

DISSENTING OPINION OF ACOBA, J.

I dissent.

Plaintiff-Appellee State of Hawai'i (the prosecution) did not argue in its brief on appeal that there was an insufficient record upon which this court could decide the sentencing question before us. Moreover, both the prosecution and Defendant-Appellant Reed Irvine (Defendant) quoted the same passage in the transcript in which the court mentioned the victim's statement. Given that, except for the use of emphasis, both parties' quotations to the record are identical, it does not make judicial sense to refuse to consider this case in light of the agreed-upon relevant statement of the court at sentencing. State v. Hoang, 93 Hawai'i 333, 3 P.3d 499 (2000), is inapposite insofar as the parties in the instant case agree to the actual statements at issue in the transcript, while in Hoang, the defendant only "contend[ed] that he and the prosecution both agree as to the facts" in issue there. Id. at 335, 3 P.3d at 501.

The record on appeal, which includes the court file, the presentence investigation report (PSI) to the court, and the judgment, are sufficient to decide this case. It is presumed the trial court reviewed the PSI. Cf. State v. Sinagoga, 81 Hawai'i 421, 428, 918 P.2d 228, 235 (App. 1996) ("[A]bsent clear evidence to the contrary, it is presumed that a sentencing court, following the receipt of a pre-sentence report . . . will have

considered all the factors in [Hawai'i Revised Statutes] § 706-606 [(1993) -- factors which include matters contained in the PSI --] before imposing concurrent or consecutive terms of imprisonment[.]"). Concluding that the court did review the PSI and the allegation of an uncharged crime, it must be established that the court did not consider that crime in its sentencing. See State v. Nunes, 72 Haw. 521, 526, 824 P.2d 837, 840 (1992) ("[A] judge cannot punish a defendant for an uncharged crime in the belief that it too deserves punishment."). Accordingly, I would vacate the judgment and remand for resentencing with instructions that the court follow the dictate of Nunes.