DISSENTING OPINION BY ACOBA, J., WITH WHOM DUFFY, J., JOINS

I respectfully dissent.

In my view, Hawai'i Revised Statutes (HRS) chapter 704, when read as a whole, and its underlying policies, excludes evidence of what Petitioner/Defendant-Appellant James George Plichta (Petitioner) purportedly did not relate to court appointed examiners for the purpose of impeaching him at trial. The admission of such evidence was prejudicial error. Accordingly, I would reverse the December 19, 2006 judgment of the Intermediate Court of Appeals (ICA), vacate the April 12, 2005 judgment of conviction of the circuit court of the first circuit (the court), and remand the case for a new trial.

I.

HRS chapter 704 establishes a process by which a defendant can establish an affirmative defense to charged conduct by proving that a physical or mental disease, disorder, or defect substantially incapacitated him from knowing right from wrong or from conforming his conduct to the requirements of law. The statutory provisions, as discussed infra, provide for examinations by professionals to determine the defendant's condition, the submission of examiners' reports to the court, and the admission of testimony by the examiners, all with respect to the defendant's physical or mental condition at the time of the charged conduct. The provisions for examination and treatment are not only for the benefit of the criminally mentally ill

defendant, but for society as a whole. See State v. Castro, 93 Hawai'i 454, 463, 5 P.3d 444, 453 (App. 2000) (Acoba, J., concurring) ("In the most egregious of circumstances, a mentally ill defendant who otherwise should have been subjected to examination and treatment may remain untreated in prison and upon his or her release, present a further or greater risk to public safety.") (internal citations omitted).

II.

In his application, Petitioner raised the following dispositive questions.[1]

> Whether the ICA gravely erred in (1) upholding [the] attack [by Respondent/Plaintiff-Appellee State of Hawai'i (Respondent)] on [Petitioner's] credibility at trial with prior statements [Petitioner] had made to the three-panel of examiners, under HRS § 704-416 [(1993)];[2] (2) upholding the [court's] limiting instruction to the jury, to consider [Petitioner's] prior statements to the three-panel, for credibility purposes only[.]

In a brief SDO the ICA stated that "we conclude that HRS § 704-416 did not preclude [Respondent's] cross-examination of [Petitioner] regarding statements pertaining to his beliefs in humanoids or aliens made by [Petitioner] during his direct examination. State v. Samuel, 74 Haw. 141, 150-51, 838 P.2d 1374, 1379 (1992)." SDO at 2.

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[1] The third question was "[w]hether the ICA gravely erred in . . . affirming the [court's] denial of the defense's motion for mistrial to allow defense counsel to withdraw, so that counsel could testify on [Petitioner's] behalf to rehabilitate [Petitioner's] credibility." Under the analysis herein the third question need not be discussed.

[2] See text, infra, for provisions of HRS § 704-416 entitled "Statements for purposes of examination or treatment inadmissible except on issue of physical or mental condition."

III.

In regard to the first and second question, cross-examination into what was not told to the examiners necessarily implicates the examination process itself. Under that process, the three member panel examination may be convened when "the defendant has filed a notice of intention to rely on the defense . . . or there is a reason to . . . believe that the physical or mental disease, disorder, or defect of the defendant will or has become an issue in the case[.]" HRS § 704-404(1) (1993). HRS § 704-404(2) (Supp. 2003) provides that "the court shall appoint three qualified examiners in felony cases . . . to examine and report upon the physical and mental condition of the defendant."

Although not expressly stated, it is apparent that a defendant cannot avoid such an examination. HRS § 704-404(2) (1993 & Supp. 2003) (the court "may order the defendant to be committed to a hospital or other suitable facility for the purpose of the examination"). Accordingly, "[i]f the examination cannot be conducted by reason of the unwillingness of the defendant to participate therein, the report shall so state[.]" HRS § 704-404(5) (1993).

The examiners are charged with rendering "[a]n opinion as to . . . the capacity of the defendant to appreciate the wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of law . . . at the time of the conduct alleged[.]" HRS § 704-404(4)(d) (1993 & Supp.

2003). An examiner's report must also include "(a) [a] description of the nature of the examination [and] (b) [a] diagnosis of the physical or mental condition of the defendant[.]" HRS § 704-404(4)(a) and (b) (1993 & Supp. 2003).

The court must make "available for inspection by the examiners" "all existing, medical, social, police and juvenile records, including those expunged, and other pertinent records in the custody of public agencies[.]" HRS § 704-404(8) (1993). The examiners may employ "any method . . . which is accepted by the profession[] of medicine[.]" HRS § 704-404(3) (Supp. 2003). Each examiner's "diagnosis and opinion" must have been "arrived at independently of any other examiner[.]" HRS § 704-404(4)(f) (Supp. 2003). "The report of the examination, including any supporting documents, shall be filed . . . with the clerk of the court, who shall cause copies to be delivered to the prosecuting attorney and to counsel for the defendant." HRS § 704-404(6) (1993).

At trial, "[e]vidence that the defendant suffered from a physical or mental disease, disorder, or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is required to establish an element of the offense." HRS § 704-401 (1993). In that respect, "the examiners . . . may be called as witnesses by the prosecution, the defendant, or the court." HRS § 704-410(1) (1993). Further,

> [w]hen an examiner testifies on the issue of the defendant's responsibility for conduct alleged[,] . . . the examiner shall be permitted to make a statement as to the nature of the examiner's examination, the examiner's diagnosis of the physical or mental condition of the defendant at the time of the conduct alleged, and the examiner's opinion of the extent, if any, to which the capacity of the defendant . . . was impaired as a result of physical or mental disease, disorder, or defect at that time.

HRS § 704-410(3) (1993).

Also, "[w]hen an examiner testifies, the examiner shall be permitted . . . to clarify the examiner's diagnosis and opinion and may be cross-examined as to any matter bearing on the examiner's competency or credibility or the validity of the examiner's diagnosis or opinion." HRS § 704-410(4) (1993). However, "[a] statement made by a person subjected to examination . . . shall not be admissible in evidence . . . on any issue other than that of the person's physical or mental condition, but it shall be admissible upon that issue, . . . unless such statement constitutes an admission of guilt[.]" HRS § 704-416 (1993).

IV.

As to the first question, HRS § 704-416 states in its entirety that:

> A statement made by a person subjected to examination or treatment pursuant to this chapter for the purposes of such examination or treatment shall not be admissible in evidence against the person in any penal proceeding on any issue other than that of the person's physical or mental condition, but it shall be admissible upon that issue, whether or not it would otherwise be deemed a privileged communication, unless such statement constitutes an admission of guilt of the offense charged.

(Emphases added.) According to the Commentary on HRS § 704-416, this section was intended to "to safeguard the defendant's rights

and to make possible the feeling of confidence essential for effective psychiatric [and other medical] diagnosis or treatment," and, as such, "the defendant's statements made for this purpose may not be put in evidence on any other issue, e.g., whether the defendant in fact engaged in the proscribed conduct, in penal proceedings."[3] Commentary on HRS § 704-416 (internal quotation marks and footnote omitted) (brackets in original).

A.

By its plain language HRS § 704-416 limits admissibility to "statement[s] made by a person[,]" not statements that were not made by a person.[4] However, HRS § 704-

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[3] The Model Penal Code is to the same effect:

> This section embodies the view that the important expert knowledge of the mental condition of a defendant, acquired by examination or treatment on order of the court, should be fully available in evidence in any proceeding where his mental condition may properly be in issue; but to safeguard the defendant's rights and to make possible the feeling of confidence essential for effective psychiatric diagnosis or treatment, the defendant's statements made for this purpose may not be put in evidence on any other issue.

Comment to MPC § 4.09 at 266 (1985).

[4] The majority also notes that HRS § 704-416 explicitly mentions only "statements" and then goes to analyze whether Petitioner's failure to mention "aliens" to the examiners constitutes a "statement." Majority opinion at 27-28. With all due respect, this analysis is inapt. First, neither the parties nor this dissent posit that not mentioning aliens would somehow constitute a "statement" for purposes of HRS § 704-416.

Second, the majority's importation of the definition of "statement" from the Hawai'i Rules of Evidence (HRE) Rule 801, majority opinion at 28, is inappropriate because (1) completely different policies underlie the admissibility of hearsay and statements made during HRS §707-404 physical and mental examinations, (2) HRE Rule 802 is inapposite because this case does not present a situation where the out-of-court silence is being admitted for the truth of the matter being asserted therein, and (3) the hearsay analogy is inappropriate because Petitioner's lack of mention of "aliens" was not in response to any specific question posed by the examiners.

416 is the only provision in chapter 704 that refers to the substance of the examination. The provisions of the chapter are silent with respect to the specific situation posed here: whether an examinee may be impeached for what was not said in the examination. Hence, while HRS § 704-416 specifically prohibits admissions of guilt made during an examination from being used at trial, its silence as to unmade statements does not invariably sanction admission of the failure to make a particular statement into evidence for impeachment purposes.

In the framework of HRS chapter 704, no provision permits impeachment of the defendant by way of a failure to make a statement to an examiner in the examination process. Cf. State v. Domingo, 69 Haw. 68, 70, 733 P.2d 690, 692 (1987) (defendant's statements made in three-member panel examination cannot be used to impeach him). Because HRS § 704-416 fails to expressly cover this question, the statutory scheme of HRS chapter 704 and its underlying policies must be considered. See Paul v. Dep't of Trans., 115 Hawai'i at 416, 426, 168 P.3d 546, 556 (2007) (quoting Gray v. Admin. Dir. of the Court, 84 Hawai'i 138, 148, 931 P.2d 580, 590 (1997) (footnote omitted)) (recognizing that "we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose") (internal quotation marks omitted); Narmore v. Kawafuchi, 112 Hawai'i 69, 88, 143 P.3d 1271, 1290 (2006) (quoting HRS § 1-16 (1993)) ("Laws in pari materia, or upon the same subject matter,

shall be construed with reference to each other.") (internal quotation marks omitted).[5]

B.

This is to be compared with a similar statute permitting impeachment. The Supreme Court of Colorado in People v. Pearson, 546 P.2d 1259 (Colo. 1976) (en banc), reviewed a statute authorizing impeachment despite the limited use otherwise allowed of a defendant's communications during court-ordered examinations.[6] It concluded that although evidence acquired from communications by a defendant during the course of a court-ordered mental examination was admissible for limited

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[5] The majority takes issue with the conclusion that language of HRS § 704-416 limits admissibility to statements made by a person undergoing an evaluation pursuant HRS § 704-404 because HRS § 704-416 does not explicitly state that "'only or 'nothing except' a statement may be admissible." Majority opinion at 29. However, as discussed infra, the majority's position conflicts within an in pari materia reading of HRS § 704-416 and other provisions of the chapter.

[6] The statute at issue in Pearson, Colo. Sess. Laws 1972, ch. 44, 39-8-107(1) at 228, "provides that any statements made by the defendant are admissible for limited purposes at the trial on defendant's guilt" and states as follows:

> Except as provided in this subsection (1), no evidence acquired directly or indirectly for the first time from a communication derived from the defendant's mental processes during the course of a court-ordered examination . . . shall be admissible against the defendant on the issues raised by a plea of not guilty, if the defendant is put to trial on those issues, except to rebut evidence of his mental condition introduced by the defendant to show incapacity to form a specific intent; and, in such case, such evidence may be considered by the trier of fact only as bearing upon the question of capacity to form a specific intent and the jury, at the request of either party shall be so instructed. If the defendant testifies in his own behalf upon the trial of the issues raised by the plea of not guilty, the provisions of this section shall not bar any evidence used to impeach or rebut the defendant's testimony.

Pearson, 546 P.2d at 1266 (quoting Colo. Sess. Laws 1972, ch. 44, 39-8-107(1) at 228) (ellipses in original) (emphases added).

purposes only, the statute could not be interpreted as only permitting statements concerning a defendant's lack of capacity to form a specific intent, because the express language of the statute indicated "statements concerning other issues of his guilt" might be used to impeach or rebut when the defendant testified in his own behalf. Pearson, 546 P.2d at 1266.

Contrastingly, in the instant case, no express allowance of impeachment is contained in HRS § 704-416. Under HRS chapter 704, the only matter concerning the examinations explicitly permitted at trial are statements as to the physical and mental condition of the defendant (excluding statements of guilt). In that regard, it appears that permitting impeachment of a defendant by way of what was not said in an examination would undermine the express purposes for which an examination is held, as recounted hereafter.[7]

V.

If the examination, compelled as it is under the

[7] The majority's attempt to analogize this dissent's analysis of HRS § 704-416 to the HRE is simply wrong. See majority opinion at 29. The majority contends that if the courts were to follow the analytical path the dissent applies to HRS § 704-416, non-hearsay statements would be per se inadmissible under HRE Rule 802 inasmuch as that rule only applies to the exceptions which make otherwise inadmissible hearsay admissible. Id. Obviously, non-hearsay statements may be admissible under other provisions of the HRE, e.g., HRE Rule 402 (2007), which provides in part, that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitutions of the United States and the State of Hawai'i, by statute, by these rules, or by other rules adopted by the supreme court[,]" although they might not be admissible under HRE Rule 802.

More to the point, the term "statement" in HRS § 704-416 is not used in an evidentiary context. Hence, the majority's recasting of the term is incorrect. The effect of HRS § 704-416, viewed with other provisions, see discussion infra, is to exclude matters of the examination not bearing on the physical and mental condition of the defendant. Accordingly, the majority overstates the implicit scope of the exclusion under HRS chapter 704.

statute, were treated as a circumstance permitting impeachment of a defendant because of what he failed to say, the statutory procedures would no longer "make possible the feeling of confidence essential for effective psychiatric and other medical diagnosis or treatment." Commentary on HRS § 704-416 (quoting MPC Tentative Draft No. 4, comments at 201 (1955) (brackets omitted)). The examination itself would necessarily become a forum for presenting a legal defense in anticipation of the type of cross-examination allowed in the instant case.

For permitting Respondent to question Petitioner as to what was <u>not</u> told to the examiners opens up a universe of possible inquiries that Petitioner would have had to prepare for and to speculate upon <u>prior</u> to the examination. To counter the advent of impeachment at trial a competent defense would have no choice but to assert in the examination itself its legal theory and its rebuttal to what it believed Respondent's inquiries would be at trial.[8] If, as in this case, the examiners can be called

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[8] Petitioner points out that in final argument Respondent argued that Petitioner failed to relate his views about "aliens" to the examiners because that "was not what was going on in [Petitioner's] head."

> . . . [Respondent] argued that the additional details in [Petitioner's] trial testimony which had not been previously disclosed to the three-panel were fabricated:
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> > [RESPONDENT]: . . . You know, Dr. Gitter told you, ladies and gentlemen, that when he interviewed [Petitioner], he saw no signs that [Petitioner] was fabricating what he was telling Dr. Gitter. <u>But, he never told Dr. Gitter a number of the things that he testified to during the trial. He never talked about these alien -- I mean, these aliens from Mars in human form. He never talked about these earth histories. . . . But there's no evidence he told anyone about this -- any of these doctors about this.</u>
> >
> > Why? He clearly understood what his purpose of

(continued...)

upon to testify as to what the defendant did not say, the defendant and examiner would be cast in adversarial roles during the examination.

Legal posturing, guarded and qualified responses, or explicit advocacy will extend the adversarial process into the examination process itself, destroying its purpose of obtaining "effective psychiatric and other medical diagnosis[.]" Id. (brackets omitted). This does not even consider the burdens placed on defendants whose physical or mental conditions render them incapable of or poorly equipped in performing the task of conveying in the examination a legal defense and rebuttal or the fairness of such a process as it subsequently develops at trial. It cannot be beneficial to society if a defendant who suffers from a mental disease, disorder, or defect is denied treatment because the defendant's failure to relate to the examiners additional factors that would support the insanity defense later casts doubt on the veracity of the insanity defense at trial. See Castro, 93 Hawai'i at 463, 5 P.3d at 453 (Acoba, J., concurring); Commentary on HRS § 704-400 (1993) (stating that "it has become common to qualify an acquittal based on the

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[8](...continued)

> going to that interview was. He understood it was for the purpose of understanding what was going on as to his state of mind at the time of the incident. But, he never tells them any of this?
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> Why? Because, ladies and gentlemen, this was not what was going on in [Petitioner's] head. . . .

(Emphases added.) (Some ellipses points in original and some added.)

defendant's mental irresponsibility and to provide for commitment of the defendant thus acquitted to an appropriate medical institution" (internal quotation marks omitted)).

VI.

Additionally, admitting evidence of what was not said to impeach the defendant substantially risks revealing information concerning the examination beyond that allowed under the express language of HRS § 704-416.[9] It is conceivable that to rebut impeaching evidence, the defense will be placed in the position of disclosing statements made to the examiners that do not relate to a mental or physical condition.

For example, after the court gave an instruction allowing impeachment, Respondent elicited testimony of whether Petitioner discussed with the examiners his belief in aliens. Petitioner stated that he could not recall what he had told Doctor Wade, that he did not think he used the term aliens when talking with Doctor Gitter, and that none of the doctors ever gave him a chance to discuss his readings about philosophies and religions regarding the individuals that were out to get him.

> Q [Respondent]. [Petitioner], isn't it true that you did not tell Doctor Wade anything about your views that there were aliens amongst us?
>
> A [Petitioner]. I can't completely recall what I told Doctor Wade.
>
> Q. Isn't it true that you never told that to Doctor Gitter?
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> A. I don't think I ever used the term "aliens."

[9] Of course, with respect to statements, "[t]he ban on usage as to other issues extends only to use against the defendant; if the defense wishes to bring out such statements it may do so." Comment on MPC § 4.09 at 268-69 (1985) (emphasis added).

> Q. Isn't it true you never expressed your obsessions in reading about these philosophies and religions dealing with individuals out to get you?
> A. They never gave me a chance.

(Emphases added.) Dr. Gitter, who Respondent called as a rebuttal witness, testified on direct examination that in his examination of Petitioner, he was not aware that Petitioner "express[ed] any strong interest in literature" describing "topics" of "humanoids." Respondent next called Dr. Wade, who related that in the examination Petitioner "talked about having consulted with his attorney about his mental state at the time of the offense and whether he would have a defense related to his mental state." Thus, in inquiring into what Petitioner did not say, Respondent exposed questions that were asked and matters that were covered during the examination that were not subject to disclosure under HRS § 704-416.[10]

VII.

The use of Petitioner's "non-statement" for impeachment is particularly inappropriate here inasmuch as Petitioner's statements do not appear to be truly contradictory. Two of the examiners testified that Petitioner did express that he felt persecuted and that people were out to get him. On direct

[10] Allowing such impeachment may have other unwarranted consequences, such as happened in this case, in which the defendant is placed in the dilemma of choosing between rebutting the attack on his credibility and waiving important rights, such as the attorney-client privilege. Other encumbering collateral effects may be the calling of new surrebuttal witnesses by the defendant and the fashioning of additional instructions by the trial court. However, in this regard, it must be recognized that, in this setting, "[e]ven if a jury is carefully instructed to consider the defendant's statements only in respect to his mental condition, it is difficult for it not to be influenced in its judgment on other questions to which the statements are obviously relevant." Comment to MPC § 4.09 at 269 (1985) (footnote omitted).

examination, Doctor Stojanovich testified that Petitioner "seemed to be under the belief that everybody was against him. He was under the belief that many people were there against him and that nobody had tried to help him." Similarly, Doctor Gitter testified on direct examination that at his interview with Petitioner, "he was still mildly delusional, he mentioned that he had been followed . . . . It was kind of a paranoid delusion of being persecuted." (Emphasis added.) These statements are not necessarily inconsistent with a belief in aliens inasmuch as the examiners called to rebut Petitioner's statement that he was influenced by delusions of aliens did not probe further to discern exactly who or what Petitioner believed was threatening him.

On cross-examination, Petitioner asked Doctor Gitter, "And in fact [your examination] never went deep enough to ask [Petitioner] whether those people might be alien or human-appearing but not really human?" to which Doctor Gitter responded, "I never asked him that question, no." Also on cross-examination, Doctor Wade answered affirmatively when asked if "[Petitioner] might have kept talking quite a bit longer" if Doctor Wade "had simply stood back and listened[.]"

We are not faced with a case in which a defendant asserting an insanity defense testified that he told the examiners, "I believed aliens were chasing me," only to be confronted with directly contradictory statements, such as

evidence that he answered in the negative when asked by an examiner whether he had any delusions of aliens, extraterrestrials, or other-worldly beings. The HRS § 704-404 examination process cannot be equated with a prior trial, see Asato v. Furtado, 52 Haw. 284, 474 P.2d 288 (1970), cited by the majority; a deposition, see Jackson v. Seib, 866 N.E.2d 663, 673 (Ill. App. 2007) (holding that plaintiff was properly impeached by use of prior inconsistent statements made during a deposition); or a criminal investigation, see Mai v. State, 189 S.W.3d 316, 322 (Tex. App. 2006) (holding that witness was properly impeached by use of prior inconsistent statements made during a criminal investigation). Those situations are unlike mental examinations ordered under HRS chapter 704 that are intended to result in an expert opinion regarding a defendant's cognitive and volitional capacities.

As to this point, the majority misapplies Asato for the proposition that plaintiffs (or, by analogy, the prosecution) should be allowed to impeach defendants' credibility through the use of prior inconsistent statements where the purported inconsistency is the defendant's omission of "important and material" facts. See majority opinion at 37. In Asato, the discrepancy could be fairly pointed out and used to impeach the defendant's credibility.

Asato was a personal injury case arising out of an automobile accident. Asato, 52 Haw. at 286, 474 P.2d at 291.

During the civil trial, the defendant testified that "he had been blinded by lights coming from the direction of the medial strip, and that before he could do anything, he hit something, which turned out to be plaintiffs' vehicle." Id. In a previous criminal trial arising out of the same accident, defendant had testified that "just before the impact" "he heard a crash, then he was blinded by bright lights coming from the direction of the medial strip, and then he hit something." Id. at 287, 474 P.2d at 292.

Plaintiffs sought to introduce defendant's testimony from the criminal trial as a prior inconsistent statement in order to impeach the defendant's credibility. Id. This court noted that whether a prior statement was inconsistent

> depends upon the circumstances under which the prior statement was made. . . . But where the prior circumstances were such that the speaker could have been expected to state the omitted fact . . . because he was purporting to render a full and complete account of the transaction or occurrence, and the omitted fact was an important and material one, so that it would have been natural to state it, the omission gives rise to a justifiable inference that the omitted fact was omitted because it did not exist.

Id. at 288, 474 P.2d at 292 (citations omitted) (emphasis added). This court held that the defendant's testimony about hearing a crash should have been admitted as a prior consistent statement because (1) defendant took the stand to testify on his own behalf in two trials regarding the same incident, (2) the sequence of events was covered "more than once" in the previous trial, (3) defendant purported to give a "full and complete account" of the events, and (4) the fact was important and material to the

defense because the existence of another crash might have significant influence on the jury's determination of whether defendant had been negligent. Id. at 288-89, 474 P.2d at 292-93.

In contrast, the circumstances surrounding Petitioner's non-statements do not give rise to the same inference of inconsistency. First, during the examinations, Petitioner was not advocating his defense and was not represented by counsel. Second, Petitioner did not claim to have given a "full and complete account" of his mental state inasmuch as the course of the examinations was directed by the examiners. And thus, third, the omission would not "give rise to a justifiable inference" that the fact was omitted because it did not exist. Id. at 288, 474 P.2d at 292. To allow Respondent to attack Petitioner's affirmative defense using such an ambiguous "contradiction" is not fair impeachment.

Additionally, as to this point, the majority's conclusion that "unlike the introduction of a prior inconsistent statement, the admission of a non-statement in the present matter does not import with it the defendant's actual statements into evidence[,]" majority opinion at 30-31, is simply contrary to the manner in which the statement was treated by the court. Respondent's cross-examination of Petitioner was intended to show that his testimony was inconsistent with his prior statements to the examiners. Petitioner's counsel's elicitation on re-cross examination that Petitioner had previously told her that he

believed aliens or humanoids were chasing him on the day of the incident was allowed under HRE Rule 613, which governs the admissibility of prior consistent statements to rehabilitate a witness whose credibility has been attacked by the use of a prior inconsistent statement.

Notably, the two examiners who diagnosed Petitioner with a mental illness did not think that Petitioner was malingering[11] or feigning his symptoms. Doctor Stojanovich testified on direct examination that "it [would] be difficult and unfair to say that he was not impaired at all." (Emphasis added.) He went on to explain that in arriving at his diagnosis that Petitioner suffered from a brief psychotic episode, he had to

> come to a certain level of understanding, certain level of myself being certain as to whether or not he did indeed or not suffer with the substantial impairment of . . . his ability to comprehend what he was doing and his ability to do things only that the law requires and nothing else.
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> And so . . . when I said more likely than not, that means that in my opinion, after considering all the things that we have to consider, in my opinion [Petitioner] was more likely than not having that substantial impairment that the law requires for this kind of examination.

[11] Malingering is defined as "feign[ing] illness or disability, [especially] in an attempt to avoid an obligation or to continue receiving disability benefits." Black's Law Dictionary 978 (8th ed.). A similar definition used by an expert witness was recently quoted by the Sixth Circuit Court of Appeals: "'[A]ttempting to feign an illness,' which 'is often done for what we might call the secondary gain; whatever might be derived from feigning an illness.'" Haliym v. Mitchell, 492 F.3d 680, 708 (6th Cir. 2007). Signs of malingering include (1) tailoring responses to each questioner, (2) providing "ridiculous" answers to simple questions that are answered correctly even by people who are severely impaired, (3) cognitive abilities that are inconsistent with self-reported symptoms, (4) "mixing" symptoms of different disorders, (5) reporting inconsistent symptoms across multiple interviews with the same examiner, and (6) "inexplicable" inconsistencies in the defendant's ability to understand the charges and proceedings he faced in successive interviews with the same examiner. Wallace v. United States, -- A.2d. --, --, 2007 WL 2669564 at *5-*6 (D.C. 2007).

(Emphases and ellipses added.) More directly, Doctor Gitter testified on cross examination that "from [his] testing and interview with" Petitioner, he did not "find any evidence of feigning or exaggeration on [Petitioner's] part[.]" (Emphasis added.) Dr. Wade did not indicate that Petitioner was untruthful during the examination.

VIII.

Furthermore, as recounted supra, the purpose of "safeguard[ing] the defendant's rights" by precluding "the defendant's statements" from being "put in evidence on any other issue, e.g., whether the defendant in fact engaged in the proscribed conduct, in penal proceedings[,]" Commentary on HRS § 704-416 (internal quotation marks and footnote omitted), would be usurped by allowing evidence of guilt to be drawn inferentially from what was not said in an examination. The compulsory nature of the examination and its intrusion into a defendant's right against self incrimination is recognized by the provision that "[a] statement made by a person subjected to examination . . . shall not be admissible in evidence . . . on any issue other than that of the person's physical or mental condition, but it shall be admissible upon that issue[.]" HRS § 704-416. As a further safeguard, a statement that otherwise would relate to a person's physical or mental condition is still excluded if "such statement constitutes an admission of guilt[.]" Id.

According to the Code, these strictures on disclosure of examination matters are "inten[ded] . . . to meet two problems: (1) the inability of a jury to divorce a statement containing an admission of guilt from the determination of all issues, and (2) an objection to the examination of the defendant on the basis of defendant's privilege against self-incrimination." Commentary on HRS § 704-416 (footnote omitted). Thus, the restriction on the scope of admissibility under HRS § 704-416 is necessary because "the purpose of an interview to probe sanity at the time of the commission of the charged offense is to obtain from the accused information bearing directly on his [or her] guilt . . . [and in such an examination] there is a greater likelihood of soliciting statements that breach a defendant's Fifth Amendment rights." United States v. Leonard, 609 F.2d 1163, 1167 (5th Cir. 1980) (internal citation omitted).

Hence, restrictions similar to that regarding statements that are made in any examination would also pertain to admissions of guilt inferred from what was not said in an examination. While a failure to make a specific statement would not strictly fall within the protection against self incrimination, impeachment by omission places the defendant in a position of jeopardy he would not be in otherwise but for the compelled examination.[12] To permit such inferences of guilt to

[12] The Commentary to MPC § 4.09 states that "it is unfair to tax the defendant generally with statements made during the state-authorized process at which he is encouraged to speak freely." Comment on MPC § 4.09 at 268 (1985) (footnote omitted).

be made would be inconsistent with the limited use of evidentiary matter now allowed under HRS § 704-416 in connection with the examination.

IX.

Also, as noted infra, inasmuch as the examiners control the mode and duration of the examination, placing the burden on a defendant to affirmatively assert his legal theory or to penalize him for not asserting his legal theory in the examination is not only counterproductive, but unfairly prejudicial. Petitioner testified that his interaction with all of the examiners was extremely brief. According to Petitioner, he had only a "real brief session" with Dr. Wade, he did not discuss much about "the incident itself" with Doctor Glitter, and although Dr. Stojanovich allowed him to speak freely, he would direct Petitioner and cut off Petitioner where the doctor believed necessary.

To reiterate, examinations performed, as in the instant case, may employ "any method" that "is accepted by the professions of medicine or psychology for the examination of those alleged to be affected by a physical or mental disease, disorder, or defect[.]" HRS § 704-404(3). Thus, it is for the professional examiners to determine how a particular evaluation will proceed. Petitioner had no control over the questions the examiners asked him or the scope of the oral examination.

Furthermore, it is not within the purview of the courts to dictate which matters, e.g., the theory of the defense, are

pertinent to a mental evaluation or to interfere with the examiners' methodology in conducting the evaluation. See id. (explaining that examiners may choose any method for evaluations accepted by the medical or psychology professions). Therefore, permitting impeachment of the defendant as to what he did not say defeats the purpose of having an independent evaluation based on such professional standards.[13]

X.

Not only was the Respondent's inquiry into Petitioner's silence improper given the limiting language and underlying purposes of HRS § 704-416 and related provisions, it was outside

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[13] The majority implies that this dissent's analysis of HRS § 704-416 "stretche[s it] beyond its terms to exclude non-statements, and, accordingly" misinterprets its "plain language." Majority opinion at 29-30. To the contrary, this dissent's approach notes that the statute, as written, does not encompass the situation presented, and therefore answers the questions raised in the Petition by considering the textual context and the policies of the relevant provisions of HRS chapter 704 together.

On the other hand, although the majority also recites the well-established tenet requiring statutes to be construed "in the context of the entire statute . . . and in a manner consistent with [their] purpose", id. at 33 (quoting State v. Haugen, 104 Hawai'i, 71, 76, 85 P.3d 178, 183 (2004) (citation, internal quotation marks, and brackets omitted)), it does not actually employ it, and therefore reaches a flawed conclusion. Specifically, after reciting the aforementioned principle, the majority goes on to say merely that

> HRS [chapter] 704 was principally designed to relieve criminally irresponsible defendants of penal liability, see HRS § 704-402(1) (1993) ("Physical or mental disease, disorder, or defect excluding responsibility is an affirmative defense."), and excluding non-statements from the purview of HRS § 704-416 furthers that end. In short, the statute's purposes are not imperiled by interpreting its terms in a straightforward fashion.

Id. at 33.

Such cursory treatment of the related statutory sections and the underlying purpose of the statute is insufficient to resolve the issue at hand. Hence, the majority's bare assertions -- without any explanation -- that the majority's interpretation of the statute does "not imperil[]" the statute's purposes, is wholly unsupported.

the scope of proper cross-examination. In its Answering Brief and at oral argument, Respondent argued that Petitioner opened the door to the attack on his credibility by putting his mental state at issue. In essence, Respondent contended that by taking the stand and testifying that he was driven by his "thoughts" about aliens or humanoids at the time of the incident, Petitioner made himself vulnerable to questioning about the truthfulness of that testimony.[14]

Like other witnesses, "[a] defendant who elects to testify in his own defense is subject to cross-examination as to any matter pertinent to, or having a logical connection with the specific offense for which he is being tried." State v. Pokini, 57 Haw. 17, 22, 548 P.2d 1397, 1400 (1976) (citations omitted). The "pertinent matters" on which a defendant may be cross-examined include "collateral matters bearing upon his credibility. . . ." Id. But the scope of the cross-examination of the defendant, while committed to the discretion of the trial court, is not unlimited.

> The subject matter of the inquiry must have some rational bearing upon the defendant's capacity for truth and veracity. And where the testimony sought to be elicited is of minimal value on the issue of credibility and comes into

[14] Generally, "the scope of cross-examination is . . . within the sound discretion of the trial court." State v. Corella, 79 Hawai'i 255, 260, 900 P.2d 1322, 1327 (App. 1995) (citing State v. Silva, 67 Haw. 581, 587, 698 P.2d 293, 296 (1985); Pokini, 57 Haw. at 22, 548 P.2d at 1400). "An abuse of discretion occurs if the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party-litigant." State v. Jackson, 81 Hawai'i 39, 47, 912 P.2d 71, 79 (1996) (internal quotation marks and citations omitted). In order to aid the finder of fact in assessing the veracity of testimony, a witness "may be cross-examined on matters bearing upon the witness's credibility, biases, prejudices, or ulterior motives." Corella, 79 Hawai'i at 260, 900 P.2d at 1327 (internal citations omitted) (citations omitted).

> direct conflict with the defendant's right to a fair trial, the right of cross-examination into those areas must yield . . . .

Id. at 22-23, 548 P.2d at 1400-1401 (emphases added) (internal citations omitted).[15] This is just such a case. The testimony elicited from Petitioner on cross-examination was of minimal value in assessing his credibility and conflicted with his right to a fair trial.

XI.

Under the Pokini standard regarding impeachment of a defendant, Respondent's elicitation of testimony regarding Petitioner's failure to mention aliens, humanoids, or alternative earth theories on its direct examination of Doctors Gitter and Wade should have been barred. Respondent's direct examination of Doctor Gitter included the following:

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[15] The majority states that "[t]he Pokini rule is implicit in HRE Rule 403, pursuant to which a trial court may preclude cross-examination if the probative value of the impeachment evidence is substantially outweighed by the danger of unfair prejudice to the defendant's right to a fair trial." Majority opinion at 34-35. However, Pokini sets a different standard for precluding cross-examination of a defendant, given the importance of the defendant's constitutional right to a fair trial. Hence, Pokini, 57 Haw. at 22-23, 548 P.2d at 1400-1401, does not require that the value of the testimony to be elicited from defendant be "substantially outweighed" by the threat to the defendant's right to a fair trial, but only that the testimony would be "in direct conflict" with that right. Moreover, the analogy to HRE Rule 403 is inappropriate inasmuch as that Rule applies to all evidence whereas the standard under Pokini specifically addresses cross-examination of a defendant.

Even assuming, arguendo, that HRE Rule 403 could apply to this case, the majority's analysis on this point is wrong. The majority concludes "that [Petitioner's] failure to mention his concerns regarding aliens was clearly relevant to the question whether he was being truthful when he testified at trial that he had those concerns at the time of the incident." Majority opinion at 37. This analysis fails to consider the crucial factor of admissibility under HRE Rule 403: whether the relevant evidence is "substantially outweighed by the danger of unfair prejudice . . . ." Applying this factor to Respondent's use of Petitioner's non-statements, the probative value of the non-statements was "substantially outweighed by the danger of unfair prejudice" as set forth in the discussion applying Pokini to this case, see infra.

> Q. [Respondent]: . . .[D]uring the course of your interview of [Petitioner], did he ever speak about . . . humanoids or . . . other beings who came in human form who were amongst us?
> A. [Dr. Gitter]: No.
> Q. Did he ever express any strong interest in literature describing those types of topics.
> A. Not that I'm aware of.
> . . . .
> Q. If [Petitioner] had been involved in that kind of thinking along the lines of these other beings in humanoid form who were going to take over the world and perhaps place him in danger, would you have expected that some information regarding that would have been provided to you during your interview of [Petitioner]?
> A. I suppose so, but that wasn't provided to me.

(Emphases added). At the end of Doctor Gitter's direct examination, however, Respondent elicited Doctor Gitter's opinion that during his interview, Doctor Gitter did not believe that Petitioner was feigning or exaggerating his symptoms. Immediately thereafter, Respondent questioned Doctor Gitter again about the information Petitioner offered during the examination:

> Q. [Respondent]: But at the same time, he never mentioned anything about aliens, for instance?
> A. [Doctor Gitter]: Not to me.
> Q. And he never mentioned anything about some philosophy along the lines of the aliens in human form taking over the world?
> A. He did not mention it to me nor did I see it mentioned to anybody in the jail.

(Emphases added). Of course, Dr. Gitter's testimony that Petitioner did not mention this to Dr. Gitter or other persons in jail would assume that there was some obligation on Petitioner's part to volunteer such information -- an assumption, however, that is not supported by the examination procedure or anything in the record. See State v. McCrory, 104 Hawai'i 203, 208, 87 P.3d 275, 280 (2004) ("[A d]efendant has no affirmative duty to proclaim his innocence, much less to do so to his cellmate." (Citation omitted.)).

The course of Doctor Wade's direct testimony is similar. Reiterating Doctor Wade's observation that Petitioner was focused on disappointments arising out of family and employment relationships, Respondent then elicited testimony from Doctor Wade that the issue of aliens and alternative earth histories was absent from Petitioner's examination with Doctor Wade.

> Q. [Respondent]: . . .[A]t any point during the course of your interview with the [Petitioner] or from any of the records that you were able to review, did [Petitioner] talk about anything regarding the end of the world?
>
> A. [Doctor Wade]: No.
>
> Q. Did he talk about there might be or suggest that there were, aliens in humanoid form that intended to take over the world?
>
> A. No.
>
> . . . .
>
> Q. Did he express to you that he was involved in reading about these types of things, including other-Earth histories, perhaps conspiracy theories, anything along those lines?
>
> A. No.
>
> Q. Would you have, if those were prevailing thoughts on the part of [Petitioner] at the time of your interview with him, would you have expected those types of things to come forward?
>
> A. Yes.
>
> Q. Can you explain why?
>
> A. Well, when I asked him about what the purpose was of my interview, he talked about having consulted with his attorney about his mental state at the time of the offense and whether he would have a defense related to his mental state.

(Emphases added). The fact that Petitioner talked about "whether he would have a defense related to his mental state" does not establish that Petitioner was, at that point, legally expected to discuss the theory of that defense. Significantly, despite Dr. Wade's "expectation" of what Petitioner would have said, "if those were prevailing thoughts . . . at the time of [the] interview," Dr. Wade apparently did not conduct any inquiry about

what the defense theory that "related to his mental state" was, thus indicating that this area was not important to his evaluation.

XII.

The majority concludes that allowing evidence of what a defendant failed to say does not undermine the purpose and policy of HRS chapter 704. See majority opinion at 33 ("the statute's purposes are not imperiled by interpreting" HRS § 704-416 "in a straightforward fashion"). The majority announces that its rule "would . . . likely serve to encourage the defendant to be more forthcoming with the examiners, which is consistent with HRS [chapter] 704's general objective of aiding examiners in gaining access to information relating to the defendant's mental and physical condition at the time of the offense . . . ." Majority opinion at 33. To the contrary, cross-examination on what Petitioner did not say should have been excluded in view of the objectives of the examination procedure and under Pokini.

A.

First, as to a "rational bearing upon the defendant's capacity for truth and veracity," Pokini, 57 Haw. at 22, 548 P.2d at 1400 (citation omitted), unmade statements in the context of the three-member examination cannot automatically and categorically be deemed illustrative of defendant's capacity for truthfulness. An assumption that the defendant is lying by omission in such a situation can be dangerously inaccurate and is inherently unfair in the context of the examination procedure.

Respondent's questions on cross-examination and the court's instructions wrongly presumed, as a matter of law, that the defendant was expected to set forth his legal defense in the examination. The failure, however, to make such a statement in the examination setting is "'ambiguous, and thus of dubious probative value,' for many other 'explanations for the silence' exist that are not indicative of guilt." McCrory, 104 Hawai'i at 207, 87 P.3d at 279 (quoting Doyle v. Ohio, 426 U.S. 610, 619 n.8 (1976) (brackets omitted)).[16]

As the examination process is presently structured, a defendant is not expected to create a veritable "checklist" of topics to be covered with each examiner. The examiners, not the defendant, control the method and scope of questioning in the examination as it must be.[17] It is established that "there are

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[16] There may be instances where the context may call for a response, but such an instance should take place within an examination, and generally should not involve matters regarding the examination. See McCrory, 104 Hawai'i at 207 n.4, 87 P.3d at 279 n.4 (silence may be significant if "it persists in the face of accusation" (quoting Fowle v. United States, 410 F.2d 48, 50 (9th Cir. 1969))).

[17] The majority states that the examiner's control of the examination is "relevant to the weight to be accorded the evidence of the omissions and not to it's admissibility[.]" Majority opinion at 37 (emphasis in original). According to the majority, once the jury learned of Petitioner's non-statements and heard his explanation, "it was for the jury to decide" whether it believed that Petitioner did not mention aliens because he did not have the opportunity or because he did not actually believe they were chasing him. Id.

This position disregards the insidious danger presented by the admission of so called non-statements to impeach a defendant. The impeachment did not merely attack Petitioner's credibility; it conflicted with his right to a fair trial. The fact that Petitioner was not in control of the scope or flow of the mental examination which was the basis for the impeachment highlights the unfairness of admitting evidence of what he did not say. Thus, under the approach employed in Pokini, the nature of the examination would go to admissibility and not merely weight of a "non-statement," as the majority would have it. This is because the nature of the mental examination is relevant to whether Respondent's cross-examination of Petitioner concerning the examination impermissibly infringed on his right to a fair trial.

'situations in which an accused is clearly under no duty to speak' and where there are various reasons, 'regardless of guilt or innocence,' for maintaining one's silence." McCrory, 104 Hawai'i at 206-07, 87 P.3d at 278-79 (quoting Fowle, 410 F.2d at 50 (brackets and footnote omitted). Accordingly, "[i]n such circumstances, since innocent and guilty alike may choose to stand mute, . . . proof of such former silence should be excluded under universally recognized principles of evidence." Id. at 207, 87 P.3d at 279 (quoting Fowle, 410 F.2d at 50) (ellipses in original).

Permitting impeachment by what was not said obfuscates the fact that Petitioner was not under any obligation to unilaterally volunteer information. See id. at 206-07, 87 P.3d at 278-79 (citation omitted). Because of the structure of the examination process, silence cannot reasonably be inferred as indicative of untruthfulness or guilt. Hence, in this setting, that Petitioner did not explain the defense's legal theory in the examination can have little rational bearing upon his credibility.

Second, as a collateral matter noted before, assuming as the majority does and the court did, that a defendant must relate the basis for his legal defense in the examination injects the courts into an area committed to other professional expertise. The clear implication of the requirement that the court appoint licensed professionals to the panel and that each panel member may employ "any method" that "is accepted by the

professions of medicine or psychology[,]" HRS § 704-404(3), is that the determination of defendant's purported mental or physical condition is initially a question of the panel's expertise.

Authorizing the prosecution to inquire into what was not asked or discussed in these examinations undermines the statutory discretion vested in an examiner to decide what information is relevant in making his or her own diagnosis. The impropriety of such an inquiry is further emphasized in this case by the fact that although Respondent tried to persuade the jury that Petitioner was feigning his alleged mental illness based on what he did not tell the examiners, two examiners opined that Petitioner was not malingering in the examination and suffered some degree of impairment. Specifically, Petitioner was diagnosed variously as suffering from a brief psychotic episode, a major depressive disorder, and methamphetamine dependence. Indeed, none of the examiners indicated they believed Petitioner was being untruthful.

B.

Hence, any failure by Petitioner to expound on a subject not inquired into by the examiners had "minimal [probative] value," Pokini, 57 Haw. at 23, 548 P.2d at 1400, on the issue of credibility. On the other hand, Respondent's inquiry into what was not said "direct[ly] conflict[s] with [Petitioner's] right to a fair trial." Id. As embodied in the procedures set forth in HRS chapter 704, the court-ordered

examination was not intended to be a proving ground for a defendant's legal theory. Allowing the prosecution to mine the examination for impeachment purposes destroys the "confidence" sought to be engendered by the statutory procedure and thought necessary for "effective psychiatric . . . diagnosis[.]" Commentary on HRS § 704-416.

The majority's approach casts the examination in a legalistic framework, raising the substantial risk that what is ambiguous, unintended, or purely innocent in the examination may be taken as proof of guilt or dishonesty at trial. As set forth in the discussion supra, the impeachment approach employed in this case would not only directly conflict with, but abrogate, the underlying purposes of the examination procedure, converting it into part of the adversarial trial process. Under these circumstances "the right of cross-examination . . . must yield[.]" Pokini, 57 Haw. at 23, 548 P.2d at 1400-01.

C.

This is not to say that the defendant's credibility is entirely unassailable when the defendant takes the stand. It certainly would be within a trial court's discretion to allow questioning directly related to the defendant's capacity for truthfulness that was not related to statements made to the three-panel. For example, questioning the defendant about his employment and sources of income to impeach defendant's credibility may be within the trial court's discretion. See id.

at 23, 548 P.2d at 1401 ("While we find that the trial court was somewhat overly permissive in the cross-examination of the defendant . . . , we are satisfied that this, in and of itself, did not prejudice his cause.") The court might also act within its discretion by allowing cross-examination regarding prior convictions for crimes directly implicating truthfulness, such as perjury. See HRE Rule 609(a) (2007) ("[I]n a criminal case where the defendant takes the stand, the defendant shall not be questioned or evidence introduced as to whether the defendant has been convicted of a crime [involving dishonesty] . . . unless the defendant has . . . introduced testimony for the purpose of establishing the defendant's credibility as a witness, in which case the defendant shall be treated as any other witness as provided in this rule."); see also, Commentary on HRE Rule 609 (quoting Asato, 52 Haw. at 292-93, 474 P.2d at 294-95) ("A perjury conviction, for example, would carry considerable probative value in a determination or whether a witness is likely to falsify under oath.").

XIII.

In contrast to the outcome in Pokini, the specific cross-examination of Petitioner in this case did "prejudice his cause" to such an extent that the judgment of the court must be vacated. The presentation of Petitioner's insanity defense was unfairly prejudiced because the court disregarded the limitations inherent in the examination process to Petitioner's "substantial

detriment." See Jackson, 81 Hawai'i at 47, 912 P.2d at 79 (setting forth abuse of discretion standard) (citations omitted). In sanctioning impeachment of Petitioner's testimony because of statements that were not made to the panel, the court disregarded both the provisions of HRS chapter 704 governing the use of information obtained during mental examinations of defendants and the purposes underlying the examination procedure. The statutory provisions and underlying policy clearly limited the inquiry made to members of the panel to an assessment of the defendant's physical or mental condition.

XIV.

A.

Regarding the second question, in limiting use of Petitioner's testimony to impeachment purposes, the court did not alleviate the prejudicial impact of Respondent's questions. The instruction amplified the improper use of impeachment.[18] As Petitioner notes, "the jury is presumed to have followed these erroneous limiting instructions[.]" See State v. Smith, 91 Hawai'i 450, 461, 984 P.2d 1276, 1287 (App. 1999) (recognizing that "it will be presumed that the jury adhered to the court's instructions") (internal quotation marks and citation omitted). Thus, the jury here is presumed to have considered Petitioner's silence for credibility purposes, when information about the

[18] The court instructed the jury "to limit [its] consideration of the response . . . to [its] determination on issues of credibility. [It was] not to consider the response for other matters . . . ."

examinations should only have been admitted for purposes of adjudicating Petitioner's mental state or condition on the date of the incident.

B.

Petitioner notes that "although [he] did object to the State's initial attempt to cross-examine Petitioner regarding his prior statements[,]" he did not "object to the erroneous limiting instructions" and thus, the issue is "raised as plain error" on appeal. The introduction of impeachment evidence, as set forth supra, constitutes plain error, and is noticeable by this court. Domingo, 69 Haw. at 71, 733 P.2d at 692 (citations omitted). In Domingo, a murder trial, this court held that HRS § 704-416 prohibits attacking a witness' credibility by using statements made during the course of a mental examination. See id. The defendant in that case relied upon the defenses of mental incapacity and self defense, and was subjected to a mental examination by a three-member panel. Id. at 69, 733 P.2d at 691. In support of his self-defense claim, defendant testified that the decedent cut him with a sharp object. Id. at 70, 733 P.2d at 692.

The prosecution discredited the defendant's self-defense argument with the testimony of one of the medical examiners. Id. The examiner testified that the defendant told him the cut was instead a result of being struck by the decedent with a chair. Id. Referring to HRS § 704-416, this court said,

"[c]learly, Dr. Dave's testimony, with respect to what appellant told him as to how he received the cut on his hand, was not adduced for the purpose of establishing his physical or mental condition, but was adduced for the purpose of attacking his credibility . . . and is forbidden by [HRS § 704-416]." Id. at 71, 733 P.2d at 692 (emphasis added). Hence, this court remanded the case for new trial. Id.

In the instant case, the central issue was whether Petitioner was penally responsible for his actions on August 1, 2003. The only evidence on this point was the conflicting testimony of the panel and the testimony of Petitioner himself. Impeachment of Petitioner's direct testimony regarding his mental condition on the day of the incident raises "a reasonable possibility" that the improper examination by Respondent "may have contributed to" Petitioner's conviction. See id. (stating that the harmless error standard requires a determination "that there is no reasonable possibility" that the erroneously admitted evidence contributed to the jury's verdict).

Analogously, in Domingo, this court concluded that inclusion of testimony "for a statutorily prohibited purpose cannot be said to be harmless beyond a reasonable doubt . . . ." Id. This court alternatively phrased the harmless error standard as requiring a determination "that there is no reasonable possibility" that the erroneously admitted evidence contributed to the jury's verdict. Id. Here, the error does not appear

harmless beyond a reasonable doubt since the allowance of Respondent's questions violated the purposes of the examination process in HRS chapter 704, the questions were used to impeach Petitioner's credibility, and the questions did not enhance his insanity defense as was the case in Samuel, 74 Haw. 141, 838 P.2d 1374,[19] cited by the ICA.

C.

Respondent does not argue that error, if any, in the impeachment procedure was harmless error. But because the court's limiting instruction was not objected to during the trial, it was raised as plain error, making "a reversal . . . necessary only if the erroneously admitted evidence did not constitute harmless error or there was a reasonable possibility that the erroneous admission of evidence may have contributed to the defendant's conviction[.]" Id. at 151-52, 838 P.2d at 1380 (citing Domingo, 69 Haw. at 71, 733 P.2d at 692.)

[19] In Samuel, 74 Haw. at 143, 149, 838 P.2d at 1376, 1379, the defendant was convicted of murder and challenged the admission of testimony by her examiners relating statements she made to the panel. The examiners, explaining the basis of their opinions, referenced statements made by the defendant during her evaluation, id. at 149, 838 P.2d at 1379, such as "[t]hen it all came to a head. She[, (the decedent),] didn't care about me anymore" and "I don't recall what I wanted to do, I just wanted the pain to stop." Id. at 150, 838 P.2d at 1379 (internal quotation marks omitted). This court held that Samuel's statements to the examiners were admissible under HRS § 700-416 to determine "whether her mental condition negated criminal responsibility" because they spoke to "her state of mind prior to and after the stabbing incident." Id. at 151, 838 P.2d at 1379 (emphases added). Contrary to the case at bar, the statements admitted in Samuel "were not prejudicial[,]" id. at 152, 838 P.2d at 1380, inasmuch as they were not used to attack the defendant' credibility. Further, Samuel's counsel made no objection to the admission of the statements, id., whereas in this case, counsel objected repeatedly to the evidence of the non-statement. Finally, Samuel is distinguishable to the extent that the "insanity defense . . . was withdrawn . . . in order to give [the defendant] a clear opportunity for a manslaughter verdict rather than an outright acquittal based on marginal evidence of legal insanity." Id. at 156, 838 P.2d at 1382.

As mentioned previously, the central issue in the instant case was Petitioner's mental state at the time of the incident. Petitioner asserted an insanity defense, claiming that he was not penally responsible for his actions on that date because of a mental illness or defect. Respondent's theory of the case proposed that Petitioner's cognition and volition were not substantially impaired at the time of the incident. Rather, Respondent posited to the jury that "on that day [Petitioner] snapped, but he snapped not because of any mental disorder but because of his [methamphetamine] use."

However, there was conflicting evidence regarding Petitioner's methamphetamine use. Jason Reed, who observed Petitioner during the incident, testified that, in his opinion, Petitioner was "high" at the time of the incident. Officers Werner and Forrester, who were involved in Petitioner's pursuit and arrest, both testified that they "checked off the categories 'mentally deranged' and 'suspected drug use'" on their respective Honolulu Police Department "192E" incident forms. Officer Werner also testified that Petitioner admitted to smoking methamphetamine "a few hours before [the incident]."

On rebuttal, Dr. Gitter testified that Petitioner suffered from a depressive disorder and was under the influence of methamphetamine at the time of the incident. Based on the lack of any noted psychotic behaviors in the two-and-one-half months between the incident and Dr. Gitter's examination of

Petitioner, "[Petitioner's] use of methamphetamine became a significant factor in Dr. Gitter's opinion as to why [Petitioner] exhibited psychotic conduct during the [incident.]" Dr. Wade also testified on rebuttal that Petitioner "did not suffer from a mental disease, disorder, or defect" but that Petitioner was "methamphetamine dependent."

In contrast, Dr. Stojanovich testified on direct examination that Petitioner's conduct "could have occurred 'without any substance abuse,' and other than [Petitioner's] report that he had used drugs two days before the [incident], [Dr. Stojanovich] saw no evidence that [Petitioner] was under the influence of drugs at the time of the [incident]." On cross-examination, Dr. Stojanovich expressly disagreed that Petitioner's "psychotic episode . . . was a result of his methamphetamine use." Petitioner himself testified that although he used methamphetamine "a few days" prior to the incident, he used "neither . . . methamphetamine nor alcohol on that day."

Faced with conflicting evidence, the jury had to weigh the credibility of each witness. If it found Respondent's witnesses more credible, and believed that Petitioner was under the influence of methamphetamine at the time of the incident, it would have to find that Petitioner was penally responsible for his actions. If, on the other hand, it found Petitioner's witnesses more credible, it could find that Petitioner had proven his insanity defense. It is manifest, then, that the "plain

error" of permitting impeachment of Petitioner's testimony through the examination of Petitioner and Drs. Gitter and Wade was not harmless beyond a reasonable doubt. There is certainly a "reasonable possibility" that the improper impeachment of Petitioner's testimony contributed to his conviction. Domingo, 69 Haw. at 71, 733 P.3d at 692.

XV.

For the reasons stated above, I would hold that admission of evidence of what Petitioner did not tell the examiners for the purpose of impeachment was harmful error, and, thus, Petitioner is entitled to a new trial.[20]

Kama E. Dubby, Jr.

[20] Other arguments raised in Petitioner's petition, in sum, are resolved by, or need not be reached, as a result of the discussion supra.