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DISSENTING OPINION BY NAKAYAMA, J.,
WITH WHOM, MOON, C.J., JOINS

I disagree with the majority's holding that, in light of State v. Arceo, 84 Hawai'i 1, 928 P.2d 843 (1996), and its progeny, the trial court was required to instruct the jury that it must be unanimous as to which acts constituted the crime. Majority Opinion (Majority) at 2, 33. I further disagree with the majority's holding that Hawai'i Revised Statutes (HRS) § 707-733.5(2) (Supp. 2002)¹ should be struck down as an unconstitutional violation of a defendant's constitutional right to due process. Majority at 2-3, 33-34. The holding in the majority opinion suggests that, for purposes of HRS § 707-733.5, multiple acts of sexual penetration or sexual contact "are, by nature, separate and discrete, and, therefore, may not form the

¹ HRS § 707-733.5 provides:

Continuous sexual assault of a minor under the age of fourteen years. (1) Any person who:

- (a) Either resides in the same home with a minor under the age of fourteen years or has recurring access to the minor; and
 - (b) Engages in three or more acts of sexual penetration or sexual contact with the minor over a period of time, but while the minor is under the age of fourteen years,
- is guilty of the offense of continuous sexual assault of a minor under the age of fourteen years.

(2) To convict under this section, the trier of fact, if a jury, need unanimously agree only that the requisite number of acts have occurred; the jury need not agree on which acts constitute the requisite number.

(3) No other felony sex offense involving the same victim may be charged in the same proceeding with a charge under this section, unless the other charged offense occurred outside the time frame of the offense charged under this section or the other offense is charged in the alternative. A defendant may be charged with only one count under this section unless more than one victim is involved, in which case a separate count may be charged for each victim.

(4) Continuous sexual assault of a minor under the age of fourteen years is a class A felony.

*** FOR PUBLICATION ***

basis of a 'continuing offense.'" Majority at 32-33. As such, the majority opinion remands this case and instructs all trial courts (1) in which defendants are charged under HRS § 707-733.5, and (2) where the prosecution adduces evidence of more than three acts of sexual penetration and/or sexual contact, as follows:

[A]t or before the close of its case-in-chief, the prosecution . . . [must] elect the specific act[s] upon which it is relying to establish the "conduct" element of the charged offense; or . . . the trial court [must] give[] the jury a specific unanimity instruction, i.e., an instruction that advises the jury that all twelve of its members must agree that the same underlying criminal act[s] ha[ve] been proved beyond a reasonable doubt.

Majority at 33 (brackets in the original). Because HRS § 707-733.5 provides specific guidelines in determining when sexual assault of a minor is a continuing offense, HRS § 707-733.5(2) neither violates Arceo and its progeny nor is an unconstitutional violation of a defendant's right to due process. Therefore, I must respectfully dissent.

A. HRS § 707-733.5, by its plain language and in accordance with its express legislative intent, affirms that a continuous sexual assault of a minor constitutes a "continuous course of conduct" offense.

In Arceo, the majority held that, based upon the definition of "continuing offense"² and given the plain language

² Arceo explained that a "continuing offense" is defined as a continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy, or an offense which continues day by day, or a breach of the criminal law, not terminated by a single act or fact, but subsisting for a definite period and intended to cover or apply to successive similar obligations or occurrences.

Arceo, 84 Hawai'i at 18, 928 P.2d at 860 (internal brackets and formatting (continued...))

*** FOR PUBLICATION ***

of HRS § 707-730(1)(b) (1993)³ (sexual assault in the first degree) and HRS § 707-732(1)(b) (1993)⁴ (sexual assault in the third degree), sexual assault in the first and third degree “are not--and cannot be--‘continuing offenses’ and . . . each distinct act in violation of these statutes constitutes a separate offense under the [Hawai‘i Penal Code].” Arceo, 84 Hawai‘i at 21, 928 P.2d at 863. As such, the majority held that, where evidence of multiple culpable acts are subsumed within a single count charging sexual assault, the defendant is entitled to either an election by the prosecution of the single act upon which it is relying upon for a conviction or a specific unanimity instruction. Id. at 32-33, 928 P.2d at 874-75. In my dissent, I agreed that sexual assault in the first and third degree “are not ‘continuing offenses’ because they represent distinct acts and therefore, separate offenses.” Id. at 38, 928 P.2d at 880 (Nakayama, J., dissenting). However, I recognized the problems inherent in the criminal prosecution of sexual molestation cases involving a child of tender years who cannot recall specific dates, instances, or circumstances surrounding the molestation,

²(...continued)
omitted).

³ HRS § 707-730(1)(b) provided that “[a] person commits the offense of sexual assault in the first degree if . . . [t]he person knowingly subjects to sexual penetration another person who is less than fourteen years old; provided this paragraph shall not be construed to prohibit practitioners licensed under chapter 453, 455, or 460, from performing any act within their respective practices.”

⁴ HRS § 707-732(1)(b) provided that “[a] person commits the offense of sexual assault in the third degree if . . . [t]he person knowingly subjects to sexual contact another person who is less than fourteen years old or causes such a person to have sexual contact with the person[.]”

*** FOR PUBLICATION ***

and, therefore, I urged the legislature to enact a "continuous sexual abuse of a child" statute. Id. at 38-39, 928 P.2d at 880-81 ("I believe that a child's inability to specifically remember every detail and date of an alleged assault should not form a basis on which to insulate a defendant from conviction.").

Subsequently, in 1997, in response to Arceo, the Hawai'i legislature enacted HRS § 707-733.5. 1997 Haw. Sess. Laws Act 379. In Section 1 of the Act, the legislature acknowledged my concern about the problems encountered in prosecuting sexual abuse cases where the victim is a minor and expressed the need for a "continuous sexual abuse of a minor" statute, similar to that enacted in California:

The legislature finds that sexual assault in the first, second, third, and fourth degrees, in the manner prohibited under the Hawaii penal code, are not "continuing offenses" in that they represent distinct acts and, therefore, separate offenses. The legislature finds, however, that many young children who have been sexually abused over an extended period of time may be unable to specifically recall or identify dates, instances, or circumstances surrounding the abuse.

. . . .

Justice Nakayama urged the legislature to enact a "continuous sexual abuse of a minor" statute, similar to the one enacted by the State of California, to address the problems inherent in the criminal prosecution of sexual abuse cases involving young children who are unable to specify the time, place, or circumstances of each act. The legislature agrees that there is a need for such a statute, and finds that the California statute has been upheld as constitutional by that State and does not violate the right to due process.

1997 Haw. Sess. Laws Act 379, § 1 at 1192-93 (emphases added).

The legislature further clarified the purpose of the Act:

The purpose of this act is to set forth the parameters of the offense of continuous sexual assault of a minor under the age of fourteen years, similar to the statute enacted by California, that defines the circumstances and provides

*** FOR PUBLICATION ***

specific guidelines under which the sexual assault of a minor is deemed a continuing offense.

Id. at 1192 (emphases added). Accordingly, the legislature took a commendable step in enacting a statute that would, on one hand, remedy the problems that continually surface in the criminal prosecution of sexual abuse cases involving minors who are unable to recall specific dates, instances or circumstances surrounding the abuse, while, on the other hand, protect a defendant's right to due process.

HRS § 707-733.5 was validly enacted. When it enacted HRS § 707-733.5, the legislature employed exceptionally clear language that leaves no doubt that the criminal offense being established was the continuous sexual abuse of a minor. See generally People v. Avina, 14 Cal.App.4th 1303, 1309, 18 Cal.Rptr.2d 511, 514 (Cal. App. 1st Dist. 1993) (explaining that a continuous course of conduct offense arises in two contexts: "The first is when the acts are so closely connected that they form part of one and the same transaction, and thus, one offense. The second is when the statute contemplates a continuous course of conduct of a series of acts over a period of time"). In particular, the continuing offense construct of HRS § 707-733.5 is expressly delineated in HRS § 707-733.5(2), which provides that, "[t]o convict under this section, the trier of fact, if a jury, need unanimously agree only that the requisite number of acts have occurred; the jury need not agree on which acts constitute the number." (Emphasis added.) See Avina, 14 Cal.App.4th at 1310 ("Subdivision (b) of [Penal Code § 288.5] states expressly that it is to be treated as a continuous-course-

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

of-conduct crime for purposes of the unanimity rule; that unanimity is not required on any particular acts of molestation. Obviously the Legislature intended to create a course-of-conduct offense."). Moreover, like other course of conduct offenses, HRS § 707-733.5 focuses on a series of acts (three or more acts) over a period of time, on the same victim and generally resulting in cumulative injury. See id. at 1311 (explaining that, even though Penal Code § 288.5 can be violated by committing only three individual acts, it is not removed from the course of conduct category, inasmuch as "[t]he three-act requirement merely sets a 'baseline' for measuring the course of conduct, while '[t]he continuous-access requirement makes clear that the statute was targeted at the resident child abuse situation, where problems with generic testimony are most likely to arise'"). Finally, under HRS § 707-733.5(3), a defendant can only be charged with one count, unless there is more than one victim, and no other felony sex offense may be charged involving the same victim and occurring within the charged time period. See id. ("[Penal Code §] 288.5 displays a final characteristic of the course-of-conduct crime. . . . When a criminal statute punishes a course of conduct, the prosecution may not divide that course up into multiple counts of the offense; the entire continuous course constitutes only a single violation of the statute. The Legislature expressly incorporated this attribute of the course-of-conduct crime in [Penal Code § 288.5], subdivision (c)[.]"). Inasmuch as sexual assaults by "resident molesters" constitute a continuous course of conduct of a series of acts over a period of

*** FOR PUBLICATION ***

time, HRS § 707-733.5 clearly contemplated, and ultimately established, a continuous course of conduct offense. Even Rabago concedes as such.

The majority finds it necessary to highlight the difference between "continuing offenses" and "several distinct acts" and then distinguish between cases involving offenses based on "multiple acts" and offenses based on "alternative means." Majority at 22-24, 28-29. The majority insists that "[t]he conduct element requisite to HRS § 707-733.5, . . . when combined with the attendant circumstances of 'over a period of time,' . . . deviates from the construct of 'continuing offenses' adopted by this court in Arceo[,] " Majority at 29, and specifically declares that "HRS § 707-733.5 is not an 'alternative means' statute. It is a 'multiple acts' statute, precisely because, pursuant to its terms, 'several acts are alleged and any combination of them could constitute the crime charged[,] " Majority at 31-32 (citation and internal brackets omitted). The majority's finding is in direct contravention of the legislative purpose and plain language of HRS § 707-733.5. By relying on Arceo and its progeny, the majority incorrectly concludes that multiple acts of sexual penetration or sexual contact "are, by nature, separate and discrete and therefore may not form the basis of a 'continuing offense.'" Majority at 32-33. None of the cases relied upon by the majority for this very proposition involved a charge under HRS § 707-733.5. In fact, State v. Klinge, 92 Hawai'i 577, 994 P.2d 509 (2000), involved a claim of terroristic threatening in the first degree, in violation of HRS

*** FOR PUBLICATION ***

§ 707-715, and, is therefore, inapposite and does not stand for the majority's proposition that, under HRS § 707-733.5, multiple acts of sexual abuse are separate and distinct, and, thus, are not "continuing offenses." The majority's attempt to disregard the legislature's intent in enacting HRS § 707-733.5 and circumvent HRS § 707-733.5's express terms, while at the same time acknowledging that the legislature "has deemed HRS § 707-733.5 to be a continuing offense," Majority at 32, should not be permitted.⁵

B. Inasmuch as HRS § 707-733.5 is modeled after California Penal Code § 288.5, cases holding that Penal Code § 288.5 does not deprive a defendant of his right to due process are instructive.

The fifth and fourteenth amendments⁶ to the United

⁵ The majority's opinion disregards the legislature's clear intent in enacting HRS § 707-733.5 by insisting that, notwithstanding the legislature's expression that a continuous sexual assault of a minor is a continuing offense, "an offense is truly 'continuing' if its attributes are capable of making it so." Majority at 33 n. 15. It is not this court's duty to judicially legislate. Instead, this court's primary responsibility is to ascertain and give effect to the intention of the legislature in accordance with the law's plain and obvious meaning. In enacting HRS § 707-733.5 to remedy the problems inherent in the prosecution of "resident molesters," the legislature clearly established a continuing course of conduct offense. The legislature expressed that the purpose of HRS § 707-733.5 "is to set forth the parameters of the offense of continuous sexual assault of a minor under the age of fourteen years . . . that defines the circumstances and provides specific guidelines under which the sexual assault of a minor is deemed a continuing offense" and declared that sexual assaults by "resident molesters" constitute a continuing offense. As such, in giving effect to HRS § 707-733.5, this court is not at liberty to disregard HRS § 707-733.5's plain language and obvious meaning, as the majority now sees fit to do.

⁶ The Due Process Clause of the Fifth Amendment, which applies to the federal government, provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The Due Process Clause of the Fourteenth Amendment, which applies to the states, provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

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

States Constitution guarantee a defendant the right to due process of law. "It is settled that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." People v. Whitman, 38 Cal.App.4th 1282, 1297, 45 Cal.Rptr.2d 571, 580 (Cal. App. 5th Dist. 1995) (citation and internal quotation marks omitted). The United States Supreme Court, however, "has never held jury unanimity to be a requisite of due process of law." Id. at 1298 (internal quotation marks omitted).

This court has not yet had the opportunity to address whether HRS § 707-733.5(2) is a violation of a defendant's right to due process. Indeed, like Hawai'i, California recognizes that "[d]ue process of law requires that an accused be advised of the charges against him so that he has a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial." People v. Higgins, 9 Cal.App.4th 294, 300, 11 Cal.Rptr.2d 694 (Cal. App. 3d Dist. 1992). Inasmuch as the legislature made clear that HRS § 707-733.5 is modeled after California Penal Code § 288.5,⁷ California cases holding

⁶(...continued)

⁷ California Penal Code § 288.5 provides:

Continuous sexual abuse of a child

(a) Any person who either resides in the same home with the minor child or has recurring access to the child, who over a period of time, not less than three months in duration, engages in three or more acts of substantial sexual conduct with a child under the age of 14 years at the time of the

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

that Penal Code § 288.5 does not deprive a defendant of his constitutional right to due process are highly persuasive and instructive.⁸

California courts have consistently rejected constitutional challenges to Penal Code § 288.5. Higgins was the first case to address a due process challenge to Penal Code § 288.5. In Higgins, the California Court of Appeals held Penal Code § 288.5 to be constitutional and, thus, rejected the defendant's claim that it violated his due process rights. The court reasoned that, inasmuch as the defendant was charged with one offense, rather than multiple offenses, and the information contained a specific time frame that referred to the time span

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commission of the offense, as defined in subdivision (b) of section 1203.066, or three or more acts of lewd or lascivious conduct under Section 288, with a child under the age of 14 years at the time of the commission of the offense is guilty of the offense of continuous sexual abuse of a child and shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years.

(b) To convict under this section the trier of fact, if a jury, need unanimously agree only that the requisite number of acts occurred not on which acts constitute the requisite number.

(c) No other felony sex offense involving the same victim may be charged in the same proceeding with a charge under this section unless the other charged offense occurred outside the time period charged under this section or the other offense is charged in the alternative. A defendant may be charged with only one count under this section unless more than one victim is involved in which case a separate count may be charged for each victim.

⁸ Determining the constitutionality of HRS § 707-733.5 is an issue of first impression for this court. Notwithstanding the legislature's reliance on California Penal Code § 288.5 to enact HRS § 707-733.5 and despite the State's analysis of cases addressing the constitutionality of Penal Code § 288.5 in its Answering Brief, the majority fails to cite to any case discussing the constitutionality of Penal Code § 288.5 to offer guidance to this court.

*** FOR PUBLICATION ***

during which the alleged acts occurred, the defendant's due process rights were not violated. Id. at 300 (explaining that "[d]ue process of law requires that an accused be advised of the charges against him so that he has a reasonable opportunity to prepare and present his defense and not be taken surprise by evidence offered at his trial," and, therefore, "the prosecution of child molestation charges based on generic testimony does not, of itself, result in a denial of a defendant's due process right to fair notice of the charges against him"). The court further declared that the crime of continuous sexual abuse of a minor under Penal Code § 288.5 was a continuous course of conduct crime, and, therefore, fell within the exception to the rule that jurors must unanimously agree on the particular acts committed by the defendant before convicting him. Id. at 301-04. As such, the court acknowledged that individual jurors may properly select different acts to meet the threshold of three acts of molestation required to establish the prohibited course of conduct, inasmuch as

proof of specific acts of molestation by a resident child molester may be murky, even where evidence of the cumulative conduct is clear. By criminalizing a course of conduct, Penal Code [§] 288.5 intended to make proof of specific acts unnecessary. The fact that the jurors select different acts to satisfy the numerical threshold for a course of conduct does not render the statute unconstitutional. Rather, it assures the jury must agree there is a course of conduct and prevents conviction based on a single act or a series of acts upon which the jury does not agree.

Id. at 307 (emphasis added).

Similarly, in People v. Avina, 14 Cal.App.4th 1303, 18 Cal.Rptr.2d 511 (Cal. App. 1st Dist. 1993), the court held that Penal Code § 288.5 does not unconstitutionally deprive a

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defendant of due process and a unanimous verdict. The court first determined that the legislature defined the prohibited offense under Penal Code § 288.5 as a continuous course of conduct:

Neither instruction nor election are required . . . if the case falls within the continuous course of conduct exception. This exception arises in two contexts. The first is when the acts are so closely connected that they form part of one and the same transaction, and thus, one offense. The second is when the statute contemplates a continuous course of conduct of a series of acts over a period of time.

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Subdivision (b) of the statute states expressly that it is to be treated as a continuous-course-of-conduct crime for purposes of the unanimity rule; that unanimity is not required on any particular acts of molestation. Obviously the Legislature intended to create a course-of-conduct offense.

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That [Penal Code §] 288.5 can, in theory, be violated by committing only three individual acts does not remove it from the course-of-conduct category. . . . The three-act requirement merely sets a "baseline" for measuring the course of conduct, while "the continuous-access requirement makes clear that the statute was targeted at the resident child abuse situation, where problems with generic testimony are most likely to arise, and was not to be used against individuals who have only transient contact with the alleged victim." . . . Like other course-of-conduct crimes, [Penal Code §] 288.5 focuses on "a series of acts occurring over a substantial period of time, generally on the same victim and generally resulting in cumulative injury." As with nonsexual child abuse and spousal battery, the victims "are likely to be unwilling to report their abuse to the authorities due to fear of physical and/or emotional retaliation" by the abuser.

Section 288.5 displays a final characteristic of the course-of-conduct crime, one of substantial benefit to a defendant. When a criminal statute punishes a course of conduct, the prosecution may not divide that course up into multiple counts of the offense; the entire continuous course constitutes only a single violation of the statute. The Legislature expressly incorporated this attribute of the course-of-conduct crime in [Penal Code § 288.5], subdivision (c): ". . . A defendant may be charged with only one count under this section unless more than one victim is involved in which case a separate count may be charged for each victim."

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

Id. at 1309-11 (citation, some internal brackets, and formatting omitted and emphasis in the original). The court then held that, by defining a continuous course of criminal conduct in Penal Code § 288.5, the legislature did not deprive defendants of due process, and, subsequently, a unanimous jury verdict, reasoning that,

[w]hile jurors might have disagreed about particular acts, there was no room here for disagreement about what criminal course of conduct, if any, defendant engaged in. In a prosecution for a course-of-conduct offense, where the evidence shows only a single course of conduct, the jury need not be instructed on a need for unanimity as to the conduct supporting the conviction.

Id. at 1313.

In People v. Gear, 19 Cal.App.4th 86, 23 Cal.Rptr.2d 261 (Cal. App. 4th Dist. 1993), the minor victim alleged that the defendant sexually assaulted her at least twenty times. The defendant was subsequently convicted on one count of continuous sexual abuse of a minor, in violation of Penal Code § 288.5. On appeal, the defendant asserted that Penal Code § 288.5 was unconstitutional on the ground that it deprived him of his right to a unanimous jury verdict by allowing a conviction without requiring jury unanimity as to which three underlying acts supported the conviction. Rejecting the defendant's argument, the court noted that the defendant virtually ignored the established continuous course of conduct exception to the requirement of jury unanimity on which specific acts the defendant committed. Id. at 91. The court recognized that the continuous course of conduct exception "arises . . . when, as here, the statute contemplates a continuous course of conduct of

*** FOR PUBLICATION ***

a series of acts over a period of time[,]” id. at 91-92

(citations omitted), and, thus, clarified that

[t]he crime of continuous sexual abuse of a child ([Penal Code] § 288.5) is a continuous[-]course-of-conduct crime and therefore falls within the exception to the rule that jurors must agree on the particular criminal acts committed by the defendant before convicting him. . . . [Penal Code §] 288.5 was not enacted without due regard for and in contravention of the constitutional requirement that an accused cannot be convicted of a crime without a unanimous verdict of a jury of his peers. This is so because [Penal Code §] 288.5 criminalizes a continuous course of conduct; the actus reus of the crime is the course of conduct encompassing the individual acts of sexual conduct. The statute requires jury unanimity with respect to the course of conduct-i.e., the actus reus-and thereby satisfies the constitutional requirement. . . . The continuous-course-of-conduct crime does not require jury unanimity on a specific act, because it is not the specific act that is criminalized. The actus reus of such a crime is a series of acts occurring over a substantial period of time, generally on the same victim and generally resulting in cumulative injury. The agreement required for conviction is directed at the appropriate actus reus: unanimous assent that the defendant engaged in the criminal course of conduct.

Id. at 92-93 (internal citations and quotation marks omitted and emphases added). The court further rejected the defendant’s argument that Penal Code § 288.5 violated his right to due process, inasmuch as the court noted that “the defendant does not have a right to notice of the specific time or place of an offense occurring within the applicable limitation period” and the defendant’s ability to present a defense was not violated.

Id. at 95-96. Specifically, the court explained that

[t]he modern answer to the rhetorical inquiry as to how defendant can prepare a defense against nonspecific molestation charges is that, at a minimum, a defendant must be prepared to defend against all offenses of the kind alleged in the information as are shown by evidence at the preliminary hearing to have occurred within the timeframe pleaded in the information.

At the preliminary hearing, the officer testified the molestations by [the defendant] began in June 1990 as [the

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

victim] was completing the sixth grade. The officer said the molestations took place in the master bedroom, the bathroom off the master bedroom and the garage. . . . The officer related a description of acts of oral copulation in the bathroom as well as in the garage. . . . [W]e find the officer's testimony was very similar to the testimony provided by [the victim] at trial, and, coupled with the information, provided sufficient due process notice to [the defendant] of the charge of engaging in a continuous course of sexual abuse against [the victim].

. . . [The defendant] presented an all-or-nothing defense based on credibility-either he is telling the truth and he did not commit any act of molestation or [the victim] is telling the truth and he is guilty. . . . [T]he defendant in a resident child molester case rarely can offer a successful alibi or wrongful identification defense. The inability to do so is not caused by the nonspecificity of dates, locations and other details of the generic charges; rather, the inability has to do with the fact that the defendant in a resident child molester case has lived with or has had access to the victim on a continuous basis.

Id. (internal quotation marks and brackets omitted and emphasis added).

In People v. Whitham, 38 Cal.App.4th 1282, 45 Cal.Rptr.2d 571 (Cal. App. 5th Dist. 1995), the court, once again, rejected a constitutional challenge to Penal Code § 288.5. The court held that subsection (b) of Penal Code § 288.5, "which expressly dispenses with the need for jury unanimity on the identity of the specific acts constituting the crime, does not trench upon either the Constitution of California or the due process clause of the constitution of the United States." Id. at 1286. In so holding, the court reasoned that Penal Code § 288.5 (1) did not deprive a criminal defendant of the right to a unanimous jury verdict, inasmuch as jurors are required to unanimously find that the defendant engaged in the prohibited course of conduct, and (2) satisfied the due process requirements of the United States Constitution because, in order to convict a

*** FOR PUBLICATION ***

defendant under Penal Code § 288.5, "the jurors must unanimously agree that this chain of behavior has been proven beyond a reasonable doubt." Id. at 1297-1298. Moreover, in People v. Vasquez, 51 Cal.App.4th 1277, 59 Cal.Rptr.2d 389 (Cal. App. 2d Dist. 1996), the court reiterated that Penal Code § 288.5 does not violate a defendant's constitutional right to due process of law and expressed that,

[n]o right or legitimate interest of defendants is invaded by applying [Penal Code §] 288.5 to conduct which occurs during separate periods of recurring access to a child. A defendant's right to notice of the charges against him, his right to present a defense, and his right to a unanimous jury verdict are all affected in the same manner and degree by generic testimony, whether such testimony relates to multiple separate incidents, a truly "continuous" course of conduct, or an interrupted one. . . . [G]eneric testimony by the child victim does not impermissibly interfere with constitutional rights. . . . If several acts are separately charged, the defendant can be convicted only if the jury agrees unanimously on each act, whereas the jurors only must agree unanimously that a total of three or more acts occurred to convict under [Penal Code §] 288.5.

Id. at 1286-1287 (formatting omitted). Furthermore, in People v. Adames, 54 Cal.App.4th 198, 62 Cal.Rptr.2d 631 (Cal. App. 2d Dist. 1997), the court held that, although Penal Code § 288.5 permitted a jury to convict a defendant of an offense based on three or more acts of sexual abuse over a period of at least three months, without requiring a jury to unanimously agree on what three acts were committed, it did not violate a defendant's right to a fair trial by jury or right to due process, inasmuch as Penal Code § 288.5 contemplates a continuous-course-of-conduct offense:

We hold that the absence of a requirement that the jury unanimously agree on the particular incidents underlying a violation of [Penal Code §] 288.5 does not violate the federal [c]onstitution, specifically, the [s]ixth [a]mendment guarantee of the right to a jury trial or the

*** FOR PUBLICATION ***

[f]ourteenth [a]mendment guarantee of due process. . . .
The continuous-course-of-conduct crime does not require jury unanimity on a specific act, because it is not the specific act that is criminalized. In such a situation, no jury unanimity instruction is required.

Id. at 207-208 (internal citations and quotation marks omitted and emphasis added). See also People v. Johnson, 47 P.3d 1064, 1066 (Cal. 2002) ("In a prosecution under [Penal Code § 288.5], the trier of fact need unanimously agree only that the requisite number of specific sexual acts occurred, not which acts constituted the requisite number."). These cases aptly demonstrate the constitutionality of Penal Code § 288.5, inasmuch as it does not violate a defendant's right to a unanimous jury verdict or right to due process.

C. HRS § 707-733.5(2) is constitutional and does not violate a defendant's right to a unanimous jury verdict or his right to due process.

I agree that an accused is guaranteed the right to an unanimous verdict in a criminal prosecution under article 1, sections 5 and 14 of the Hawai'i constitution and the right to due process under the 5th and 14th amendments to the United States Constitution as well as article 1, sections 5 and 14 of the Hawai'i Constitution. HRS § 707-733.5 does not conflict with or deny a defendant such constitutional rights.

HRS § 707-733.5 was enacted in 1997 in order to remedy some of the problems of pleading, proof and jury instruction that had arisen in the prosecution of "resident child molesters." The legislature expressly articulated that sexual assault in the first, second, third, and fourth degrees do not constitute "continuing offenses," inasmuch as they represent distinct acts

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

and, therefore, separate offenses. However, recognizing the inherent problems involved in prosecuting "resident child molesters," the legislature made specifically clear that the criminal offense punished under HRS § 707-733.5 was based on a "continuing course of conduct"--the continuous sexual abuse of a minor.

It would be anomalous to rule HRS § 707-733.5(2) unconstitutional, as the majority holds. Indeed, when the legislature enacted HRS § 707-733.5, it took great care to protect a defendant's constitutional rights, in particular, the right to due process. Specifically, HRS § 707-733.5(3) provides that a defendant can only be charged with one count for each victim and cannot be charged with any other felony sex offense involving the same victim and occurring within the charged time period. Moreover, HRS § 707-733.5(2) compels that the jury unanimously agree, beyond a reasonable doubt, that the defendant engaged in three or more acts over a period of time. Finally, HRS § 707-733.5(1)(a) mandates that the defendant reside in the same home or have recurring access to the minor under the age of 14. As such, HRS § 707-733.5(2) survives constitutional scrutiny. In fact, Rabago, having been charged and convicted of one count of continuous sexual assault of a minor for Complainant A and one count of continuous sexual assault of a minor for Complainant B, rather than multiple counts of sexual assault, is a beneficiary of HRS § 707-733.5.⁹

⁹ Rabago was charged as follows: (1) one count of continuous sexual assault of a minor under the age of fourteen years, in violation of HRS § 707-
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In conclusion, the California courts, in Higgins, Avina, Gear, Whitham, Vasquez, Adames, and Johnson, overwhelmingly held Penal Code § 288.5 to satisfy due process requirements. The courts declared that, inasmuch as the legislature defined the prohibited offense under Penal Code § 288.5 as a continuous course of conduct, jurors need not unanimously agree on the three specific acts that comprised the crime, but need only agree that three or more acts occurred in the criminal course of conduct. Moreover, the California courts held that, inasmuch as Penal Code § 288.5 defined a continuous course of criminal conduct, defendants were not deprived of their constitutional right to due process. Similar to Penal Code § 288.5, HRS § 707-733.5(2) provides specific guidelines to determine that the offense being punished is the continuous sexual abuse of a minor. The Hawai'i legislature expressly contemplated a continuous course of criminal conduct offense under HRS § 707-733.5. As such, HRS § 707-733.5(2) does not require a jury unanimity instruction and, therefore, unlike the majority holds, does not violate Arceo and its progeny. In fact, even Rabago concedes that continuing course of conduct crimes are an exception to the Arceo jury unanimity requirement. Majority at 18.

In the instant case, Rabago's asserted deprivation of due process, in the context of a continuing course of conduct

⁹(...continued)
733.5, for Complainant A; (2) one count of continuous sexual assault of a minor under the age of fourteen years, in violation of HRS § 707-733.5, for Complainant B; and (3) two counts of sexual assault in the third degree, in violation of HRS § 707-732(1)(b), for Complainant C.

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crime, as charged under HRS § 707-733.5, is utterly without merit. The prosecution exercised commendable discretion by charging Rabago with one count of continuous sexual assault of a minor, with respect to Complainant A, and one count of continuous sexual assault of a minor, with respect to Complainant B, rather than separate counts of molestation. The information framed the charges within a specific time frame, from August 19, 1998 to October 4, 2000. That information, coupled with Complainants A and B and Mother's testimonies, more than adequately apprised Rabago of the nature of the charges against him. Moreover, Rabago had a trial before a jury of his peers. Due process compels nothing more.