*** FOR PUBLICATION IN *WEST HAWAI'I REPORTS* AND *PACIFIC REPORTER****

CONCURRING AND DISSENTING OPINION BY NAKAYAMA, J.
IN WHICH MOON, C.J., JOINS

While I concur in the result of this case, I must respectfully dissent from the majority's express "holding" in Section II.A (the standard of review section), that reads as follows:

> we hold that, although as a general matter forfeited assignments of error are to be reviewed under the HRPP 52(b) plain error standard of review, in the case of erroneous jury instructions, that standard of review is effectively merged with the HRPP 52(a) harmless error standard of review because it is the duty of the trial court to properly instruct the jury. As a result, once instructional error is demonstrated, we will vacate, without regard to whether timely objection was made, if there is a reasonable possibility that the error contributed to the defendant's conviction, i.e., that the erroneous jury instruction was not harmless beyond a reasonable doubt.

Majority op. at 19-20 (emphases added). As explained more fully infra, the stark changes being made to this court's longstanding jury instruction jurisprudence have the wholly inappropriate and dire consequences of (1) further eroding our formerly high regard for our plain error doctrine, (2) sub silentio overruling at least one of our prior cases, (3) upending at least three of this court's rules of procedure, and (4) discounting the competence, diligence and above all candor of attorneys as officers of the court -- all due to the majority's tortured interpretation of Hawai'i Rules of Penal Procedure ("HRPP") Rule 52.

Before delving into the unintended havoc the majority's holding wreaks upon the plain error rule and the adversarial system in general, I will first point out the chain reaction the

majority has set in motion via its transformation of our jury instruction jurisprudence in situations where instructional error is not alleged below or on appeal.

This court has repeatedly recognized that "[e]rroneous [jury] instructions are presumptively harmful and are a ground for reversal unless it affirmatively appears from the record as a whole that the error was not prejudicial." State v. Gonsalves, 108 Hawai'i 289, 293, 119 P.3d 597, 601 (2005) (citations omitted) (internal quotation marks omitted); see also State v. Rabago, 103 Hawai'i 236, 245, 81 P.3d 1151, 1160 (2003) (same) State v. Lagat, 97 Hawai'i 492, 495, 40 P.3d 894, 897 (2002) (same); State v. Crail, 97 Hawai'i 170, 180, 35 P.3d 197, 207 (2001) (same); State v. Aganon, 97 Hawai'i 299, 302, 36 P.3d 1269, 1272 (2001) (same); State v. Valentine, 93 Hawai'i 199, 204, 998 P.2d 479, 484 (2000) (same); State v. Sua, 92 Hawai'i 61, 69, 987 P.2d 959, 967 (1999) (same); State v. Holbron, 80 Hawai'i 27, 32, 904 P.2d 912, 917 (1995) (same); State v. Pinero, 70 Haw. 509, 527, 778 P.2d 704, 716 (1989) (same) (citing Turner v. Willis, 59 Haw. 319, 326, 582 P.2d 710, 715 (1978)). The criminal standard set forth in Pinero is, of course, perfectly

well and good.[1] The jury is the ultimate finder of fact, and the constitutional right to a fair trial is endangered whenever the jury is not adequately and accurately instructed as to key elements of the law, or whether certain statements made during trial may be considered, since instructions are the only material the jury may refer to during deliberation.

It must be noted, though, that until today, we have never once held that the Pinero standard of review is to be

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[1] I also note that the criminal standard set forth in Pinero is in no way modified by the majority's citation of State v. Arceo. See majority op. at 20-21 n.6. The court "parts company" with me on "the question [of] whether an appellant, if he or she can overcome the initial presumption against error, has an additional burden of demonstrating the harmfulness of the error in the absence of a timely objection below[,]" and declares "[o]ur precedent compels the conclusion that no such burden exists." See id. at 20 n.6. Assuming such an initial presumption against error (when jury instructions are unobjected-to at trial) still exists following the majority's holding, see footnote 3 of this dissent, this is a "red herring" argument and readily dismissed for three reasons. First, I have not made any intimation in my dissent that I believe "additional burdens of demonstration" are required after an appellant "overcome[s] the initial presumption against error." Second, HRPP Rule 30(f) (2000), which was a valid rule of procedure until today, see infra, prevented assertions of instructional error where the jury instruction was not objected to at trial. See HRPP Rule 30(f) ("[n]o party may assign as error the giving or the refusal to give, or the modification of, an instruction. . . . unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of the objection." (Emphasis added.)). Third, the only reason why HRPP Rule 30(f) has not operated to block the relevant assignments of instructional error not objected to below in prior cases is because, as in the majority's cited case of Arceo, the court found and noticed plain error, thereby exercising its discretionary power not to have the procedural violation determine the outcome of the case. See Arceo, 84 Hawai'i at 33, 928 P.2d at 875 ("Arceo's substantial constitutional right to unanimous jury verdicts was prejudiced in such a manner as to give rise to plain error." (Emphasis added.)) Thus, HRPP Rule 30(f) and our plain error review have always coexisted peacefully, such that it is far from necessary or inevitable to combine plain error and harmless error in order to continue our adherence to the Pinero standard.

automatically applied to all criminal cases just because erroneous jury instructions exist. There are numerous reasons why this is so. "As a general rule, jury instructions to which no objection has been made at trial will be reviewed only for plain error." State v. Sawyer, 88 Hawai'i 325, 330, 966 P.2d 637, 642 (1998) (emphasis added). Despite the severity and import of plain errors, our Hawai'i Rules of Penal Procedure make clear that they "may be noticed although they were not brought to the attention of the court." The Hawai'i Rules of Appellate Procedure ("HRAP") similarly grant the ICA and this court the option to notice plain errors not presented. See HRAP Rules 28(b)(4)(D) (2004)[2] and 40.1(d)(1) (2000).

Our (former) rationale for reserving appellate discretion to review plain error, aside from the obvious benefits to judicial economy, is as sound as it is obvious. "The plain error rule is a departure from the position usually presupposed by the adversary system that a party must look to his counsel to protect him and that he must bear the cost of the mistakes of his counsel." State v. Fox, 70 Haw. 46, 56, 760 P.2d 670, 675 (1988) (quoting 3A Wright, Federal Practice and Procedure: Criminal 2d §

[2] The pertinent language of this rule did not change following the October 6, 2003 amendment thereto.

856 (1982) (footnote omitted)). As a result, "our power to deal with plain error is one to be exercised sparingly and with caution[,]" State v. Aplaca, 96 Hawai'i 17, 22, 25 P.3d 792, 797 (2001) (emphasis added). Finally, we may not apply plain error review arbitrarily, much less automatically; "the decision to take notice of plain error must turn on the facts of the particular case[.]" Fox, 70 Haw. at 56, 760 P.2d at 676.

By its holding today "in the case of erroneous jury instructions," the majority has taken its first step towards eviscerating the discretion from our inherently discretionary plain error analysis. In announcing the new rule that "once instructional error is demonstrated, we will reverse, without regard to whether timely objection was made, if there is a reasonable possibility that the error contributed to the defendant's conviction, []" the majority has injected nondiscretionary court review into the Pinero discretionary standard of review. Majority op. at 19 (emphasis added). Because the court does not state who, if anyone, possesses the burden of demonstrating such error, and also notes that "it is the duty of the trial court [to properly] instruct the jury," see id., the majority's new standard effectively reads: "the appellate courts shall seek out erroneous jury instructions

within the record, either when called upon by the parties or sua sponte, and shall reverse the trial court unless it can be proven that the instructional error was harmless beyond a reasonable doubt."[3]

[3] I appreciate the clarification from the majority that "the appellate court is under no duty to scour the record for error sua sponte." Majority op. at 20 n.6. I fear, however, that this clarification is invalidated by the very same rule advanced by the majority today. While the majority emphasizes that "the phrase 'once instructional error is demonstrated' in our holding is not to be taken lightly[,]" see id., the same must be said of the immediately preceding sentence, "we hold that, although as a general matter forfeited assignments of error are to be reviewed under the HRPP 52(b) plain error standard of review, in the case of erroneous jury instructions that standard of review is effectively merged with the HRPP 52(a) harmless error standard of review because it is the duty of the trial court properly to instruct the jury." Majority op. at 19 (emphasis added).

The majority maintains that "there was and remains a presumption that unobjected-to jury instructions are correct[.]" Majority op. at 20 n.6. But how can this be when the majority has just conflated plain error review with harmless error review? The majority has essentially adopted the ICA's view that, in pertinent part, "the standard of review for an erroneous jury instruction will always be the harmless error non-discretionary standard, and will never be the plain error discretionary standard." Majority op. at 18 (citing ICA's Opinion at 19-20) (emphases added).

In other words, the majority cannot claim that unobjected jury instructions are correct and will not be reviewed when the substantial rights of a criminal defendant are being affected. See HRPP Rule 52(b). To do so would be to ignore the majority's own holding, and moreover, to exercise its discretion to ignore harmful error even as it commits the appellate courts to undertake non-discretionary review when such error exists. Because the majority cannot both uphold and dissolve the plain error doctrine in the jury instruction context, it either (a) does not actually mean what it is holding, or (b) it has overruled the cited Eberly case at least in part, since if ostensibly correct instructions harmed the substantial rights of the defendant, non-discretionary harmless error review demands that the majority disregard any such presumption of correctness in the face of such harm. And since the majority surely does not intend to overrule its express holding by way of footnote, it follows that Eberly is overruled in this respect.

Thus, if the substantial rights of the defendant have been affected, then the appellate courts must reverse, since such error is by definition not harmless as regards jury instructions. But the appellate courts cannot fully and faithfully discharge the majority's mandate by ignoring harm-causing jury instructions that were not objected to at trial. The only way to carry out the majority's holding is to, at the very minimum, scour the record for error whenever the defendant makes any assertion of harmful instructional error on appeal, even if there was no objection below,

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The idea of the appellate courts taking an active role in reversing convictions based upon erroneous jury instructions that were not harmless beyond a reasonable doubt has a certain visceral appeal in the abstract. As mentioned supra, a criminal defendant has a constitutional right to a fair trial, and if the jury is improperly instructed as to how to conduct its deliberations, that right has been violated if there is a reasonable possibility that the error contributed to the defendant's conviction.

Unfortunately, the majority's new rule does not exist in a vacuum. It must co-exist with precedent, this court's rules of procedure, judicial economy, and our adversarial system of justice, and it does violence to all of these.

First, the collateral damage done to our plain error review precedent is obvious. By finding that "HRPP Rule 52(b) plain error" and "HRPP Rule 52(a) harmless error" "merge" for purposes of jury instructions,[4] the majority equates (and

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the alleged error is not specific, and the assertion is not in compliance with HRAP.

[4] Further, it is entirely unclear as to whether HRPP Rule 52(a) and (b) were ever intended as anything more than "signposts" in the first place. Plain error and harmless error review clearly exist in our caselaw, separate and apart from these rules. Also, HRPP Rule 52 is not referenced elsewhere within HRPP, nor do the words "plain error" or "harmless error" appear
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conflates) "plain error" with "non-harmless error", and sub silentio overturns the general rule of Sawyer, 88 Hawai'i at 330, 966 P.2d at 642: "jury instructions to which no objection has been made at trial will be reviewed only for plain error." (Emphasis added.)[5] In its puzzling "merger" interpretation of HRPP Rules 52(a) and 52(b), the court changes plain error into the mere opposite of harmless error. Thus, flying in the face of our longstanding precedent making clear that plain error review is discretionary, the court effectively construes HRPP Rule 52(b) to mean "any error, defect, irregularity or variance which does affect substantial rights shall not be disregarded." The necessary implication of this rule is that the appellate courts must seek out instructional error wherever it exists, irrespective of whether it is raised on appeal. See majority op. at 16-18.

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[4](...continued)
elsewhere in the Rules. Moreover, it is debatable as to whether HRPP Rule 52 was ever intended to "define" harmless error and plain error, insofar as explicit "definition" sections are included in HRPP, but are absent within HRPP Rule 52. See e.g. HRPP Rule 15(g) (1977) (defining when a witness is "unavailable"); HRPP Rule 16(b)(3) (2000) ("statement" defined); HRPP Rule 49(b)(3) (2000) (defining delivery of papers); HRPP Rule 54(b) (1977) (definitions of, e.g., "civil action" and "prosecutor").

[5] I take issue with the majority's convenient disrespect of precedent in its characterization of the general rule of Sawyer as a mere "proposition" set forth in dissent. See majority op. at 20 n.6. Because jury instructions to which no objection has been made at trial will not be reviewed only for plain error any longer, the rule has been overturned.

The majority stresses that its departure from the plain error analysis in this unique instance is solely because of "our previous cases holding that it is ultimately the trial court that is responsible for ensuring that the jury is properly instructed." Majority op. at 14 (citing State v. Eberly, 107 Hawai'i 239, 250, 112 P.3d 725, 736 (2005).) That may be, but this duty is being interpreted far too broadly, such that it is easily manipulated by unscrupulous counsel (and more troublingly, competent counsel seeking the greatest advantage for the client) to essentially receive automatic retrial.

Such potential for manipulation of our justice system is readily observed in the majority ruling's impact upon our rules of procedure. By essentially holding that all erroneous jury instructions will be automatically noticed, the majority has invisibly amended in part and repealed in part HRPP Rule 30. More specifically, this court has invalidated HRPP Rule 30(f) (2000), which provides in pertinent part that "[n]o party may assign as error the giving or the refusal to give, or the modification of, an instruction. . . . unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of the objection." (Emphasis added.) The majority has also implicitly

invalidated HRPP Rule 30(b) (2000), which provides that "[a]t such reasonable time as the court directs, the parties shall file written requests that the court instruct the jury on the law," since the duty to properly instruct the jury now squarely falls upon the courts, thereby obviating any need for this rule.[6] Further, the core of HRPP Rule 30(d) (2000) is modified in three respects in light of the majority's decision, inasmuch as the rule pertinently provides that

> [t]he court may revise the language of [(a)] any or all of the requested instructions which are approved by the court in whole or in part. . . . and of [(b)] any or all of the requested instructions to which no objection is made, and may combine such instructions, with or without any additional instructions which the court shall deem appropriate, in such manner as the court believes will eliminate repetition and will afford to the jury an adequate and understandable charge. If no written requests for instructions are filed the court shall prepare its own instructions.

(Emphasis added.) HRPP Rule 30(d), as effectively amended by this case, will now essentially provide that

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[6] The majority "reaffirms[,]" see Majority op. at 17 n.5 (second paragraph), Haanio's statement that "the prosecution and the defense may, as they do in the ordinary course, propose particular included offense instructions, and our holding is not to be taken as discouraging or precluding their desire or felt obligation to do so." Haanio, 94 Hawai'i at 415, 16 P.3d at 256 (emphases added). It further assures, ironically citing HRPP Rule 30(b), that "nothing said in Haanio precludes the trial court from requiring the parties to submit relevant instructions for its review." Majority op. at 17 n. 5 (emphasis added).

Although the majority does later "clarify" that unobjected-to instructional error is still presumed correct, notwithstanding the consequences of its holding today, see majority op. at 20 n. 6 but also n.3 of this dissent, the point remains that its soothing words are a false salve. Because the majority has now put upon the trial courts a total duty to properly instruct the jury, the "reaffirmation" rings hollow, and cannot somehow resurrect HRPP Rule 30(b). After all, there is no longer any need for the parties to move the court to instruct the jury on the law.

> [t]he court shall, under penalty of automatic reversal upon appeal, revise the language of any or all of the parties' requested instructions, where erroneous, if there is a reasonable possibility that the instruction will not be harmless beyond a reasonable doubt. The court shall also modify, combine, and/or supplement the parties' instructions to ensure that the jury is properly instructed and will not thereby convict the defendant on any improper basis therein. Moreover, the court shall prepare its own instructions, whether or not the parties have filed written requests for instructions, to the extent necessary to eliminate insufficient, erroneous, misleading, or otherwise prejudicial jury instructions.

There is simply no other way to rationally construe HRPP Rule 30(d) following the majority's ruling.

As readily seen supra, the combined effects of the majority's changes to HRPP Rule 30 are contrary to HRPP Rule 2 (1977) ("Purpose and Construction"), which provides that "[t]hese rules are intended to provide for the just determination of every penal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." (Emphases added.)

In contrast, the lower courts are now burdened with a de jure absolute duty of properly instructing the duty beyond a reasonable doubt, lest the appellate court sua sponte find error and remand for new trial. Clearly, this newly enhanced jury instruction duty leads to more complicated court procedure, unfair results, and potentially extreme impacts on judicial economy. The new rule effectively punishes competent counsel, those who know the case best, for proffering accurate jury

instructions, and rewards counsel who will, inter alia, (1) shirk their responsibility to advocate for their client via jury instructions by letting the trial court do it for them, and (2) wait for an opportune moment to "spring the trap" of potentially erroneous jury instructions either post-trial or on appeal, whether it be by failing to bring noticed error to the court's attention, or worse, by attempting to introduce or invite jury instruction error. In other words, the majority's opinion elevates legal gamesmanship to new heights.

However, the damage does not end with HRPP. The majority's new rule has also carved out invisible exceptions to HRAP Rules 28(b)(4) (2004)[7] and 40.1(d)(1) (2000). Both rules state that issues not raised on appeal (whether to the ICA or on application for certiorari to this court) will be disregarded, but that the ICA or this court has the option to notice a plain error not presented. As previously noted, the appellate courts are now required to notice jury instruction error. Thus, even if the parties on appeal specifically agreed that the jury was properly instructed, we must still sedulously examine the jury instructions to ensure that there was no harmful error. And if

[7] The pertinent operative language of this rule subsection, "[p]oints not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented[]," is unchanged from the 2000 version to the 2004 amendments.

instructional error is demonstrated from the record, see majority op. at 19-20, we must reverse even if the trial court's resolution of the actual issues on appeal was entirely proper. This again leads to manifestly unfair results and diminished judicial economy.

Last but not least, the majority has eroded our bedrock adversarial principles of justice along with our respect and justified expectations for counsel as officers of the court. We hold fast to the principle that a party must look to counsel for protection and bear the cost of counsel's mistakes, while requiring the court to fully and completely instruct the jury on the law after a painstaking review of whether instructions the parties may proffer, in essence adopting an inquisitorial approach. We demand competence from attorneys, yet paradoxically excuse them of or excuse them from the legal knowledge, skill, thoroughness and preparation reasonably necessary to prepare fair and accurate jury instructions. See Hawai'i Rules of Professional Conduct ("HRPC") Rule 1.1 (1994). We expect counsel to be diligent and prompt, but reward them for waiting until the most advantageous moment to seek reversal for an erroneous jury instruction that was either conveniently ignored or invited, thus encouraging rampant opportunism. See HRPC Rule 1.3 (1994). We

state that an advocate has a duty not to abuse legal procedure, yet the majority has impliedly amended its rules to encourage such abuse. See HRPC Rule 3.1 cmt. 1 (1994) We similarly believe that "[d]ilatory practices bring the administration of justice into disrepute," while knowing full well that counsel may consciously fail to raise the issue of instructional error until appeal, where the appellate courts have a quasi-absolute obligation to reverse once said error is demonstrated. See HRPC Rule 3.2 cmt. 1 (1994) and majority op. at 19-20. We hold that an attorney has a duty of candor to the courts, yet encourage gamesmanship and subterfuge to achieve the best possible result. See HRPC Rule 3.3 cmt. 1 (1994) We deem it professional misconduct for counsel to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation," yet may actually countenance such misconduct in definitively absolving counsel from any duty to properly instruct the jury, even if counsel knows that the other party or the court is committing error. See HRPC Rule 8.4(b) (1994).[8]

[8] The majority dismisses my very real concerns about the integrity of the legal profession as "at best, premature." See majority op. at 17-18 n.5 (third paragraph). The majority "emphasizes" attorneys' duty of candor to the tribunal, and asserts that attorneys who either "affirmatively submit erroneous jury instructions" or "omit to point out erroneous instructions" are in violation of HRPC Rule 3.3. See id. at 17 n.5. The majority also speculatively contends that "attorneys contemplating instructional skulduggery would be well advised to consider the risk of a civil suit for legal

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Finally, and most importantly, we place ourselves and our ICA in the position of finding error without knowing the tactical choices made by counsel in the course of litigation. As appellate courts, we do not and cannot know how or why counsel's choices resulted from tactics or strategies in the interests of the client.[9] That information, if it is appropriate to review at

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[8](...continued)
malpractice by a dissatisfied client[,]" illustrating the potential danger by way of hypothetical. Id.

First, HRPC Rule 3.3, on its face, is plainly about disclosure of facts and proffering evidence which the attorney believes to be true and correct. It does not directly concern matters of trial strategy. A defendant's strategic failure to being instructional error to the court's attention is clearly not a violation of HRPC Rule 3.3(a)(3), as the majority contends, inasmuch as the rule only requires the disclosure of adverse controlling legal authority, rather than disclosure of accurate jury instructions. Also, it is doubtful that a unscrupulously savvy attorney would ever directly introduce or invite instructional error in such a way that opposing counsel or the appropriate court could readily trace the tainted error to the attorney's request for relief based on such erroneous instructions; thus, as a practical matter, HRPC Rule 3.3(a)(1) violations will be difficult to detect.

Second, the majority admits to "the proof problems and attorney-client privilege issues attendant to disciplinary and civil proceedings in such cases." Majority op. at 17-18 n.5. Thus, even assuming that an HRPC violation took place which was both noticed and complained of, significant further roadblocks to appropriate relief or attorney discipline remain. In other words, the "deterrence" afforded by the faint specter of an ODC investigation and/or civil malpractice lawsuit is far from "adequate."

[9] The majority claims my "contention" is "misplaced" on account of our ruling in Haanio. See Majority op. at 17 n.5 (first paragraph). The majority correctly notes that Haanio rejected "all-or-nothing" jury instructions, which apparently operate on the rationale that a defendant risks being convicted of the sole offense charged (i.e., suffering the maximum possible punishment) in exchange for the defendant having a presumably higher chance of acquittal if the jury's findings beyond reasonable doubt do not meet the single, high standard. The majority is also correct in noting that constitutional law and "trial strategy" considerations afford no right to either the prosecution or the defense to engage in such a truth-impairing game of chance.

The majority, however, then takes the specific principles of Haanio, to which I have no objection, and applies them in out-of-context
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all must be reviewed in light of evidence in an appropriate proceeding such as a malpractice action or a petition for post-conviction relief.

For all of the foregoing reasons, I dissent.

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[9](...continued)
fashion to my general concerns about vitiating our plain error review in the name of heightening our protection against instructional error, and by doing so engaging in improper second-guessing of the actions of trial counsel. I further note that the majority's strategically placed footnote misrepresents the very specific scope and target of my dissent -- specifically, its holding that "we hold that . . . . plain error . . . . in the case of erroneous jury instructions . . . . is effectively merged with . . . . harmless error . . . . As a result, once instructional error is demonstrated, we will vacate, without regard to whether timely objection was made, if there is a reasonable possibility that . . . . the erroneous jury instruction was not harmless beyond a reasonable doubt[]" on pages 19-20 of the majority's opinion. In other words, my contention is "misplaced" because it is the majority who has misplaced it in the first instance.