CONCURRING AND DISSENTING OPINION BY ACOBA, J.

I concur except, respectfully, I believe that the Intermediate Court of Appeals (ICA) did gravely err (1) in affirming the decision of the Second Circuit Family Court (the court) to exclude, based on a purported violation of the notice provision in Hawai'i Rules of Evidence (HRE) Rule 404(b) (Supp. 2007), evidence submitted by Petitioner/Defendant-Appellant Kevin Pond (Petitioner) that the Complainant herein (Complainant) struck him prior to the incident in question; (2) in affirming the court's decision to deny Petitioner's request for a continuance; and (3) in affirming the ruling of the court that the jury instruction on self-defense was proper. State v. Pond, 117 Hawai'i 336, 338, 181 P.3d 415, 417 (App. 2007).

I.

First, while the majority herein overturns the ICA's holding excluding the Complainant's marijuana use, with all due respect I believe it incorrectly fails to treat the assault evidence proposed by Petitioner similarly.[1] In my view, both ICA holdings were in error and, thus, the ICA's affirmance of the court's exclusion of the prior assault evidence should be vacated.

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[1] The ICA held that "[the court's] decision to preclude the admission of evidence that [Complainant] allegedly struck [Petitioner] on a prior occasion did not constitute an abuse of discretion[]" and that "no abuse of discretion occurred when the [court] precluded [Petitioner] from cross-examining [Complainant] about her alleged marijuana use[.]" 117 Hawai'i at 350, 181 P.3d at 429 (emphasis added).

A.

The ICA and the majority note that in consonance with parallel changes made in 1991 to the Federal Rules of Evidence (FRE), "reasonable notice" was added to HRE 404(b) by the legislature in 1994. Id. at 347, 181 P.3d at 426 (citing Sen. Stand. Comm. Rep. No. 2744, in 1994 Senate Journal, at 1092; Hse. Stand. Comm. Rep. No. 567-94, in 1994 House Journal, at 1088); majority opinion at 15-16 (citing Hse. Stand. Comm. Rep. No. 567-94, in 1994 House Jornal, at 1088). The notice requirement only applies to criminal cases and "does not require any particular form or set forth specific time limits for such notice." Pond, 117 Hawai'i at 346-47, 181 P.3d at 425-26 (footnote omitted) (distinguishing HRE Rule 404(b) from HRE Rule 412(c)(1) (Supp. 2007), stating that for criminal cases, HRE Rule 412(c)(1) requires that in order for the accused to admit "evidence of specific instances of the alleged victim's past sexual behavior," a written motion to offer the evidence must be made "no later than fifteen days before" trial is scheduled to begin). Based on The Advisory Committee Note to the 1991 Amendments to FRE Rule 404(b) (1991 Advisory Committee Note), the ICA and the majority state that "reasonable notice" is a "pretrial notice" that "serves as a condition precedent to the admissibility of 404(b) evidence." Id. at 347, 181 P.3d at 426 (emphasis added); majority opinion at 16 (citation omitted).

But the term "condition precedent" in the federal commentary is not contained in HRE 404(b), Rule 404 Commentary, or legislative history.[2] The ICA conceded that HRE Rule 404(b)[3] differs from FRE Rule 404(b) because, inter alia, in the former, the notice requirement applies to both parties, while the federal rule applies only to the prosecution. 117 Hawai'i at 349, 181 P.3d at 427. Nevertheless, the ICA applied federal case law and state case law that imposed notice requirements on the prosecution only, in order to argue that Hawaii's Rule 404(b) notice was a "condition precedent" for the defense. Id. at 350, 181 P.3d at 429. Similarly, in connection with HRE Rule 404(b), the majority maintains that "[t]he [court] did not abuse its discretion in precluding [Petitioner's] evidence" of a prior assault by Complainant. Majority opinion at 27 (formatting altered).

Significantly, the majority references to differences between HRE Rule 404(b) and statutory privileges fail to mention that the notice requirement in FRE Rule 404(b) applies only to

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[2] The legislative history states that "[t]he notice provision parallels the change made in 1991 to the [FRE]." Sen. Stand. Comm. Rep. No. 2744, in 1994 Senate Journal, at 1092; see also Hse. Stand. Comm. Rep. No. 567-94, in 1994 House Journal, at 1088 (the modification was "modeled after a change recently made to the [FRE]"). This is not accurate, however, inasmuch as under HRE Rule 404(b), the notice provision applies to both parties and the FRE 404(b) notice provision applies to the prosecution only.

[3] HRE 404(b) states, in relevant part: "In criminal cases, the proponent of evidence to be offered under the subsection shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the date, location, and general nature of any such evidence it intends to introduce at trial." (Emphasis added.)

the prosecution. This patent difference makes the cases citing FRE Rule 404(b) and the commentary to FRE Rule 404(b) inapplicable to the instant case. Stricter enforcement of the notice requirement under FRE Rule 404(b) is implicated inasmuch as a violation of the requirement may result in a violation of the defendant's constitutional rights. See discussion infra. Thus, the 1991 Advisory Committee Note to FRE Rule 404(b), cited in the majority opinion at 22, and the mention in the Note to the notice requirement as a "condition precedent," binding on the prosecution only, are simply not germane where the notice requirement is imposed on a defendant as under HRE Rule 404(b).

Similarly, the majority's argument that FRE Rule 404(b) is "'in the mainstream with notice and disclosure provisions in other rules of evidence,' such as FRE Rule[s] 412[,] . . . 609[,] . . . 803(24) and 804(b)(5)," majority opinion at 22 (quoting 1991 Advisory Committee Note to FRE Rule 404(b)), is irrelevant. The majority argues that "[t]hese federal rules of evidence, by their plain language, apply equally to the prosecution and the defense," and, therefore, HRE Rule 404(b), which also applies to the prosecution and the defense, "is not per se unconstitutional[.]" Majority opinion at 22.

First, as repeatedly noted, see infra, it is not argued in this opinion that an evidentiary rule applicable to both the prosecution and the defense is per se unconstitutional. Rather, it is contended, see infra, that rules precluding a defendant

from introducing evidence relevant to his defense should not be applied automatically without balancing the enforcement of the rule against a resulting violation of the defendant's constitutional rights.

Second, with respect to the aforementioned evidence rules cited by the majority, the notice provisions in FRE and HRE Rule 412 relating to the offer of evidence of a victim's past sexual behavior in a sexual misconduct case, in FRE Rule 609[4] governing the offer of evidence of a prior conviction for witness impeachment purposes, in FRE and HRE Rule 803(24) pertaining to the offer of evidence not excluded by the rule against hearsay whether or not the declarant is unavailable, and in FRE Rule 804(b)(5) and its counterpart HRE 804(b)(8) governing the offer of evidence not excluded as hearsay where the declarant is unavailable, apply to <u>both</u> the prosecution and the defense. However, it is precisely because these rules impose the notice requirement on both parties that a valid analogy cannot be drawn between them and FRE Rule 404(b), which requires notice from the prosecution alone. Thus, whether FRE Rule 404(b) is "in the mainstream with notice and disclosure provisions in other rules of evidence" is of no import here. Hence, Petitioner argues, and I agree, that there is no basis for applying the precondition requirement with "equal force to [Petitioner] without considering

[4] HRE Rule 609 does not impose a notice requirement with respect to the offer of evidence.

the extent to which exclusion of evidence impinges on the rights to [a] fair trial and [to] present a defense."

B.

To support its holding, the ICA cited United States v. Long, 814 F. Supp. 72 (D.Kan. 1993), Pond, 117 Hawai'i at 348, 181 P.3d at 427, and two foreign state cases, Hatcher v. State, 735 N.E.2d 1155 (Ind. 2000), id. at 348-49, 181 P.3d at 427-28, and Scott v. State, 57 S.W.3d 476 (Tex. App. 2001), id. at 349, 181 P.3d at 428. In these cases, the notice requirement applied only to the prosecution.

In citing Long, the ICA noted that the United States District Court of Kansas held that "[t]he court has the discretion to determine whether a particular notice is not reasonable due to incompleteness. The notice requirement is a prerequisite to admissibility of the Rule 404(b) evidence." Id. at 348, 181 P.3d at 427 (quoting Long, 814 F. Supp. at 73) (emphasis in original). But that case involved the FRE Rule 404(b) notice requirement which, as discussed supra, differs markedly from HRE Rule 404(b) in that the federal requirement applies only to the prosecution. In Long, the issue was whether the notice requirement of FRE Rule 404(b) should preclude the introduction of evidence by the prosecution, as opposed to the introduction of evidence by the defendant, as in the instant case. 814 F. Supp. at 73. Thus, Long, unlike the instant case, did not address the issue of whether the defendant's

constitutional rights were violated by a prohibition on the introduction of evidence because the notice rule was violated; and seemingly that question could never be an issue under FRE Rule 404(b) and cases construing that rule.

C.

1.

The same must be said about the state cases relied on by the ICA. In Hatcher, the defense objected to the prosecution's 404(b) notice six days before trial, arguing that "no good cause was shown by the [prosecution] for failing to give earlier notice." 735 N.E.2d at 1158 (internal quotation marks, citation, and brackets omitted). According to the ICA, in its ruling, "the Indiana Supreme Court looked to the circumstances of the case in light of the purpose behind the notice provision" "to determine whether . . . six days' notice to a criminal defendant" of the names of witnesses who would be called to testify regarding "other crimes, wrongs, or acts" was reasonable. Pond, 117 Hawai'i at 348-49, 181 P.3d at 427-28 (citing Hatcher, 735 N.E.2d at 1155) (footnote omitted). The Indiana court held that "the defendant was not surprised by the [prosecution's] notice," and at the preliminary hearing, "the [prosecution] provided a summary of each witness' testimony." Id. at 349, 181 P.3d at 428 (quoting Hatcher, 735 N.E.2d at 1158, 1159) (alteration omitted). Thus, that court concluded the six-day notice was reasonable and

that the lower court did not err in admitting evidence. Hatcher, 735 N.E.2d at 1159.

In Scott, the defendant appealed the admission of "evidence of extraneous offenses" on the ground that the provision of only six-days' notice was unreasonable. 57 S.W.3d at 481 n.2. The Texas Court of Appeals held that "reasonableness" under Texas Rules of Evidence Rule 404(b) "must be determined by examining the facts and circumstances of each individual case." Id. at 480.

In Scott, the defense counsel was retained to represent the defendant in connection with three separate sexual assault charges involving different complainants. Id. at 481. Ten days before trial, the prosecution decided not to pursue two of those cases. Id. Six days before trial, the prosecution notified the defendant that it intended to introduce twenty-two "extraneous offenses," id. at 479, eleven of which related to the two dropped charges of sexual assault, id. at 481. The prosecution was allowed to introduce some of this evidence during the guilt phase of the trial. Id. at 479-80. Before the "punishment phase" of trial, the prosecution again gave the defendant notice of its intent to introduce evidence of the twenty-two extraneous offenses. Id. at 480. The evidence was admitted over the defendant's objection for lack of notice. Id. On appeal, the defendant argued that the trial court erred in admitting the evidence over his objection. Id. at 478.

Analyzing the "facts and circumstances" of that case, the Scott court concluded that, because defense counsel was made aware of and investigated the evidence that the prosecution sought to introduce before the guilt phase of trial--but did not object to admission of the evidence at that point, the defendant was not "surprised or disadvantaged because of lack of preparation time." Id. at 482-83. Thus, the Texas court concluded that the trial court did not abuse its discretion in "finding that notice was reasonable." Id.

2.

With all due respect, the ICA inappropriately based its holdings on Hatcher and Scott for several reasons. First, as discussed infra, like the federal rule, the "reasonable notice" requirement in Indiana and Texas applies to the prosecution only. The reasonable notice requirement is triggered when the defendant in a criminal case makes a timely request for such notice to the prosecution. See Hatcher, 735 N.E.2d at 1157-58 (quoting Indiana Rules of Evidence R. 404(b)); Scott, 57 S.W.3d at 480. Texas Rules of Evidence Rule 404(b)[5] requires reasonable notice by the

[5] Texas Rules of Evidence Rule 404(b) provides in pertinent part that evidence of other crimes, wrongs or acts

> may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon timely request by the accused in a criminal case, reasonable notice is given in advance of trial of intent to introduce in the [prosecution's] case-in-chief such evidence other than that arising in the same transaction.

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prosecution in advance of trial. Scott, 57 S.W.3d at 480. Indiana Rules of Evidence Rule 404(b)[6] allows the prosecution to provide reasonable notice in advance of or during trial. Hatcher, 135 N.E.2d at 1158 (quoting Indiana Rules of Evidence R. 404(b)). By contrast, HRE Rule 404(b) requires the "proponent of evidence" to "provide reasonable notice in advance of trial, or during trial" if the court excuses pretrial notice for good cause shown" of its intent to introduce "[e]vidence of other crimes, wrongs, or acts[.]" Because the HRE 404(b) notice provision applies to both parties, the reasonable notice language in the Texas and Indiana Rules of Evidence 404(b), like the language of FRE Rule 404(b) construed in Long, is not analogous to the reasonable notice language in HRE Rule 404(b).

Second, no constitutional issues relating to the defendant's due process rights were raised in any of the cases relied on by the ICA, since, obviously, the notice obligation ran only to the prosecution. Thus, the defendant's constitutional

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[5](...continued)
(Emphases added.)

[6] Indiana Rules of Evidence Rule 404(b) provides in pertinent part that evidence of other crimes, wrongs, or acts

> may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

(Emphasis added.)

rights to present a defense and to cross-examine[7] were not implicated in those cases by the exclusion of evidence based on a defendant's failure to provide reasonable notice. Significantly, however, the Indiana Supreme Court in Hatcher did, sua sponte, caution that forgiving tardy notice by the prosecution might be overborne by the defendant's claim of a violation of due process. It observed that, "[i]f notice of the intent to use 404(b) evidence were so crucial to a fair trial as to implicate due process considerations and constitute fundamental error," a defendant's failure to object to such evidence would not be deemed a waiver. 735 N.E.2d at 1158 n.1 (internal quotation marks and citation omitted). Unlike in Hatcher and Scott, in the instant case, Petitioner argued his constitutional right to cross-examine was violated.

Third, in both cases the defense sought to exclude evidence the prosecution sought to introduce at trial. Thus, the evidentiary issues in Hatcher and Scott differ from the instant case. In Hatcher and Scott, it was the prosecution's unreasonable notice that was in dispute. The evidence sought to be admitted would have enhanced the credibility of the prosecution's 404(b) evidence as the complainants in both cases

[7] Because the court denied Petitioner's request to introduce evidence that Complainant allegedly attacked Petitioner on a prior occasion, on the ground that Petitioner had not given the requisite notice to Respondent under HRE Rule 404(b), Petitioner was effectively precluded from cross-examining Complainant about this alleged prior attack as well, as noted herein.

were not the sole witnesses of the evidence (in Hatcher, the victim was deceased).

In this case, Petitioner sought to introduce evidence over Respondent's objections. Petitioner testified that the Complainant had struck him on a prior occasion. However, Respondent objected and the court sustained the objection, ordering that Petitioner's testimony on this issue be stricken and that the jury disregard it. In conjunction with constitutional right claims, Petitioner argued that because the Complainant in this case was the sole witness to the prior alleged assault, it was highly relevant to his defense of self-defense. Unlike in Hatcher and Scott, where additional witnesses were available to address the credibility of the complainant's 404(b) evidence, apparently Petitioner and the Complainant were the only witnesses germane to Petitioner's defense of self-defense. The evidence was particularly critical to Petitioner's defense because based on Petitioner's representation, he and Complainant were the sole witnesses to the alleged prior attack by Complainant. There was no other means by which Petitioner could adduce evidence of Complainant's alleged attack other than by testifying himself on the matter and by cross-examining Complainant about it. Thus, in striking Petitioner's testimony on the alleged prior attack, the court denied Petitioner his only opportunity to adduce evidence about the attack.

II.

A.

Petitioner argues, also, that "the interests forwarded by the notice requirements" of HRE Rule 404(b) do not prevail over "[Petitioner's] constitutional rights" including the "rights to fair trial, to present a defense and [to] cross-examination." Respondent contends that HRE Rule 404(b) may properly serve as a basis for excluding evidence proffered by Petitioner insofar as Petitioner "fail[ed] to give reasonable notice of the 404(b) evidence in advance of trial." The ICA agreed with Respondent that HRE 404(b) is a "valid basis" for excluding evidence, and therefore, "the [court's] decision to preclude the admission of evidence that [Complainant] allegedly struck [Petitioner] on a prior occasion did not constitute an abuse of discretion." Pond, 117 Hawai'i at 350, 181 P.3d at 429. The majority maintains that the reasonable notice provision of "HRE Rule 404(b) is not per se unconstitutional" and "the [court] did not abuse its discretion by denying [Petitioner's] request to introduce [this evidence]" pursuant to this rule. Majority opinion at 27, 28-29.

However, this does not sanction unconstitutional application of the rule. Neither the court nor the ICA balanced the interests of enforcing the notice requirement of HRE Rule 404(b) against the interests of protecting Petitioner's constitutional rights to present a defense and to cross-examine

the Complainant on matters relevant to his defense. Rather, the ICA focused exclusively on the interests in enforcing the notice requirement of the rule which included "reduc[ing] surprise and promot[ing] early resolution of admissibility questions." Pond, 117 Hawai'i at 350, 181 P.3d at 429.

B.

The court and the ICA did not consider State v. Peseti, 101 Hawai'i 172, 65 P.3d 119 (2003), which, as discussed below, requires that a defendant's constitutional rights be weighed against the interests in enforcing evidentiary rules that preclude the admission of certain evidence. In Peseti, the defendant sought to "cross-examin[e] the complainant regarding her recantation of her allegations of sexual abuse by [the defendant]." Id. at 174, 65 P.3d at 121. The trial court had prohibited the defendant from cross-examining the complainant regarding this matter "on the basis that her recantation fell within either the statutory privilege set forth in [HRE] Rule 505.5(b) (1993)[8] or HRE Rule 504.1(b) (1993)[.]"[9] Id. The

[8] HRE Rule 505.5(b) governing the victim-counselor privilege provides in relevant part:

> (b) General rule of privilege. A victim has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to a victim counselor for the purpose of counseling or treatment of the victim for the emotional or psychological effects of sexual assault, domestic violence, or child abuse or neglect, and to refuse to provide evidence that would identify the name, location, or telephone number of a safe

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defendant argued that such prohibition "violat[ed his] constitutional right to confront adverse witnesses as guaranteed by article I, section 14 of the Hawai'i Constitution and sixth amendment to the United States Constitution[.]" Id.[10]

This court recognized that "statutory privileges, such as the victim-counselor privilege at issue . . . operate to preclude the admission at trial of certain classes of confidential communications." Id. at 180, 65 P.3d at 127. This court also noted that "[t]he scope of a stuatory privilege, however, is tempered by the principle that 'privileges preventing disclosure of relevant evidence are not favored and may often give way to a strong public interest.'" Id. (quoting State v. L.J.P., 637 A.2d 532, 537 (N.J. Super. 1994)). Thus, this court

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[8](...continued)
house, abuse shelter, or other facility that provided temporary emergency shelter to the victim.

(Emphasis added.)

[9] HRE Rule 504.1(b) governing the psychologist-client privilege provides:

> (b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of counseling or psychotherapy with respect to behavioral problems, including substance addiction or abuse, among oneself, the client's psychologist, and persons who are participating in the counseling or psychotherapy under the direction of the psychologist, including members of the client's family.

(Emphasis added.)

[10] Article I, section 14 of the Hawai'i Constitution provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against the accused[.]" The sixth amendment to the United States Constitution provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]"

held that "when a statutory privilege interferes with a defendant's constitutional right to cross-examine, then, upon a sufficient showing by the defendant, the witness' statutory privilege must, in the interest of the truth-seeking process, bow to the defendant's constitutional rights." Id. at 181, 65 P.3d at 128.

Because the right to confrontation guaranteed by article I, section 14 of the Hawai'i Constitution "will not trump a statutory privilege in every case in which a conflict arises between the two[,]" id. at 182, 65 P.3d at 129, this court articulated circumstances under which the defendant's constitutional right to confrontation will prevail over a statutory privilege. Those circumstances include "when the defendant demonstrates that: '(1) there is a legitimate need to disclose the protected information; (2) the information is relevant and material to the issue before the court; and (3) the party seeking to pierce the privilege shows by a preponderance of the evidence that no less intrusive source for that information exists.'" Id. (quoting L.J.P., 637 A.2d at 537).

C.

1.

The instant case is analogous to Peseti. Here, Petitioner argues that the court, in prohibiting him from introducing evidence about the Complainant's prior attack on him, "violat[ed his constitutional rights to present a defense and

[to] cross-examin[e]" a witness. Because HRE Rule 404(b), like the privilege provision of HRE Rule 505.5(b), "operate[s] to preclude the admission at trial of certain" information, id. at 180, 65 P.3d at 127, enforcement of HRE Rule 404(b) "should [likewise] be tempered by the principle that privileges preventing disclosure of relevant evidence are not favored and may often give way to a strong public interest[,]" id. (internal quotation marks and citation omitted). Thus, the rule articulated by this court in Peseti, that "when a statutory privilege interferes with a defendant's constitutional right to cross-examine, then, upon a sufficient showing by the defendant, the witness' statutory privilege must, in the interest of the truth-seeking process, bow to the defendant's constitutional rights[,]" id. at 181, 65 P.3d at 128, should apply where an evidentiary rule interferes with an accused's constitutional right to put on a defense and to cross-examine.

2.

The circumstances identified by this court under which the defendant's constitutional rights will control over a statutory privilege are met here. First, "there [was] a legitimate need to disclose the [prohibited] information[.]" Id. at 182, 65 P.3d at 129 (internal quotation marks and citation omitted). As Petitioner argues, evidence of the Complainant's prior attack on Petitioner "was central to his self-defense and without it defense counsel could not adequately defend his

client." This is because evidence of a victim's prior violence is relevant to the defendant's argument that the bodily injury inflicted on the victim was a result of the defendant's use of self-defense.

Petitioner had proffered evidence of Complainant's prior attack under HRE Rule 404(b)(2) because the evidence was "relevant to the issue of 'first aggressor' and the reasonableness of [Petitioner's] belief that he was justified in using protective force against her." After the court precluded Petitioner from introducing the evidence under HRE Rule 404(b) due to Petitioner's failure to comply with that subsection's notice requirement, Petitioner requested that the court admit his testimony regarding the prior attack as HRE Rule 404(a) evidence, over Respondent's objection. However, the court sustained the objection, struck the testimony, and instructed the jury to disregard it.

Contrary to the majority's position that the court did not err by precluding this evidence under HRE Rule 404(b), as discussed infra, the court's preclusion constituted error. See HRE Rule 404(a)(2) (providing that "[e]vidence of a pertinent trait of character of the victim of the crime offered by an accused" may be admitted "for the purpose of proving action in conformity therewith on a particular occasion"); State v. Basque, 66 Haw. 510, 515, 666 P.2d 599, 603 (1983) (holding that "the court abused its discretion when it flatly prohibited [the

defendant] from . . . eliciting evidence of[] the criminal history of the deceased" where the defendant argued that he acted in self-defense"); State v. Lui, 61 Haw. 328, 329, 603 P.2d 151, 154 (1979) (following the common law rule that "a defendant who claims self-defense to a charge of homicide is permitted to introduce evidence of the deceased's violent or aggressive character either to demonstrate the reasonableness of his apprehension of immediate danger or to show that the decedent was the aggressor"). Here, Petitioner had "a legitimate need to disclose the [prohibited] information," Peseti, 101 Hawai'i at 182, 65 P.3d at 129, about Complainant's prior attack because it would "demonstrate the reasonableness of his apprehension of immediate danger or to show that the [Complainant] was the aggressor[,]" Lui, 61 Haw. at 329, 603 P.2d at 154.

Second, the evidence proffered by Petitioner was "relevant and material to the issue before the court[.]" Peseti, 101 Hawai'i at 182, 65 P.3d at 129. As discussed above, the evidence of the Complainant's prior attack was highly relevant to Petitioner's defense which rested on Complainant being the first aggressor. Petitioner testified that he argued with Complainant about Complainant allowing her dog into the home they shared. Petitioner testified that Complainant "started swearing at [him]" because he disapproved of animals in the home and that Complainant "proceeded to smack [him]." As noted above, the

court ordered that this testimony be stricken and that the jury disregard it. However, this evidence of Complainant's alleged prior acts toward Petitioner would be relevant in assisting the jury in its determination of who was the first aggressor.

Third, Petitioner, as "the party seeking to [introduce the evidence,] show[ed] by a preponderance of the evidence that no less intrusive source for that information exists.'" Id. Petitioner testified that the alleged prior attack by Complainant occurred when they were at home together. Because there were no other witnesses to that alleged attack and no documentation or other evidence that the attack occurred, the only means by which to introduce evidence of the Complainant's prior attack was by Petitioner's testimony. Thus, the court, in prohibiting Petitioner from providing such evidence, denied Petitioner the only opportunity available to him to introduce the evidence. Accordingly, HRE Rule 404(b) should have given way to Petitioner's constitutional right to present the evidence he proffered in this case.

D.

The holding in Peseti that a defendant's constitutional rights may take precedence over enforcement of evidentiary rules, is supported by other case law. In State v. French, 104 Hawai'i 89, 91, 85 P.3d 196, 198 (App. 2004), the defendant was convicted of robbery in the second degree and burglary in the first degree. The defendant argued on appeal that "the circuit court erred by

[relying on HRS § 806-73 (Supp. 2003)[11] in] refusing to conduct an in camera review of the complaining witness's Adult Probation Division records (APD records) for evidence of untruthfulness and dishonesty." Id. at 91, 85 P.3d at 198.

Previous to this case, the ICA itself had held that "the circuit court did abuse its discretion by not conducting an in camera review of the complaining witness's APD records[.]" Id. In reaching that holding, the ICA cited Peseti, stating that case "specifically held 'that, when a statutory privilege interferes with a defendant's constitutional right to cross-examine, then, upon a sufficient showing by the defendant, the witness' statutory privilege must, in the interest of the truth-seeking process, bow to the defendant's constitutional rights.'" Id. at 95, 85 P.3d at 202 (quoting Peseti, 101 Hawai'i at 181, 65 P.3d at 128).

In Chambers v. Mississippi, 410 U.S. 284, 285-86 (1973), gunfire was exchanged between police officers and an angry crowd, resulting in the death of an officer. Chambers, a member of the crowd who was also shot, was charged with the murder. Id. at 286-87. However, McDonald signed a sworn statement that he fired the shots that killed the officer. Id. at 287. McDonald was arrested but later repudiated his

[11] HRS § 806-73 governs the duties and powers of probation officers and adult probation records. In general, under that statute, "all records of the Hawaii state adult probation divisions shall be confidential and shall not be deemed to be public records." HRS § 806-73(b)

confession, stating that he confessed because he believed he would not go to jail and hoped to share the proceeds he expected Chambers to receive in a civil suit against the city for being shot. Id. at 288.

The charges against McDonald were dropped and the prosecution proceeded with the murder prosecution against Chambers. Id. At trial, Chambers alleged that McDonald had indeed shot the officer. Id. at 289. However, the trial court prevented Chambers from calling McDonald as an adverse witness to confront him about his confession. The trial court stated that McDonald could not be treated as an "adverse witness" because McDonald's statements did not accuse Chambers of any wrongdoing. Id. at 291-92. Furthermore, the trial court prohibited Chambers from introducing testimony of witnesses who heard McDonald admit to killing the officer and from introducing McDonald's written confession because the Mississippi rules of evidence at that time allowed an exception to the rule against hearsay only for statements against pecuniary interest but not penal interest. Id. at 299.

In reversing the court, the U.S. Supreme Court recognized that "[t]he rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." Id. at 294. The Court further explained that the evidence Chambers sought to admit "was critical to [his] defense" thus, "[i]n these

circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." Id. at 302 (emphasis added). See also Martin v. Commonwealth, 884 N.E.2d 442, 447 (Mass. 2008) (stating that "'[t]he Legislature has accorded a privilege to many types of records that are often sought in protections for sexual assault, but the legislative creation of such privileges cannot trump a defendant's constitutional right to a fair trial'" (quoting Commonwealth v. Sheehan, 755 N.E.2d 1208, 1217 (Mass. 2001) (Sosman, J., concurring)). In this case, the right to admit the proffered evidence was an essential aspect of Petitioner's right to present a defense and to cross-examine. Accordingly, these rights outweighed the interest in enforcing the notice provision of an evidentiary rule.

Although some cases uphold the exclusion of evidence in the face of a constitutional challenge by the defendant, those cases are distinguishable. In State v. Calaro, 107 Hawai'i 452, 461, 114 P.3d 958, 967 (App. 2005), the defendant, who was accused of fatally stabbing the victim, sought to introduce evidence of a toxicology report that "'potentially toxic' level[s] of methamphetamine in the decedent's blood was relevant to the cause of death[.]" The circuit court excluded the evidence on the grounds that any probative value of this evidence was "substantially outweighed by the danger of unfair prejudice,

confusion of the issues, or misleading the jury . . . not to mention considerations of undue delay or waste of time." Id. at 462, 114 P.3d at 968. The defendant argued that the court's "exclusion was an abuse of discretion and a violation of [his] constitutional rights to confrontation, due process and a jury trial." Id. at 461, 114 P.3d at 967. The ICA affirmed the court's ruling that the evidence should be excluded. Id. at 462, 114 P.3d at 968.

Calaro is distinguishable from the instant case in that the grounds for excluding the evidence was the court's determination that under HRE Rule 403 (1993), the probative value of the evidence was outweighed by the danger of prejudice, confusion of the issues, misleading the jury, and undue delay. In general, such determinations are within the province of the court and should not be disturbed by an appellate court. See Sato v. Tawata, 79 Hawai'i 14, 19, 897 P.2d 941, 946 (1995) (explaining that "the determination of the admissibility of relevant evidence under HRE 403 is eminently suited to the trial court's exercise of discretion because it requires a cost-benefit calculus and a delicate balance between probative value and prejudicial effect" (internal quotation marks and citation omitted)).

In contrast, here, the court apparently did not consider HRE Rule 403 in excluding the evidence proffered by Petitioner. Thus, this case is unlike Calaro where the court

exercised its discretion on a matter which it is "eminently suited" to determine, namely, the balancing of the probative value of evidence against the dangers that the evidence is prejudicial, confusing, misleading, or a waste of time. Rather, as noted above, the problem with the court's exclusion of Petitioner's evidence lies in the fact that it did not exercise any discretion in balancing Petitioner's constitutional rights against the strict enforcement of the HRE 404(b) notice requirement.

In State v. Iwatate, 108 Hawai'i 361, 120 P.3d 260 (App. 2005), the ICA held that the State's refusal to disclose the identity of a confidential informant pursuant to HRE Rule 510 (1993),[12] did not infringe on the defendant's constitutional rights where the defendant was accused, inter alia, of promoting a dangerous drug in the second degree. The ICA explained that the exception in HRE Rule 510(c)(3) to the privilege guaranteed by HRE Rule 510(a) regarding the identity of informants was not applicable "[b]ecause the circuit court judge did not believe that the police officer's testimony regarding the [informant] was 'inaccurate or untruthful[.]'" Id. at 370, 120 P.3d at 269.

[12] HRE Rule 510 provides that "[t]he government . . . has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation." HRE Rule 510(a). An exception to this general rule exists under HRE Rule 510(c)(3) whereby the "judge may require the identity of the informer to be disclosed" in certain instances where "the judge is not satisfed that the information was received from an informer reasonably believed to be reliable or credible[.]"

Hence, "the judge did not err in not requiring disclosure of the [informant's] identity[.]" Id.

Iwatate is distinguishable from the instant case in that the circuit court, under HRE Rule 510(c)(3), was at liberty there to exercise discretion regarding whether the information "received from an informer [can be] reasonably believed to be reliable or credible." Thus, the ICA deferred to the circuit court's judgment on this issue. As in Calaro, the ICA in Iwatate did not disturb the determination of the circuit court on matters for which it was authorized to exercise discretion where there was no indication that the circuit courts' determinations were erroneous. Contrastingly, here, the court did not properly exercise discretion in precluding Petitioner's evidence because the court strictly applied the notice requirement of HRE Rule 404(b) without considering other factors such as the harm to Petitioner's constitutional rights.

In sum, consistent with the precedent in our jurisdiction, we must balance the rights to present a fair defense and to cross-examine with "other legitimate interests in the criminal trial process." State v. Nizam, 7 Haw. App. 402, 410, 771 P.2d 899, 904-05 (1989) (internal quotation marks and citations omitted). The due process guarantee of a fair trial confers upon the accused in criminal proceedings "a meaningful opportunity to present a complete defense." State v. Matafeo, 71 Haw. 183, 186, 787 P.2d 671, 672 (1990) (emphasis added)

(internal quotation marks and citations omitted). Under the circumstances Petitioner's right to introduce evidence was "arbitrar[ily]" and "disproportionate[ly]" restricted. Nizam, 7 Haw. App. at 410, 771 P.2d at 905 (citation omitted).

E.

The majority argues that "[t]he Peseti rule[13] is not outcome dispositive of the instant issue . . . because HRE Rule 404(b) serves a different purpose than a statutory privilege and does not per se exclude evidence." Majority opinion at 23.[14] With all due respect, the majority's argument is incorrect. That the victim-counselor privilege differs from HRE Rule 404(b) because it is for a different purpose and is more stringent in its exclusionary provisions, does not render Peseti inapplicable to the instant case.

Peseti stands for the proposition that the enforcement of statutes precluding admission of evidence by a defendant requires that the defendant's constitutional rights be weighed

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[13] The rule referred to by the majority is the holding in Peseti that "'when a statutory privilege interferes with a defendant's constitutional right to cross-examine, then, upon a sufficient showing by the defendant, the witness' statutory privilege must, in the interest of the truth-seeking process, bow to the defendant's constitutional rights.'" Majority opinion at 24 (quoting Peseti, 101 Hawai'i at 181-82, 65 P.3d at 128-29).

[14] The majority notes that the goal of the victim-counselor statutory privilege in Peseti was to "assure[] victims that 'their thoughts and feelings will remain confiential' and thereby promotes successful counseling." Majority opinion at 24 (quoting Peseti, 101 Hawai'i at 180, 65 P.3d at 127). The majority states that, in contrast, the purpose of HRE Rule 404(b) was "designed to reduce surprise during the criminal trial and maintain fairness for both parties." Majority opinion at 26. The majority also notes that "[u]nlike a statutory privilege, HRE Rule 404(b) does not automatically render evidence inadmissible." Majority opinion at 25.

against the interests in enforcing the statute. That the statute there happened to be a "privilege" statute rather than an evidentiary rule is not a valid basis for distinguishing Peseti. The rationale for the Peseti rule is sound - rules "'preventing disclosure of relevant evidence are not favored and may often give way to a strong public interest'" 101 Hawai'i at 180, 65 P.3d at 127 (quoting L.J.P., 637 A.2d at 537), and is equally applicable in the instant case.

An evidentiary "rule may not be applied mechanistically to defeat the ends of justice." Chambers, 410 U.S. at 302. The impairment of a defendant's constitutional rights must be considered and weighed against the imposition of a rule excluding evidence. Failure to do so impermissibly relegates the defendant's constitutional rights to that of rule status. See State v. Calbero, 71 Haw. 115, 124, 785 P.2d 157, 161 (1989) (holding that "HRE [Rule] 412 cannot override the constitutional rights of the accused"). See also Leighty v. State, 981 So. 2d 484, 494 (Fla. App. 2008) (noting that "Chambers stands for the proposition that constitutional rights and protections trump state court rules of evidence which exclude evidence only when the reliability of that evidence can be tested"); State v. Richardson, 670 N.W.2d 267, 280 (Minn. 2003) (stating that "[i]f the constitutional right to a fair opportunity to defend against the charge means anything, it must empower a court to override a state evidence rule that would bar

the defendant from presenting eivdence that could create a reasonable, non-speculative doubt about the defendant's guilt"); State v. Kornbrekke, 943 A.2d 797, 799 (N.H. 2008) (stating that "[d]ue process and confrontation rights guaranteed by the State and Federal Constitutions may trump established evidentiary rules" (internal quotation marks and citation omitted)). The majority ignores altogether the due process underpinning of the Peseti rule.

The majority also argues that the Peseti rule is inapplicable in the instant case because "the Peseti rule was not designed or intended to address evidentiary notice requirements." Majority opinion at 24-25. This argument is incorrect. Nothing in Peseti expressly limits the application of its holdings to cases where evidence is precluded because of statutory privilege requirements, as opposed to cases where evidence is precluded because of evidentiary notice requirements. To read Peseti so narrowly would unfairly discriminate among defendants, requiring a balance of the defendants' constitutional rights against enforcement of the preclusionary rule in some cases, and requiring strict enforcement of the preclusionary rule in other cases, depending merely on the type or category to which the preclusionary rule belonged. Such a distinction is without a rational basis and would result in inconsistent outcomes. Not only has the majority failed to identify language in Peseti prohibiting its application to the instant case, but the majority

has also failed to adhere to the precedent of the Peseti rule, casting the law in this area in an unpredictable state.

III.

The majority also argues that "applying the Peseti test to otherwise admissible HRE Rule 404(b) evidence invariably renders the rule's notice requirements unconstitutional" because "it appears that relevant HRE Rule 404(b) evidence would always satisfy the Peseti test and therefore, be rendered admissible." Majority opinion at 26. The majority's desire to ignore the Peseti precedent cannot be justified because the majority may be unhappy with the result this court's own precedent demands. Whether correct or not, the majority's view that HRE Rule 404(b) evidence "would always satisfy the Pesti test" is not a basis for rejecting it in any specific case. The evidence proffered by Petitioner in this case involved an alleged prior attack by the Complainant upon Petitioner. Thus, this evidence was highly relevant to Petitioner's defense, which asserted that Complainant was the aggressor with respect to the incident of December 12, 2005, and that Petitioner was acting in self-defense on that night. Moreover, because Petitioner and Complainant were the only witnesses to the alleged prior attack, their testimony constituted the only evidence available on that issue. Based on these particular facts, the evidence proffered by Petitioner regarding the alleged prior attack satisfied the Peseti test. There is no merit to the majority's argument that because the

Peseti test was satisfied in this particular case, it will be satisfied in nearly every future case. We only decide specific cases; if the majority is dissatisfied with the requirements of Peseti, the majority should overrule it, not ignore it.

A.

The majority cites Michigan v. Lucas, 500 U.S. 145, 151 (1991), for the proposition that a "defendant's right to present relevant evidence 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.'" Majority opinion at 20 (quoting Lucas, 500 U.S. at 149) (quoting Rock v. Arkansas, 483 U.S. 44, 55 (1987)). In addition, the majority cites Taylor v. Illinois, 484 U.S. 400 (1988), United States v. Nobles, 422 U.S. 225 (1975), and Wardius v. Oregon, 412 U.S. 470 (1973), as examples of other cases "upholding evidentiary notice requirements even where it limited a defendant's right to confrontation." Majority opinion at 20-21 (emphasis omitted). Reliance on these cases is manifestly misplaced.

Lucas concerned whether the trial court could preclude evidence proffered by the defendant, who was accused of criminal sexual conduct, regarding his past sexual relations with the victim where the defendant failed to comply with the rape shield statute's evidentiary notice requirements. As posed by the Supreme Court, the issue there was whether the "notice-and-hearing requirement [of the rape shield law] is unconstitutional

in all cases where it is used to preclude evidence of past sexual conduct between a rape victim and a criminal defendant." 500 U.S. at 148 (emphasis added). The Lucas court expressly limited its opinion, explaining that it "did not address whether the trial court abused its discretion," nor did it address "whether, on the facts of this case, preclusion violated [the defendant's] rights under the Sixth Amendment." Id. at 153 (emphasis added). Thus, the Lucas holding was that the lower court's "per se rule that preclusion is unconstitutional in all cases where the victim had a prior sexual relationship with the defendant" was "error." Id.

It is not argued in this dissent that a statute or rule that impinges on a defendant's constitutional right, including the right to confront witnesses and the right to present a defense, is unconstitutional per se. The error committed by the court and the ICA did not involve a determination that HRE Rule 404(b) was per se unconstitutional. Rather, as discussed supra, the error was the failure of the court to balance the interests of enforcing the notice requirements of HRE Rule 404(b) against the interests of protecting Petitioner's constitutional rights. In accordance with Peseti, a defendant's constitutional right to confrontation, guaranteed by article I, section 14 of the Hawai'i Constitution, may prevail over statutory provisions that preclude the admission of certain evidence, under the three factors

discussed previously. See Peseti, 101 Hawai'i at 182, 65 P.3d at 129.

Indeed, the proposition that a statutory provision precluding the admission of evidence may violate a defendant's constitutional rights, is supported by Lucas insofar as Lucas remanded the case to the Michigan court to determine "whether, on the facts of this case, preclusion violated [the defendant's] rights under the Sixth Amendment." Lucas, 500 U.S. at 153. Thus, Lucas did not hold that the requirements could not be held unconstitutional, as evidenced by its order to the lower court to make this determination on remand.

Taylor, like Lucas, is inapplicable because it too involved the question of whether a rule precluding the admission of evidence proffered by the defendant was per se inappropriate. There, the petitioner, convicted of attempted murder, argued "that the sanction of preclusion of the testimony of a previously undisclosed witness is so drastic that it should never be imposed." Taylor, 484 U.S. at 413 (emphasis added). The Taylor court recognized "the defendant's right to offer the testimony of witnesses in his favor," but explained that "the mere invocation of that right cannot automatically and invariably outweigh countervailing public interests," including the enforcement of the discovery rules that were in question. Id. at 414 (emphasis added).

That court held that "[t]he integrity of the adversary process . . . must also weigh in the balance." Id. at 414-15. Thus, the Taylor court "reject[ed] petitioner's argument that a preclusion sanction is never appropriate no matter how serious the defendant's discovery violation may be." Id. at 416. However, the Taylor court upheld the evidence preclusion sanction against the petitioner because "it [was] plain that the case fits into the category of willful misconduct in which the severest sanction is appropriate." Id. at 417 (emphasis added).

This case is distinguishable from Taylor as it does not involve an argument that HRE Rule 404(b) is per se inappropriate or unconstitutional. This case is also distinguishable in that there was no finding by the court and no argument made by the parties that the delayed notice regarding the HRE Rule 404(b) evidence was attributable to "willful misconduct." Moreover, Taylor supports this dissent's position that in deciding whether to enforce a rule that precludes evidence, the court must "balance" the defendant's rights against the interests in enforcing the rule. Id. at 414-15.

Nobles is also not analagous to the instant case. There, the defendant was convicted of bank robbery. The U.S. Supreme Court upheld the trial court's refusal to allow the defense investigator to testify about his interviews with prosecution witnesses inasmuch as the defense stated that "it did not intend to produce the [investigator's] report" for

examination by the prosecution. 422 U.S. at 227-29. The defendant in Nobles, in contrast to Petitioner in the instant case, could have called the investigator as a witness but chose not to because he did not want to produce the report. As Nobles noted, the defendant was at liberty to make "an informed choice to call for the investigator's testimony and thereby open his report to examination," id. at 241, but instead chose not to do so.

Nobles observed that the trial court "did not bar the investigator's testimony" but instead, "merely prevented [the defendant] from presenting to the jury a partial view of the credibility issue by adducing the investigator's testimony and thereafter refusing to disclose the contemporaneous report that might offer further critical insights." Id. This situation is entirely different from the instant case where Petitioner was not presented with a choice to introduce the evidence, but was instead summarily denied that right despite the explanation he offered for the delayed notice.

Wardius is likewise inapplicable. The question before the court was whether an Oregon statute precluding the introduction of alibi evidence where notice of the alibi defense was not given prior to trial violated a defendant's due process rights because it did not provide for reciprocal discovery. 412 U.S. at 471-72. Wardius held that "the Due Process Clause of the Fourteenth Amendment forbids enforcement of alibi rules unless

reciprocal discovery rights are given to criminal defendants" and since the "Oregon statute did not provide for reciprocal discovery, it was error for the court below to enforce it against petitioner[.]" Id. at 472.

Wardius is manifestly inappropriate inasmuch as the "reciprocal discovery" provision of a statute is not at issue. Moreover, this dissent does not take issue with the statement in Wardius, quoted by the majority, that "'the growth of [] discovery devices is a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system[.]'" Majority opinion at 21 (quoting Wardius, 412 U.S. at 474). See State v. Dowsett, 10 Haw. App. 491, 498, 878 P.2d 739, 743 (1994) (holding that "'[t]he ends of justice will best be served by a system of liberal discovery,'" maximizing the information available to both parties, and that "discovery devices[,] . . . by increasing the evidence available to both parties, enhances the fairness of the adversary system'" (quoting Wardius, 412 U.S. at 473-74) (internal quotation marks and citation omitted)), overruled on other grounds by State v. Rogan, 91 Hawai'i 405, 423 n.10, 984 P.2d 1231 n.10 (1999).

B.

The majority also cites Williams v. Florida, 399 U.S. 78 (1970), Baxter v. State, 522 N.E.2d 362, 369 (Ind. 1988), and Lambert v. Holbert, 172 S.W.3d 894 (Mo. App. S.D. 2005), in support of the proposition that the notice requirements of a rule

like HRE Rule 404(b) advance the interests of "protect[ing] parties and the jury trial system from falling prey to opposing counsel's trial tactics and strategies that do not promote a fair trial." Majority opinion at 26. It is not doubted that HRE Rule 404(b) advances these legitimate interests. It is the blind enforcement of the rule, without any regard to the impact on the defendant's constitutional rights to whether any prejudice has been suffered by the opposing party, and to whether prejudice, if any, can be rectified by a means other than the total preclusion of evidence, that this dissent considers erroneous.

IV.

Second, in my view the court should have conducted an inquiry into whether a continuance was required in this case in light of Petitioner's right to present a complete defense and to cross-examine. Even though not expressly raised in the certiorari application, a trial court should consider whether a continuance would cure a discovery-like violation.[15] Prior to

[15] This issue was not expressly raised in the Amended Application for Writ of Certiorari (Application). However, Petitioner did include it in his "Points of Error" raised with the ICA. ("The court erred when it . . . denied [d]efense counsel's motion to continue trial and allow him time to file written notice under HRE [Rule] 404(b)."") Nevertheless, because, as discussed infra, I believe that in denying the continuance the court abused its discretion and substantially prejudiced Petitioner's constitutional right to put forth a defense, see State v. Vliet, 91 Hawai'i 288, 294 n.3, 983 P.2d 189, 195 n.3 (1999) ("The sixth amendment to the United States Constitution and article I, section 14 of the Hawai'i Constitution guarantee an accused . . . the right to present a defense[.]" (Citing Nizam, 7 Haw. App. at 411, 771 P.2d at 905.)), this issue may be resolved under the doctrine of plain error, see State v. McCrory, 104 Hawai'i 203, 206, 87 P.3d 275, 278 (2004) (explaining that, pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 52(b), "[a]n appellate court may recognize plain error when the error committed affects substantial rights of the defendant" (internal quotation marks and citations omitted)); State v. Nichols, 111 Hawai'i 327, 334, 141 (continued...)

the start of trial, Petitioner asked for a continuance in order to satisfy the HRE 404(b) notice requirement. Petitioner argued that "the record shows there was no prejudice to [Respondent]" and "the court could have commenced with voir dire, while allowing [Respondent] time to investigate prior to ruling on the admissibility of the 404(b) evidence." See Dowsett, 10 Haw. App. at 495, 878 P.2d at 742 (holding that a court "must consider whether less severe measures would rectify prejudice caused to [a] defendant" by a prosecutor's violation of a rule of penal procedure prior to dismissing the case). The court denied the request because of its desire to proceed with jury selection, which had been scheduled for that morning.[16] Regarding this issue, the ICA ruled that "[the court's] refusal to continue the trial to allow [Petitioner] to provide HRE Rule 404(b) notice in advance of a rescheduled trial was not an abuse of discretion." Pond, 117 Hawai'i at 350, 181 P.3d at 429.

However, neither the court nor the ICA conducted the requisite inquiry into the relative equities related to a

[15](...continued)
P.3d 974, 981 (2006) (holding that "this [c]ourt will apply the plain error standard of review to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights" (citations omitted)).

[16] Defense counsel maintained that he was unable to communicate with Petitioner until the day of trial to obtain the date of the prior assault. In addition, defense counsel stated that he was "stuck in court all day in trials" on the Friday before and did not receive notice until that Friday that Petitioner's trial had been moved ahead in the court's schedule and would therefore begin sooner than anticipated.

decision regarding a requested continuance, i.e., Petitioner's constitutional rights to present a defense and to cross-examine and prejudice to Respondent. "An abuse of discretion occurs when the court clearly exceeds the bounds of reason or disregards rules or principles of law to the substantial detriment of a party litigant." State v. Fetelee, 117 Hawai'i 53, 63, 175 P.3d 709, 719 (2008) (quoting State v. Torres, 85 Hawai'i 417, 421, 945 P.2d 849, 853 (App. 1997)).

A.

In Dowsett, prior to trial and pursuant to HRPP Rule 16,[17] the trial court had ordered the prosecution to produce any statements made by the complaining witness. 10 Haw. App. at 494, 878 P.2d at 741. No documents relating to statements made against the defendant by any witnesses, including the complainant, were provided to defense counsel before trial. However, during trial, a police officer handed the defendant a document signed by the complaining witness describing the suspect and vehicle. This statement production took place after four witnesses had testified at trial. Id. Upon review of the document, the trial court apparently ascertained that the

[17] HRPP Rule 16 (1991), the version in effect when the trial court in Dowsett issued its discovery order, required that "the prosecutor shall disclose" certain "material and information within the prosecutor's possession or control[,]" including, pertinently, "any books, papers, documents, photographs, or tangible objects . . . which are material to the preparation of the defense and are specifically designated in writing by defense counsel." HRPP Rule 16(b)(1)(iv).

description therein was inconsistent with the complaining witness' testimony, ruling that "from this form alone, it can be seen that the complaining witness' testimony would have been impeached." Id.

The prosecutor admitted knowing about the document "'approximately two weeks before trial' but stated he 'forgot about it.'" Id. The defendant maintained that the prosecutor's failure to disclose the document was "extremely prejudicial" and requested a mistrial. Id. The trial court granted the defendant's motion, dismissing the case with prejudice, on the ground that the document "was a 'substantial part of [d]efendant's defense and was necessary for [d]efendant for his use in cross examination of the complaining witness.'" Id.

On appeal, the ICA in Dowsett noted that although the trial court has broad discretion in considering a motion to dismiss, "before the court orders dismissal of a case because of the [prosecutor's] violation of HRPP Rule 16,[18] it must consider whether less severe measures would rectify prejudice caused to the defendant by the violation." Id. at 495, 878 P.2d

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[18] HRPP Rule 16, entitled "Discovery," reads, in pertinent part:

> **(e) Regulation of discovery.**
> . . . .
> (9) Sanctions.
> (i) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or an order issued pursuant thereto, the court may order such party to permit the discovery, grant a continuance, or it may enter such other order as it deems just under the circumstances.

at 742. In accordance with HRPP Rule 16, the ICA observed that "the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial[.]" Id. at 498, 878 P.2d at 743 (quoting Wardius, 412 U.S. at 473-74) (brackets omitted).

Despite the fact that the existence of the relevant document in the Dowsett case was revealed after the trial had begun and the complaining witness had already testified, the ICA noted that the prosecution had not yet closed its case when the document came to light. Id. at 495, 878 P.2d at 742. The ICA concluded that "[a] short continuance to allow [the d]efendant to examine the form and to prepare cross-examination would have cured whatever prejudice resulted because of the document's late production" by the prosecution. Id. at 495-96, 878 P.2d at 742. According to the ICA, because "[t]he trial court . . . failed to 'take into account . . . the feasibility of rectifying that prejudice by a continuance[,]' . . . the court abused its discretion in failing to grant a continuance to allow the prejudice to be rectified." Id. (quoting State v. Marzo, 64 Haw. 395, 397, 641 P.2d 1338, 1340 (1982)) (emphasis added), overruled on other grounds by State v. Wells, 78 Hawai'i 373, 894 P.2d 70 (1995). Thus, although from the facts neither party in Dowsett requested a continuance, the ICA identified it as an option that

judges must consider to rectify any potential prejudice caused by late notice of evidence not timely produced.

B.

In State v. Estrada, 69 Haw. 204, 210, 738 P.2d 812, 818 (1987), the prosecutor failed to produce evidence regarding a report prepared by a Victim-Witness Counselor in the prosecutor's office regarding allegations of physical abuse by the complainant against his former girlfriend (the Ogawa Report). Previously, the prosecutor had provided the defendant with a police report in which a former girlfriend raised allegations of physical abuse that occurred several times while she was dating the complainant. Id. Although not explicitly stated, it appears that the defendant intended to call the former girlfriend as a witness to lend credence to his contention that the complainant was the initial aggressor, and that the defendant was justified in using force to defend himself. Id.

On the third day of trial, during an in limine hearing to determine the relevance of the former girlfriend's testimony, the girlfriend revealed the existence of another abuse complaint against the complainant that was documented in the Ogawa Report. Id. Had the witness not mentioned the Ogawa Report, the defendant would not have known of its existence. It was also found that the report was prepared in September 1985, about two months after the discovery request. Id.

The defendant asked for a continuance to review the Ogawa Report and investigate the former girlfriend's allegations, which she had subsequently recanted. Id. The trial court denied the request, ruled both reports inadmissible, and precluded the former girlfriend from testifying, concluding that "[her] charges had been exaggerated, were not relevant, or alternatively, even if they were relevant, their probative value would be substantially outweighed by the dangers of unfair prejudice, confusion of the issues, or waste of time." Id.

On appeal, this court held that although the trial court had discretion to deny the continuance, it abused its discretion. Id. at 214-15, 738 P.2d at 820-21. It was explained that the complainant's "prior bad acts[,] which indicate a propensity for violence, aggression, or abuse of police powers, . . . were highly relevant to [the] self-defense claims." Id. at 215, 738 P.2d at 821 (citation omitted). Ultimately, this court concluded that because defense counsel "had little opportunity to investigate the [reports] to prepare the defense" and the trial judge "made no inquiry regarding the reasons for [the prosecution's] failure to comply with HRPP Rule 16(b) or whether any prejudice resulted from [the prosecution's] misconduct," the judge "should have allowed the trial continuance as an appropriate remedy to cure the harm created by [the prosecution's] unexplained delays in providing discovery of

essential information." Id. at 216, 738 P.2d at 821 (emphasis added).

V.

Analogous to the present case, Dowsett and Estrada involved the impact of new evidence on a defendant's ability to fairly and adequately present a defense. First, the discovery rule involved in Dowsett and Estrada, HRPP 16(b), and the notice requirement of HRE Rule 404(b) implicated in this case, are alike. In Dowsett, the ICA explained that strict adherence to the discovery rules was essential to the truth-finding function of trials and a necessary component of judicial efficiency. 10 Haw. App. at 497-98, 878 P.2d at 743. Similarly, when the notice requirement was added to FRE Rule 404(b), which HRE Rule 404(b) "closely resembles," see Commentary on HRE Rule 404, the 1991 Advisory Committee Note explained that it "[was] intended to reduce surprise[.]" Fed. R. Evidence, Advisory Committee Notes, 1991 Amendment. Thus, like discovery rules, the notice requirement in HRE Rule 404 was intended to ensure that both parties will have access to pertinent evidence, better enabling the preparation of their respective cases.[19]

[19] Similarly, the majority's argument that the explanation offered by Petitioner for failure to provide advance notice of the Complainant's alleged prior attack was "disingenuous at best[,]" and that Petitioner's explanation that he wasn't able to pinpoint the day of the alleged prior attack until the morning of the trial, did not constitute "good cause for delaying the notification," majority opinion at 29, only pertains to the failure to give notice without any consideration of balancing the constitutional interests embodied in a fair trial.

VI.

However, the violation of the discovery rule in Dowsett and Estrada was not enough to preclude admission of the evidence at trial.[20] In the instant case, new evidence was disclosed and a continuance requested before jury selection, unlike in Estrada and Dowsett where new evidence was presented during trial and a continuance was denied, but subsequently allowed by the appellate court on the ground that a continuance should have been granted. In the instant case the court felt a continuance was unnecessary; however, in stating it did not need a continuance because there were "more than sixty jurors outside" and that the evidence should have been produced before trial[,] it failed to adequately consider the impact on Petitioner's self-defense argument and whether any substantial prejudice would redound to Respondent. A short continuance could have allowed Respondent to verify the alleged prior assault from its own witness, while, as Petitioner stated, "the court could have commenced with voir dire."

Respondent argued Petitioner failed to "give reasonable notice of the HRE Rule 404(b) evidence in advance of trial[,]"

[20] In this case, Petitioner requested a continuance to allow time to file the HRE Rule 404(b) notice before trial. Petitioner maintains that (a) "there was no evidence that defense counsel intentionally delayed until the morning of trial to give HRE 404(b) notice to [Respondent] or did so to gain unfair advantage," and (b) prior notice of intent to introduce the 404(b) evidence was not given because "[Petitioner] did not remember the date [of Complainant's prior attack] until the morning of trial." The ICA affirmed the court's ruling, holding that the court "did not abuse its discretion when it precluded the admission of HRE 404(b) evidence and denied [Petitioner's] motion to continue trial." Pond, 117 Hawai'i at 346, 181 P.3d at 425. The ICA agreed with the court that Petitioner's "oral notice of intent" to submit the prior bad act evidence--the alleged prior assault--did not constitute "reasonable notice." Id. (quoting HRE Rule 404(b)).

and he "failed to show good cause to excuse pretrial notice." According to Respondent, "[the court] did not find an adequate showing to excuse pretrial notice," given that Petitioner "could have gave [sic] notice of at least a[n] estimated time period, the location, and general nature of the evidence" he sought to admit even though he could not remember the exact date of the prior attack.

But in Estrada, this court held that a continuance was "an appropriate remedy to cure the harm created by [the prosecution's] unexplained delays in providing discovery of essential information." 69 Haw. at 216, 738 P.2d at 821 (citation omitted) (emphasis added). In this instance, the prior assault evidence was revealed to Respondent and the court before jury selection, i.e., "in advance of trial," within the literal language of HRE Rule 404(b). As Petitioner argued, a continuance would have provided time for him to "file written notice for the 404(b) evidence in order to comply with the notice requirement[,]" thus eliminating any possibility of prejudice to Respondent if such evidence was a "surprise."

VII.

Assuming, arguendo, that the notice was not "reasonable notice in advance of trial[,]" the court made no finding regarding whether, in light of Petitioner's constitutional claim and the lack of any expression of prejudice by Respondent, a continuance was appropriate or not. Respondent restated the

court's rationale in denying the continuance on grounds that "if the evidence went to the heart of [Petitioner]'s defense, the evidence should have been given more prominence." On the other hand, Petitioner asserted that "the [HRE Rule] 404(b) evidence was central to [his] self-defense defense and without it counsel could not adequately defend [Petitioner.]"

Similar to the defendant's argument raised in Estrada concerning the relevance of precluded evidence to prove the "original aggressor," Petitioner contended that "the evidence that [Complainant] had physically attacked [Petitioner] two weeks prior to the alleged offense was highly relevant to the issue of 'first aggressor.'" Given the importance of this evidence to Petitioner's defense, the court should have considered whether "less severe measures" such as a continuance was an appropriate remedy for a tardy notice. Dowsett, 10 Haw. App. at 495, 878 P.2d at 742.

VIII.

Indeed, the court did not at all consider the impact that excluding the evidence would have on Petitioner's constitutional rights, and weigh that right against any prejudice shown by Respondent because of a continuance. The court made no inquiry as to the feasibility of investigating the alleged prior assault. There was no evidence that witnesses other than the Complainant would be a witness, or that other witnesses would be necessary, and, if so, that the delay would prevent Respondent

from being able to prosecute. Correlatively, Respondent did not make any showing that it had been prejudiced by the failure to disclose the incident earlier.

In light of the holdings in Dowsett and Estrada, the court should have at the least conducted an inquiry into the feasibility of a short continuance to cure any perceived prejudice suffered by Respondent in order to preserve the integrity of the criminal proceedings. The court was required to "consider whether less severe measures would rectify [any] prejudice," Dowsett, 10 Haw. App. at 495, 878 P.2d at 742, caused to Respondent by Petitioner's violation of an evidentiary rule rather than to deny Petitioner the right to present the proffered evidence altogether.

As noted in Estrada, the court "made no inquiry regarding . . . whether any prejudice resulted from [Petitioner's] misconudct." 69 Haw. at 216, 738 P.2d at 821. The court's denial of Petitioner's right to present the proffered evidence was a substantial detriment to Petitioner's defense because the evidence bore directly on the issue of whether the Complainant was the first aggressor and therefore whether Petitioner was acting in self-defense. The majority does not address the requirement under Dowsett that "less severe measures would rectify prejudice" caused to a party before precluding the evidence entirely. 10 Haw. App at 495, 878 P.2d at 742. In this case, the "less severe measure" would have been to grant a

continuance of the trial. The majority also does not address the requirement under Estrada that the court was required to make an "inquiry regarding the reasons" for failure to comply with the rule in question and "whether any prejudice resulted" from the failure to comply. 69 Haw. at 216, 738 P.2d at 821. Based on the foregoing, I would hold that the failure to conduct such an inquiry was an abuse of discretion.

IX.

Third, I would vacate the court's and the ICA's judgments and remand the case because the self-defense instruction given was incorrect. Petitioner argues that the ICA erred in affirming the court's instruction to the jury on self-defense. The court issued the following jury instruction on self-defense:

> The use of force upon or towards another person is justified when a person reasonably believes that such force is immediately necessary to protect himself on the present occasion against the use of unlawful force by the other person. A person employing protective force may estimate the necessity thereof under the circumstances as he reasonably believes them to be when the force is used without retreating. If, and only if, you find that the defendant was reckless in having a belief that he was justified in using self-protective force against another person, or that the defendant was reckless in acquiring or failing to acquire any knowledge or belief which was material to the justifiability of his use of force against the other person, then the use of such protective force is unavailable as a defense to the offense of abuse of family or household member.

(Emphases added.) This instruction was affirmed by the ICA which stated that "[t]he foregoing instruction is consistent with the

language of [HRS § 703-304 (1993)]"[21] and "adequately prohibits the jury from assessing those circumstances unknown to the defendant at the time." Pond, 117 Hawai'i at 351, 181 P.3d at 430. In his writ, Petitioner argues that the self-defense instructions were erroneous because they failed to "define for the jury that the reasonableness of [Petitioner's] belief must be viewed from his perspective." Petitioner's position is supported by this court's prior decisions.[22]

In Estrada, this court held that the following instructions on self-defense were proper:

> INSTRUCTION NO. 19
> (STATE'S INSTRUCTION NO. 8)
> A person is justified in using force upon or toward another when the person using the force reasonably believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by the other person on the present occasion.

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[21] HRS § 703-304 reads in relevant part:

> **Use of force in self-protection.** (1) . . . [T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by the other person on the present occasion.
>
> . . . .
>
> (3) . . . [A] person employing protective force may estimate the necessity thereof under the circumstances as he believes them to be when the force is used without retreating, surrendering possession, doing any other act which he has no legal duty to do, or abstaining from any lawful action.

(Boldfaced font in original.)

[22] Here, Petitioner did not object at trial to the instruction. This court has recognized that "the duty to properly instruct the jury lies with the trial court[.]" Nichols, 111 Hawai'i at 335, 141 P.3d at 982. "As a general rule, jury instructions to which no objection has been made at trial will be reviewed only for plain error." Id. at 334, 141 P.3d at 981 (internal quotation marks and citation omitted). Plain error occurs where "the substantial rights of the defendant have been affected adversely[.]" Id. (internal quotation marks and citation omitted).

. . . .

> INSTRUCTION NO. 23
> (DEFENDANT'S INSTRUCTION NO. 4)
> The reasonableness of the Defendant's belief shall be determined from the point of view of a reasonable person in the Defendant's position under the circumstances as he believed them to be.

69 Haw. at 224-25, 738 P.2d at 826 (emphasis added).

In State v. Pemberton, 71 Haw. 466, 477, 796 P.2d 80, 85 (1990), this court held that the following instruction misstated the law on self-defense and therefore vacated the defendant's conviction:

> The reasonableness of the Defendant's belief shall be determined from the viewpoint of a reasonable person in the Defendant's position under the circumstances shown in the evidence.

(Emphasis added.)

The Pemberton court held that the standard for evaluating a claim of self-defense requires the jury to "consider the circumstances as the Defendant subjectively believed them to be at the time he tried to defend himself." Id. (emphasis added). This court explained that "[t]he instruction given in this case allowed the jury to consider all the circumstances shown by the evidence, regardless of whether or not Defendant was aware of them" and the instructions given above were therefore "misleading and erroneous." Id. Hence, this court agreed with the defendant's argument there that in requiring the jury to "consider all the circumstances shown by the evidence, regardless of whether or not Defendant was aware of them[,]" the instruction "allowed the jury to disregard Defendant's perception of the

alleged incident" and "direct[ed] them to apply an objective standard instead." Id. (emphasis added).

The Hawai'i Committee on Pattern Jury Instructions - Criminal (HAWJIC) relied on this court's express statements in Estrada and Pemberton. The HAWJIC commentary reiterates that a "defendant's belief for the need to use deadly force is 'determined from the point of view of a reasonable person in the [d]efendant's position under the circumstances as the defendant believed them to be.'" Commentary to HAWJIC 7.01 (quoting Estrada, 69 Haw. at 225, 738 P.2d at 826) (emphasis added).[23] Thus, "an instruction focusing the jury on the 'defendant's position under the circumstances shown in the evidence' was misleading and erroneous," id. (quoting Pemberton, 71 Haw. at 477-78, 796 P.2d at 85), in that it failed to communicate to the jury that "the jury must consider the circumstances as the defendant subjectively believed them to be" at the time of the incident in question, id. (emphasis added). The HAWJIC Commentary also notes that "[t]he facts of consequence to the determination of self-defense all concern the actor's state of

[23] It should be noted that "while the HAWJIC 'have been approved for publication, the Hawai'i Supreme Court has not approved the substance of any of the pattern instructions' . . . and the courts are not bound by them." State v. Gomes, 117 Hawai'i 218, 226 n.14, 177 P.3d 928, 936 n.14 (2008) (quoting Calaro, 107 Hawai'i at 463, 114 P.3d at 969 (quoting State v. Nupeiset, 90 Hawai'i 175, 181 n.9, 977 P.2d 183, 189 n.9 (App. 1999)). However, this HAWJIC instruction has been approved by this court as discussed supra. See State v. Augustin, 101 Hawai'i 127, 63 P.3d 1097 (2002); Pemberton, 71 Haw. at 477, 796 P.2d at 85; and Estrada, 69 Haw. at 225, 738 P.2d at 826.

mind: (1) whether the actor reasonably believed that deadly force was necessary, and (2) whether the actor reasonably believed that he or she was threatened with one of the specified harms." Id. (internal citation omitted). Thus, the Commentary notes that this court in State v. Lubong, 77 Hawai'i 429, 886 P.2d 766 (App. 1994), held that "a defendant's self-protection defense requires a subjective determination of whether the defendant had the requisite belief that deadly force was necessary" to avoid harm. Commentary to HAWJIC 7.01 (citing Lubong).

In Augustin, a majority of this court dismissed a certiorari proceeding brought by a petitioner who argued that the self-defense instruction given during his trial for murder was erroneous. The majority sanctioned the HAWJIC pattern instruction. The instruction read as follows:

> The use of deadly force upon or toward another person is justified when a defendant using such force reasonably believes that deadly force is immediately necessary to protect himself on the present occasion against death or serious bodily injury. The reasonableness of the defendant's belief that the use of such protective force was immediately necessary shall be determined from the viewpoint of a reasonable person in the defendant's position under the circumstances of which the defendant was aware or as the defendant reasonably believed them to be.

101 Hawai'i at 130, 63 P.3d at 1100 (emphasis added). The majority in Augustin approved the foregoing instruction that mandated that the jury evaluate the reasonableness of the defendant's use of self-defense "from the viewpoint of a reasonable person in the defendant's position[.]" Id. The

majority held that such instructions were proper "because the instructions in question--derived from [HAWJIC] 7.01 ('Self-Defense') and 7.02 ('Defense of Others')--are fully consonant with the controlling statutory and case law of this state." Id. at 127, 63 P.3d at 1097.[24]

The commentary to the self-defense statute, HRS § 703-304, states that "Hawai'i case law require[s] that the defendant's belief [regarding the necessity of using force in

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[24] As noted in the Augustin dissent, in my view the petitioner's application for certiorari in that case "should have been granted primarily to clarify the state of our case law with regard to the use of force defense to protect oneself or others" that was raised by the petitioner. Augustin, 101 Hawai'i at 129, 63 P.3d at 1099 (Acoba, J. dissenting, joined by Ramil, J.). It was stated that a three-part test should serve as the standard for evaluating the use of self-defense by a defendant.

> First, under the subjective portion of the test, it must be asked whether a defendant's belief that self-defense was necessary under the circumstances as he or she believed them to be, is actual and real . . . . Second, assuming it was, the fact finder must consider whether the prosecution has proved that the defendant's view of the circumstances was unreasonable. [Third, i]f the prosecution fails to do so, then the fact finder must decide whether the prosecution has established that a reasonable person under those circumstances would believe the force used was necessary.

Id. at 135, 63 P.3d at 1105. It was explained that the instruction's statement that the jury "should view 'the circumstances [as] the defendant was aware [of them]' fail[ed] to inform [the jury] that the defendant's subjective understanding of the situation must be evaluated from a reasonable person's perspective." Id. at 136, 63 P.3d at 1106.

Thus, the "jury [was] seemingly foreclosed from considering whether the defendant's interpretation of the circumstances was reasonable." Id. at 134, 63 P.3d at 1104. Nonetheless, as stated there, I "would affirm the ICA's decision" allowing the instruction because despite the error, it "benefitted Petitioner" by "allow[ing] the jury to accept Petitioner's point of view without assessing the reasonableness of it . . . ." Id. at 137, 63 P.3d at 1107 (citing Nupeiset, 90 Hawai'i at 185, 977 P.2d at 193 ("The Hawaii Supreme Court has held a defendant cannot complain of an erroneous instruction which benefitted him [or her)]." (Brackets, internal quotation marks, and citation omitted.))).

Although this was a published order dismissing certiorari, unpublished orders rejecting applications for certiorari and dissents thereto may be found in the LexisNexis database at http://www.lexis.com.

self-defense must] be reasonable." Commentary to HRS § 703-304. The commentary cites the case of State v. Clyde, 47 Haw. 345, 388 P.2d 846 (1964), to illustrate this point. The defendant there, accused of murder in the first degree for shooting the victim with a shotgun, argued that he fired in self-defense. The self-defense instruction read in pertinent part:

> The law of self-defense is founded on the principle of necessity, either actual or apparent, and in order to justify the taking of human life on this ground the slayer, as a reasonable man, must have reason to believe and must believe that he is in danger of receiving great bodily harm; and further, the circumstances must be such that an ordinarily reasonable person, if he were in those circumstances and if he knew and saw what such person in real or apparent danger knows and sees, would believe that it was necessary for him to use, in his defense and to avoid great bodily injury to himself, such force or means as might cause the death of his adversary.

Id. at 354-55, 388 P.2d at 851 (emphasis added). This court held that the instruction was proper. The Clyde instructions clearly indicated that the jury was to consider the use of force from one in the defendant's position because the jury was required to consider what a reasonable person would do "if he were in those circumstances" faced by the defendant and "if he knew and saw" what the defendant "knows and sees[.]" Id.

In light of the foregoing cases, and as the HAWJIC Advisory Committee indicated, a proper jury instruction on self-defense contains both a subjective prong and an objective prong. Under the objective prong, emphasis is placed on the reasonable person standard so the defendant's use of force must be "determined from the point of view of a reasonable person[.]"

Estrada, 69 Haw. at 225, 738 P.2d at 826. See also Pemberton, 71 Haw. at 477, 796 P.2d at 85 (explaining that "the standard for judging the reasonableness of a defendant's belief for the need to use deadly force is determined from the point of view of a reasonable person in the [d]efendant's position"); State v. Faafiti, 54 Haw. 637, 645, 513 P.2d 697, 703 (1973) (holding that the degree of force to which a person is lawfully entitled to use is "limited by what a reasonable person in the same situation . . . would believe to be necessary"); Nupeiset, 90 Hawai'i at 186, 977 P.2d at 194 (holding that the self-defense instruction was proper because it "required that the jury evaluate the [d]efendant's belief that the use of force was necessary from the viewpoint of a reasonable person").

Under the subjective prong the jury is required to evaluate the use of force from the defendant's perspective. Under the subjective prong, the focus is on the circumstances known to the defendant, thus directing the jury to consider the actions of a "reasonable person in the [d]efendant's position under the circumstances as he believed them to be." Estrada, 69 Haw. at 224-25, 738 P.2d at 826 (emphasis added). See also Pemberton, 71 Haw. at 477, 796 P.2d at 85 (holding that the jury "must consider the circumstances as the defendant subjectively believed them to be at the time he tried to defend himself" (emphasis added)); Faafiti, 54 Haw. at 645, 513 P.2d at 703

(affirming the jury instruction that required the jury to evaluate the defendant's use of force "seeing what [the defendant] sees and knowing what [the defendant] knows"); Nupeiset, 90 Hawai'i at 186, 977 P.2d at 194 (affirming the jury instruction that required jurors to consider "the circumstances of which the defendant was aware or as [the] defendant believed them to be").

In the instant case, Petitioner is correct that the instruction was erroneous because the necessary reference to the subjective prong of the self-defense test was lacking. The statement in the instructions that the use of force may be "estimated . . . under the circumstances as [the defendant] reasonably believes them to be" (emphasis added) is not equivalent to an instruction that the use of force must be evaluated from a person in defendant's position. The statement, "under the circumstances as he reasonably believes them to be," omits the requirement that the viewpoint be that of a person who is "in the defendant's position" which would satisfy the requirement that the defendant's subjective belief is accounted for. Similar to Pemberton, the reference to "reasonable belief" results in an incomplete instruction[25] because a juror may

[25] The standard of review for jury instructions is "whether, when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent or misleading." State v. Crail, 97 Hawai'i 170, 180, 35 P.3d 197, 207 (2001) (internal quotation marks and citation omitted). See State v. Pinero, 70 Haw. 509, 527, 778 P.2d 704, 716 (1989) (stating that "[e]rroneous instructions are presumptively harmful and are a ground for reversal unless it affirmatively appears from the record as a (continued...)

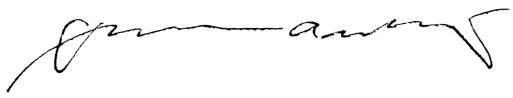
interpret the term as an instruction to view the situation as a hypothetical reasonable person would or as the juror himself would, but may fail to consider the situation from Petitioner's position. That unaccounted-for perspective would entail consideration of factors such as Petitioner's interaction with the Complainant and the facts known to Petitioner.

There was insufficient guidance to the jury here to evaluate the use of force from Petitioner's point of view because the instruction lacked express language pertaining to Petitioner's position. The question of whether the defendant's subjective view of the circumstances was reasonable is a separate question. This distinction was recognized in Estrada, in Pemberton, in HAWJIC, and in Augustin.

By approving the language used in the self-defense instruction in the instant case as a substitute for the language sanctioned in the foregoing cases, the majority has reduced the self-defense instruction to one of an objective standard only. In doing so, "the substantial rights of the defendant have been affected adversely," Nichols, 111 Hawai'i at 334, 141 P.3d at 981, because it is not clear that the jury would evaluate the use of self-defense considering a person in Petitioner's position as our case law requires. In my opinion, the giving of the self-

[25](...continued)
whole that the error was not prejudicial" (internal quotation marks and citation omitted)).

defense instruction in this case thus constituted prejudicial error.[26]



[26] However, because this case has been remanded, and with all due respect, the court is at liberty to give the HAWJIC instruction although its giving was not reversed.