarily agree with the ICA's ultimate holding. However, in light of the ICA's reasoning and the relevant facts, I do not believe that it can be concluded as a matter of law (1) that in the exercise of its appellate review power, the ICA "gravely erred" in law or fact or (2) that its decision contained "obvious inconsistencies" with the relevant case law.