DISSENTING OPINION BY MOON, C.J.

I agree with Justice Nakayama's dissent that a trial court does not have a duty to sua sponte instruct the jury on a particular defense "when there is evidence -- however weak -- that supports the consideration of that issue," dissenting op. at 3, as the majority's opinion implies. See majority op. at 21-26. In that regard, I cannot agree with Judge Kim that "it do[es] not . . . necessarily follow[] from the majority opinion that[,] as a matter of law, a trial court is hereafter required to instruct the jury sua sponte as to every conceivable defense suggested by the evidence in a given case." Concurring op. at 1. Here, the majority answered the question, i.e., "whether Petitioner presented any evidence, 'no matter how weak,' that would have supported the jury's consideration of a mistake of fact defense," majority op. at 21, in the affirmative. See majority op. at 21-23. Having done so, the majority -- observing that Petitioner did not specifically request a mistake of fact instruction -- proceeds to examine "whether the court's failure to instruct . . . was harmless beyond a reasonable doubt." Id. (emphasis added). It then concludes that the court's failure to instruct was not harmless. Id. Thus, when considered together, it does -- in my view -- "necessarily follow[]" that, based on the majority's discussion, "a trial court is hereafter required to instruct the jury sua sponte as to every conceivable defense suggested by the evidence in a given case." Concurring op. at 1.

Consequently, as previously indicated, I agree with Justice Nakayama that a trial court does not have a duty "to instruct the jury sua sponte as to all defense instructions that may possibly be implicated by the facts." Dissenting op. at 16.

However, I respectfully disagree with Justice Nakayama's conclusion that a trial court is never required, absent a request by the parties, to so instruct. For that reason, I write separately to explain my disagreement with the broad view of the majority's implicit "holding" and the narrow view of Justice Nakayama's dissent, as well as suggest a different approach upon which my concurrence in the dissent's ultimate result is based.

In her dissent, Justice Nakayama proposes the rule that "[a]n instruction as to a defense is not required if the defendant or prosecution, for strategic reasons, do not request it." Id. at 9 (emphasis added) (citations omitted). In so doing, Justice Nakayama looks to State v. Locquaio, 100 Hawai'i 195, 58 P.3d 1242 (2002), which specifically provides that a trial court is not required to issue a mistake of fact defense sua sponte; rather, such instruction is contingent upon the defendant's request. Id. at 208, 58 P.3d at 1255.

In support of her position, Justice Nakayama explains that, according to the majority's holding,

> when requested by a defendant, a defense instruction is required to be given if the evidence fairly raises the issue, regardless of "how weak, unsatisfactory, or inconclusive" the evidence may be. Because of the low standard governing defense instructions, it would be extremely problematic to require a court to instruct the jury sua sponte as to **all** defense instructions that may possibly be implicated by the facts. This requirement would (1) burden the trial court with the duty to examine every possible theory that may fit the entire body of evidence before the court, (2) restructure the adversary system contrary to the interests of both the prosecution and defendant, and (3) create incentives for a defendant not to request a defense instruction.

Dissenting op. at 15-16 (citations omitted) (underscored emphasis in original) (bold emphasis added). Although I agree that it would be "extremely problematic" to impose a duty on the trial court to instruct the jury sua sponte as to all possible defense instructions that may be implicated by the facts, I believe, as discussed below, that it would be appropriate, under certain circumstances, to impose a duty on the trial court to sua sponte instruct as to defenses.

In People v. Barton, 906 P.2d 531, 536 (Cal. 1995), the Supreme Court of California compared a trial court's duty to instruct the jury with regard to lesser included offenses versus its duty, if any, to instruct on particular defenses. In so doing, the court rejected the defendant's request that an instruction as to a lesser included offense be treated the same as an instruction on particular defenses, id., holding that:

> [A] trial court must, sua sponte, or on its own initiative, instruct the jury on lesser included offenses "when the evidence raises a question as to whether all of the elements of the charged offense were present, but not when there is no evidence that the offense was less than that charged.
> . . . .

> In contrast to lesser included offenses, a trial court's **duty** to instruct, sua sponte, or on its own initiative, on particular defenses is more limited, arising "only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case."

Id. at 535 (citations omitted) (emphases added).

In People v. Maury, 68 P.3d 1, 60 (Cal. 2003), the Supreme Court of California examined, among other things, the issue whether the trial court erred in failing to sua sponte instruct the jury on the defense of reasonable and good faith mistake of fact regarding a person's consent to sexual intercourse. Id. at 60. Consistent with the view expressed by the Barton court, the Maury court stated that "[a] trial court's duty to instruct, sua sponte, on particular defenses arises only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." Id. (internal quotations omitted). The court concluded that, because "[its] review of the record shows no substantial evidence to trigger a sua sponte obligation to give [a mistake of fact jury] instruction," the trial court was not obliged to so instruct. Id.; see also People v. Villanueva, 169 Cal. App. 4th 41, 49 (2008) (applying the rule that "[a] trial court is required to instruct sua sponte on any defense, including self-defense, only when there is substantial evidence supporting the defense, and the defendant is either relying on

the defense or the defense is not inconsistent with the defendant's theory of the case."); People v. Montoya, 874 P.2d 903, 915 (Cal. 1994) ("It is settled that, even in the absence of a request, a trial court must instruct on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case.") (citations omitted); People v. Burnham, 176 Cal. App. 3d 1134, 1139-40 (1986) (recognizing that a defendant must demonstrate substantial evidence supporting a defense in order to require the trial court to issue a sua sponte instruction on the defense) (citation omitted).

In my view, the rule set forth by California courts that a trial court has a duty to sua sponte instruct the jury on potential defenses when (1) it appears that the defendant relies on such defense or (2) there is substantial evidence to support a defense and such defense is not inconsistent with the defendant's theory of the case [hereinafter, the Barton rule] is the more appropriate rule to apply in the instant case and in future cases. As discussed below, I believe that the Barton rule, contrary to the rules advanced by the majority and Justice Nakayama, preserves a trial court's discretion, protects a defendant's right to a fair trial, and also promotes the important interest of judicial economy.

First, the Barton rule would eliminate (1) the undue burden on the trial court of reviewing "the entire body of

evidence and considering every defense that may be applicable to the facts," dissenting op. at 17, and (2) the potential of prejudice to the defendant. See Barton, 906 P.2d at 536 (stating that, "to require trial courts to ferret out all defenses that might possibly be shown by the evidence, even when inconsistent with the defendant's theory at trial, would not only place an undue burden on the trial courts but would also create a potential of prejudice to the defendant" and "[a]ppellate insistence upon sua sponte instructions which are inconsistent with defense trial theory or not clearly demanded by the evidence would hamper defense attorneys and put trial judges under pressure to glean legal theories and winnow the evidence for remotely tenable and sophistical instructions") (internal citations and quotations omitted); People v. Wade, 348 P.2d 116, 125 (Cal. 1959) ("Omniscience is not required of our trial courts."), overruled on other grounds in People v. Carpenter, 935 P.2d 708, 747 (Cal. 1997).

Second, I believe the adoption of the Barton rule supports and is in accordance with "the interests of both the prosecution and defendant," dissenting op. at 16, inasmuch as the trial court would not be called upon to create or implement defense strategy -- a burden that should be left to defense counsel. See Shells v. State, 642 So. 2d 1140, 1141 (Fla. Dist. Ct. App. 1994). Rather, the rule properly delegates to the trial court the role of selecting and presenting those defense

instructions implicated by substantial evidence and supportive of a legal theory that is not inconsistent with the defendant's legal theory of the case. Thus, any "incentives for a defendant not to request a defense instruction," about which Justice Nakayama expressed concern, see dissenting op. at 16 (emphasis in original), would no longer be present.

Finally, the adoption of the Barton rule, unlike the rules set forth by the majority and Justice Nakayama, promotes the interest of judicial economy. In my view, the majority's approach, requiring sua sponte instructions for all defenses, no matter how weak the evidence, would unduly burden the trial court and arguably increase the likelihood of error. By the same token, Justice Nakayama's approach, requiring the giving of a particular instruction to the jury only when requested, ignores the important policy that it is the trial court's duty to maintain fairness in the courtroom and, as such, it must ensure that a defendant receives a fair trial.

Based on the foregoing, I would hold, contrary to the broad duty imposed by the majority and the narrow duty imposed by Justice Nakayama's dissent, that the trial court has a limited duty to sua sponte instruct the jury on a particular defense only if (1) it appears that the defendant is relying on such a defense, or (2) if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case. Nevertheless, I agree with

Justice Nakayama that, "even if trial courts have a duty to instruct the jury sua sponte on defenses supported by 'substantial evidence,'" dissenting op. at 23 n.6, the trial court's failure to instruct in this case was harmless. Id. at 22-30. Indeed, I believe that the evidence in this case "overwhelmingly" indicates that Stenger knew the reporting requirements and failed to comply. Consequently, I agree with Justice Nakayama's ultimate conclusion that "the trial court's failure to instruct sua sponte on the mistake of fact defense was harmless because it was not reasonably possible that the issuance of a separate mistake of fact instruction could have supported a finding that Stenger did not knowingly deceive DHS." Id. at 30.