CONCURRING OPINION BY RAMIL, J.,
IN WHICH NAKAYAMA, J., JOINS

Consistent with my dissenting opinion in State v. Jumila, 87 Hawaiʻi 1, 950 P.2d 1202 (1998), I agree that this court's holding in Jumila should be overruled, and accordingly, the circuit court's denial of Brantley's HRPP Rule 35 motion should be affirmed. I am compelled to write separately for two reasons. First, I cannot agree with the plurality's decision not to consider the subsequent legislative history of the 1999 amendment. Second, I do not wholly agree with the double jeopardy analysis as laid out by Justice Levinson in his concurring opinion.

The plurality writes, "In this appeal, the State points to legislative history of a 1993 amendment to the statute -- which established the version at issue in this case -- and suggests that the legislature was aware that persons were being convicted of both offenses and approved of the practice." Plurality at 8-9. The plurality then proceeds to examine the 1993 House Standing Committee Report No. 472, the 1993 Senate Standing Committee Report No. 1217, and the 1993 Conference Committee Report No. 12. When the court decided Jumila in 1998, it had each of these pieces of legislative history available to it. In 1998, the Jumila majority held that it "found no indications in the language of HRS § 134-6(a) or the legislative history preceding its original enactment in 1990 to suggests [sic.] that the legislature intended that an individual could be

convicted of both an HRS § 134-6(a) offense and its underlying felony or that the legislature otherwise intended to create an exception to HRS § 701-109." Jumila, 87 Hawaiʻi at 5, 950 P.2d at 1206. The Jumila majority even quoted the 1993 Senate Standing Committee Report in its footnote nine. Id. at 5 n.9, 950 P.2d at 1205 n.9. In light of this, I cannot understand how the plurality has elected not to consider the subsequent legislative history. See plurality at 16 ("In light of our decision to overrule Jumila, we need not consider, as the State urges, whether the subsequent legislative history of the 1999 amendment to the statute would shed further light on the legislature's earlier intent in enacting HRS § 134-6(a).").

"[W]e have often held that 'subsequent legislative history or amendments' may be examined in order to confirm our interpretation of statutory provisions." Bowers v. Alamo Rent-A-Car, Inc., 88 Hawaiʻi 274, 282, 965 P.2d 1274, 1282 (1998) (Ramil, J., concurring) (citing Keliipuleole v. Wilson, 85 Hawaiʻi 217, 225, 941 P.2d 300, 308 (1997); State v. Ganal, 81 Hawaiʻi 358, 372, 917 P.2d 370, 384 (1996); Pacific Int'l Servs. Corp. v. Hurip, 76 Hawaiʻi 209, 217, 873 P.2d 88, 96 (1994); Franks v. City & County of Honolulu, 74 Haw. 328, 340 n.6, 843 P.2d 668, 674 n.6 (1993)).

The 1999 Senate Standing Committee report states in relevant part:

> Your Committee finds that the clarification in the law is necessary due to a recent Hawaiʻi Supreme Court case, State v. Jumila, 87 Haw. 1 (1998), in which the Court held

> that the offense of carrying or using a firearm in the commission of a felony was not punishable as a separate offense from the underlying felony. In Jumila, the majority and the dissent agreed that the legislature could, if desired, permit the conviction and sentencing for both as to whether the legislature has done so. The majority found that there was insufficient legislative history to conclude that the legislature had intended separate convictions and sentencing. The dissent disagreed, however, citing prior case law and language in committee reports indicating that carrying or using a firearm in the commission of a felony could be charged in addition to the underlying offense.
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> Your Committee agrees with the dissent[.]

Sen. Stand. Comm. Rep. No. 843, in 1999 Senate Journal, at 1296. In my view, this report clearly supports the plurality's holding that "the legislature intended to permit convictions of both HRS § 134-6(a) and the separate felony at the time of Brantley's conviction." Plurality at 16. In fact, there is no piece of legislative history that more convincingly confirms our overruling of Jumila. Accordingly, I disagree with the plurality's decision not to consider the subsequent legislative history of the 1999 amendment.

I also write separately because I do not wholly agree with the double jeopardy analysis as laid out by Justice Levinson in his concurring opinion, see Levinson, J., concurring at 3-6, and as adopted by the plurality in its footnote. See plurality at 16 n.8.

In Jumila, the majority reasoned that, "by virtue of the statutory definition of HRS § 134-6(a), the felony underlying an HRS § 134-6(a) charge will always be 'established by proof of the same or less than all the facts required to establish the commission of the' HRS § 134-6(a) offense. Consequently, the felony underlying an HRS § 134-6(a) offense is, as a matter of

law, an included offense of the HRS § 134-6(a) offense." State v. Jumila, 87 Hawai‘i 1, 3, 950 P.2d 1201, 1203 (1998). Justice Levinson's concurring opinion would accordingly be applicable to the holding by the Jumila majority. In the present case, however, because the plurality now holds that "a defendant can be convicted of both HRS § 134-6(a) and the separate [underlying] felony," plurality at 7, a "lesser included offense" analysis is misplaced.

As I stated in my dissent in Jumila:

> The first step in the double jeopardy analysis is to determine whether the legislature intended that each violation be a separate offense. If the legislature, as expressed in the language of the statute or its legislative history, clearly intended cumulative punishment under two different statutory provisions, the imposition of multiple punishment does not violate the Double Jeopardy Clause and the court's inquiry is at an end.

Jumila, 87 Hawai‘i at 11, 950 P.2d at 1211 (Ramil, J., dissenting, joined by Nakayama, J.) (citing United States v. Lanzi, 933 F.2d 824 (10th Cir. 1991)); internal citations omitted). Because we have, in the present case, determined that the legislature intended that HRS § 134-6(a) and the underlying felony each be treated as separate offenses, our double jeopardy inquiry is at an end. Therefore, to the extent that the plurality and concurrence continue to cling to the "lesser included offense" analysis of Jumila, I respectfully disagree.