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

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

HAL FELICIANO, Defendant-Appellant.

NO. 26273

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 02-1-1177)

JULY 5, 2005

MOON, C.J., LEVINSON, NAKAYAMA, AND DUFFY, JJ.;
AND ACOBA, J., DISSENTING

OPINION OF THE COURT BY DUFFY, J.

Defendant-appellant Hal Feliciano appeals from the Circuit Court of the First Circuit's judgment of conviction filed on November 19, 2003, the Honorable Richard K. Perkins presiding. Feliciano shot his cousin, Alex Stoesser, in the eye with a .22 caliber revolver. The circuit court convicted Feliciano on three counts: (1) attempted murder in the second degree (Hawai'i Revised Statutes (HRS) §§ 705-500, 707-701.5, and 706-656) [hereinafter, attempted murder in the second degree]; (2) place to keep pistol or revolver (HRS §§ 134-6(c) & (e)) [hereinafter, place to keep]; and (3) carrying, using or threatening to use a firearm in the commission of a separate felony (HRS §§ 134-6(a) &

(e)) [hereinafter, use of a firearm]. Feliciano was sentenced as follows: (1) life with the possibility of parole and a three-year mandatory minimum term of imprisonment[1] for count one; (2) ten years for count two; and (3) twenty years for count three. On appeal, Feliciano argues that the circuit court erred by: (1) violating the Hawai'i Constitution's double jeopardy clause when it (a) punished him for conduct by sentencing him to a mandatory minimum term of imprisonment pursuant to § 706-660.1 and then punishing him a second time for the same conduct with convictions of use of a firearm and place to keep, and (b) convicted him of attempted murder, place to keep, and use of a firearm; and (2) concluding that neither the HRS § 704-400 defense (entitled "Physical or mental disease, disorder, or defect excluding penal responsibility") or self-defense applied. We disagree with Feliciano, and affirm the circuit court's final judgment, guilty convictions, and sentences in all respects.

I. BACKGROUND

A. Event

On June 1, 2002, Stoesser (Feliciano's cousin) went to Delia Feliciano's (Feliciano's mother) [hereinafter, Delia[2]]

[1] The circuit court sentenced Feliciano to serve a mandatory minimum term of imprisonment of three years pursuant to HRS § 706-660.1, entitled "Sentence of imprisonment for use of a firearm, semiautomatic firearm, or automatic firearm in a felony."

[2] In the circuit court's findings of fact and conclusions of law, Feliciano's mother's name is spelled "Delia." In the March 6, 2003 transcript, her name is spelled "Deelia."

house and gave her $600 ($100 was owed to Delia and $500 was a loan). Feliciano lived at Delia's house as well. Later that night Delia claimed that the money Stoesser gave her was missing; Stoesser (who had been drinking) refused to believe Delia and began arguing with her; Feliciano asked Stoesser to leave. The next morning, Stoesser returned to the Feliciano residence.

There was conflicting testimony as to what happened at this point. Delia testified that Feliciano told her that he would pay Stoesser the money and that when Stoesser and Feliciano left in Stoesser's truck they were going to an ATM to withdraw money. Feliciano testified that he went with Stoesser to throw away a couch and visit Stoesser's co-worker Graham[3] (who Stoesser also suspected of stealing the money). Stoesser testified that when he arrived at the house that morning Delia asked him to take Feliciano out of the house because they could not handle him. In any event, later that same morning, Feliciano and Stoesser left the Feliciano residence in Stoesser's truck. Sometime before noon, Feliciano and Stoesser got into an argument (while in Stoesser's truck) and Stoesser referred to Feliciano as a "stupid mother fucker." Stoesser saw that Feliciano had a gun and asked him "Why you bring the gun stupid mother fucker, you wanna shoot me?" Stoesser eventually stopped the car and told Feliciano to get out, saying "Get the fuck out stupid. What, you going shoot

[3] Feliciano did not testify as to Graham's full name.

me? What's the problem?" A few moments later, Feliciano shot Stoesser in his right eye. After shooting Stoesser, Feliciano walked approximately two-tenths of a mile west of the shooting until he was disarmed and arrested by police who had been called by a witness to the shooting. After the police arrested Feliciano, they brought him to the Pearl City Police Station where his hands were processed for gunshot residue. Police Officer Chase Inamine testified that while the evidence specialist was processing Feliciano's hands Feliciano said, "I shot with my right."

B. Feliciano's History of Mental Illness

In 1979, Feliciano suffered a mental breakdown while he was stationed in Germany with the United States Air Force. Feliciano was diagnosed as suffering from schizophrenia and was discharged from the Air Force in 1981 as 100% disabled due to his mental illness. Feliciano's mental illness has been characterized as a delusional belief that he possesses the supernatural power to control and transform others through the use of "supernatural devices" that may be invoked by using a television remote control. Feliciano also believed that he was one of several people: Hal, Halice, and Opel.[4] After his discharge from the Air Force, Feliciano received the prescription drug Risperdal to treat his mental illness; Risperdal is designed

[4] "Opel" is also referred to as "Opal" in the court transcripts.

to control delusions, hallucinations and aggressiveness. During the months prior to the shooting Feliciano appeared to be taking less than his prescribed dosage of Risperdal. For some time prior to June 2, 2002, Feliciano was smoking marijuana regularly and using methamphetamine at least once a week.

C. Trial, Convictions, and Sentences

On June 10, 2002, the State of Hawai'i [hereinafter, prosecution] filed a complaint charging Feliciano with three counts: (1) attempted murder in the second degree in violation of HRS §§ 705-500 (1993),[5] 707-701.5 (1993),[6] and 706-656 (1993);[7]

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[5] HRS § 705-500, entitled "Criminal attempt," provides in pertinent part:

> (1) A person is guilty of an attempt to commit a crime if the person:
> (a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as the person believes them to be; or
> (b) Intentionally engages in conduct which, under the circumstances as the person believes them to be, constitutes a substantial step in a course of conduct intended to culminate in the person's commission of the crime.
> (2) When causing a particular result is an element of the crime, a person is guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, the person intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.

[6] HRS § 707-701.5, entitled "Murder in the second degree," provides in pertinent part: "(1) Except as provided in section 707-701, a person commits the offense of murder in the second degree if the person intentionally or knowingly causes the death of another person."

[7] HRS § 706-656, entitled "Terms of imprisonment for first and second degree murder and attempted first and second degree murder," provides in pertinent part: "(1) Persons convicted of first degree murder or first degree attempted murder shall be sentenced to life imprisonment without possibility

(2) place to keep in violation of HRS § 134-6(c) and (e) (Supp. 2004);[8] and (3) use of a firearm in violation of HRS §§ 134-6(a)

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of parole."

HRS § 706-656 was amended in 1996, but those amendments were to subsection two, pertaining to murders which were "especially heinous, atrocious, or cruel." As this subsection is not applicable in the present case, we cite to the 1993 version of the statute.

[8] HRS § 134-6 entitled, "Carrying or use of firearm in the commission of a separate felony; place to keep firearms; loaded firearms; penalty," provides in pertinent part:

> (a) 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 separate felony is:
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> (1) A felony offense otherwise defined by this chapter;
> (2) The felony offense of reckless endangering in the first degree under section 707-713;
> (3) The felony offense of terroristic threatening in the first degree under section [707-716(1)(a)], [707-716(1)(b)], and [707-716(1)(d)]; or
> (4) The felony offenses of criminal property damage in the first degree under section 708-820 and criminal property damage in the second degree under section 708-821 and the firearm is the instrument or means by which the property damage is caused.
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> . . . .
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> (c) Except as provided in sections 134-5 and 134-9, all firearms and ammunition shall be confined to the possessor's place of business, residence, or sojourn; provided that it shall be lawful to carry unloaded firearms or ammunition or both in an enclosed container from the place of purchase to the purchaser's place of business, residence, or sojourn, or between these places upon change of place of business, residence, or sojourn, or between these places and the following: a place of repair; a target range; a licensed dealer's place of business; an organized, scheduled firearms show or exhibit; a place of formal hunter or firearm use training or instruction; or a police station. "Enclosed container" means a rigidly constructed receptacle, or a commercially manufactured gun case, or the equivalent thereof that completely encloses the firearm.
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> . . . .
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> (e) Any person violating subsection (a) or (b) shall be guilty of a class A felony. Any person violating this section by carrying or possessing a loaded firearm or by carrying or possessing a loaded or unloaded pistol or

and (e).[9] The complaint also alleged that, under the attempted murder in the second degree charge, Feliciano was subject to sentencing in accordance with HRS § 706-660.1 (1993)[10] for use of a firearm while engaged in the commission of a felony.

On September 10, 2002, the circuit court appointed a three-member panel of examiners to determine Feliciano's fitness

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> revolver without a license issued as provided in section 134-9 shall be guilty of a class B felony. Any person violating this section by carrying or possessing an unloaded firearm, other than a pistol or revolver, shall be guilty of a class C felony.
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> 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.

[9] For statutory text, see footnote 8.

[10] HRS § 706-660.1, entitled "Sentence of imprisonment for use of a firearm, semiautomatic firearm, or automatic firearm in a felony," provides in pertinent part:

> (1) A person convicted of a felony, where the person had a firearm in the person's 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;
> (b) For a class A felony--up to ten years;
> (c) For a class B felony--up to five years; and
> (d) For a class C felony--up to three years.
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> The sentence of imprisonment for a felony involving the use of a firearm as provided in this subsection shall not be subject to the procedure for determining minimum term of imprisonment prescribed under section 706-669; provided further that a person who is imprisoned in a correctional institution as provided in this subsection shall become subject to the parole procedure as prescribed in section 706-670 only upon the expiration of the term of mandatory imprisonment fixed under paragraph (a), (b), (c), or (d).

to proceed and the extent of Feliciano's penal responsibility. The appointed examiners were Richard Kappenberg, Ph.D. (a clinical psychologist), David Stein, M.D., Ph.D. (a psychiatrist), and Terence Wade, Ph.D. (a clinical psychologist). Reports from all three doctors were admitted into evidence, but only Dr. Kappenberg and Dr. Stein testified at trial.

On January 2, 2003, Feliciano filed a notice of intention to rely on a defense of mental disease, disorder or defect, pursuant to HRS § 704-400 (1993).[11] Feliciano's jury-waived[12] trial commenced on February 27, 2003 and concluded on March 6, 2003.

Dr. Kappenberg testified that he reviewed Feliciano's Oahu Community Correctional Center (OCCC) records and his records at Adult Probation (which provide information about past hospitalizations, police reports and Veterans' Administration records) and conducted a one and a half hour examination of

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[11] HRS § 704-400, entitled "Physical or mental disease, disorder, or defect excluding penal responsibility," provides:

> (1) A person is not responsible, under this Code, for conduct if at the time of the conduct as a result of physical or mental disease, disorder, or defect the person lacks substantial capacity either to appreciate the wrongfulness of the person's conduct or to conform the person's conduct to the requirements of law.
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> (2) As used in this chapter, the terms "physical or mental disease, disorder, or defect" do not include an abnormality manifested only by repeated penal or otherwise anti-social conduct.

[12] On February 27, 2003 Feliciano waived his right to a jury trial.

Feliciano at OCCC. Based on the records and his examination, Dr. Kappenberg opined that Feliciano was suffering from a paranoid type of schizophrenia and polysubstance dependence at the time of the alleged offense. Dr. Kappenberg further opined that at the time of the offense, Feliciano's cognitive capacity was not impaired and that he was able to understand the difference between right and wrong. Dr. Kappenberg based his opinion on Feliciano's description of the event (which comported with the description given by other witnesses) and the fact that Feliciano specifically indicated that there was no connection between his beliefs (his supernatural ability to control others with a secret device) and his behavior that day. When asked about Feliciano's behavior when he was arrested by the police, i.e., telling the police to take care of his gun and that he shot with his right hand, Dr. Kappenberg stated that this showed that Feliciano was aware of what happened, that he participated, and that he was oriented and responding to his environment. Dr. Kappenberg was also asked about Feliciano's behavior when he was being questioned by the police, i.e., identifying himself as "Opel" and believing that he was in Germany; Dr. Kappenberg stated that this showed that Feliciano's mental functions had decreased significantly. Dr. Kappenberg opined that this decrease may have been caused by the stress of being arrested and placed in jail.

On cross-examination, Dr. Kappenberg was questioned as to why he did not conduct a further examination of Feliciano after reading the report about Feliciano's interview with the police. Dr. Kappenberg replied that there was no need for a further examination because there was no apparent connection between what Feliciano said at his police interview and his description of Feliciano's behavior at the time of the alleged offense. Dr. Kappenberg was further questioned as to whether Feliciano was taking his medication at the time of the incident; he responded that the records were unclear, but that Delia said that he would sometimes slip in taking his medications and Feliciano stated that he had not taken his medication for a long time, but was not clear as to how long this was. Dr. Kappenberg also testified that he was aware of Feliciano's history of mental illness dating back to 1979 and 1980.

Dr. Stein testified that he reviewed Feliciano's records[13] and examined Feliciano at OCCC for about an hour; based on his examination and review of records, Dr. Stein believed that Feliciano was "psychotic at the time of the offense" and that the psychosis was "most probably amphetamine-induced psychosis." Dr. Stein opined that the defendant's appreciation of the

[13] Dr. Stein testified that he reviewed police reports, reports relating to Feliciano's service in the Air Force, and post-discharge information from the Veterans' Administration. Dr. Stein stated that he did not review the OCCC records or the other doctors' reports.

wrongfulness of his conduct was not substantially impaired at the time of the alleged offense. Dr. Stein's opinion was based on: his examination of Feliciano, where Feliciano told him that it was wrong to shoot people; Feliciano's statements to the police that he used his right hand to shoot Stoesser, demonstrating that he knew what he had done; and Feliciano's statement (during Dr. Stein's examination) that he would not have shot Stoesser if a police officer was standing there, showing that Feliciano knew that shooting Stoesser was wrong, and also demonstrating that Feliciano had the ability to control his behavior. Dr. Stein also testified that he was aware of Feliciano's long history of mental illness, anti-psychotic medication use, and substance abuse.[14]

On November 19, 2003, the circuit court entered its judgment, guilty convictions, and sentences. The circuit court convicted and found Feliciano guilty on all three counts and sentenced him as follows: Count 1, life with the possibility of parole; Count 2, ten years; and Count 3, twenty years. The circuit court also granted the prosecution's motion to sentence Feliciano to a mandatory minimum term of imprisonment pursuant to

[14] Dr. Wade's report similarly concluded that Feliciano suffered from a mental disorder, but that Feliciano's delusional beliefs were not connected to the shooting. Dr. Wade opined that Feliciano had the capacity to appreciate the wrongfulness of his conduct and was not substantially impaired by his mental disorder at the time of the alleged conduct. Furthermore, Dr. Wade stated that Feliciano believed he was acting in self-defense.

HRS § 706-660.1 for Count 1 and accordingly sentenced Feliciano to a mandatory minimum of three years. Feliciano is currently incarcerated; he filed a timely appeal.

II. STANDARDS OF REVIEW

A. Constitutional Questions

"We answer questions of constitutional law by exercising our own independent judgment based on the facts of the case. . . . Thus, we review questions of constitutional law under the 'right/wrong' standard." State v. Jenkins, 93 Hawai'i 87, 100, 997 P.2d 13, 26 (2000) (citations, some quotation signals, and some ellipsis points omitted).

B. Sufficiency of the Evidence

> We have long held that evidence adduced in the trial court must be considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support a conviction; the same standard applies whether the case was before a judge or a jury. The test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact.

State v. Batson, 73 Haw. 236, 248, 831 P.2d 924, 931, recon[sideration] denied, 73 Haw. 625, 834 P.2d 1315 (1992) (citations omitted); see also State v. Silva, 75 Haw. 419, [434], 864 P.2d 583, 590 (1993) (citations omitted).

"'Substantial evidence' as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a [person] of reasonable caution to support a conclusion." Batson, 73 Haw. at 248-49, 831 P.2d at 931 (citation omitted). See also Silva, 75 Haw. at [432], 864 P.2d at 590 (quoting State v. Matias, 74 Haw. 197, 207, 840 P.2d 374, 379 (1993) [(1992)]); State v. Aplaca, 74 Haw. 54, 64-65, 837 P.2d 1298, 1304 (1992) (citations omitted).

In Interest of John Doe, Born on January 5, 1976, 76 Hawai'i 85, 92-93, 869 P.2d 1304, 1311-12 (1994); see also State v. Valdivia, 95 Hawai'i 465, 471, 24 P.3d 661, 667 (2001).

State v. Martinez, 101 Hawai'i 332, 338-39, 68 P.3d 606, 612-13 (2003)(alterations in original).

III. DISCUSSION

A. Double Jeopardy in "Successive Prosecution" Cases

1. U.S. and Hawai'i Constitutional prohibitions against double jeopardy

Article 1, section 10 of the Hawai'i Constitution provides the following protection: "nor shall any person be subject for the same offense to be twice put in jeopardy[.]" The fifth amendment to the United States Constitution similarly provides that "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb[.]" These constitutional safeguards are commonly referred to as providing protection against "double jeopardy."

In State v. Lessary, 75 Haw. 446, 865 P.2d 150 (1994), this court pointed out that double jeopardy provides protection in three scenarios: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." Lessary, 75 Haw. at 454, 865 P.2d at 154 (quoting North Carolina v. Pearce, 395 U.S. 711, 717 (1969)).

2. "Successive prosecution," "multiple prosecution," and "multiple punishments"

"Successive prosecution" cases occur when the defendant is prosecuted for an offense, then is prosecuted a second time for the same offense after acquittal or conviction. "Multiple prosecution" (again "multiple prosecution," not "multiple punishments") cases occur when the defendant is prosecuted for the same offense at the same time in two different courts, e.g., district court and family court. Both "successive prosecution" and "multiple prosecution" cases require more than one prosecution. In contrast, in "multiple punishments" cases, there is a single prosecution after which the defendant is punished multiple times for the same offense.[15]

The Lessary facts presented one of the two "successive prosecution" scenarios (as distinguished from the "multiple punishments" scenario) following an alleged criminal episode (that spanned multiple hours) with his estranged wife as the victim. Lessary was charged by complaint in district court with terroristic threatening and kidnapping of his estranged wife (which was later amended to unlawful imprisonment). Id. at 449, 865 P.2d at 152-53. On the same day, Lessary was charged by complaint in family court with abuse of a family member. Id. at

[15] This distinction is important because each situation invokes different aspects of the double jeopardy clause. As we conclude infra, this difference is also a justification for different tests for each type of case ("successive prosecution" and "multiple punishments").

449, 865 P.2d at 152. Lessary pled "no contest" to the abuse charge, and was sentenced to five days of incarceration and one year of probation. Id. at 449-50, 865 P.2d at 152. Lessary subsequently moved to dismiss the terroristic threatening and unlawful imprisonment charges on double jeopardy grounds. Id. at 450, 865 P.2d at 152. The motion to dismiss was granted, and the prosecution appealed. Id. at 450-51, 865 P.2d at 152-53.

3. Possible tests in double jeopardy cases

In our analysis of double jeopardy in this "successive prosecution" case, this court discussed the three tests that courts have applied in determining whether offenses are the "same offense" for double jeopardy purposes:

1. The "same elements" test initially set forth in Blockburger v. United States, 284 U.S. 299 (1932): "[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the 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." Lessary, 75 Haw. at 452, 865 P.2d at 153 (quoting Blockburger, 284 U.S. at 304)(alteration in original).

2. The "same conduct" test set forth in Grady v. Corbin, 495 U.S. 508, 521 (1990): "the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that

prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." Lessary, 75 Haw. at 457-58, 865 P.2d at 155 (quoting Grady, 495 U.S. at 521).

3. The "same episode" test set forth in Ashe v. Swenson, 397 U.S. 436, 453-54 (1970) (Brennan, J., concurring): "all offenses 'that grow out of a single criminal act, occurrence, episode, or transaction'" are considered to be the "same offense" for double jeopardy purposes. Lessary, 75 Haw. at 458, 865 P.2d at 155-56 (quoting Ashe, 397 U.S. at 453-54).

4. The Lessary "same conduct" test is used in "successive prosecution" cases.

After discussing each of these tests in the context of the Lessary "successive prosecution" facts, we rejected the application of the Blockburger "same elements" test and the Ashe "same episode" test. Lessary, 75 Haw. at 457-59, 865 P.2d at 155-56. With respect to the "same episode" test, we concluded that while the double jeopardy clause should protect an individual from being twice put in jeopardy for a single act, it should not protect an individual from separate prosecutions for separate acts. Id. at 458, 865 P.2d at 156. With respect to the Blockburger "same elements" test, we concluded that its protection was inadequate in "successive prosecution" cases because its focus on the statutory definitions of offenses did not prevent the government from initiating multiple prosecutions

against an individual based on a single act as long as the subsequent prosecutions were for offenses with "different" elements. Id. at 456-57, 865 P.2d at 155.

We held that the Hawai'i Constitution provides greater protection against "successive prosecutions" than does the United States Constitution, and adopted the "same conduct" test in "successive prosecution" cases:

> Although the double jeopardy clause of the United States Constitution does not bar the prosecution of either the Unlawful Imprisonment or Terroristic Threatening charges, we hold that the Hawai'i Constitution provides greater protection against multiple prosecutions than does the United States Constitution. The double jeopardy clause of the Hawai'i Constitution prohibits the State from pursuing multiple prosecutions of an individual for the same conduct. Prosecutions are for the same conduct if any act of the defendant is alleged to constitute all or part of the conduct elements of the offenses charged in the respective prosecutions. Under the "same conduct" test, prosecution of the Unlawful Imprisonment charge is barred while prosecution of the Terroristic Threatening charge is allowed.

Id. at 462, 865 P.2d at 157.

We take this opportunity to reconfirm that the "same conduct" test is the proper test to be applied in "successive prosecution" cases to determine whether an offense is the "same offense" for double jeopardy purposes under our Hawai'i Constitution.

B. Double Jeopardy in "Multiple Punishments" Cases

1. Jumila, Brantley, and lesser included offenses (HRS § 701-109)

We most recently addressed the issue of double jeopardy in "multiple punishments" cases in State v. Jumila, 87 Hawai'i 1,

950 P.2d 1201 (1998), and State v. Brantley, 99 Hawai'i 463, 56 P.3d 1252 (2002).

In Jumila, we held that convictions of both second-degree murder (HRS § 707-701.5) and use of a firearm in commission of a felony (HRS § 134-6) were improper under HRS § 701-109 because the second-degree murder charge was an included offense of the firearm charge. Jumila, 87 Hawai'i at 3, 950 P.2d at 1203.

In Brantley, a plurality opinion with three justices concurring separately, we overruled Jumila; we held that a defendant can be convicted of both use of a firearm in the commission of a separate felony and the separate felony, despite the HRS § 701-109 statutory prohibition, where the legislature intended to allow convictions for both offenses. Brantley, 99 Hawai'i at 469, 56 P.3d at 1258. While the double jeopardy constitutional argument was implicated to the extent that the plurality opinion and concurring opinion of Justice Levinson acknowledged that HRS § 701-109 must be construed to provide the minimum protections afforded by the fifth amendment's double jeopardy clause, the parties and this court focused on the statutory interpretation of HRS § 701-109. Id. at 469 n.8, 56 P.3d at 1258 n.8.

These cases, however, primarily involved interpretation of HRS § 701-109 (1993), entitled "Method of prosecution when

conduct establishes an element of more than one offense," which provides:

> (1) When the same conduct of a defendant may establish an element of more than one offense, the defendant may be prosecuted for each offense of which such conduct is an element. The defendant may not, however, be convicted of more than one offense if:
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> (a) One offense is included in the other, as defined in subsection (4) of this section; or
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> . . . .
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> (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:
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> (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
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> (b) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or
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> (c) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a different state of mind indicating lesser degree of culpability suffices to establish its commission.

In contrast, in this case, Feliciano bases his claims of double jeopardy violations on the double jeopardy clause of the Hawai'i Constitution. We will thus address the issue, for the first time, of which test we should apply to determine whether an offense is the "same offense" under the double jeopardy clause of the Hawai'i Constitution in multiple punishments cases.

2. Lessary, Blockburger, and Dixon

In Lessary, we explained that we will only extend the double jeopardy protections of the Hawai'i Constitution if we find that the protections afforded by the United States Constitution are inadequate. Lessary, 75 Haw. at 454, 865 P.2d

at 154. Our analysis must thus begin with the protections provided under the United States Constitution in the "multiple punishments" scenario. In Blockburger, a "multiple punishments" case, the United States Supreme Court ruled that the double jeopardy clause protects defendants from receiving multiple punishments for the same offense, even in a single prosecution, and created the "same elements" test to implement that protection. As stated earlier herein, the Blockburger test held that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the 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." Lessary, 75 Haw. at 452, 865 P.2d at 153 (quoting Blockburger, 284 U.S. at 304). Put simply, in a "multiple punishments" case, if each offense has an element that the other does not, then there is no double jeopardy clause violation.[16] In United States v. Dixon, 509 U.S. 688 (1993), the Supreme Court vigorously debated the issue of whether to apply the "same elements" or "same conduct" tests to "successive prosecution" cases before overruling Grady and holding that the "same elements" test

[16] If only one of the two crimes has an additional element, then one crime is a lesser included offense of the other. In this situation, the prosecution for the lesser included offense is barred by the "same elements" test. The double jeopardy clause protects against multiple punishments because it prevents the state from prosecuting the defendant for both the greater and the lesser offenses. See Brantley, 99 Hawai'i at 472, 56 P.3d at 1261 (Levinson, J., concurring).

applies; it appears settled at the federal level that the "same elements" test applies in "multiple punishments" cases as well as in "successive prosecution" cases.

3. The "same elements" test protects a defendant's double jeopardy rights and interests in a "multiple punishments" case.

Again, we have not previously adopted a test for determining whether an offense is the "same offense" under the double jeopardy clause of the Hawai'i Constitution in "multiple punishments" cases.[17] Feliciano argues that the "same conduct"

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[17] In State v. Santiago, 8 Haw. App. 535, 540, 813 P.2d 335, 338 (1991), and State v. Caprio, 85 Hawai'i 92, 102, 937 P.2d 933, 943 (App. 1997), the Intermediate Court of Appeals (ICA) concluded that State v. Pia, 55 Haw. 14, 18-19, 514 P.2d 580, 584 (1973), established a two-part test for "multiple punishments" cases in Hawai'i. The ICA first applied the Blockburger "same elements" test, then determined whether "the law defining each of the offenses is intended to prevent a substantially different harm or evil." Santiago, 8 Haw. App. at 541, 813 P.2d at 338 (quoting Pia, 55 Haw. at 18, 514 P.2d at 584); Caprio, 85 Hawai'i at 102, 937 P.2d at 943 (quoting Pia, 55 Haw. at 18, 514 P.2d at 584). However, the holding in Pia is very narrow and Pia does not establish the Hawai'i standard for constitutional "multiple punishment" cases. See also Jumila, 87 Hawai'i at 12 n.5, 950 P.2d at 1212 n.5 (Ramil and Nakayama, JJ., dissenting) (stating that Santiago and Caprio should be overruled because these cases improperly relied on dicta that did not adequately address the distinction between multiple punishments and successive prosecutions.)

In Pia, the defendants were charged with: (1) committing assault or battery on a police officer with the intent to obstruct the officer's duties; and (2) willfully interfering with a police officer while the officer is lawfully executing his duties. Pia, 55 Haw. at 15, 514 P.2d at 582. The charging document had little in the way of factual allegations. Id. The defendants pled guilty to the second offense and then moved to dismiss the first count on double jeopardy grounds. Id. at 15-16, 514 P.2d at 582-83. The prosecution offered to prove that the offenses were based on separate and distinct acts; the trial court, however, looked only at the information in the charging document and ruled that both counts originated in the same factual transaction and that count two was a lesser included offense of count one. Id. at 16, 514 P.2d at 583. We held that "the State should have been afforded the opportunity to demonstrate that the first count of the information related to a factual incident separate from that upon which the defendants pleaded guilty in the second count." Id. at 17, 514 P.2d at 583-84. This holding is all that Pia stands for. In dicta, we also addressed the defendants' argument that count two was a lesser included offense of count one, but we concluded

(continued...)

test this court has adopted for "successive prosecution" cases should apply to his "multiple punishments" case because: (1) it comports with the common sense notions of double jeopardy protections; and (2) it prohibits legislative "end-runs" around his constitutional double jeopardy protections.

We do not believe, however, that it is necessary to extend the protection of the Lessary "same conduct" test to "multiple punishments" cases. First, the rights and interests protected by the double jeopardy clause, as it applies in "multiple punishments" cases, are adequately preserved by the "same elements" test:

> [T]he Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors. The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense . . . . Where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense.

Brown v. Ohio, 432 U.S. 161, 165 (1977).[18] In other words, the double jeopardy clause (as applied in "multiple punishments"

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[17](...continued)
that the lesser included offense was not at issue because the prosecution was relying on two separate physical acts, not one. Id. at 17-18, 514 P.2d at 584. We did not establish a "Hawai'i rule" to determine when multiple punishments are barred by the Hawai'i Constitution's double jeopardy clause. Id. As such, Santiago and Caprio are overruled to the extent that these cases concluded that Pia established a "Hawai'i rule" applicable to "multiple punishment" cases because these cases misread Pia in reaching this conclusion.

[18] When, on the other hand, successive prosecutions are at stake, the guarantee serves "a constitutional policy of finality for the defendant's benefit." Brown, 432 U.S. at 165 (quoting United States v. Jorn, 400 U.S. 470, 479 (1971)).

cases) ensures that the courts cannot punish a defendant beyond what is authorized by the legislature. As such, the "same elements" test adequately preserves the protections afforded by the double jeopardy clause because it focuses on whether the legislature intended to allow the imposition of multiple punishments for the commission of a particular act, and ensures that the courts cannot punish a defendant beyond what was intended.

Second, in "multiple punishments" cases, we do not have the same concerns that caused us to apply the Lessary "same conduct" test in "successive prosecution" cases. As we expressed in Lessary, the dangers in "successive prosecution" cases are as follows:

> Successive prosecutions, however, whether following acquittals or convictions, raise concerns that extend beyond merely the possibility of an enhanced sentence[.] The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity[.] Multiple prosecutions also give the State an opportunity to rehearse its presentation of proof, thus increasing the risk of an erroneous conviction for one or more of the offenses charged. Even when a State can bring multiple charges against an individual under Blockburger, a tremendous additional burden is placed on that defendant if he must face each of the charges in a separate proceeding.

Lessary, 75 Haw. at 455-56, 865 P.2d at 154-55 (quoting Grady, 495 U.S. at 518-19)(alterations in original). Third, a legislative "end-run" around constitutional double jeopardy

protections is not possible so long as the legislature acts within its power to define criminal offenses and to set the punishment for those convicted of these offenses. See Whalen v. United States, 445 U.S. 684, 689 (1980) ("[T]he legislative power to define offenses and to prescribe the punishments to be imposed upon those found guilty of them resides wholly with the Congress."); State v. Rivera, 106 Hawai'i 146, 158, 102 P.3d 1044, 1056 (2004) ("[T]he power to determine appropriate punishment for criminal acts lies in the legislative branch." (Quoting State v. Bernades, 71 Haw. 485, 490, 795 P.2d 842, 845 (1990).); Bernades, 71 Haw. at 490, 795 P.2d at 845 (stating further that the "courts cannot interfere unless the punishment prescribed appears clearly and manifestly to be cruel and unusual"). In "multiple punishments" cases, the double jeopardy clause serves as a constraint on the courts, ensuring that the court cannot impose punishment upon a defendant that is greater than what the legislature has authorized. As such, it is not possible to have a legislative end-run as long as the legislature is acting within its power.

The dissent disagrees with our analysis, contending that the "same conduct" test should be applied as Lessary is not limited to "successive prosecution" cases, and that Lessary extended double jeopardy protections against the legislature. We respectfully disagree. The facts of Lessary, discussed infra,

show successive prosecution for abuse, terroristic threatening, and unlawful imprisonment, and not a multiple punishments scenario. As clearly stated by Justice Ramil in Jumila, a multiple punishments case decided after Lessary:

> "[T]here is a crucial distinction between Lessary and the present case -- Lessary involved successive prosecutions while the present case involves multiple punishments. Successive prosecutions raise significant dangers that are not present in multiple punishment situations. These concerns justify a more rigorous standard for successive prosecution cases.

Jumila, 87 Hawai'i at 12, 950 P.2d at 1212 (Ramil, J., dissenting)(emphasis added). In addition, the dissent in Brantley acknowledged that Lessary did not decide the issue of whether the "same conduct" or "same elements" test applies to multiple punishments situations:

> The question of whether State v. Lessary, 75 Haw. 446, 865 P.2d 150 (1994), or Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L.Ed. 306 (1932), applies to multiple punishments in a single prosecution has not been answered by this court. See Tomomitsu 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 Hawai'i Constitution in the multiple punishments situation.")

Brantley, 99 Hawai'i at 485, 56 P.3d at 1274 (Acoba, J., dissenting)(footnote omitted).

The dissent's contention that Lessary extended our double jeopardy protections against the legislature is belied by our subsequent decisions in Jumila and Brantley. In Jumila, discussed infra, we stated 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. Jumlia, 87 Hawai'i at 4-5, 950 P.2d at 1204-05. In Brantley, we found that the legislature indeed did intend to permit convictions of both HRS § 134-6(a) and the separate felony (the included offense), and held that a defendant can be convicted of both offenses. Brantley, 99 Hawai'i at 469, 56 P.3d at 1258.

Our jurisprudence on this issue, grounded in the belief that the double jeopardy clause is primarily a restriction on the courts and the prosecution, which allows the legislature (within the boundaries of the eighth and fourteenth Amendments to the United States Constitution and article I, section 12 of the Hawai'i Constitution) to define crimes and fix punishments, is consistent with the jurisprudence of the United States Supreme Court. In addition, with the exception of Indiana cited in the dissent, we have been unable to locate any other jurisdiction, state or federal, whose majority has agreed with the dissent's argument; the dissent's premise (with the exception of Indiana) has been espoused solely in dissents. See, e.g., Missouri v. Hunter, 459 U.S. 359, 370 (1983) (Marshall, J., dissenting) (stating that the legislature cannot authorize multiple punishments). We reject the dissent's argument as it is contrary to the double jeopardy jurisprudence of the United States Supreme

Court and this court.[19] We consequently hold that the double jeopardy clause does not constrain the legislature from intentionally imposing multiple punishments upon a defendant for separate offenses arising out of the same conduct.

In conclusion, we believe that the protections afforded by the United States Constitution, as set forth in the Blockburger "same elements" test, adequately protect against double jeopardy in "multiple punishments" cases.

C. Application of the Blockburger "Same Elements" Test to Feliciano

Feliciano asserts that his rights to double jeopardy protection were violated when he was convicted of and sentenced for three offenses: (1) attempted murder in the second degree (HRS § 706-500, 707-701.5, and 706-656), with a sentence of life imprisonment with the possibility of parole, and a three-year mandatory minimum term sentence under HRS § 706-660.1); (2) place to keep pistol (HRS § 134-6(c) and (e)), with a ten-year sentence; and (3) use of a firearm in the commission of a separate felony (HRS §134-6(a) and (e)), with a twenty-year sentence. Specifically, Feliciano contends that his constitutional double jeopardy rights were violated in two ways. First, he argues that the circuit court's sentence for use of a

[19] If we were to adopt the dissent's argument, HRS § 701-109 would be rendered unconstitutional because this statute authorizes the legislature to impose multiple punishments for separate offenses arising out of the same conduct.

firearm in the commission of a separate felony constituted multiple punishments for the same offense in two ways: as between use of a firearm in the commission of a separate felony and HRS § 706-660.1, and as between using a firearm in the commission of a separate felony and attempted murder in the second degree. Second, he argues that the circuit court's sentence on place to keep constituted multiple punishments for the same offense in three ways: (a) as between place to keep and attempted murder in second degree; (b) as between place to keep and HRS § 706-660.1; and (c) as between place to keep and use of a firearm in the commission of a separate felony.

Application of the Blockburger "same elements" test to each violation of double jeopardy alleged by Feliciano reveals that Feliciano's constitutional rights have not been violated.

1. Use of a Firearm and Second Degree Attempted Murder

The elements of murder in the second degree are: (1) causing the death of another person; and (2) doing so intentionally or knowingly. HRS § 707-701.5. The elements of attempt are: (1) engaging in conduct which would constitute the crime if the attendant circumstances were as the person believed them to be; or (2) engaging in conduct which, under the circumstances as the person believes them to be, constitutes a substantial step in a course of conduct intended to culminate in

the person's commission of the crime; and (3) engaging in either element (1) or (2) intentionally. HRS § 705-500.

Use of a firearm has the following elements: (1) carrying, having within the person's immediate control, using, or threatening to use a firearm; (2) while committing a separate felony; and (3) engaging in elements (1) and (2) knowingly. HRS § 134-6(a). Use of a firearm requires proof of fact that second degree attempted murder does not -- that the person use a firearm. A person can commit second degree attempted murder with or without the use of a firearm. Attempted murder requires that the person intended to cause the death of another person -- an element not present in the use of a firearm. Each offense has an element which the other does not, and thus is a separate offense for double jeopardy purposes.

Attempted murder is, however, an included offense of use of a firearm. As we discussed in Jumila, HRS § 701-109 prohibits convictions for both an offense and an offense included therein. However, in Brantley, 99 Hawai'i at 469, 56 P.3d at 1258, after examination of the legislative history of the use of a firearm statute (HRS § 134-6(a)), we held that: (1) the legislature intended to permit convictions of both HRS § 134-6(a) and the separate felony; and (2) HRS § 134-6(a) was a statutory exception to the prohibition against convicting for both an offense and an included offense set forth in HRS § 701-109.

Therefore, per our holding in Brantley, Feliciano can be convicted of both attempted murder and of use of a firearm.

2. Place to Keep and Attempted Murder in the Second Degree

The elements of place to keep are: (1) carrying or possessing a loaded or unloaded firearm; (2) doing so when the firearm was not confined in an enclosed container; and (3) carrying or possessing the unenclosed firearm in a place other than the person's place of business, residence, or sojurn or between specific places (i.e., place of purchase or repair, target range, police station, etc.). HRS § 134-6(c). Attempted murder in the second degree and place to keep do not share any common elements, and thus are separate offenses for double jeopardy purposes.

3. Place to Keep and Use of a Firearm

Both place to keep and use of a firearm require that the person carry a firearm. However, use of a firearm requires that the person commit a separate felony, an element not required by place to keep. Place to keep focuses on location (i.e., whether the person was at an authorized location or traveling between authorized locations), an element which is not present in use of a firearm. Place to keep and use of a firearm are thus separate offenses for double jeopardy purposes.

4. Conclusion

Each of the aforementioned offenses (attempted murder in the second degree, place to keep, and use of a firearm) contains elements which the others do not. Thus, the circuit court did not violate the Hawai'i Constitution's double jeopardy clause by convicting Feliciano of attempted murder in the second degree, place to keep, and use of a firearm.

D. Double Jeopardy Does Not Bar Imposition of a Mandatory Minimum Term Sentence for Attempted Murder in the Second Degree When Feliciano Was Also Convicted of and Sentenced for Use of a Firearm in the Commission of Attempted Murder in the Second Degree as the Legislature Intended to Impose Multiple Punishments.

We previously concluded, supra, that the circuit court did not violate Feliciano's rights under the Hawai'i Constitution's double jeopardy clause by convicting Feliciano of attempted murder in the second degree, place to keep, and use of a firearm. However, Feliciano also contends that his constitutional double jeopardy rights were violated when the circuit court imposed a mandatory minimum term sentence pursuant to HRS § 706-660.1 for attempted murder in the second degree when Feliciano was also convicted of, and sentenced for, use of a firearm in the commission of the separate felony of attempted murder in the second degree. We disagree.

1. Legislative intent is the proper analysis to apply in determining whether double jeopardy bars multiple punishments.

We previously discussed, supra, the legislature's power to define criminal offenses and to determine appropriate punishments for the offenses. We held that the double jeopardy clause does not constrain the legislature from intentionally imposing multiple punishments upon a defendant for separate offenses arising out of the same conduct. The issue we are faced with in this case is thus whether the legislature intended to punish Feliciano under both HRS § 134-6(a) and HRS § 706-660.1 for use of a firearm in shooting Stoesser.[20]

2. The legislature clearly intended to punish a defendant multiple times if the defendant uses a firearm in the commission of a felony.

a. 1990 legislative history

In 1990, the legislature amended HRS § 134-6 as follows (bracketed material deleted, new material underlined):

> §134-6 Possession or use of firearm in the commission of a felony; [Place] place ~~to keep firearms; loaded firearms; penalty~~. (a) It 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, whether the firearm was loaded or not, and whether operable or not.
>
> . . . .
>
> [(c)](d) Any person violating this section by possessing, using or threatening to use a firearm while

[20] The Blockburger "same elements" test applies to offenses only, and does not apply when comparing a mandatory minimum sentence statute and an offense. Ball v. United States, 470 U.S. 856, 861 (1985)("For purposes of applying the Blockburger test in this setting as a means of ascertaining congressional intent, 'punishment' must be the equivalent of a criminal conviction and not simply the imposition of sentence.")

> engaged in the commission of a felony shall be guilty of a class A felony.

990 Haw. Sess. L. Act 195, § 2 at 422 (footnote omitted). In section 5 of the same bill, the legislature also amended language in HRS § 706-660.1. 1990 Haw. Sess. L. Act 195, § 2 at 423-24. While the amendments to the mandatory minimum statute are not relevant (because they involve semi-automatic firearms) the fact that the legislature amended HRS § 134-6 in the same bill that contained the mandatory minimum sentence statute, HRS § 706-660.1, shows that the legislature was aware of both punishments and intended to punish a defendant who committed a felony while using a firearm multiple times.

b. 1993 legislative history

In 1993, the legislature amended HRS § 134-6 as follows (deleted material bracketed; new material underlined):

> **§ 134-6 [Possession] Carrying or use of firearm in the commission of a separate felony; place to keep firearms; loaded firearms; penalty.** (a) It shall be unlawful for a person to knowingly [possess] 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 separate felony is:
>
> (1) A felony offense otherwise defined by this chapter;
> (2) The felony offense of reckless endangering in the first degree under section 707-713;
> (3) The felony offense of terroristic threatening in the first degree under section 707-716(a), 707-716(b), and 707-716(d); or
> (4) The felony offenses of criminal property damage in the first degree under section 708-820 and criminal property damage in the second degree under section 708-821 and the firearm is the

> instrument or means by which the property damage is caused.
>
> (b) It shall be unlawful for a person to knowingly possess a firearm with the intent to facilitate the commission of a felony offense involving the distribution of a controlled substance, whether the firearm was loaded or not, and whether operable or not.

1993 Haw. Sess. L. Act 239, § 1 at 418. The House Judiciary Committee stated that this amendment was to clarify that HRS § 134-6 "was not intended to apply to certain felonies which already have enhanced penalties for identical conduct." Hse. Stand. Comm. Rep. No. 472, in 1993 House Journal, at 1163. This amendment is significant, because while the legislature amended the statute to exempt certain felonies, it did not exempt the present situation, where the defendant is convicted of a separate felony (to which the mandatory minimum is attached) and use of a firearm.[21]

c. 1999 legislative history

In 1999, the legislature amended HRS § 134-6 as follows (new material underlined):

> (e) Any person violating subsection (a) or (b) shall be guilty of a class A felony. Any person violating this section by carrying or possessing a loaded firearm or by carrying or possessing a loaded or unloaded pistol or revolver without a license issued as provided in section

[21] The Senate Judiciary Committee also stated that HRS § 134-6(a) "was not intended to permit charging of a separate felony for use of a firearm where the underlying felony involves a firearm and is classified as a felony for that reason alone." Sen. Stand. Comm. Rep. No. 1217, in 1993 Senate Journal, at 1210.

The Senate Judiciary Committee also stated that the legislature created the offense of "use of a firearm" to "recognize and deter the heightened danger presented when a firearm is involved in the commission of a felony such as burglary." Sen. Stand. Comm. Rep. No. 1217, in 1993 Senate Journal, at 1210.

> 134-9 shall be guilty of a class B felony. Any person violating this section by carrying or possessing an unloaded firearm, other than a pistol or revolver, shall be guilty of a class C felony.
>
> 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.

1999 Haw. Sess. L. Act 12, § 1 at 12. The legislature made this amendment to clarify the law after this court issued Jumila, where we held that a defendant could not be punished for use of a firearm and a separate, underlying felony. The Senate Judiciary Committee stated that:

> The purpose of this bill is to clarify that any conviction or sentence for carrying or use of a firearm in the commission of a separate felony shall be in addition to and not in lieu of any conviction and sentence for the separate felony. . . .
>
> Your Committee believes that stronger and more certain penalties should be instituted to discourage the use of firearms in the commission of a felony and to provide a deterrent effect against such use.
>
> Your Committee finds that clarification in the law is necessary due to a recent Hawaii 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." (Emphasis added.)
>
> At the same time, your Committee recognizes and seeks to address another shortcoming in the law, as pointed out by

> the Jumila dissent. The dissent noted that there was insufficient legislative intent to permit cumulative sentencing under section 134-6(a) and section 706-660.1 (sentence of imprisonment for use of a firearm in a felony). Your Committee believes that when the application of both statutes is based upon the same underlying felony, cumulative punishment is permissible.

Sen. Stand. Comm. Rep. No. 843, in 1993 Senate Journal, at 1296 (Emphases added, third emphasis in original). This legislative history clearly shows that the legislature intended to punish defendants multiple times for both the underlying, separate felony (with a conviction and a mandatory minimum) and with a conviction for use of a firearm.

We note that our recent decision in State v. Vellina, 106 Hawai'i 441, 106 P.3d 364 (2005), and the recent decision of the ICA in State v. Coelho, No. 25805 __ Hawai'i __, __ P.3d __ (Haw. Apr. 28, 2005), are consistent with, but distinguishable from, our decision in this case.[22] In Vellina, the defendant allegedly stole two firearms from an apartment. Vellina, 106 Hawaii at 445, 106 P.3d at 368. The defendant entered a plea of

[22] Our decision today is also consistent with State v. Ambrosio, 72 Haw. 496, 496-97, 824 P.2d 107, 107-108 (1992), where the defendant pled no contest to charges of kidnaping and possession of a firearm in the commission of a felony (among other charges). The trial court imposed mandatory minimum terms of imprisonment for both the kidnaping charge and the possession of a firearm in the commission of the felony of kidnaping charge. Id. at 497, 824 P.2d at 108. We held that a defendant could be sentenced to a mandatory minimum term of imprisonment in connection with the kidnaping conviction, but could not be sentenced to a mandatory minimum term of imprisonment for the use of a firearm conviction. Id. at 498, 824 P.2d at 108. We based this holding on the fact that "[t]he legislature has chosen to make the use of a firearm in the commission of a felony the basis for enhanced sentencing for that felony, and it has also chosen to make such use a separate felony, but it clearly has not chosen to impose two mandatory minimum sentences for one use of a gun." Id. at 497-98, 824 P.2d at 108.

no contest to the charges against him, which included two counts of theft in the first degree. Id. at 444, 106 P.3d at 367. The prosecution requested, and the court granted, mandatory minimum terms of imprisonment (pursuant to HRS §§ 706-660.1(1)(c) and 706-660.1(3)(c)) as to both of the theft counts. Id. We stated:

> Vellina did not possess, use, or threaten the use of a firearm while engaged in the commission of the felonies of theft of a firearm and a semi-automatic firearm. Vellina's theft of a firearm was the entire felony; in other words, there was no underlying felony that Vellina committed while possessing or using a firearm.

Id. at 447-48, 106 P.3d at 370-71.

In Coelho, the defendant was a felon who was on probation; one of the terms of the defendant's probation was that he was not to possess any type of firearm. While executing a search warrant, police officers recovered a firearm from the trunk of the defendant's vehicle. The defendant was convicted of prohibited possession of a firearm and sentenced to a ten-year term of imprisonment. The trial court also imposed a mandatory minimum term of imprisonment for the possession of a firearm during the commission of a felony. Based upon statutory construction and Hawai'i case law, the ICA concluded that the trial court could not convict the defendant for possession of a firearm and sentence him for a mandatory minimum term of imprisonment based upon the same possession of a firearm because the legislature did not intend that the mandatory minimum term be

applied where the entirety of the felonious conduct is the use or the possession of a firearm.

Vellina and Coelho are thus both distinguishable from the present case. In the present case, the mandatory minimum sentence was attached to a separate (from use of a firearm) felony -- attempted murder; in contrast, in Vellina and Coelho, there was no separate felony and the trial courts improperly attached the mandatory minimum term of imprisonment to the use or possession of a firearm conviction.[23]

E. HRS § 704-400 Defense and Self-Defense

1. HRS § 704-400 Defense

Feliciano argues that the circuit court erred in relying on the opinions of Dr. Stein and Dr. Kappenberg because both doctors failed to conduct a thorough examination of Feliciano. Specifically, Feliciano argues that Dr. Kappenberg and Dr. Stein failed to investigate Feliciano's health status in the weeks and months before the shooting and failed to ask Feliciano questions about critical delusional beliefs. We disagree.

The record shows that both doctors conducted a thorough examination of Feliciano. Both doctors testified that they reviewed Feliciano's records, including police reports, Veterans'

[23] The holdings of this court and the ICA are also consistent with the legislative history of HRS § 706-660.1. See supra note 21.

Administration records, Adult Probation records, and reports of past hospitalization. Dr. Kappenberg also testified that he reviewed Feliciano's OCCC records. Both doctors also conducted clinical examinations of Feliciano where they spent a hour to an hour and a half examining Feliciano. Both doctors testified to their knowledge of Feliciano's history of mental illness. Thus, the record shows that both Dr. Kappenberg and Dr. Stein conducted a thorough examination of Feliciano.

The record also shows that the doctors investigated Feliciano's mental status during the time before the shooting. Both doctors testified as to Feliciano's pattern of taking (or not taking) his anti-psychotic medication and other drugs. Dr. Kappenberg also testified that Feliciano told him that he was not taking his anti-psychotic medication for a while before the shooting, indicating that Dr. Kappenberg's examination included an inquiry into Feliciano's mental state before the shooting.

Feliciano also argues that both doctors failed to make inquiries as to critical delusional beliefs; however, this argument is not persuasive because both doctors testified that Feliciano's delusional beliefs had no effect on his actions that day. Dr. Kappenberg testified that Feliciano knew the difference between right and wrong, could give a description of the event (and that the description comported with the accounts of other witnesses), and that Feliciano specifically indicated that his

beliefs had no connection to the shooting. Dr. Stein similarly testified that Feliciano knew that it was wrong to shoot people, was aware of the event, and was aware of his participation in that event. Dr. Stein further testified that Feliciano's capacity to conform his conduct to the requirements of law was not substantially impaired at the time of the offense. All three doctors opined that Feliciano's delusional beliefs were not connected to the shooting and that Feliciano was not substantially impaired at the time of the shooting. In summary, there was substantial evidence to support the circuit court's conclusion that Feliciano was penally responsible for his conduct at the time he shot Stoesser.

2. Self-defense

Feliciano also argues that the circuit court's conclusion of law that "the shooting of Stoesser was not justifiable under HRS § 703-304 has been proved beyond a reasonable doubt by the prosecution" is irrelevant because Feliciano did not raise self-defense.

Self defense is a defense in any prosecution for an offense. HRS § 703-301(1) (1993); see also State v. Culkin, 97 Hawai'i 203, 215, 35 P.3d 233, 242 (2001). "Self-defense is not an affirmative defense, and the prosecution has the burden of disproving it once evidence of justification has been adduced." State v. Van Dyke, 101 Hawai'i 377, 386, 69 P.3d 88, 97 (2003)

(quoting Culkin, 97 Hawai'i at 215, 35 P.3d at 242). Feliciano was charged with shooting Stoesser in the eye; this conduct constituted "deadly force." See HRS § 703-300 (1993) (defining deadly force as "force which the actor uses with the intent of causing or which the actor knows to create a substantial risk of causing death or serious bodily harm"). Such force would be justified if Feliciano believed that deadly force was necessary to protect himself against "death, serious bodily injury, kidnaping, rape or forcible sodomy." HRS § 703-304 (1993 and Supp. 2004).[24] Feliciano testified that he acted in self-

[24] HRS § 703-304, entitled "Use of force in self-protection," provides:

> (1) Subject to the provisions of this section and of section 703-308, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by the other person on the present occasion.
>
> (2) The use of deadly force is justifiable under this section if the actor believes that deadly force is necessary to protect himself against death, serious bodily injury, kidnapping, rape, or forcible sodomy.
>
> (3) Except as otherwise provided in subsections (4) and (5) of this section, a person employing protective force may estimate the necessity thereof under the circumstances as he believes them to be when the force is used without retreating, surrendering possession, doing any other act which he has no legal duty to do, or abstaining from any lawful action.
>
> (4) The use of force is not justifiable under this section:
>
> (a) To resist an arrest which the actor knows is being made by a law enforcement officer, although the arrest is unlawful; or
>
> (b) To resist force used by the occupier or possessor of property or by another person on his behalf, where the actor knows that the person using the force is doing so under a claim of right to protect the property, except that this limitation shall not apply if:
>
> (i) The actor is a public officer acting in the performance of his duties or a person lawfully

(continued...)

defense. On cross-examination, Feliciano testified that: (1) Stoesser told him that he had a sawed-off shotgun; (2) Feliciano thought that Stoesser was going to kill him; (3) when Feliciano and Stoesser got into an argument before the shooting, Stoesser hit Feliciano with his baton; and (4) Feliciano shot Stoesser because he thought that Stoesser was going to shoot him

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[24](...continued)

assisting him therein or a person making or assisting in a lawful arrest; or

(ii) The actor believes that such force is necessary to protect himself against death or serious bodily injury.

(5) The use of deadly force is not justifiable under this section if:

(a) The actor, with the intent of causing death or serious bodily injury, provoked the use of force against himself in the same encounter; or

(b) The actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action which he has no duty to take, except that:

(i) The actor is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be; and

(ii) A public officer justified in using force in the performance of his duties, or a person justified in using force in his assistance or a person justified in using force in making an arrest or preventing an escape, is not obliged to desist from efforts to perform his duty, effect the arrest, or prevent the escape because of resistance or threatened resistance by or on behalf of the person against whom the action is directed.

(6) The justification afforded by this section extends to the use of confinement as protective force only if the actor takes all reasonable measures to terminate the confinement as soon as he knows that he safely can, unless the person confined has been arrested on a charge of crime.

with his sawed-off shotgun. Feliciano further testified that he only shot Stoesser once because he did not want to kill him, he only wanted "to neutralize the threat."[25] Feliciano having raised the issue of self-defense, the circuit court did not err by concluding that the prosecution proved that Feliciano was not acting in self-defense when he shot Stoesser.

IV. CONCLUSION

We affirm the circuit court's November 19, 2003 final judgment, guilty convictions, and sentences in all respects.

On the briefs:

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[25] Furthermore, on cross-examination, Feliciano's counsel questioned Stoesser as to whether he had any martial arts implements; Stoesser testified that he had nunchakus (a weapon which consists of a pair of hardwood sticks joined by a chain) and a baton. Feliciano's counsel further questioned Stoesser as to whether he had the implements the day of the shooting and whether he used them on Feliciano. Moreover, all three doctors stated that Feliciano described his actions as self-defense.