DISSENTING OPINION OF ACOBA, J.

With all due respect, I believe that the plurality's decision-making methodology violates fundamental precepts that should guide our decisions. Because it is probable that similar questions will confront us in the future, I set out my concerns in detail.

I disagree with the decision to overrule State v. Jumila, 87 Hawai'i 1, 950 P.2d 1201 (1998) (holding on "plain language" grounds that a defendant cannot be convicted of both Hawai'i Revised Statutes (HRS) § 134-6(a) and the underlying separate felony), inasmuch as (1) there is no "compelling justification" for doing so, see State v. Garcia, 96 Hawai'i 200, 29 P.3d 919 (2001), and (2) contrary to the plurality's assertion, the legislative history of the 1993 amendment to HRS § 134-6(a) was previously considered by the Jumila court. I further disagree that subsequent legislative history of HRS § 134-6(a), as urged by Plaintiff-Appellee State of Hawai'i (the prosecution) and relied on by the circuit court of the second circuit (the court), is another basis for overruling Jumila.

In my view, this case should be remanded to the trial court to provide the parties the opportunity to brief, present evidence, and argue the question of whether dual convictions under HRS § 136-4(a) and its predicate felony violate constitutional double jeopardy principles. That question was left unanswered by the Jumila majority. The terse statement in

footnote 8 of the plurality opinion and the reference to general double jeopardy principles in the concurring opinion of Justice Levinson do not elucidate in any cogent way the plurality's conclusion that double jeopardy is not implicated in a case of this nature -- a matter undecided in our case law and not raised or argued by the parties in this appeal. Because Defendant-Appellant Mark A. Brantley (Defendant) relied entirely on the statutory analysis in Jumila, and because at that point Jumila was good law, he should be allowed to demonstrate why, if Jumila is no longer controlling, constitutional double jeopardy principles would preclude the affirmance entered by the plurality in this case.[1]

I.

While I agree that precedent may be overruled for compelling reasons, see Garcia, 96 Hawai'i at 206, 29 P.3d at 925, such reasons are not present in the plurality's opinion.

A.

To provide some background, Defendant was sentenced, inter alia, to life in prison for murder in the second degree, HRS § 707-701.5, and to twenty years for carrying or use of a firearm in commission of a separate felony, HRS § 134-6(a).

[1] As stated infra, Jumila was not premised on double jeopardy grounds. Therefore, Defendant's reliance on Jumila did not encompass a double jeopardy argument.

Judgment was filed on March 6, 1997, and became effective as of February 27, 1997. No appeal was taken from the judgment.[2]

On February 3, 1998, this court decided Jumila. Like Defendant, in Jumila, the defendant was convicted of murder in the second degree, HRS § 707-701.5(1), and carrying or using a firearm in the commission of a separate felony, HRS § 134-6(a), the felony being the second degree murder. See 87 Hawai'i at 1-2, 950 P.2d at 1201-02. Jumila was sentenced to a mandatory minimum term of imprisonment pursuant to HRS § 701-660.1(1)(a), for the use of a firearm during the commission of a murder. See 87 Hawai'i at 2, 950 P.2d at 1201-02. Following the imposition of sentence, Jumila filed a motion to reduce and correct illegal sentence pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 35,[3] which the circuit court denied. See id.

B.

Jumila appealed, contending that (1) the second degree murder charge was an included offense of the HRS § 134-6(a)

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[2] Defendant had appealed the original sentence in this case, the details of which are not relevant to this proceeding. The sentence discussed herein refers to the final sentence, rendered and imposed after remand from the Intermediate Court of Appeals (ICA). See State v. Brantley, 84 Hawai'i 112, 929 P.2d 1362 (App. 1996).

[3] At his sentencing hearing, Jumila argued that if a mandatory minimum term of imprisonment was imposed, then HRS § 701-109(1)(a) and (4)(a) (1993) would prohibit the imposition of separate sentences for each offense. See Jumila, 87 Hawai'i at 1-2, 950 P.2d at 1201-02. The circuit court sentenced Jumila to (1) life imprisonment with the possibility of parole on the second degree murder charge, (2) an indeterminate term of imprisonment with the possibility of parole for the HRS § 134-6(a) charge, and (3) a mandatory minimum sentence of fifteen years on the second degree murder charge pursuant to HRS § 701-660.1(1)(a). See id.

charge, pursuant to HRS § 701-109(4)(a), because he was sentenced to the mandatory minimum term under HRS § 706-660.1(a) for using a firearm during the murder and (2) the imposition of "dual punishment" under HRS § 134-6(a) and HRS § 706-660.1(a) violated his constitutional right against double jeopardy. Jumila, 87 Hawai'i at 2, 10, 950 P.2d at 1202, 1210. A majority of this court agreed with Jumila's first contention, holding that "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." Id. at 3, 950 P.2d at 1203. At that time, HRS § 134-6(a) (1993) provided in pertinent part as follows:

> It shall be unlawful for a person to knowingly carry on the person or have within the person's immediate control or intentionally use or threaten to use a firearm while engaged in the commission of a separate felony, whether the firearm was loaded or not, and whether operable or not; provided that a person shall not be prosecuted under this subsection where the felony is:
>
> (1) A felony offense otherwise defined by this chapter[.]

(Emphasis added.) The majority asserted that "the legislature could, if it desired, create an exception to the statutory prohibition set forth in HRS § 701-109 against convictions for both an offense and an offense included therein . . . [, but] there is not sufficient basis in the language or legislative history of HRS § 134-6(a) to conclude that the legislature so desired." Jumila, 87 Hawai'i at 4-5, 950 P.2d at 1204-05 (emphasis added). Reasoning that "[b]ecause the felony underlying an HRS § 134-6(a) offense is an included offense of the HRS § 134-6(a) offense, pursuant to HRS § 701-109(1)(a)," the

majority there held that "Jumila should not have been convicted of both the HRS § 134-6(a) offense and the underlying second degree murder offense." Id. at 3, 950 P.2d at 1203. It was decided that the conviction and sentence for one of the two offenses, use of a firearm in the commission of a separate felony pursuant to HRS § 134-6(a), should be reversed, and the other, second degree murder pursuant to HRS § 707-701.5(1), affirmed.[4] See id. The majority did not reach Jumila's double jeopardy claim.

The Jumila dissent maintained that (1) second degree murder was not an included offense of carrying or use of a firearm because it perceived from legislative history that the legislature intended to allow simultaneous convictions for both HRS § 134-6(a) and the underlying felony, see id. at 10, 950 P.2d at 1204 (Ramil, J., dissenting), and (2) double jeopardy would prohibit the imposition of cumulative punishments under both HRS § 134-6(a) and HRS § 770-660.1 when based upon the same underlying felony, and, thus, the trial court should not have imposed both an indeterminate twenty-year term of imprisonment under HRS § 706-659 and a fifteen-year mandatory minimum sentence under HRS § 706-660.1. See id. at 14, 950 P.2d at 1214.

[4] Determining that Jumila should not have been convicted of both offenses, see 87 Hawai'i at 3, 950 P.2d at 1203, the majority stated that "it would be manifestly unfair to the prosecution and to the public to reverse the second degree murder conviction simply because it was the included offense[,]" id. at 4, 950 P.2d at 1204.

II.

On January 12, 1999, Defendant filed, in the instant case, a motion pursuant to HRPP Rule 35, arguing, in essence, that the Jumila decision required the court to reverse Defendant's HRS § 134-6(a) conviction and sentence because Jumila and Defendant were similarly situated. Initially, the hearing on the motion was scheduled for January 19, 1999. On January 19, 1999, the parties stipulated to a continuance until February 4, 1999, at the request of the prosecution. The prosecution filed a memorandum in opposition to Defendant's motion on February 3, 1999, referring to a possible legislative amendment to § 134-6(a).

> [T]he current 1998-1999 legislative session will be considering a bill which would clarify the legislature's intent to allow independent convictions for both HRS §134-6(a) and any enumerated included offense. According to commentators, the likelihood of the bill's passage is high.

The prosecution also maintained that (1) relying upon State v. Ikezawa, 75 Haw. 210, 857 P.2d 593 (1993), and State v. Okuno, 81 Hawai'i 226, 915 P.2d 700 (1996), the Jumila interpretation of HRS § 134-6(a) should not be retroactively applied to Defendant's case, (2) there would be no appreciable benefit to Defendant if the 134-6(a) charge were reversed, because Defendant was already serving concurrent prison terms for other felonies, and (3) it would be unable to resurrect the charge if the court dismissed the HRS § 134-6(a) count under Jumila and the legislature

subsequently passed the pending bill.[5] In connection with its last position, the prosecution indicated that "if the [court] is inclined to grant the Defendant's motion[,] . . . the hearing be postponed till [sic] after the current legislative session in order that the issue of the pending HRS § 134-6(a) bill may be resolved." The court heard Defendant's motion on February 14, 1999, but continued the hearing for six months to await the legislature's action:

> THE COURT: . . . [T]he question is whether to retroactively apply a Supreme Court decision regarding the issue of a lesser included offense.
>
> After reviewing this matter and thinking about it, I'm going to continue the hearing on this for six months because I think since this very matter is again before the legislature, and because of the filial relationships of these two offenses, I'm going to -- I want to see what the legislature is going to do before I make a decision to retroactively apply the ruling in the case.
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> It's a close question as to whether I should do it in the first place, but I want to see what the legislature is going to do.
>
> If they change the law so that it's not going to be applied in the manner which the cited case law indicates it is now, then I won't make any change. If they do, then I'll go back and evaluate the matter, whether it should be retroactively applied.
>
> [PROSECUTION]: As I pointed out in the case law, the Court always has the discretion to retroactively apply a particular decision, a judicial decision, and in this particular case there is other reasons besides the fact that the legislature may take action that I think warrants the Court in not taking any action at all.
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> [DEFENSE COUNSEL]: Let me put on the record my objection to continuing the matter. It's been continued once.
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> THE COURT: It has?
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> [DEFENSE COUNSEL]: Yeah, we stipulated to a continuance so that [the prosecution] would have time to research this issue. It was originally set in January, I believe.
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> . . . .
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> THE COURT: I'll continue this two weeks and the State will make the filing within one week from today, and that gives you a week to file something in response.

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[5] The prosecution appeared to be under the mistaken impression that the 1999 amendment would apply to Defendant's case, see discussion infra, and that deciding the motion prior to the passage of the amendment would somehow prejudice it.

> . . . .
> . . . I want to see what the language of the statute is. I don't know, I might change my mind.
> I want to continue this hearing.
> [CLERK]: So March 2nd, 8:00 a.m.
> THE COURT: So I'm going to leave it as my inclination to continue it until after the legislature addresses this, but I think it's a fair point that we should actually look at the bill, and especially since the movant, you know, got short notice on the responding memorandum.

(Emphases added.) Subsequently, Defendant and the prosecution submitted briefs pursuant to the court's request. Defendant argued inter alia that the case should not be continued any further because Jumila was "the law":

> There is no valid reason for continuing this Motion any further. After the hearing on March 2, 1999, this Court should not delay making a decision thereon. This Motion has already been continued twice, due to no fault of Defendant.
> Currently, State v. Jumila, supra[,] is the law of the land. The Motion was made and is being heard while State v. Jumila is the law of the land. This Honorable Court should render a decision thereon expeditiously. We do not even have any idea whether this law will change.

In response, the prosecution urged that the court should continue the matter because the legislation would "nullif[y]" Jumila:

> [T]he State would submit that the prejudice it would suffer is unique in at least one aspect; time sensitive legislative events are pivotal. If Senate Bill 1122, which nullifies Jumila, is passed by the legislature after the Court grants the Defendant's motion, the State would be irrevocably prejudiced. The State could not undo this Court's action in reversing a conviction and dismissing a charge.
> Although the Defendant urges this Court not to delay a decision on his motion, the conservative and perhaps most pragmatic course would be for the Court to delay its ruling till [sic] late summer. A delay does not prejudice the Defendant and resolves the question of Senate Bill 1122's fate.

(Emphases added.) On March 2, 1999, the court again continued the matter to await legislative action, opining, in opposition to the Jumila holding, that, in its view, the legislature had not intended to treat murder as a lesser included offense of the firearm charge.

> THE COURT: The Court's view is that the legislature did not intend it to be a lesser included offense. I understand the Supreme Court's ruling. I see the legislature is attempting at the present moment to correct this, and I think -- I don't see any prejudice to [Defendant] for waiting a few months to see if it does.
>
> This will affect the Court's view on retroactivity certainly. So I'm going to continue this matter for 90 days.
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> . . . .
>
> Is that enough time? When is the legislature over? Okay. 90 days ought to do it.
>
> [CLERK]: So this matter will be continued to June 8th at 8:00 a.m.

(Emphases added.)

On April 13, 1999, Senate Bill No. 1122 was signed into law as Act 12. See 1999 Haw. Sess. L. Act 12, at 12. Act 12 amended HRS § 134-6 (Supp. 1998) to include the following language:

> A conviction and sentence under subsection (a) or (b) shall be in addition to and not in lieu of any conviction and sentence for the separate felony; provided that the sentence imposed under subsection (a) or (b) may run concurrently or consecutively with the sentence for the separate felony.

HRS § 134-6 (Supp. 2001) (emphasis added). The Act became effective on April 13, 1999, but provided that "[t]his Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date." 1999 Haw. Sess. L. Act 12, § 2, at 12 (emphasis added).

After learning that Act 12 had been signed into law, the prosecution moved to advance the hearing date. The court agreed and advanced the hearing date "for decision" to May 18, 1999.

At the hearing on May 18, 1999, the prosecution argued that as a result of Act 12, the legislature's "intent" as to HRS

§ 134-6(a) "was, in fact, clarified" and Jumila was now "moot":

> The issue is that particular decision[, Jumila]. Jumila . . . was valid for a little over 14 months. [Defense counsel] filed the [motion] . . . on January 12th of this year, and Act 012, which basically vitiates the Jumila decision, became law on April 13, 1999.
>
> In other words, Section 134-6(a) was, in fact, clarified by the legislature, or at least the legislature's intent, in regards to that particular statute, was clarified three months after the filing of the defendant's motion.
>
> Basically, the State's position is that there has been a prejudice to the State. Should the motion be granted, that prejudice briefly lies in the damage to the concepts of fairness and justice if [the victim]'s killer, who is [Defendant], were to have his sentence diminished by the retroactive application of what is now a moot decision on the part of the Supreme Court in State versus Jumila.

(Emphases added.) Finding Jumila's interpretation "faulty," "no question" of what the prior legislature had intended, and that the present legislature had "clarified" the statute, the court rejected Defendant's request to apply Jumila retroactively.

> Then when the Supreme Court addressed [§ 134-6(a)] in the Jumila case, it found that, in fact, because of the way the law was drafted and passed by the legislature, that technically it actually qualified . . . as a lesser included offense, so conviction of that and the greater offense was not correct, and actually that was a later case.
>
> So, then you brought your motion and said, well, given that the Court ought to consider retroactively applying that decision and applying it to [Defendant's] case. But looking at the Ik[e]zawa case, which basically says that this is a discretionary call with the Court, I looked through the factors there. One of them is the effect on the administration of justice of a retroactive application of the new standards, clearly, appears to me this was the Supreme Court's efforts to interpret a statute passed by the legislature which basically was faulty.
>
> No question what the intent of the legislature was, and that was to make it a separate crime if you use a weapon, a gun in this type of crime. And so I think that to apply this retroactively would not be in the interest of justice.
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> . . . .
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> [DEFENSE COUNSEL]: I just want to get clarification from the Court.
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> Is the Court deciding this motion on the law prior to SB 1120?
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> THE COURT: Actually I just didn't think it was appropriate application and the fact that the legislature changed it, clarified it, that's exactly what they meant. I took that into consideration. That was my decision.

(Emphases added.) On May 25, 1999, the court entered its order denying Defendant's motion and Defendant appealed.

On appeal, Defendant contends that the court had no choice but to apply Jumila retroactively and to grant Defendant's motion to correct the illegal sentence. The prosecution argues that (1) the court did not abuse its discretion when it determined that Jumila did not apply retroactively to Defendant's motion, or, in the alternative, (2) that this court should overrule the Jumila decision. As is evident, the plurality agrees that the Jumila decision should be overruled. See Plurality opinion at 3.

III.

A.

Upon its publication in 1998, Jumila became precedent. As we recently observed in Garcia,

> [p]recedent is an adjudged case or decision of a court, considered as furnishing an example of authority for an identical or similar case afterwards arising or a similar question of law. The policy of courts to stand by precedent and not to disturb settled points is referred to as the doctrine of stare decisis, and operates as a principle of self-restraint with respect to the overruling of prior decisions. The benefit of stare decisis is that it furnishes a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise[,] eliminates the need to relitigate every relevant proposition in every case[,] and maintains public faith in the judiciary as a source of impersonal and reasoned judgments.

96 Hawai'i at 205, 29 P.3d at 924 (internal quotation marks, citations, and ellipsis points omitted). See also Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989) ("[S]tare decisis

ensures that the law will not merely change erratically and permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals." (Citations and quotation marks omitted.)), superseded by statute on other grounds as stated in Landgraf v. USI Film Prods., 511 U.S. 244 (1994).

Discussing the standard for overruling precedent, Garcia also decided that, "[w]hile there is no necessity or sound legal reason to perpetuate an error under the doctrine of stare decisis, we agree with the proposition expressed by the United States Supreme Court that a court should 'not depart from the doctrine of stare decisis without some compelling justification.'" 96 Hawai'i at 206, 29 P.3d at 925 (quoting Hilton v. South Carolina Pub. Rys. Comm'n, 502 U.S. 197, 202 (1991) (some internal quotation marks and citations omitted). In that connection, it was stated that "considerations of stare decisis have special force in the area of statutory interpretation . . . [where] the legislative power is implicated, [because] the legislative branch remains free to alter what we have done." Id. (quoting Hilton, 502 U.S. at 202) (internal quotation marks and citation omitted)) (brackets omitted). Inasmuch as HRS § 134-6 was subject to legislative amendment following Jumila, considerations of stare decisis weigh heavily in favor of preserving Jumila as precedent. It is within this framework that this case must be evaluated.

B.

The plurality's "compelling justification" for overruling Jumila is based on legislative history from the 1993 amendment which, it contends, this court did not consider in Jumila. But, in Jumila, this court stated that it was the plain language of § 134-6 that prohibited dual convictions. See Jumila, 87 Hawai'i at 5, 950 P.2d at 1205 ("[W]e must abide by the plain language of HRS §§ 134-6(a) and 701-109, which, as discussed above, prohibits the conviction of a defendant for both an HRS § 134-6(a) offense and its underlying felony."). The plurality in its present approach decides, however, that the language in § 134-6(a) is not plain after all, and that "the 1993 amendment illuminate[d] an ambiguity in HRS § 134-6(a)[.]" Plurality opinion at 10. This proposition rests on what is said to be several "unconsidered" standing committee reports indicating that "the legislature intended to allow dual convictions whenever the separate felony was not one of the designated offenses."[6] Plurality opinion at 11 (emphases in original).

Contrary to this assertion, however, the Jumila court did consider the 1993 legislative history, but did not find such

[6] These reports refer to "enhanced penalties for the use of a firearm" and appear to better support an interpretation that the legislature was attempting to avoid double jeopardy violations. See Sen. Stand. Comm. Rep. No. 1217, in 1993 Senate Journal, at 1210 ("[T]his bill will correct the overreaching effect of section 134-6, which allows the prosecutor to apply this section to offenses that already have enhanced penalties for the use of a firearm[.]"); Conf. Comm. Rep. No. 12, in 1993 House Journal, at 880 ("The purpose of this bill is to amend [HRS § 134-6] to clarify that this section was not intended to apply to certain felonies, that already have enhanced penalties for identical conduct.").

history persuasive. The dissent reviewed the legislative history of § 134-6(a), see 87 Hawai'i at 7, 950 P.2d at 1207 (Ramil, J., dissenting), as well as the text of § 134-6(a), see id. at 8, 950 P.2d 1208. Citing to a Standing Committee Report relating to the 1993 version of § 134-6, the dissent found the legislature intended to allow punishment for both the firearm charge and the separate underlying offense. See id. at 7, 950 P.2d at 1207. Responding to this view, the majority rejected the legislative history on which the plurality now purports to rely:

> We agree [with the dissent] that the legislature could, if it desired, create an exception to the statutory prohibition set forth in HRS § 701-109 against convictions for both an offense and an offense included therein. In our view, however, there is not sufficient basis in the language or legislative history of HRS § 134-6(a) to conclude that the legislature so desired.
>
> We have 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.

Id. at 5, 950 P.2d at 1204-05 (emphasis added). Because this court had access to the legislative history of § 134-6(a) and stated expressly that this history was considered, there is no "unconsidered" legislative history that provides new support for overturning Jumila.

As observed by Justice Ramil in the instant case, the Jumila majority did not, in fact, "overlook" the legislative history that the instant plurality relies upon. Concurring opinion of Ramil, J., at 1-2. The enumerated exceptions listed in HRS § 134-6(a) that the plurality uses to support its

interpretation were considered by the Jumila majority, but disregarded. See id. Moreover, the Jumila majority quoted from a committee report that the instant plurality now deems unconsidered. See id. at 2.

IV.

As a basis for annulling Jumila, the prosecution urges a reliance on a legislative committee report of the 1999 legislature purporting to clarify that the 1993 legislature had, in HRS § 134-6, intended all along to permit dual convictions for the firearm offense of § 134-6 and for the underlying felony therefor. That report states:

> Your Committee finds that clarification in the law is necessary due to a recent Hawai'i 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 offenses. However, the majority and dissent disagreed as to whether the legislature had 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, 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.
>
> Your Committee agrees with the dissent. Senate Standing Committee Report No. 1217 (1993 Senate Journal at 1210) clearly states[,] "[A]n offender who uses a firearm in the commission of a felony can be charged with, in addition to the underlying offense, a class A felony under section 134-6(a) and therefore be subject to enhanced penalty."

Sen. Stand. Comm. Report No. 843, in 1999 Senate Journal, at 1296 (emphases added). Such reliance on after-the-fact "legislative history" is questionable at best.

Subsequent amendments or the legislative history of subsequent amendments as a basis for construing the intent of prior legislatures should be viewed with extreme caution. See United States v. Texas, 507 U.S. 529, 535 (1993) ("[S]ubsequent legislative history is a 'hazardous basis for inferring the intent of an earlier' Congress." (Quoting Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990).)); United States v. Price, 361 U.S. 304, 313 (1960) (noting that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one"). See also Tennessee Valley Auth. v. Hill, 437 U.S. 153, 189-93 (1978), superseded by statute on other grounds as stated in Pacific Rivers Council v. Thomas, 30 F.3d 1050 (9th Cir. 1994); SEC v. Sloan, 436 U.S. 103, 119-22 (1978). "[E]ven when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment." Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 n.13 (1980).

The basis for such skepticism lies in the inherent unreliability of such pronouncements. In many instances, subsequent legislatures are comprised of different individuals who were not privy to the intentions of earlier legislators. See United States v. United Mine Workers, 330 U.S. 258, 281-82 (1947) (explaining that subsequent statements regarding the scope of an act "were expressed by Senators, some of whom were not members of the Senate in 1932, and none of whom was on the Senate Judiciary

Committee which reported the bill[,]" and that the statements "were expressed eleven years after the Act was passed and cannot be accorded even the same weight as if made by the same individuals"). Even the same legislators' statements of earlier purpose are not necessarily reliable, because "as time passes memories fade and a person's perception of his [or her] earlier intention may change." Consumer Prod. Safety Comm'n, 447 U.S. at 118 n.13. It would also appear self-evident that multiple considerations may motivate a subsequent amendment or legislative statement, some of which may not relate to the supposed intent of a prior legislature.

In view of the foregoing considerations, I cannot agree that a legislature's views of the original intent of a statute enacted six years earlier by another legislature amounts to a "compelling" basis for overruling precedent.

V.

A.

Act 12 specifically did "not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date." 1999 Haw. Sess. L. Act 12, § 2, at 12 (emphasis added). This clause directs and confirms the legislative intent that the 1999 amendment should have no effect on proceedings that were begun prior to its April 13, 1999 effective date, such as that commenced by Defendant on January 12, 1999. See HRS § 1-3 (1993) ("No law has

any retrospective operation, unless otherwise expressed or obviously intended."). Because the Act expressly indicated that it was to have prospective effect only, the amendment should not be considered applicable in any way to proceedings begun before its passage, even if the Jumila decision prompted the amendment.

This precept is consistent with tenets of statutory construction. Absent clearly express contrary legislative intent, the well-established rule of statutory construction forbids the retrospective operation of statutes. See Yamaguchi v. Queen's Medical Ctr., 65 Haw. 84, 89, 648 P.2d 689, 693 (1982); Clark v. Cassidy, 64 Haw. 74, 77, 636 P.2d 1344, 1346 (1981); Graham Constr. Supply v. Schrader Constr., 63 Haw. 540, 546, 632 P.2d 649, 653 (1981); HRS § 1-3; 1A N.J. Singer, Sutherland Statutory Construction § 22.36 (5th ed. 1993) ("[I]t is presumed that provisions added by the amendment affecting substantive rights are intended to operate prospectively . . . [; t]here is a presumption of prospectivity that can only be rebutted by the act itself."); see also Bond v. State, 675 So. 2d 184, 185 (Fla. Dist. Ct. App.) ("The amendment [to the statute] does not provide for retroactive application, therefore, it is to be applied prospectively."), review denied, 684 So. 2d 1350 (1996).

In State v. Nakata, 76 Hawai'i 360, 878 P.2d 699, reconsideration denied, 76 Hawai'i 453, 879 P.2d 558 (1994), cert. denied, Nakata v. Hawai'i, 513 U.S. 1147 (1995), this court

did allow retroactive application of an amendment which overrode a judicial decision, but there the amendment expressly provided that it was to be applied retroactively. See id. at 364, 878 P.2d at 703 (citing 1993 Haw. Sess. Law Act 128, § 5, at 179-80, which stated, "This Act shall take effect upon its approval; provided that section 2 shall be retroactive for all pending first-offense cases for driving under the influence of intoxicating liquor."). That is not the case here.

Generally, interpretive statutes are to be applied prospectively:

> The usual purpose of a special interpretive statute is to correct a judicial interpretation of a prior law which the legislature determines to be inaccurate. Where such statutes are given any effect, the effect is prospective only.

1A C. Sands, Statutory Construction § 27.04 (5th ed. 1991) (emphases added). Consequently, in the absence of legislative direction that such amendment be applied retroactively, there is no justification for employing subsequent legislative history of an amendment as the basis for "clarification" of original legislative intent.

B.

Moreover, that the 1999 amendment was enacted in response to Jumila does not override the legislature's express direction in Act 12 that the amendment was not to be applied retroactively. In Rivers v. Roadway Express, 511 U.S. 298

(1994), the United States Supreme Court noted that "the choice to enact a statute that responds to a judicial decision is quite distinct from the choice to make the responding statute retroactive." Id. at 305. There, the Court ruled that, "[e]ven when Congress intends to supersede a rule of law embodied in one of our decisions with what it views as a better rule established in earlier decisions, its intent to reach conduct preceding the 'corrective' amendment must clearly appear." Id. at 313. Accord Sutherland Statutory Construction, supra, § 41.01 ("[A] statute is not rendered retroactive merely because the facts upon which its subsequent action depends are drawn from a time antecedent to its effective date.").

Therefore, giving retroactive effect to Act 12 violates not only the express direction of the Act itself, but also accepted rules of statutory construction. After the Jumila decision, the legislature, in amending HRS § 134-6(a), could not authoritatively "clarify" the original intent of the earlier legislature, but could only amend the statute. See Marine Power & Equip. Co. v. Washington State Human Rights Comm'n Hearing, 694 P.2d 697, 700 (Wash. Ct. App. 1985) ("The Legislature may not, under the guise of clarification, overrule by legislative enactment a prior authoritative Supreme Court opinion construing a statute.").

VI.

More significantly, such an approach would adversely affect our system of checks and balances and the separation of functions among the branches of government. Reinterpreting the original intent of a past legislature based on the expressions of a subsequent different legislature "would make the legislature a court of last resort." Sands, Statutory Construction, supra, § 27.04. Such a course in effect places the interpretation of statutes, a judicial function, in the hands of the legislature. The appropriate legislative function is not to reconstrue the judiciary's interpretation of a statute, but to amend the statute if it seeks to supercede a rule of law. As one court has noted,

> [s]eparation of powers problems arise when the Legislature attempts to perform a judicial function. The function of a legislature is to make laws, not to construe them. Nor can the Legislature construe the intent of other legislatures. The latter functions are primarily judicial. Thus, legislative clarifications construing or interpreting existing statutes are unconstitutional when they contravene prior judicial interpretations of a statute.

Marine Power & Equip. Co., 694 P.2d at 700 n.2. A legal environment in which any subsequent legislative statement can retroactively override the prior construction of a statute by this court is thus problematic. In sum, the legislative history in these circumstances is neither compelling nor a justifiable basis for overturning this court's precedent.

VII.

As for the court's conclusion that such subsequent history was relevant to Defendant's Rule 35 proceeding, it is

necessary to emphasize the binding nature of Jumila as precedent on the court in the light of its statements during the proceedings.

Under the doctrine of stare decisis, Jumila's construction of § 134-6(a) was applicable and binding on trial courts. "[W]here a [legal] principle has been passed upon by the court of last resort, it is the duty of all inferior tribunals to adhere to the decision, without regard to their views as to its propriety, until the decision has been reversed or overruled by the court of last resort or altered by legislative enactment." State by Price v. Magoon, 75 Haw. 164, 186, 858 P.2d 712, 723 (quoting Robinson v. Ariyoshi, 65 Haw. 641, 653, 658 P.2d 287, 297 (1982) (citations omitted), reconsideration denied, 66 Haw. 528, 726 P.2d 1133 (1983)), reconsideration denied, 75 Haw. 580, 861 P.2d 735 (1993). See also People v. Haynes, 72 Cal. Rptr. 2d 143, 153 (Cal. Ct. App. 1998) ("[T]he doctrine of stare decisis compels lower court tribunals to follow the Supreme Court whatever reason the intermediate tribunals might have for not wishing to do so."). "It is the duty of the [trial] court[s] to adhere to and to be guided by the opinions of the [appellate] court . . . unless subsequently reversed[.]" In re Estate of Allen, 35 Haw. 501, 501 (1940).

Hence, at the time the motion was filed, the court was bound to accept the Jumila rule established by this court. By postponing its decision, the court called into question the duty

imposed on all trial courts to follow the law as established by a higher tribunal. The court's disregard of Jumila as precedent was a departure from this fundamental principle.[7] Plainly, the court was bound by precedent, notwithstanding its own opinion of what the Jumila court should have held.

VIII.

Justice Levinson's concurring opinion asserts that the

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[7] I do not believe that, in this case, the court's actions violated the Code of Judicial Conduct (CJC) Canons 3.B(8) (2001), 3.B(5) (2001), and 2.A (2001). However, courts in similar situations should be cautioned that delaying a ruling, such as regarding Defendant's motion, could implicate these canons, even when no impropriety or prejudice to a defendant is intended.

CJC Canon 3.B(8) states that "[a] judge shall dispose of all judicial matters promptly, efficiently[,] and fairly." This means that "[i]n disposing of matters promptly, efficiently[,] and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay." Commentary to Canon 3. Thus, a court should resolve post-conviction motions in a timely manner.

Similarly, delay at the behest of a party, in this case the prosecution, also may raise an appearance of bias by the court as was raised by Defendant. Canon 3.B(5) of the Code of Judicial Conduct states that "[a] judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice." The Commentary cautions that "[a] judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. . . . A judge must be alert to avoid behavior that may be perceived as prejudicial." Commentary to Canon 3.

Continuing a decision on a defendant's motion at the request of the prosecution without good cause may also raise an appearance of impropriety. See CJC Canon 2.A ("A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."). As noted in the Commentary to Canon 2.A,

> [p]ublic confidence in the judiciary is eroded by irresponsible or improper conduct by judges. . . .
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> . . . [T]he proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. . . . The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality[,] and competence is impaired.

(Emphasis added.) In reasonable minds, postponing a defendant's motion for a lengthy period without good cause can create a perception of the court's inability to be impartial as to that defendant.

plurality overrules Jumila only insofar as that opinion mistakenly concluded that there was insufficient legislative history of HRS § 134-6(a) to determine that the legislature intended two separate punishments for both an offense under that statute and the attendant felony. See Concurring opinion of Levinson, J., at 1. The concurrence then explains 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 . . . ." Id. (emphasis in original).

Although double jeopardy was raised by the defendant in Jumila, the Jumila decision was not premised at all on double jeopardy concepts, but only on a statutory analysis. The Jumila majority specifically stated that it was not considering any double jeopardy argument leveled by the defense:

> Because we are reversing Jumila's conviction and sentence on the HRS § 134-6(a) charge, we need not address Jumila's argument that the double jeopardy clause prohibits the imposition of both a sentence on the HRS § 134-6(a) charge and a mandatory minimum term pursuant to HRS § 706-660.1(1)(a) based on the single use of a firearm.

Jumila, 87 Hawai'i at 4 n.7, 950 P.2d at 1204 n.7 (emphases added.) Because the Jumila majority refused to consider the double jeopardy claim, it cannot now be reasonably argued that most of the Jumila rationale must be maintained to preserve double jeopardy rights. Thus, the present plurality's overruling of the Jumila analysis, based as it is upon a statutory analysis,

leaves nothing to which to attach any "vitality."[8] Concurring opinion of Levinson, J., at 6. Insofar as Justice Levinson's analysis rests on the proposition that our double jeopardy analysis must meet minimal standards established under the federal constitution, he answers what is not questioned and restates what is obvious. How that proposition is to be squared with our case law is what is "germane" to this case and what is not answered.

IX.

The question of whether State v. Lessary, 75 Haw. 446, 865 P.2d 150 (1994), or Blockburger v. United States, 284 U.S. 299 (1932), applies to multiple punishments in a single prosecution has not been answered by this court.[9] See Tomomitsu

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[8] I observe, as well, that Justice Levinson's concurring opinion could be read to suggest that State v. Christian, 88 Hawai'i 407, 967 P.2d 239 (1998) remains good law because the legislative history of the statute referred to in that case, HRS § 134-51(b) (1993), "Use of a deadly or dangerous weapon in the commission of a crime," does not reflect a legislative intent to allow for conviction under that statute and a predicate felony. See Concurring opinion of Levinson, J., at 5 n.3. Significantly, Christian relied entirely on Jumila when reversing the defendant's conviction for use of a deadly or dangerous weapon in commission of a crime. See Christian, 88 Hawai'i at 411, 967 P.2d at 242 ("[B]ecause Christian's conviction of . . . use of a deadly or dangerous weapon in the commission of a crime . . . and simultaneous conviction of [second degree murder] is barred under the rationale of this court's opinion in Jumila, we reverse his conviction of and sentence in connection with [the former crime]."). Nowhere in the text of Christian do the words "double jeopardy" appear, nor is there any discussion of what the legislature did and did not intend in enacting HRS § 134-51(b). Because Christian was entirely premised on Jumila, which, as stated supra, was decided on statutory grounds, in my opinion, by overruling Jumila, this court cannot now salvage Christian on double jeopardy principles.

[9] In State v. Caprio, 85 Hawai'i 92, 937 P.2d 933 (App. 1997), the ICA applied what amounted to a "Blockburger plus" test for double jeopardy in a multiple punishments case. Id. at 103, 937 P.2d at 944. The ICA noted that Lessary was distinguishable, inasmuch as Lessary "did not indicate . . . that the same conduct test was to be applied to multiple punishment situations[.]" Id. at 102, 937 P.2d at 943. The ICA then turned to State v. Mendonca, 68 (continued...)

v. State, 93 Hawai‘i 22, 31, 995 P.2d 323, 332 (App. 2000) (Acoba, J., concurring) ("The supreme court has not expressly indicated which test applies under the Hawaii Constitution in the multiple punishments situation."). In State v. Ake, 88 Hawai‘i 389, 967 P.2d 221 (1998), this court reiterated that double jeopardy analysis applies in three circumstances, one of which is the imposition of multiple punishments for the same offense:

> We have often recognized that double jeopardy is implicated in three types of situations. "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)). See also North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969)[, overruled on other grounds by Alabama v. Smith, 490 U.S. 794 (1989)]. The first two situations deal with successive prosecutions, while the third situation deals with multiple punishments.

Id. at 392, 967 P.2d at 224. The Ake court, referring to Lessary, confirmed that this court had adopted the "same conduct" test set forth in Grady v. Corbin, 495 U.S. 508 (1990), later overruled in United States v. Dixon, 509 U.S. 688 (1993), as the test to apply to successive prosecution situations under the Hawai‘i Constitution's double jeopardy provision:

> In the successive prosecutions context, this court has adopted the "same conduct" test as the general standard

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[9](...continued)
Haw. 280, 711 P.2d 731 (1985), "a multiple punishments case[,]" to divine a double jeopardy test for such circumstances. See id. The ICA, relying on Mendonca and State v. Pia, 55 Haw. 14, 514 P.2d 580 (1973), concluded that "[t]he Hawai‘i test [for multiple punishments cases] thus adopts the Blockburger rule and adds thereto a requirement that the law defining each of the offenses is intended to prevent a substantially different harm or evil." Id. at 103, 937 P.2d at 944 (internal quotation marks and citation omitted). Notably, however, Mendonca itself lacks thorough double jeopardy analysis and Pia seems to rely primarily on statutory language at least with regard to multiple punishments cases. See Pia, 55 Haw. at 18, 514 P.2d at 584. Significantly, both Mendonca and Pia preceded Lessary.

> under the Double Jeopardy Clause of the Hawai‘i Constitution. In State v. Lessary, 75 Haw. 446, 865 P.2d 150 (1994), we held that, "[u]nder the 'same conduct' test, prosecution of [a] charge is barred if the State, to establish the conduct element of [that offense], will prove acts of the defendant on which the State relied to prove the conduct element of [another] offense for which [the defendant] had already been prosecuted." Id. at 460, 865 P.2d at 157.

Ake, 88 Hawai‘i at 392-93, 967 P.2d at 224-25. Indeed, in Lessary, this court rejected the Blockburger test as not controlling under our state constitution, at least in cases of successive prosecutions. See Lessary, 75 Haw. at 457, 865 P.2d at 155 ("[W]e conclude that the interpretation given to the double jeopardy clause by the United States Supreme Court in Dixon does not adequately protect individuals from being 'subject for the same offense to be twice put in jeopardy.'").[10] This court also observed that the federal courts apply Blockburger to multiple punishments cases. See Ake, 88 Hawai‘i at 393 n.7, 967 P.2d at 225 n.7.

The threshold question under Blockburger is whether the legislature intended to punish both offenses. See Lessary, 75 Haw. at 454, 865 P.2d at 154. The plurality and Justice

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[10] The Ake court observed that the double jeopardy test to be applied under the Hawai‘i Constitution differed from that adopted by the United States Supreme Court -- the "same elements" or "Blockburger" test.

> The United States Supreme Court, however, has adopted the "same elements" test, originally described in Blockburger v. United States, 284 U.S. 299 (1932), as the standard under the Double Jeopardy Clause of the United States Constitution. See United States v. Dixon, 509 U.S. 688 (1993) (overruling Grady v. Corbin, 495 U.S. 508 (1990), and returning to the "same elements" test). "[T]he test to be applied to determine whether there are two offenses or only one, is whether each requires proof of a fact which the other does not." Blockburger, 284 U.S. at 304.

Ake, 88 Hawai‘i at 393, 967 P.2d at 225 (brackets in original).

Levinson's concurring opinions, by addressing the legislature's intent, appear to apply Blockburger rather than Lessary to this multiple punishments case. See Plurality opinion at 14; Concurring opinion of Levinson, J., at 1. But in doing so, the concurring opinion specifically relies on federal case law only. See id. at 3. As mentioned, the test to be applied in such a circumstance still has not been analytically addressed in this jurisdiction. Thus, the plurality's position can only be interpreted as resting on federal, rather than state, constitutional grounds. While Justice Levinson maintains that "the core Jumila analysis" is not overruled, see concurring opinion of Levinson, J. at 6, neither he nor the plurality opinion indicates how that core is maintained. The result is to obfuscate rather than to clarify the status of double jeopardy jurisprudence in this jurisdiction.

X.

Considering that Jumila explicitly did not address any constitutional double jeopardy protection, Defendant's reliance on Jumila below did not amount to a claim that his double jeopardy rights would be violated by the imposition of dual convictions pursuant to HRS 134-6(a) and a predicate felony. The plurality's determination, then, that Defendant's double jeopardy rights are not violated in such an instance, is made without the benefit of Defendant's position. Prudence and fair play mandate that, before we determine that state action does not violate a

defendant's constitutional rights, we allow him or her the opportunity to address the question involved. Cf. State ex rel. Oklahoma Bar Ass'n v. Smolen, 837 P.2d 894, 903 (Okla. 1992) (Opala, C.J., concurring) ("If no constitutional challenge has been advanced, the dictates of fairness are not impugned by the court's denial of sua sponte consideration. 'We do not reach for constitutional questions not raised by the parties.'" (Quoting Mazer v. Stein, 347 U.S. 201, 206 n.4 (1954), superseded by statute on other grounds as stated in Fabrica, Inc. v. El Dorado Corp., 697 F.2d 890 (9th Cir. 1983). (Other citations omitted.))). Thus, in my view, remanding this case to allow Defendant the opportunity to be heard on the constitutional double jeopardy issue and the court and the parties to generate a record germane to that issue is the only appropriate disposition in the wake of the plurality's decision to overrule Jumila on statutory grounds.

XI.

For the reasons above, I do not agree that Jumila should be overruled, because the plurality has failed to establish a "compelling justification" for doing so. Even if the statutory basis for the Jumila holding is overruled by the plurality, in my view, this case should be remanded to allow the parties an opportunity to be heard on whether double jeopardy principles would bar Defendant's dual convictions for second degree murder and for the firearms conviction under HRS § 134-

6(a) and to create a relevant record for our review.