CONCURRING OPINION BY RAMIL, J.,
WITH WHOM LEVINSON, J., JOINS

The appropriate method by which to determine whether statutory alternatives represent separate and distinct offenses or alternative means of proving a single offense is by reference to legislative intent, and not by utilization of an amorphous due process analysis. Accordingly, while I concur with the majority s conclusion that the defendant s conviction must be vacated because there is a reasonable possibility that the verdict in this case was based upon a statutory alternative unsupported by legally sufficient evidence, I do not join section III.B.2.a of the opinion. I write separately to explain my disagreement with the majority s analysis[1].

As explained by a plurality of the Supreme Court of the United States:

> Decisions about what facts are material and what are immaterial, or . . . what facts are necessary to constitute the crime, and therefore must be proved individually, and what facts are mere means, represent value choices more appropriately made in the first instance by a legislature than by a court.

Schad v. Arizona, 501 U.S. 624, 638 (1991) (quotation signals, brackets, and internal citation omitted). The question whether statutory alternatives constitute alternative means of proving a

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[1] I also note several technical inaccuracies in the majority opinion. The majority refers to Klinge as having recognized that unanimity may not be required where the jury is presented with alternative means of establishing a single element of the offense charge. Opinion at 24 (emphasis added). See also Opinion at 29 (again referring to mental state as an element of a crime). However, Klinge dealt with alternative means of proving the requisite mental state of the offense of terroristic threatening. See 92 Hawai i at 586, 994 P.2d at 518. Mental state is not an element of an offense, see HRS § 701-205 (1993), but rather an independent fact that the prosecution must prove with respect to each material element of the offense. HRS § 701-114(1) (1993).

single offense is therefore a question of statutory interpretation. Id. at 636 (citing United States v. UCO Oil Co., 546 F.2d 833, 835-838 (9th Cir. 1976)). This court has long recognized that its primary duty in interpreting a statute is to ascertain the intention of the legislature and to implement that intention to the fullest degree[.] Kaiama v. Aguilar, 67 Haw. 549, 554, 696 P.2d 839, 842 (1985).

The analysis employed by the majority is simply inapposite to a determination of the very issue the majority seeks to resolve. A wide-ranging due process analysis that contemplates history, fairness, widespread practice, and the moral equivalence of statutory alternatives is, for the most part, irrelevant to the issue of legislative intent. I fail to see, for example, how Kansas law is of any assistance to this court in ascertaining and effectuating the intent of the Hawai i legislature.

I. The majority s utilization of the analysis set forth in Schad is misplaced

In Schad, the United States Supreme Court considered whether it was constitutionally permissible for the state of Arizona to treat premeditated murder and felony murder as alternative means by which to prove the offense of first degree murder. Rejecting Schad s contention that these statutory alternatives constituted separate offenses, the Arizona Supreme Court relied upon its holding in a prior decision, which in turn

relied upon State v. Axley, 646 P.2d 268 (Ariz. 1982).[2] In Axley, the Arizona Supreme Court, looking solely to the text of Arizona s first degree murder statute, held that the statutory alternatives were alternative means of proving a single offense.[3] Axley, 646 P.2d at 277. The Court reasoned that [a]lthough the . . . indictment set forth the two bases delineated in [Ariz.

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[2] Specifically, the Arizona Supreme Court cited to State v. Encinas, 647 P.2d 624 (Ariz. 1982), which in turn cited to Axley, for the proposition that [i]n Arizona, first degree murder is only one crime regardless whether it occurs as a premeditated murder or a felony murder. See State v. Schad, 788 P.2d 1162, 1168 (Ariz. 1989).

[3] The court in Axley, employed the following analysis:

> [Ariz. Rev. Stat. §] 13-1105 provides that the crime of first degree murder can be committed in either of two ways. First, an individual commits first degree murder if he causes the death of another with premeditation, intending or knowing that his conduct will cause death. Second, under the doctrine of felony-murder, a person commits first degree murder if (a)cting either alone or with one or more other persons such person commits or attempts to commit . . . robbery . . . and in the course of and in furtherance of such offense or immediate flight from such offense, such person or another person causes the death of any person. [Ariz. Rev. Stat. §] 13-1105(A)(2). Although the first count of the indictment set forth the two bases delineated in [Ariz. Rev. Stat. §] 13-1105 for classifying appellant s actions as first degree murder, it charged him with only one crime. Thus, the indictment was not duplicitous.

Axley, 646 P.2d at 277.

The version of Arizona s first degree murder statute at issue inAxley, codified at Ariz. Rev. Stat. 13-1105, was actually an amended version of the statute at issue in Schad. Under both versions, however, premeditated murder and murder committed in the course of a robbery constitute first degree murder. The version of the statute at issue in Schad read as follows:

> A murder which is perpetrated by means of poison or lying in wait, torture or by any other kind of wilful, deliberate or premeditated killing, or which is committed in avoiding or preventing lawful arrest or affecting an escape from legal custody, or in the perpetration of, or attempt to perpetrate, arson, rape in the first degree, robbery, burglary, kidnapping, or mayhem, or sexual molestation of a child under the age of thirteen years, is murder in the first degree. All other kinds of murder are of the second degree.

Ariz. Rev. Stat. § 13-452 (Supp. 1973).

Rev. Stat. §] 13-1105 for classifying appellant s actions as first degree murder, it charged him with only one crime. [4] Id.

I emphasize that although Arizona s practice of treating premeditated murder and felony murder as alternative means of proving first degree murder has substantial historical and contemporary echoes[,] Schad, 501 U.S. at 640; see also State v. Serna, 211 P.2d 455, 459 (Ariz. 1949), the Arizona Supreme Court s resolution of the issue inAxley turned entirely on statutory interpretation. Noticeably absent from its analysis, and in stark contrast to the analysis employed by the majority of this court, is a survey of case law from other jurisdictions, or any discussion about history or degrees of blameworthiness and culpability. In my view, the Axley court quite properly limited its analysis to the statute s plain language because issues such as moral equivalence, blameworthiness, and culpability represent value choices more appropriately left to the legislature. See Schad, 501 U.S. at 638.

The issue in Schad was whether Arizona law in this respect was consistent with the Due Process Clause of the United States Constitution. Schad, 501 U.S. at 631; see also Richardson

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[4] Although not mentioned by the Arizona Supreme Court in Axley, a plurality of the United States Supreme Court subsequently noted that Arizona s equation of the mental states of premeditated murder and felony murder as species of the blameworthy state of mind required to prove a single offense of first-degree murder finds substantial historical and contemporary echoes. Schad, 501 U.S. at 640. As Justice Scalia observed, the crime for which Schad was convicted has existed in the Anglo-American legal system, largely unchanged, since at least the early 16th century[.] Schad, 501 U.S. at 648 (Scalia, J., concurring) (citation omitted).

v. United States, 526 U.S. 813, 820 (1999) (citing Schad for the proposition that the Constitution itself limits a State s power to define crimes in ways that would permit juries to convict while disagreeing about means, at least where that definition risks serious unfairness and lacks support in history or tradition.). TheCourt did not, as the majority suggests, set forth any test or standard to be utilized in determining whether statutory alternatives delineate separate offenses or alternative means of proving a single offense. Rather, the plurality in Schad expressly deferred to Arizona s decision that premeditated murder and felony murder were not separate offenses. 501 U.S. at 636 (If a State s courts have determined that certain statutory alternatives are mere means of committing a single offense, rather than independent elements of the crime, we simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law.);see also State v. Correa, 696 A.2d 944, 957 (Conn. 1997) (InSchad, the United States Supreme Court deferred to the states determination that certain statutory alternatives are mere means of committing a single offense.). The plurality in Schad explained:

> In the present case . . . by determining that a general verdict as to first-degree murder is permissible under Arizona law, the Arizona Supreme Court has effectively decided that, under state law, premeditation and the commission of a felony are not independent elements of the crime, but rather are mere means of satisfying a single mens rea element. The issue in this case therefore is not whether "the State must be held to its choice, . . . for the Arizona Supreme Court has authoritatively determined that the State has chosen not to treat premeditation and the commission of a felony as independent elements of the crime,

but rather whether Arizona's choice is unconstitutional.

Schad, 501 U.S. at 637 (internal citation omitted).

To determine whether Arizona s choice was consistent with due process, a plurality of the Court referred both to history and to the current practice of other States. Id. at 640. The plurality also indicated that where statutory alternatives constitute alternative means of committing a single offense, the alternatives must reflect notions of equivalent blameworthiness or culpability. Id. at 644. In his concurrence, Justice Scalia disputed that the plurality engaged in an evaluation of moral equivalence, contending that the plurality s analysis ultimately relies upon nothing but historical practices. Id. at 651 (Scalia, J., concurring); see also State v. Fortune, 909 P.2d 930, 933 (Wash. 1996) (noting that the plurality s approval of Arizona s alternative means for first degree murder rested entirely upon an analysis of history and modern practice.) (emphasis in original). The plurality ultimately concluded that Arizona s choice to define these statutory alternatives as alternative means of proving first degree murder did not fall beyond the constitutional bounds of fundamental fairness and rationality. Id. at 645.

Schad is widely understood to stand not for the proposition set forth in the majority opinion, but rather for the proposition that the Due Process Clause of the United States Constitution does not require jury unanimity on alternative means of proving a single offense. See, e.g., State v. Derango, 613

N.W.2d 833, 841 (Wis. 2000); State v. Nunez, 981 P.2d 738, 744 (Idaho 1999); Ex Parte Madison, 718 So. 2d 104, 106-07 (Ala. 1998); Correa, 696 A.2d at 958; People v. Rand, 683 N.E.2d 1243, 1249 (Ill. App. 1 Dist. 1997); State v. St. Pierre, 693 A.2d 1137, 1139 (Me. 1997); State v. Salazar, 945 P.2d 996, 1006 (N.M. 1997); Richardson v. State, 673 A.2d 144, 146-47 (Del. Supr. 1996). For this reason, criminal defendants attempting to distinguish Schad have argued that their particular state legislature did not intend to create statutory alternatives, but rather intended to define separate and distinct offenses. See, e.g., Fortune, 909 P.2d at 931 (Wash. 1996) (On facts nearly identical to those inSchad, the criminal defendant argued that the Washington Legislature did not intend to make premeditated murder and felony murder alternative ways of establishing the mens rea element of first degree murder.). The Supreme Court of Oregon has explained: The Supreme Court of the United States determined in Schad that different statutory offenses require separate verdicts, but that the question whether statutory alternatives amount to separate offenses is best answered by an inquiry into legislative intent[.] State v. King, 852 P.2d 190, 193 n.6 (Or. 1993) (emphasis added).

Notwithstanding the foregoing, the majority in Klinge made the following erroneous statement, which the majority relies upon in this case: $chad] set forth a test for determining whether alternative mental states merely constitute a means of satisfying a single mens rea element, or instead create separate

crimes requiring individual proof. 92 Hawai‘i at 586, 994 P.2d at 518. The majority in Klinge further concluded that [t]he appropriate test under Schad appears to be whether the level of verdict specificity required by the instructions was rational and fair, considering history and practice, and the degree of blameworthiness and culpability. 92 Hawai‘i at 586-87, 994 P.2d at 518-19 (citing Schad, 501 U.S. at 637). The majority continues to misread and misapply Schad in this case. The issue that the majority confronts in III.B.2.a, supra, is whether alternative theories of guilt define separate crimes or may be treated as alternative means of establishing elements of a single offense. Majority opinion at 29. In my view, this issue is one of statutory interpretation, see Schad, 501 U.S. at 636, and our inquiry should focus, first and foremost, on legislative intent. Kaiama, 67 Haw. at 554, 696 P.2d at 842.

Nevertheless, the majority resorts to history and practice in Hawai‘i and other jurisdictions, and whether the alternatives reasonably reflect notions of equivalent blameworthiness and culpability. Majority opinion at 29 (citing Klinge, 92 Hawai‘i at 587-89, 994 P.2d at 519-21). Applying this test, the majority engages in a wide-ranging analysis. Quite properly, the majority looks to [t]he language and history of the relevant statutory provisions[.] Majority opinion at 30-31. Quite unnecessarily, the majority considers the history and practice in other jurisdictions. Majority opinion at 33-34.

To demonstrate the absurdity of the majority s position, I emphasize two points. First, this is the very analysis employed by a plurality of the United States Supreme Court in concluding that premeditated murder and felony murder may be alternative means of proving first degree murder. See Schad, 501 U.S. at 645. While I presume that the majority would agree that such is not the case in Hawai i, it employs a test that purportedly leads to such a result.[5] Second, this court has

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[5] Notwithstanding the fact that Hawai i does not recognize the offenses of felony murder and premeditated murder, a strict application of the Schad analysis leads to such a result. The conclusion in Schad did not turn upon statutory construction, for the plurality deferred to Arizona law in this regard. Accordingly, unless the plurality s analysis of history and practice are erroneous, the Schad analysis should, in fact, lead to the conclusion that felony murder and premeditated murder are alternative means of proving the single offense of first degree murder.

This conclusion underscores that, while the majority purports to apply a Schad analysis, it does not actually do so. The majority begins its analysis, for example, with a discussion of [t]he language and history of the relevant statutory provisions[.] The foregoing is not part of theSchad analysis. See Id. at 637-645. Application of the Schad analysis would have the majority look, rather, to the history of states generally treating the statutory alternatives as alternative means. Id. The majority s inquiry of widespread practice is limited to cases from two jurisdictions. And the majority does not discuss the moral equivalence of the alternatives. Accordingly, as I read it, the majority actually relies primarily upon legislative history, as manifested in the language and history of the relevant statutory provisions, in reaching its conclusion.

With respect to Hawai i s first degree murder statute, I note that a proper application of the Schad analysis would certainly lead to the conclusion that the five means of proving the offenses enumerated in HRS § 707-701(1) (1993) are but alternative means of proving the offense of first degree murder. HRS § 707-701(1) instructs that:

> (1) A person commits the offense of murder in the first degree if the person intentionally or knowingly causes the death of:
> (a) More than one person in the same or separate incident;
> (b) A peace officer, judge, or prosecutor arising out of the performance of official duties;
> (c) A person known by the defendant to be a witness in a criminal prosecution;
> (d) A person by a hired killer, in which event both the person hired and the person responsible for hiring the killer shall be punished under this section; or

(continued...)

repeatedly recognized that it may accord greater protection to criminal defendants under the Hawai i Constitution than that conferred under the United States Constitution. See, e.g., State v. Mendoza, 82 Hawai i 143, 146, 920 P.2d 357, 360 (1996) (citing State v. Wallace, 80 Hawai i 382, 397 n.14, 910 P.2d 695, 710 n.14 (1996) (citing State v. Texeira, 50 Haw. 138, 142 n.2, 433 P.2d 593, 597 n.2 (1967))). Inasmuch as the analysis employed by the plurality in Schad concluded that the Due Process Clause of the United States Constitution does not preclude a state from employing a statute by which premeditated murder and felony murder are but alternative means of proving a single offense, I submit that Article I, sections 5 and 14 of the Hawai i State Constitution may mandate a different result.

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[5](...continued)

(e) A person while the defendant was imprisoned.

In my view, the foregoing were not intended by the legislature to be alternative means of proving first degree murder. Indeed, they have never been treated as such in this jurisdiction, and the requisite mental state for each of the foregoing offenses differs. Nevertheless, with the possible exception of subsection (1)(a), application of the Schad test -- to use the majority s word --would lead to such a result. As the Schad court noted, there is substantial historical and contemporary practice treating felony murder and premeditated murder as alternative means of satisfying a mens rea requirement of high culpability. Id. at 640. Indeed, subsections (1)(b) through (e) would certainly fall within the scope of Arizona s first degree murder statute. See infra note 3. Causing the death of a prosecutor, judge, or witness, or utilizing a hired killer also likely reflect notions of equivalent blameworthiness and culpability. Id. at 644. In sum, if the majority has really adopted Schad as the test to determine whether statutory alternatives delineate alternative means of proving a single offense, it has wrought great change upon this jurisdictions s traditional understanding of offenses set forth in the Hawai i Penal Code. If not, reference to the Schad test will continue to cause confusion in how we apply Arceo.

In sum, I fail to the see how the majority can extract from Schad an analysis utilized to determine the outside limits of a states power to define statutory alternatives as alternative means of proving a single offense, see Schad, 501 U.S. at 637, and transform that standard into the test to be applied to ascertain the intent of the Hawai i legislature in enacting the Hawai i Penal Code.[6]

II. The correct analysis for determining whether statutory alternatives constitute separate offenses or alternative means of proving a single offense

In my view, a more appropriate analysis for determining whether statutory alternatives constitute alternative means or separate offenses can be found in United States v. UCO Oil Co., 546 F.2d 833 (9th Cir. 1976), in which the United States Court of Appeals for the Ninth Circuit addressed this issue. The Ninth Circuit articulated the following four factors: (1) the language of the statute; (2) the legislative history; (3) the nature of the proscribed conduct; and (4) the appropriateness of multiple punishment for the conduct charged in the indictment. Id. at 836-37; see also State v. James, 698 P.2d 1161, 1165-67 (Alaska 1985). Applying these factors, I conclude that the alternative theories of guilt presented to the jury in the instant case represent alternative means of proving a single offense.

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[6] The analysis employed by the majority would be appropriate if the defendant in this case claimed that treating the lack of consent and the presence of ineffective consent as statutory alternative means of proving the underlying offenses with which he was charged violated his right to due process of law, as guaranteed by the fourteenth amendment to the United States Constitution. See generally Schad.

The first factor to be considered is the language of the statute itself. UCO Oil, 546 F.2d at 836. The defendant in this case was charged with numerous sexual assault offenses. HRS § 702-205 instructs that:

> The elements of an offense are such (1) conduct, (2) attendant circumstances, and (3) results of conduct, as:
> (a) Are specified by the definition of the offense, and
> (b) Negative a defense (other than a defense based on the statute of limitations, lack of venue, or lack of jurisdiction).

I agree with the majority that, pursuant to HRS § 702-205(a), the prosecution was required to prove lack of consent as an element of the offenses charged in Counts I, II, and IV. I also agree that, with respect to the offense charged in Count III, and pursuant to HRS § 702-205(b), the prosecution was required to disprove the defense of consent. HRS chapter 702 discloses two means by which the prosecution may disprove the defense of consent. On the one hand, the prosecution may demonstrate that the Complainant did not consent to the sexual contact:

> In any prosecution, the victim's consent to the conduct alleged, or to the result thereof, is a defense if the consent negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense.

HRS § 702-233 (1993). On the other hand, the prosecution may establish that any apparent consent was ineffective:

> Unless otherwise provided by this Code or by the law defining the offense, consent does not constitute a defense if:
> (1) It is given by a person who is legally incompetent to authorize the conduct alleged; or
> (2) It is given by a person who by reason of youth, mental disease, disorder, or defect, or intoxication is manifestly unable or known by the defendant to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct alleged; or
> (3) It is given by a person whose improvident consent is sought to be prevented by the law defining the

offense; or
(4) It is induced by force, duress or deception.

HRS § 702-235 (1993).

A plain reading of the foregoing reveals that the statutory alternatives are not separate offenses. HRS § 702-205 indicates that both sections 702-233 and 702-235 are alternative means by which the prosecution might prove one of three requisite elements of an offense. See HRS § 702-205. It follows that these provisions are not, themselves, an offense.

Common sense dictates a similar result. HRS §§ 702-233 and 702-235 describe mutually exclusive attendant circumstances. It should thus be impossible for the prosecution to disprove the defense of consent by one means without simultaneously rendering the alternative an impossibility. That these statutory alternatives cannot co-exist suggests that they are not independent offenses.

The second factor to be considered in determining whether statutory alternatives create separate and distinct offenses is legislative history and statutory context. UCO Oil, 546 F.2d at 837. With respect to statutory context, the various offenses recognized by the Hawai i Penal Code are set forth in HRS chapters 707 through 712. As the majority explains, HRS §§ 702-233 and 702-235 are not located within any of these chapters, but rather found in HRS chapter 702, entitled General Principles of Penal Liability. Majority opinion at 30. Presumably, had the legislature intended the foregoing statutory alternatives to

constitute independent offenses rather than alternative means of proving a single offense, they would be placed within one of the several chapters of the code defining such offenses.

Moreover, and as the majority explains, HRS §§ 702-233 and 702-235 are based on Model Penal Code section 2.11 (1962), which explains that the concept of consent must be analyzed separately in the context of the particular offenses to which they apply. Majority opinion at 30.

The third factor to be considered is the nature of the proscribed conduct itself. UCO Oil, 546 F.2d at 837. The proscribed conduct in this case is the commission of sexual assault in the second, third, and fourth degrees. Our inquiry must therefore turn on whether the nature of the proscribed conduct differs upon application of the two statutory alternatives. In this case, it does not. Both sexual assault committed in the absence of consent and sexual assault committed following ineffective consent fall well within the conventional understanding of sexual assault. In fact, for purposes of HRS § 702-205, the alternative methods of disproving the defense of consent, as defined in sections 702-233 and 702-235, merge into the statutory definition of the underlying criminal offense as attendant circumstances. As the majority explains, it is not significant that the jury may have reached different conclusions regarding whether Complainant did not consent or any apparent consent was ineffective, i.e., meaningless, because such differences do not reflect disagreement as to the specific

incident charged. Majority opinion at 34.

The fourth factor concerns the appropriateness of multiple punishment for the conduct charged in the indictment. UCO Oil, 546 F.2d at 837. Inasmuch as the absence of consent and the presence of ineffective consent are mutually exclusive concepts, this factor is not implicated in the instant case. Moreover, principles of double jeopardy would undoubtedly preclude a defendant punished for committing sexual assault absent consent from being prosecuted for the same incident, alleging on the second go-around the presence of ineffective consent, and vice versa. Blockburger v. United States, 284 U.S. 299 (1932); State v. Lessary, 75 Haw. 446, 865 P.2d 150 (1994).

III. Conclusion

For the foregoing reasons, I agree with the majority that the alternative theories of absence of consent and ineffective consent do not represent separate crimes, but rather alternative means of proving the attendant circumstance element of a single crime. Therefore, while I do not join section III.B.2.a. of the opinion, I concur with the majority s disposition of this appeal.