***** FOR PUBLICATION *****

CONCURRING OPINION BY ACOBA, J.

I concur in the result but on different grounds.

In appeals from separate cases involving the use of firearms in the commission of second degree murder, Defendants-Appellants Justin Van Den Berg and Gary G. Karagianes urge this court to vacate their companion convictions under Hawai‘i Revised Statutes (HRS) § 134-6 (Supp. 1990), possession or use of a firearm in the commission of a felony (i.e., the underlying murder), or, in the alternative, to vacate their mandatory minimum sentences imposed under HRS § 706-660.1 (Supp. 1990) for use of a firearm in committing murder.[1] As to vacation of their HRS § 134-6 convictions, both rely on State v. Jumila, 87 Hawai‘i 1, 950 P.2d 1201 (1998), decided subsequent to their cases. In Jumila, this court held that a defendant could not be convicted under HRS § 134-6 for the use of a firearm in the commission of a felony and for the underlying felony.

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[1] Both Defendants maintain in the alternative that "a defendant may not be convicted of a HRS § 134-6(a) violation and receive a mandatory minimum term of imprisonment on the underlying felony pursuant to HRS § 706-660.1." State v. Jumila, 87 Hawai‘i 1, 6, 950 P.2d 1201, 1206 (1998). HRS § 706-660.1(1)(a) (Supp. 1990) provided in pertinent part:

> A person convicted of a felony, where the person had a firearm in his possession or threatened its use or used the firearm while engaged in the commission of the felony, whether the firearm was loaded or not, and whether operable or not, may in addition to the indeterminate term of imprisonment provided for the grade of offense be sentenced to a mandatory minimum term of imprisonment without possibility of parole or probation the length of which shall be as follows:
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> (a) For murder in the second degree and attempted murder in the second degree -- up to fifteen years.

(Emphases added.) Inasmuch as I agree that Defendants may not be convicted of HRS § 134-6, use of a firearm in a felony, and of the underlying felony committed with the same firearm, I do not discuss the alternative argument.

I.

I agree with Defendant Van Den Berg that the trial court was required, under the doctrine of stare decisis, to follow Jumila at the time Van Den Berg brought his motion to correct sentence because it was controlling precedent. See State v. Brantley, 99 Hawai‘i 463, 483, 56 P.3d 1252, 1272 (2002) (Acoba, J., dissenting) (stating that "*Jumila's* construction of § 134-6(a) was applicable and binding on trial courts" and that "it is the duty of all inferior tribunals to adhere to [an appellate] decision, without regard to their views as to its propriety, until the decision has been reversed or overruled by the court of last resort" (citations omitted)). However, after the instant appeals were taken, a plurality of this court in Brantley overruled Jumila and held that a defendant may be convicted of both the predicate felony such as murder, and the use of a firearm in the commission of that felony. See id. at 464, 56 P.3d at 1253. Accordingly, Defendants can no longer successfully argue, relying on Jumila, that they cannot be convicted of firearm use and the underlying murder.

It is also evident that neither the later 1993 amendments to HRS § 134-6 made by Act 239, nor the 1999 amendments by Act 12, apply to either of Defendants, inasmuch as the amendments were adopted after Defendants were indicted, tried, and sentenced. For, each Act provides that it "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; 1993 Haw. Sess. L. Act 239, § 2, at 419. It is well established that

> [a]bsent 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[.]"

Brantley, 99 Hawai'i at 482, 56 P.3d at 1271 (Acoba, J., dissenting) (citations omitted).

Moreover, contrary to the court's position, post-Jumila legislative reports, which purport to ascribe legislative intent as to the meaning of HRS § 134-6 at the time of the Jumila decision are not determinative. "In many instances, subsequent legislatures are comprised of different individuals who were not privy to the intentions of earlier legislators." Id. at 481-82, 56 P.3d at 1270-71 (citation omitted). More importantly, "[r]einterpreting 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[,]' [1A. C.] Sands, *Statutory Construction*, § 27.04 [(5th ed. 1991)][,] . . . plac[ing] the interpretation of statutes, a judicial function, in the hands of the legislature." Id. at 483, 56 P.3d at 1272. See id. ("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." (Citations omitted.)). Accordingly, only the 1990 version of HRS § 134-6 is relevant to this case.[2]

In light of the reversal of Jumila, these appeals squarely present the question of whether double jeopardy applies where a defendant is, in the same case, subject to multiple punishments for the same act, i.e., whether a defendant may be punished separately for murder and for use of a firearm in the commission of that murder. In Brantley, that question was never argued at trial or in the appeal briefs. See Brantley, 99 Hawai'i at 487, 56 P.3d at 1276 (Acoba, J., dissenting) ("Even if the statutory basis for the Jumila holding is overruled by the plurality, . . . this case should be remanded to allow the parties an opportunity to be heard on whether double jeopardy principles would bar [Brantley]'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."). The double jeopardy question is, however, raised here. Defendant Van Den Berg maintains that "the mandatory minimum sentence on Count I violated the double jeopardy clause of the United States and Hawai'i Constitutions as there was no clearly expressed legislative intent in the applicable statutes to allow for cumulative punishment."[3]

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[2] At the time the charged offenses were committed, the 1990 version of HRS § 134-6(a) was in effect and stated in pertinent part that "[i]t shall be unlawful for a person to knowingly possess or intentionally use or threaten to use a firearm while engaged in the commission of a felony."

[3] Defendant Karagianes maintains that the test set forth in Blockburger v. United States, 284 U.S. 299 (1932), is not satisfied with (continued...)

II.

In that regard, HRS § 701-109(1)(a) (1993) does not contain any statutory direction to the effect that the legislature's intent is determinative of whether punishment may be imposed for the included offense as well as the greater offense. HRS § 701-109(1)(a) is plain in its language to the effect that a defendant may not be convicted of both the greater offense and the included one:

> (1) . . . The defendant may not . . . be convicted of more than one offense if:
> (a) One offense is included in the other, as defined in subsection (4) of this section[.]
> . . . .
> (4) A defendant may be convicted of an offense included in an offense charged in the indictment or the information. An offense is so included when:
> (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged[.]

Accordingly, insofar as the majority employs a legislative intent analysis, it deviates from the clear language of HRS § 701-109(1)(a), in effect applying a separate rule of review reminiscent of the approach outlined in Blockburger v. United States, 284 U.S. 299 (1932). See Brantley, 99 Hawai‘i at 474, 56 P.3d at 1263 (Ramil, J., concurring, joined by Nakayama, J.) (stating that "[t]he first step in the double jeopardy analysis is to determine whether the legislature intended that each violation be a separate offense[]" and, if so, "the court's

[3](...continued)
respect to a conviction under HRS § 134-6(a) along with the enhanced sentence imposed under HRS § 706-660.1 for use of a gun. Thus, he argues, there was a double jeopardy violation by virtue of multiple punishments for the same offense. See supra note 1.

inquiry is at an end[]" and, "[t]herefore, . . . the 'lesser included offense' analysis" is misplaced).

Were the double jeopardy test set forth in Blockburger to control, "[t]he threshold question . . . [would be] whether the legislature intended to punish both offenses." Id. at 486, 56 P.3d at 1275 (Acoba, J., dissenting) (citing State v. Lessary, 75 Haw. 446, 454, 865 P.2d 150, 154 (1994). I do not believe such an analysis governs. This court has said that the double jeopardy clause under our constitution protects "'individuals against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense afer 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 445, 450, 923 P.2d 388, 392 (1996)). . . . The first two situations deal with successive prosecutions, while the third situation deals with multiple punishments." Id. at 485-86, 56 P.3d at 1274-75 (quoting State v. Ake, 88 Hawai'i 389, 392, 967 P.2d 221, 224 (1998)) (emphasis added).

Unlike the United States Supreme Court, however, this court in Lessary eschewed the Blockburger test with respect to successive prosecutions. In its place, our jurisdiction has "adopted the 'same conduct' test set forth in Grady v. Corbin, 495 U.S. 608, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), later overruled in United States v. Dixon, 509 U.S. 588, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993), as the test to apply to successive

prosecution situations under the Hawai‘i Constitution's double jeopardy provision[.]" Brantley, 99 Hawai‘i at 486, 56 P.3d at 1275 (Acoba, J., dissenting). It was held that the "Hawaii Constitution provides greater protection against multiple prosecutions than does the United States Constitution." Lessary, 75 Haw. at 462, 865 P.2d at 157.

In view of this court's embracement of the same conduct test with respect to successive prosecutions, there is no sound basis for applying a different test or application of the words "the same offense" in article I, section 10 of the Hawai‘i Constitution to situations implicating multiple punishments. The adverse impact of multiple punishments for the same offense is as far reaching as that resulting from successive prosecutions:

> When multiple charges are brought, the defendant is "put in jeopardy" as to each charge. To retain his freedom, the defendant must obtain an acquittal on all charges; to put the defendant in prison, the prosecution need only obtain a single guilty verdict. The prosecution's ability to bring multiple charges increases the risk that the defendant will be convicted on one or more of those charges. The very fact that a defendant has been arrested, charged, and brought to trial on several charges may suggest to the jury that he must be guilty of at least one of those crimes. Moreover, where the prosecution's evidence is weak, its ability to bring multiple charges may substantially enhance the possibility that, even though innocent, the defendant may be found guilty on one or more charges as a result of a compromise verdict. The submission of two charges rather than one gives the prosecution the advantage of offering the jury a choice -- a situation which is apt to induce a doubtful jury to find the defendant guilty of the less serious offense rather than to continue the debate as to his innocence.
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> The Government's argument also overlooks the fact that, quite apart from any sentence that is imposed, each separate criminal conviction typically has collateral consequences, in both the jurisdiction in which the conviction is obtained and in other jurisdictions. The number of convictions is often critical to the collateral consequences that an individual faces. For example, a defendant who has only one prior conviction will generally not be subject to sentencing under a habitual offender statute.

> Furthermore, each criminal conviction itself represents a pronouncement by the State that the defendant has engaged in conduct warranting the moral condemnation of the community. Because a criminal conviction constitutes a formal judgment of condemnation by the community, each additional conviction imposes an additional stigma and causes additional damage to the defendant's reputation.

Missouri v. Hunter, 459 U.S. 359, 372-73 (Marshall, J., dissenting, joined by Stevens, J.) (internal quotation marks and citations omitted).

In Lessary, the defendant was charged in the circuit court with terroristic threatening and kidnaping (later amended to unlawful imprisonment), and in the family court with abuse of a family or household member. See 75 Haw. at 449, 865 P.2d at 152. Lessary allegedly went to his estranged wife's workplace and grabbed her by the hair and threw her into a wall. See id. at 448-49, 865 P.2d at 152. He then pointed a pair of scissors at his wife and a co-worker, grabbed his wife by the front of her shirt, and dragged her to his jeep. See id. at 449, 865 P.2d at 152. When she refused to enter his jeep, Lessary allegedly threatened to stab her if she continued to refuse. See id. Lessary then drove to a canefield where they talked and he eventually let her drive him out after a few hours. See id.

In the family court, Lessary pled no contest to the abuse charge, but in the circuit court, Lessary pled not guilty to the felony charges and demanded a jury trial. See id. "Subsequently, Lessary moved to dismiss both charges on double jeopardy grounds . . . ." Id. The circuit court dismissed the charges, and the prosecution appealed to this court. See id. at 450-51, 865 P.2d at 152-53.

The prosecution conceded the unlawful imprisonment charge, and, as to the terroristic threatening charge, this court applied the same conduct test and concluded that, "[b]ecause the conduct element of the Terroristic Threatening charge can be established by proof of acts independent of the acts alleged in the Abuse prosecution, the offenses are not based upon the 'same conduct.'" Id. at 461, 865 P.2d at 157. Thus, under Lessary, the determinative question is not whether the legislature intended to punish both crimes but whether the prosecution violated the same conduct test. Lessary described this test as follows:

> Under the "same conduct" test, prosecution of the Terroristic Threatening charge is barred if the State, to establish the conduct element of Terroristic Threatening, will prove acts of the defendant on which the State relied to prove the conduct element of the Abuse offense for which Lessary had already been prosecuted.

Id. (emphasis added). In the present cases, the prosecution proved the same acts to prove conduct under the firearms charge of HRS § 134-6, i.e., use or threatened use of a firearm in commission of a separate felony, and the conduct element of murder. Therefore, under the same conduct test of Lessary, double jeopardy would bar dual convictions in the instant cases for murder and the use of a firearm in committing that murder. On that basis, I would reverse the HRS § 134-6 convictions of both defendants.