CONCURRING OPINION BY LEVINSON, J.

I join in the decision of the plurality opinion to "overrule our holding in State v. Jumila, 87 Hawai'i 1, 950 P.2d 1201 (1998), that a defendant cannot be convicted of both HRS § 134-6(a) and its separate felony," plurality opinion at 19, "except, of course, as provided in the statute itself," id. at 16, "and [to] affirm the order of the circuit court denying Brantley's HRPP Rule 35 motion." Id. at 19. I write separately, however, to emphasize that the aspect of Jumila that we are overruling is strictly limited to our mistaken view that there was "not sufficient basis in the language or legislative history of HRS § 134-6(a) to conclude that the legislature . . . desired [to] create an exception to the statutory prohibition set forth in HRS § 701-109[1] against convictions for both an offense and an offense included therein," Jumila, 87 Hawai'i at 4-5, 950 P.2d at 1204-05, and to underscore -- as a general proposition -- that the Jumila analysis regarding the foregoing "statutory prohibition" remains good law. Indeed, it must remain good law by virtue of the right against double jeopardy, as guaranteed by

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[1] HRS § 701-109 (1993) provides in relevant part:

> **Method of prosecution when conduct establishes an element of more than one offense.** (1) When the same conduct of a defendant may establish an element of more than one offense, the defendant may be prosecuted for each offense of which such conduct is an element. The defendant may not, however, be convicted of more than one offense if:
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> (a) One offense is included in the other, as defined in subsection (4) of this section[.]
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> (4) A defendant may be convicted of an offense included in an offense charged in the indictment or information. An offense is included when:
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> (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged[.]

(Emphases added.)

the United States and Hawai‘i Constitutions.[2] Accordingly, I will undertake in this opinion to elaborate upon what the plurality opinion does not overrule.

I wish to emphasize at the outset that my thesis -- which seems to elude Justice Acoba -- is a narrow one. While we are free to afford greater protections to individuals under article I, section 10 of the Hawai‘i Constitution than are perceived in the fifth amendment to the United States Constitution, see supra note 2, we are not free to construe HRS § 701-109 in such a way as to run afoul of the minimum protections afforded by the fifth amendment's double jeopardy clause. See State v. Richie, 88 Hawai‘i 19, 42, 960 P.2d 1227, 1250 (1998) ("[W]hen departing from the federal standard, this court must at least provide the minimum level of protection required by the federal interpretation of the United States Constitution." (Citing State v. Quino, 74 Haw. 161, 170, 840 P.2d 358, 362, reconsideration denied, 74 Haw. 650, 843 P.2d 144 (1992), cert. denied, 507 U.S. 1031 (1993), and State v. Texeira, 50 Haw. 138, 142 n.2, 433 P.2d 593, 597 n.2 (1967).)). That is why, at the very least, our construction of HRS § 701-109 must not be more restrictive than the United States Supreme Court's

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[2] The double jeopardy clause of the fifth amendment to the United States Constitution, made applicable to the states through the fourteenth amendment, see Benton v. Maryland, 395 U.S. 784 . . . (1969), provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb[.]" Analogously, article I, section 10 of the Hawai‘i Constitution provides that no person "shall . . . be subject for the same offense to be twice put in jeopardy[.]" We have not always construed the two clauses as coterminous. See, e.g., State v. Lessary, 75 Haw. 446, 457-59, 865 P.2d 150, 155-56 (1994) (ruling that interpretation given to double jeopardy clause of fifth amendment by United States Supreme Court does not adequately protect individuals from being "subject for the same offense to be twice put in jeopardy," thus requiring additional protections under Hawai‘i Constitution).

State v. Quitoq, 85 Hawai‘i 128, 130 n.2, 938 P.2d 559, 561 n.2 (1997) (brackets in original).

view of the minimum protections that the federal double jeopardy clause imposes. Accordingly, regardless of whether we grounded the Jumila analysis solely in principles of statutory construction, we cannot, for present purposes, ignore federal constitutional imperatives.[3] That is also why Justice Acoba's discourse on the differences between federal and Hawai'i double jeopardy jurisprudence, while interesting, is not germane to my analysis.

This court has

> often recognized that there are three separate and distinct aspects to the protections offered by the double jeopardy clause. Double jeopardy protects individuals against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense.

State v. Quitog, 85 Hawai'i 128, 141, 938 P.2d 559, 572 (1997) (quoting State v. Ontiveros, 82 Hawai'i 446, 450, 923 P.2d 388, 392 (1996)) (internal citations and quotation signals omitted) (emphases added); see also State v. Rogan, 91 Hawai'i 405, 416, 984 P.2d 1231, 1242 (1999). The federal view of the range of protections afforded by the fifth amendment is the same. See, e.g., Jones v. Thomas, 491 U.S. 376, 380-81 (1989) (characterizing the third protection as being "against 'multiple punishments for the same offense' imposed in a single proceeding") (emphasis added)); United States v. Halper, 490 U.S. 435, 440 (1989); North Carolina v. Pearce, 395 U.S. 711, 717 (1969). "It is clear that . . . it [was] the third protection -- [i.e., that against] multiple punishments -- that [was]

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[3] My point is not that "our [state constitutional] double jeopardy analysis must meet minimal standards established under the federal constitution," as Justice Acoba suggests, although that point is certainly correct. My point is that HRS § 701-109 must, at the very least, comport with those "minimal standards." If the core Jumila analysis were overruled, the statute would not so comport.

implicated" in Jumila. Jumila, 87 Hawai'i at 10, 950 P.2d at 1210 (Ramil, J., joined by Nakayama, J., dissenting).

Consistent with the constitutional protection against multiple punishments for the same offense, the United States Supreme Court has been steadfast in its view that "with respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause . . . prevent[s] the sentencing court from 'prescribing greater punishment than the legislature intended.'" Missouri v. Hunter, 459 U.S. 359, 366 (1983); see also Rutledge v. United States, 517 U.S. 292, 297 (1996); Jones, 491 U.S. at 381; Brown v. Ohio, 432 U.S. 161, 165 (1977). Moreover, the United States Supreme Court "presume[s] that 'where two statutory provisions proscribe the "same offense,"' 'a legislature does not intend to impose two punishments for that offense,'" Rutledge, 517 U.S. at 297 (quoting Whalen v. United States, 445 U.S. 684, 691-92 (1980)), but, rather, "intend[s] to authorize only one punishment." Id. at 307. "[T]he presumption against allowing multiple punishments for the same crime may be overcome" only "if [the legislature] clearly indicates that it intended to allow courts to impose them." Id. at 303 (citations omitted) (emphasis added). Put differently, "'where two statutory provisions proscribe the "same offense," they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent'" or "'unless elsewhere specially authorized by [the legislature].'" Hunter, 459 U.S. at 366-67 (quoting Whalen, 445 U.S. at 691-93) (emphases in original).

Because the HRS § 701-109(1)(a) prohibition against convictions for both a lesser included and the greater offense is grounded in the double jeopardy clause of the Hawai'i Constitution, Quitoq, 85 Hawai'i at 130 n.4, 938 P.2d at 561 n.4,

it is noteworthy that it is federal double jeopardy law that, "[a]s is invariably true of a greater and lesser included offense, . . . [t]he greater offense is . . . by definition the 'same' for purposes of double jeopardy as any lesser offense included in it." Brown, 432 U.S. at 168; see also Rutledge, 517 U.S. at 307. That being the case,

> the Double Jeopardy Clause prohibits a State or the Federal Government from trying a defendant for a greater offense after it has convicted him of a lesser included offense. . . . [O]ne convicted of the greater offense may not be subjected to a second prosecution on the lesser offense, since that would be the equivalent of two trials for "the same offense." . . . [T]he sequence of the two trials for the greater and the lesser offense is immaterial, and trial on a greater offense after conviction on a lesser ordinarily is just as objectionable under the Double Jeopardy Clause as the reverse order of proceeding.

Jeffers v. United States, 432 U.S. 137, 150-51 (1977) (citations and footnotes omitted). With respect to greater and lesser included offenses, the Jeffers principles obviously apply to multiple convictions and sentences imposed in a single trial. See Rutledge, 517 U.S. at 297; Jones, 491 U.S. at 381; Hunter, 459 U.S. at 366; Brown, 432 U.S. at 165.

In State v. Christian, 88 Hawai'i 407, 967 P.2d 239 (1998), this court relied on the Jumila analysis in unanimously reversing a defendant's conviction of and sentence for the offense of "use of a deadly or dangerous weapon in the commission of a crime," in violation of HRS § 134-51(b) (1993), where, in the same proceeding, the defendant had, inter alia, also been convicted of second degree murder.[4] In so doing, we ruled as follows:

> HRS § 134-51(b), . . . which [the defendant] was convicted of violating in Count II, is a class C felony. And, analogously to HRS § 134-6(a), "the [crime] underlying

[4] HRS § 134-51(b) provides that "[w]hoever knowingly possesses or intentionally uses or threatens to use a deadly or dangerous weapon while engaged in the commission of a crime shall be guilty of a class C felony." HRS § 134-51(b) is unencumbered by the legislative history that the opinion of the court describes in connection with HRS § 134-6(a). See opinion of the court at 9-16.

> an HRS § [134-51(b)] charge will always be 'established by proof of the same or less than all the facts required to establish the commission of the' HRS § [134-51(b)] offense." Jumila, 87 Hawai'i at 3, 950 P.2d at 1203. Consequently, as is true with respect to felonies underlying HRS § 134-6(a) offenses, "the [crime] underlying an HRS § [134-51(b)] offense is, as a matter of law, an included offense of the HRS § [134-51(b)] offense," within the meaning of HRS § 701-109(4)(a), and [the defendant] "should not have been convicted of both the HRS § [143-51(b)] offense and the underlying second degree murder offense." Id. at 2-3, 950 P.2d at 1202-03 (footnote omitted).
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> . . . [B]ecause [the defendant's] conviction of Count II (use of a deadly or dangerous weapon in the commission of a crime) and simultaneous conviction of Count I [(second degree murder)] is barred under the rationale of this court's opinion in Jumila, [the defendant's] conviction of and sentence in connection with Count II is reversed.

Christian, 88 Hawai'i at 432-33, 967 P.2d at 264-65 (some brackets added and some in original).

Precisely because the HRS § 701-109(1)(a) prohibition against convictions for both a lesser included and the greater offense is grounded in the double jeopardy clause of the Hawai'i Constitution, which may not be more restrictive than the double jeopardy clause of the fifth amendment to the United States Constitution, the core Jumila analysis and Christian retain their vitality.