DISSENTING OPINION BY ACOBA, J.

In my view, the same act or series of acts cannot be used as the factual basis for convicting a person of more than one offense. In this case one act was used as the common factual basis upon which to hinge all offenses and the resulting convictions. I must, therefore, respectfully dissent.

The Hawai'i double jeopardy clause has been interpreted to afford greater protection than the double jeopardy clause of the United States Constitution. In State v. Lessary, 75 Haw. 446, 457, 865 P.2d 150, 155 (1994), this court "conclude[d under the facts in that case] that the interpretation given to the double jeopardy clause by the United States Supreme Court in [United States v.]Dixon[, 509 U.S. 688 (1993), did] not adequately protect individuals from being 'subject for the same offense to be twice put in jeopardy.'" "[B]eliev[ing] that the application of the Grady [v. Corbin, 495 U.S. 508 (1990)] rule [was] necessary to afford adequate double jeopardy protection, . . . [this court] adopt[ed] the 'same conduct' test under the Hawai'i Constitution." Id. at 459, 865 P.2d at 156.

I.

Article I, section 10 of the Hawai'i Constitution states, in relevant part, "nor shall any person be subject for the same offense to be twice put in jeopardy[.]"[1] This court has

[1] The Fifth Amendment of the United States Constitution states, in relevant part, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb[.]" Apparently this court has looked to

recognized three traditional forms of double jeopardy protection that include protection against (1) "a second prosecution for the same offense after acquittal[,]" (2) "a second prosecution for the same offense after conviction[,]" and (3) "multiple punishments for the same offense." Lessary, 75 Haw. at 454, 865 P.2d at 154. The instant case would ostensibly fall under this third category.

The Supreme Court has never expressly defined "multiple punishments," the term apparently referring to every context other than that in which a defendant is prosecuted successively. But the United States Supreme Court's seminal double jeopardy case, Blockburger v. United States, 284 U.S. 299 (1932), has been characterized as a "multiple punishments" case, inasmuch as the defendant was charged under various statutes in a single action apparently for the same act. See Grady, 495 U.S. at 516. In Blockburger, the defendant was charged with, inter alia, "selling any of the forbidden drugs except in or from the original stamped package" and "selling any of such drugs not in pursuance of a written order of the person to whom the drug is sold." 284 U.S. at 303-04. He argued that, because the charges were for the same drug sale, they constituted "but one offense, for which only a single penalty lawfully may be imposed." Id. at 301. The Supreme Court held that "although both [statutes] were violated by the one sale, two offenses were committed." Id. at

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federal decisions based on similar language in the federal constitution.

304. According to the Supreme Court, "[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 provision requires proof of an additional fact which the other does not." Id.

Subsequently, in Grady, the Court addressed double jeopardy protection in the "successive prosecutions" context. The defendant in that case pled guilty to two traffic tickets charging him with driving while intoxicated and failing to keep right of the median. Two months later he was charged with various homicide and assault offenses. 495 U.S. at 511-14. The Grady majority of five justices held that the double jeopardy clause "bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." Id. at 510 (emphasis added). Thus, Grady marked a shift from the prior emphasis on "elements" to an evaluation of "conduct." Applying the "same conduct" test to the facts in Grady, the Court determined that

> [b]y its own pleadings, the State has admitted that it will prove the entirety of the conduct for which [the defendant] was convicted -- driving while intoxicated and failing to keep right of the median -- to establish the essential elements of the homicide and assault offenses. Therefore, the Double Jeopardy Clause bars this successive prosecution[.]

Id. at 523 (emphasis added).

Later, in Dixon, the majority in a splintered Supreme Court overruled Grady. 509 U.S. at 704. Dixon was a consolidation of two appeals, both addressing "whether prosecution for criminal contempt based on violation of a criminal law incorporated into a court order bars a subsequent prosecution for the criminal offense." Id. at 695. Justice Scalia's majority opinion ended with an application of the Blockburger "same elements" test without applying the Grady "same conduct" test. Id. at 704.

II.

In Lessary, this court rejected the "same elements" test announced in Blockburger and later reinstated in Dixon, and adopted the Grady "same conduct" test under the Hawai'i Constitution. The defendant in Lessary, "[o]n April 5, 1991, . . . was charged by complaint in district court with Terroristic Threatening and Kidnapping.[2] On the same day, Lessary was charged by complaint in family court with Abuse." 75 Haw. at 449, 865 P.2d at 152 (emphasis added).[3] The defendant in Lessary subsequently pled no contest to the abuse charge in family court on April 29, 1991. Id. The family court found him guilty of abuse and sentenced him to five days' incarceration and one year

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[2] The Kidnapping charge was later amended to an Unlawful Imprisonment charge. 75 Haw. at 449 n.4, 865 P.2d at 152 n.4.

[3] The "prosecutions" in Lessary were not clearly "successive." 75 Haw. at 450, 865 P.2d at 152. Thus, in Lessary, this court referred to "multiple prosecutions." Id. at 457, 865 P.2d at 155 ("The protections must ensure that individuals are not subjected to multiple prosecutions for a single act.").

probation. Id. at 450, 865 P.2d at 152. On the following day, April 30, 1991, the defendant pled not guilty in circuit court and moved to dismiss the charges of terroristic threatening and unlawful imprisonment on double jeopardy grounds. Id. The circuit court granted the motion to dismiss. Id.

On appeal, this court held that "prosecution of the [t]erroristic [t]hreatening charge is barred if the State, to establish the conduct element of [t]erroristic [t]hreatening, will prove acts of the defendant on which the State relied to prove the conduct element of the [a]buse offense." Id. at 460, 865 P.2d at 157 (emphases added). The "conduct element" of abuse was identified as "physically abusing a family or household member" and this court indicated that the defendant's acts of throwing the victim against a wall and dragging her from her office to his vehicle were used to satisfy that element. Id. at 460, 865 P.2d at 157. The "conduct element" of terroristic threatening was determined to be "threatening to cause bodily injury to another person." Id. The state maintained that it would rely on "different acts, namely [the defendant's] act of brandishing the scissors toward the victim and her co-worker in the office and his acts of pointing the scissors at the victim's stomach and telling her that he would stab her if she refused to enter his jeep, to prove that [the defendant] threatened to cause bodily injury." Id. at 461, 865 P.2d at 157.

Because the "conduct element" of terroristic threatening would be established by proof of acts independent of the acts alleged in the abuse prosecution, this court held that "the two offenses [were] not based on the 'same conduct'" and, therefore, the prosecution of the terroristic threatening charge was not barred under Hawaii's double jeopardy clause. Id. The Lessary "same conduct" test, then, involves two steps: (1) isolating the "conduct element" of both offenses and (2) determining whether the "acts" used to satisfy the "conduct element" of the first offense would be[4] or were the same "acts" used to satisfy the "conduct element" of the second offense.[5]

This distinction between "act" and "conduct" is consistent with the Hawai'i Penal Code, which attributes different meanings to the terms. "Act" or "action" is defined as "a bodily movement whether voluntary or involuntary[.]"[6] Hawai'i Revised Statutes (HRS) § 701-118(2) (1993). "Conduct," as

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[4] Where a double jeopardy problem is foreseen at the pre-trial stage, a well-grounded motion for a bill of particulars to ferret out double jeopardy concerns, i.e., whether the prosecution will rely on the same act or acts to prove its various charges, should be granted. See State v. Pia, 55 Haw. 14, 20 n.7, 514 P.2d 580, 585 n.7 (1973) ("Nor were defendants left without resources to ascertain before trial the factual basis of the prosecution's charges in view of the availability to them of a motion for a [b]ill of [p]articulars.")

[5] Similarly, Grady held that "the [d]ouble [j]eopardy [c]lause 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." Grady, 495 U.S. at 521 (emphases added.) Lessary employed the term "conduct element" in lieu of "essential element" and, at times, "acts" in lieu of "conduct." 75 Haw. at 460, 865 P.2d at 157.

[6] This case is concerned with a "voluntary act" which is defined as "a bodily movement performed consciously or habitually as the result of the effort or determination of the defendant." Hawai'i Revised Statutes (HRS) § 702-201 (1993).

defined in HRS § 701-118(4) (1993), constitutes an act or omission or "a series" thereof.[7] Hence, the "conduct test" as applied in Lessary requires a comparison between the factual basis or "acts" used to convict, for example, under the first offense and the factual basis or "acts" used to convict under a second offense. If the factual bases for both offenses are identical, the offenses are the "same offense" for double jeopardy purposes. In other words, the defendant has been "subject for the same offense to be twice put in jeopardy."[8] Haw. Const. art I, § 10.

The "same conduct" approach is also consistent with this court's pre-Lessary decision, State v. Pia, 55 Haw. 14, 514 P.2d 580 (1973), which, although "rel[ying] primarily on statutory language," State v. Brantley, 99 Hawai'i 463, 485 n.9, 56 P.3d 1252, 1274 n.9 (2002) (Acoba, J., dissenting),[9] concluded

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[7] HRS § 701-118(4) defines "conduct" as "an act or omission, or, where relevant, a series of acts or a series of omissions, or a series of acts and omissions[.]"

[8] The Lessary court did not adopt the "same episode" test, under which "all offenses that grow out of a single criminal act, occurrence, episode, or transaction would be considered the "same offense" for purposes of determining whether the guarantee against being subject for the same offense to be twice put in jeopardy bars a second prosecution." 75 Haw. at 458, 865 P.2d at 155-56 (internal quotation marks and citation omitted).

[9] In Tomomitsu v. State, 93 Hawai'i 22, 31 n.4, 995 P.2d 323, 332 n.4 (App. 2000) (Acoba, J., concurring and dissenting), it was observed that, in interpreting Pia in State v. Caprio, 85 Hawai'i 92, 937 P.2d 933 (App. 1997), the Intermediate Court of Appeals had concluded that "the appropriate test for a multiple punishment situation was the Blockburger 'same elements' test and [an] added . . . requirement that the law defining each of the offenses is intended to prevent a substantially different harm or evil." (Internal quotation marks, citation, and brackets omitted.) However, "I disagree[d] that the appropriate test include[d] the additional requirement." Id. Thus, the majority's decision to overrule State v. Santiago, 8 Haw. App. 535, 813 P.2d 335 (1991) and Caprio to that extent, majority opinion at 22

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that "where a defendant in the context of one criminal scheme or transaction commits several acts independently violative of one or more statutes, he may be punished for all of them if charges are properly consolidated by the [s]tate in one trial[,]" 55 Haw. at 19, 514 P.2d at 585 (emphasis added). Contrary to the majority's assertions, this language in Pia was not "dicta," see majority opinion at 21, n.17 (citing State v. Jumila, 87 Hawai'i 1, 12 n.5, 950 P.2d 1201, 1212 n.5 (1998) (Ramil, J., dissenting, joined by Nakayama, J.)), but an inherent basis for this court's ultimate holding that the "trial court committed error in denying the [s]tate the opportunity to demonstrate that the first count of its information rested on evidence factually distinct and separate from the evidence supportive of the second count, to which defendants pleaded guilty." 55 Haw. at 20, 514 P.2d at 585 (emphasis added).

Consequently, I do not agree that "the holding in Pia is very narrow." Majority Opinion at 21 n.17. Although Pia did not expressly "establish the Hawai'i standard for constitutional 'multiple punishment' cases[,]" majority opinion at 23 n.17, it indicated that the focus should be on the "acts" to be proved, 55 Haw. at 19, 20, 514 P.2d at 584, -85, when faced with a double jeopardy challenge to multiple charges in one trial, id. at 15, 514 P.2d at 582.

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[9](...continued)
n.17, is consistent with my position in Tomomitsu.

III.

In Lessary, this court observed that the policy justifications for protecting against "successive prosecutions" as enunciated in Grady, 75 Haw. at 456, 865 P.2d at 154-55, were just as applicable to "multiple prosecutions," see id. at 455-57, 865 P.2d at 154-55. Hence, although the majority characterizes Lessary as a "successive prosecution" case, majority opinion at 16, that cannot be reconciled with this court's repeated references to "multiple prosecutions" in that case.[10] In any event, such policy justifications, including protecting defendants from "embarrassment, expense and ordeal and compelling [them] to live in a continuing state of anxiety and insecurity[,]" id. at 455, 865 P.2d at 155, were not the only concerns in Lessary.

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[10] To accommodate the facts in Lessary, this court employed the term "multiple prosecutions," and the term "successive prosecutions." Strictly speaking, "successive prosecutions" are distinguishable from "multiple prosecutions."

> Historically, double jeopardy presented itself in the form of successive trials, largely because of the prevailing criminal procedure of the time. The early principle of the English common law served to protect against repeated prosecutions. Once acquitted or convicted, the defendant was freed of the great power of the state. He could not be subjected to it again for the same offense. The problem of multiple prosecutions at one trial is a contemporary one arising from the proliferation of criminal statutes adopted by legislatures. Particular conduct may violate several statutes, giving prosecutors the option of several charges.

Michigan v. Robideau, 355 N.W.2d 592, 609-10 (Mich. 1984) (Kavanagh, J., dissenting) (citations omitted) (emphases added). The language of the Hawai'i double jeopardy clause does not differentiate between "multiple prosecutions" at one trial or at two, see State v. Van den Berg, 101 Hawai'i 187, 195, 65 P.3d 134, 142 (2003) (Acoba, J., concurring) ("[T]here is no sound basis for applying a different test or application of the words 'the same offense' in article I, section 10 of the Hawai'i Constitution to situations implicating multiple punishments.").

Lessary determined that the Blockburger-Dixon approach was inadequate because it did not protect against legislative intrusion. This court observed that "the State should not be allowed to circumvent the constitutional prohibition against double jeopardy by creating a variety of courts, each having limited jurisdiction, in which to bring successive prosecutions that could not otherwise be pursued." Id. at 457, 865 P.2d at 155 (emphasis added). Hence, the Lessary court emphasized as a fundamental principle, that double jeopardy protection "must ensure that individuals are not subjected to multiple prosecutions for a single act." Id.

For these reasons, this court declined to follow the Blockburger-Dixon "same elements" test, but, rather, adopted the "same conduct" test as set forth in Grady. It was "believe[d] that the application of the Grady rule [was] necessary to afford adequate double jeopardy protection[.]" Id. at 459, 865 P.2d at 156. The Lessary court adopted the Grady rule because it provided a functional balance, "protect[ing] individuals from multiple prosecutions for the same act without unnecessarily restricting the ability of the State to prosecute individuals who perform separate acts that independently constitute separate offenses." Id. (emphases added).

Consequently, no one can dispute that, in Lessary, this court departed from Supreme Court precedent in interpreting Hawaii's double jeopardy clause. The majority, however,

interprets Lessary as rejecting the Blockburger-Dixon "same elements" test in the "successive prosecution" cases only and that in the "multiple punishment" context, "the 'same elements' test adequately preserves the protections afforded by the double jeopardy clause." Majority opinion at 23. But, contrary to the majority's approach, the critical point in Lessary was that the Hawai'i double jeopardy clause affords greater protection, independent from legislative circumvention. And plainly, despite the majority's contention, Jumila and Brantley did not at all decide the scope of our double jeopardy clause,[11] see majority opinion at 25-26, because Jumila and Brantley did not rest on the double jeopardy clause and did not analyze Lessary.

Even assuming, arguendo, that Lessary was a "successive prosecutions" case that did not address the double jeopardy protections afforded in the multiple punishments context, see

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[11] With all due respect, the majority's argument that the "dissent's contention that Lessary extended our double jeopardy protections against the legislature is belied by our subsequent decisions in Jumila and Brantley[,]" majority opinion at 25, is incorrect. "Although double jeopardy was raised by the defendant in Jumila, the Jumila decision was not premised at all on double jeopardy concepts, but only on a statutory analysis." Brantley, 99 Hawai'i at 484, 56 P.3d at 1273 (Acoba, J., dissenting). As for Brantley, a footnote in the plurality decision stated,

> the United States and Hawai'i Constitutions forbid 'multiple punishments for the same offense' -- i.e., conviction of more than one offense when one offense is included within another, unless there is a clear legislative intent to the contrary. Our decision rests on the premise that such intent exists in this case.

99 Hawai'i at 469 n.8, 56 P.3d at 1258 n.8. However, as emphasized in the Brantley dissent, this solitary conclusory footnote, "made without the benefit of the [d]efendant's position[,]" id. at 486, 56 P.3d at 1275, and without so much as a citation, or a discussion of Lessary, cannot in principle serve as a holding that a legislative intent approach to double jeopardy protection was adopted.

Brantley, 99 Hawai'i at 486, 56 P.3d at 1275 (2002) (Acoba, J., dissenting) ("The question of whether . . . Lessary . . . or Blockburger . . . applies to multiple punishments in a single prosecution has not been answered by this court.") (citing Tomomitsu, 93 Hawai'i at 31, 995 P.2d at 332 (Acoba, J., concurring and dissenting) ("The supreme court has not expressly indicated which test applies under the Hawai'i Constitution in the multiple punishments situation.")), the test we adopt today must uphold the Lessary principle that the Hawai'i double jeopardy clause stands between the individual and all branches of government.[12]

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[12] The majority references statements in my dissenting opinion in Brantley and my concurring and dissenting opinion in Tomomitsu, majority opinion at 25, apparently for the proposition that the Lessary test does not govern the instant case. In Brantley, I stated that "the test to be applied in [multiple punishments cases] still has not been analytically addressed in this jurisdiction." 99 Hawai'i at 486, 56 P.3d at 1275 (2002) (Acoba, J., dissenting). This observation was made to answer the "plurality and Justice Levinson's concurring opinions, [which,] by addressing the legislature's intent [in construing HRS § 134-6(a)], appear[ed] to apply Blockburger rather than Lessary to [a] multiple punishments case[]" without saying so. Id. As was pointed out then, if such was the case, "[t]he plurality's determination . . . that [the d]efendant's double jeopardy rights [were] not violated . . . [was] made without the benefit of [the d]efendant's position[,]" id., and, hence, the case should have been remanded to allow the defendant "the opportunity to be heard on the constitutional double jeopardy issue and the court and the parties to generate a record germane to that issue," id. at 487, 56 P.3d at 1276.

In this case, where the constitutional issue is squarely raised, it is evident that Lessary applies. The "benefit" of Defendant's and the State's positions, in addition to a "germane" record, crystallize the extent of Hawai'i double jeopardy protection -- that, to remain true to Lessary, the test we adopt in the multiple punishments context must guard against encroachment by all branches of government. As in Brantley, in the Tomomitsu separate opinion it was said that this court "has not expressly indicated which test applies under the Hawai'i Constitution in the multiple punishments situation." 93 Hawai'i at 31, 995 P.2d at 332 (Acoba, J., concurring and dissenting).

However, it was observed that the double jeopardy clauses of the federal and state constitutions were "not implicated" in Tomomitsu "because the robbery and charged thefts [did] not arise from the same conduct, act, or transaction." Id. at 32, 995 P.2d at 333 (emphasis added). It was noted that

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IV.

With all due respect, the majority decision today undermines the "greater protection" afforded in Lessary. First, the "rights and interests" protected by the Hawai'i double jeopardy clause include not only the right to be free from a second or contemporaneous prosecution for the "same act" but, also, the right to be free from a second punishment from such prosecution, as Lessary explained. 75 Haw. at 454, 865 P.2d at 154. See State v. Tuipuapua, 83 Hawai'i 141, 147, 925 P.2d 311, 317 (1996) ("[T]he government cannot prosecute or punish an individual for the same criminal offense more than once."). "[P]rotection from multiple punishment for the same offense lies at the core of the [d]ouble [j]eopardy [c]lause, and this protection is as applicable to single prosecutions as to two."

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> separate acts were charged by the State and admitted to by Tomomitsu. Count III regarding robbery referred to theft as the taking and carrying away of the camera and wristwatch from Alricson. The relevant facts were Tomomitsu's threat of force by exposure of a weapon and the taking of property from Alricson's person or presence. In contrast, Counts I and II referred to the thefts as the disposal of the stolen items at different times. The relevant facts were the actual disposal of stolen property on specific dates to an undercover detective.
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> . . . The colloquy between Tomomitsu, the court, and attorneys confirmed the sale of the camera equipment and watch at different times and apparently at a place other than that of the robbery. Hence, the criminal acts of the robbery and each theft were supported by different factual evidence and separated by time and space.

Id. (emphasis omitted) (emphases added). Thus, inasmuch as "the offense charged and admitted to did not relate to the 'same conduct[,]'" "affirm[ance of] Tomomitsu's convictions for theft in the first degree and in the second degree" would be proper. Id. at 34, 995 P.2d 335 (emphasis added). My position in Tomomitsu, therefore, is consistent with my position today.

Michigan v. Robideau, 355 N.W.2d 592, 610 (Mich. 1984) (Kavanagh, J., dissenting).

Moreover, as established in Lessary, these rights are insulated from legislative, as well as judicial and executive, intrusion. For in Lessary, as noted before, a crucial justification for affording more protection under the Hawai'i double jeopardy clause was to prohibit the contravention of the clause through "creati[on of] a variety of courts[,]" 75 Haw. at 457, 865 P.2d at 155, in which to bring prosecutions for the same act. Hence, this court in Lessary extended double jeopardy protections as against the legislature. A similar concern gave rise to a caution voiced by Justice Marshall. Acknowledging that a state "has wide latitude to define crimes and to prescribe punishment for a given crime[,]" Missouri v. Hunter, 459 U.S. 359, 370 (1983) (Marshall, J., dissenting), Justice Marshall nevertheless asserted that if the legislature were not subject to the double jeopardy clause, multiple punishments could be imposed for the same act:

> If the Double Jeopardy Clause imposed no restrictions on a legislature's power to authorize multiple punishment, there would be no limit to the number of convictions that a [s]tate could obtain on the basis of the same act, state of mind, and result. A [s]tate would be free to create substantively identical crimes differing only in name, or to create a series of greater and lesser-included offenses, with the first crime a lesser-included offense of the second, the second a lesser-included offense of the third, and so on.

Id. at 371 (emphases added). The view that the protection against multiple punishment for the same act is central to the double jeopardy clause has been more recently reiterated.

> Neither precedent nor reason supports the . . . contention that the Legislature is not restrained by the Double Jeopardy Clause. Such circular reasoning requires a unique construction of an instrument which limits the government in all of its branches. It would surely render the clause nugatory, for if legislative intent is the governing principle, that would render the courts and prosecutors impotent to effect the protection.
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> More importantly, however, the . . . argument ignores the evil of double jeopardy -- that of punishing more than once for one wrong. . . . Multiple prosecutions do engender double jeopardy concerns that are not present in single prosecutions. But protection from multiple punishment for the same offense lies at the core of the Double Jeopardy Clause, and this protection is as applicable to single prosecutions as to two.
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> The legislature is free to define offenses. The beginning point of judicial resolution of whether two offenses are the same is the Legislature's definition of an offense. Legislative authority to define offenses, however, does not mean that it may subject a defendant to jeopardy under two offenses which are the same. Nor does it mean that legislative intent to separately punish may turn what is, in legal effect, one offense into two.
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> . . . .
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> In sum, although the legislative power is broad it cannot make a circle square by definition. Neither can it make the same offense two different crimes[.]

Robideau, 355 N.W.2d at 610-11 (Kavanagh, J., dissenting) (internal quotation marks and citations omitted) (emphases added). On its face, the shield afforded by the double jeopardy clause of the Hawai'i Constitution is not limited only as against the courts and the prosecution. Our inquiry in the multiple punishment context, therefore, cannot be restricted only to what the legislature intended, inasmuch as what the legislature enacts may, as was said in Lessary, impair double jeopardy protection.[13]

[13] The majority holds "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[,]" majority opinion at 27, and that, accordingly, "[l]egislative intent is the proper analysis to apply in determining whether double jeopardy bars multiple punishments[,]" id. at 32. Relegating the double jeopardy clause to a tool of statutory construction in this manner contravenes the greater protection announced in Lessary.

Again, in Lessary this court plainly recognized that legislative acts are subject to the Hawai'i constitutional protection against double

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V.

Although the "concerns" cited in Lessary were attributed to "successive prosecutions," equally compelling justifications for protecting against "multiple punishment" exist. For in addition to multiple sentences,

> each separate criminal conviction typically has collateral consequences, in both the jurisdiction in which the conviction is obtained and in other jurisdictions. The number of convictions is often critical to the collateral consequences that an individual faces. For example, a defendant who has only one prior conviction will generally not be subject to sentencing under a habitual offender statute.
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> Furthermore, each criminal conviction itself represents a pronouncement by the State that the defendant has engaged in conduct warranting the moral condemnation of the community. Because a criminal conviction constitutes a formal judgment of condemnation by the community, each additional conviction imposes an additional stigma and causes additional damage to the defendant's reputation.

State v. Van den Berg, 101 Hawai'i 187, 195, 65 P.3d 134, 142 (2003) (Acoba, J., concurring) (quoting Hunter, 459 U.S. at 372-73 (Marshall, J., dissenting, joined by Stevens, J.)) (citations omitted) (emphasis added). Hence, although the interest in guarding against "successive prosecutions" -- the "tremendous additional burden" of facing charges in a separate proceeding, Lessary, 75 Haw. at 456, 865 P.2d at 155, -- is not implicated in the context of multiple charges in a single prosecution, the hazard of multiple punishments flowing therefrom for the same

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jeopardy, -- a critical basis for affording greater protection than under its federal counterpart. See 75 Haw. at 457, 865 P.2d at 155. Therefore, I cannot agree that "[o]ur jurisprudence," majority opinion at 26, leaves the legislature free to punish defendants for the "same offense" multiple times over. Lessary stands as a testament against such a proposition. Accordingly, the majority's legislative intent analysis of HRS §§ 134-6 and 706-660.1, see id. at 31-38, is not germane in assessing whether a double jeopardy violation occurred in this case.

act, "collateral consequences," and "additional stigma" warrant the same level of double jeopardy protection in "multiple punishments" cases. Judicial scrutiny of potential multiple punishment violations is more imperative today. For under modern criminal procedure and due to the advent of a multiplicity of criminal offenses, the potential for abuse no longer rests in "successive prosecutions," but in the proliferation of charges in a single prosecution, amounting to "multiple prosecutions at one trial" which has become commonplace. Robideau, 355 N.W.2d at 610 (Kavanagh, J., dissenting).

In excluding the legislature and, in this case, the prosecution from the restraints of Hawaii's guarantee against double jeopardy, the majority upsets the balance Lessary struck between protecting the defendant from "multiple prosecutions for the same act" and allowing the "State to prosecute individuals who perform separate acts that independently constitute separate offenses." 75 Haw. at 459, 865 P.2d at 156. As opposed to the "same elements" formulation, the "same conduct" test complies with the mandate under the Hawai'i Constitution's double jeopardy clause to protect the individual from multiple punishments for the same act.

Accordingly, following the precedent expressly set down in Lessary, the "same conduct" test should be the unitary test for assessing double jeopardy claims under the Hawai'i Constitution. The majority's adoption of two separate tests, the

applications of which would be governed by the Supreme Court's classifications, would inappropriately bifurcate the double jeopardy clause. As the debate in the Supreme Court has shown, the Blockburger and the Grady approaches are mutually exclusive.[14] By recognizing in Lessary that the legislature is constrained by the double jeopardy clause, this court adopted one of two diametric positions in the debate surrounding double jeopardy protection, that is, that the clause "limits the power of all branches of government." Hunter, 459 U.S. at 374 (Marshall, J., dissenting) (emphasis added). Thus, Lessary forecloses the majority's suggestion that our "jurisprudence" is "grounded in the belief that the double jeopardy clause is primarily a restriction on the courts and the prosecution." Majority Opinion at 26.

VI.

The majority contends that "were [it] to adopt the dissent's argument, HRS § 701-109 would be rendered unconstitutional because this statute authorizes the legislature

[14] As the Supreme Court's cases indicate, each approach is derived from diametric perceptions of the scope of double jeopardy protection -- the Blockburger-Dixon "same elements" test grounded in the belief that the double jeopardy clause is primarily a restriction on the courts and the prosecution, see Brown v. Ohio, 432 U.S. 161, 165 (1977) ("[T]he Fifth Amendment double jeopardy guarantee serves principally as a restraint on the courts and prosecutors. The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments[.]"), and the Grady "conduct" test borne from the understanding that the double jeopardy clause "limits the power of all branches of government[,]" Hunter, 459 U.S. at 374 (Marshall, J., dissenting) (emphasis added). Furthermore, two separate tests would compound the confusion that already plagues this area of law. By overruling Grady, the Supreme Court has returned to employing a unitary standard. See Dixon, 509 U.S. at 704 ("[I]t is embarrassing to assert that the single term 'same offence' . . . has two different meanings[.]")

to impose multiple punishments for separate offenses arising out of the same conduct." Majority opinion at 27 n.19. Preliminarily, I note that the parties do not address the constitutionality of HRS § 701-109 in their briefs and, hence, the issue should be reserved for a time when it is properly raised. However, in response to the majority's contention, HRS § 701-109 (1993) does not refer to "multiple punishments." Rather, it provides, in relevant part, that "[w]hen 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." HRS § 701-109(1) (emphasis added). Thus, on its face, HRS § 701-109 does not authorize multiple punishments. The statute enumerates five situations in which "[t]he defendant may not . . . be convicted of more than one offense."[15] HRS § 701-109(1) (emphasis added). These five "exceptions" encompass a wide range of circumstances, reflecting

[15] HRS § 701-109(1) lists the five situations as follows:

> The defendant may not, however, be convicted of more than one offense if:
>
> (a) One offense is included in the other, as defined in subsection (4) of this section; or
> (b) One offense consists only of a conspiracy or solicitation to commit the other; or
> (c) Inconsistent findings of fact are required to establish the commission of the offenses; or
> (d) The offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or
> (e) The offense is defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of conduct constitute separate offenses.

the penal code's "policy to limit the possibility of multiple convictions and extended sentences when the defendant has basically engaged in only one course of criminal conduct directed at one criminal goal, or when it would otherwise be unjust to convict the defendant for more than one offense." Commentary on HRS § 701-109 (emphases added.) Hence, there is no discernible conflict with double jeopardy protection under Lessary. But again, absent a case in which HRS § 701-109 is said to authorize two convictions based upon the same acts, there is no reason to reach a supposed constitutional issue.

Furthermore, HRS § 701-109 is not pertinent to the disposition of this appeal, which does not involve a double jeopardy violation by the legislature, i.e., a statutory challenge, but, rather, concerns a violation by the prosecution and the court. The double jeopardy violation here resulted from multiple convictions and, consequently, multiple punishments, that were all based on the same act -- "fir[ing] a single shot into Stoesser's right eye." Indeed, Defendant-Appellant Hal Feliciano (Defendant) acknowledges that the first circuit court (the court) "could have avoided a double jeopardy problem by finding [Defendant] guilty of [place to keep] based on different acts." (Emphasis added.) The prosecution established, and the court found, only one fact related to Defendant's conduct. See Tomomitsu, 93 Hawai'i at 33, 995 P.2d at 334 (Acoba, J., concurring and dissenting) (recognizing that the defendant's

convictions "did not constitute multiple punishment for the same crime" where "[e]ach charged offense . . . rested on distinct and separate acts and one offense was not premised upon the occurrence or existence of the other offense") (emphasis added). Thus, pursuant to Lessary, Defendant could not be convicted of more than one offense.

VII.

A.

In arguing that the position herein is only supported by dissents, the majority seemingly disregards the fact that in interpreting the Hawai'i Constitution, we have adopted the positions of dissenting justices in United States Supreme Court cases.[16] Indeed, Lessary itself, in adopting the Grady conduct test embraced a minority position of the Supreme Court and established this jurisdiction's singular departure from the other

[16] See, e.g., State v. Cuntapay, 104 Hawai'i 109, 116, 85 P.3d 634, 641 (2004) (adopting Justice Ginsburg's dissent in Minnesota v. Carter, 525 U.S. 83, 106 (1998), that short term guests have a protected right of privacy, inasmuch as "'a guest should share his [or her] host's shelter against unreasonable searches and seizures'"); State v. Lopez, 78 Hawai'i 433, 451, 896 P.2d 889, 907 (1995) (adopting Justice Brennan's dissenting position in Nix v. Williams, 467 U.S. 431 (1984), and holding that the prosecution is required to "present clear and convincing evidence that any evidence obtained in violation of article I, section 7 [of the Hawai'i Constitution] would inevitably have been discovered by lawful means before such evidence may be admitted under the inevitable discovery exception to the exclusionary rule"); State v. Kam, 69 Haw. 483, 490, 748 P.2d 372, 377 (1988) (adopting the dissenting view in Pope v. Illinois, 481 U.S. 497 (1987), that "since the 'government may not constitutionally criminalize [the] mere possession or sale of obscene literature, absent some connection to minors, or obtrusive display to unconsenting adults[,]' the government cannot prosecute the sellers of pornography"); State v. Santiago, 53 Haw. 254, 265-66, 492 P.2d 657, 664 (1971) (adopting the dissent's view in Harris v. New York, 401 U.S. 222, 229-32 (1971), that using tainted Miranda statements interferes with an accused's right to testify in his own behalf, for the Hawai'i Constitution's privilege against self-incrimination requires "that before reference . . . at trial to statements made by the accused during custodial interrogation, the prosecutor must first demonstrate that certain safeguards were taken before the accused was questioned").

jurisdictions. It bears repeating that even "[t]he Supreme Court has recognized that 'it is fundamental that state courts be left free and unfettered by the Court in interpreting their state constitutions.' Bock v. Westminster Mall Co., 819 P.2d 55, 58 (Colo. 1991) (quoting Minnesota v. Nat'l Tea Co., 309 U.S. 551, 557, 60 S.Ct. 676, 84 L.Ed. 920 (1940))" and that "a state has a 'sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.' PruneYard Shopping [Ctr.] v. Robins, 447 U.S. 74, 81, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980)." State v. Viglielmo, 105 Hawai'i 197, 214, 95 P.3d 952, 969 (2004) (Acoba, J., dissenting) (brackets omitted). "The neutral principal that should guide us is whether in a particular case, a 'sound regard' 'for the purpose' of the rights involved, warrants greater protection than that afforded under the federal constitution. [State v.] Kaluna, 55 Haw. [361,] 369, 529 P.2d [51,] 58 (1974)." Id. at 214, 95 P.3d at 969. In ascertaining the boundaries of a constitutional guarantee, it is the policy and rationale inhering in the provision that must reign uppermost in divining the rule we should adopt.

B.

I do observe that, as the majority notes, majority opinion at 26, the Indiana Supreme Court has construed its state double jeopardy clause to offer more protection than the federal double jeopardy clause. In doing so, that court has adopted a

conduct-focused approach, termed the "actual evidence test," for all forms of double jeopardy scenarios, without distinguishing between successive prosecutions and multiple punishments cases. Richardson v. Indiana, 717 N.E.2d 32 (Ind. 1999).[17]

In Richardson, the defendant was convicted of, and sentenced for, both robbery and battery. Id. at 37. The Indiana Supreme Court addressed the application of the Indiana double jeopardy clause "as distinct from its federal counterpart in the

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[17] In interpreting the double jeopardy clause of its state constitution, the Indiana appellate courts have declined to follow Dixon, adhering instead to their own double jeopardy analysis. See e.g. Grafe v. Indiana, 686 N.E.2d 890 (Ind. Ct. App. 1997) ("[W]e conclude that the interpretation of the [d]ouble [j]eopardy [c]lause of the Indiana Constitution was not altered by Dixon."); Shipley v. Indiana, 620 N.E.2d 710, 717 n.2 (Ind. Ct. App. 1993) ("Despite the recent United States Supreme Court's decision in [Dixon], this [c]ourt is bound by our own supreme court's interpretation of the [d]ouble [j]eopardy [c]lause contained in the Indiana Constitution."). In Shipley, the Indiana Court of Appeals observed that its "supreme court requires that in addition to a Blockburger . . . analysis, [it] must also look to the manner in which the offenses [were] charged and not merely the statutory definitions of the offenses." Id. "Moreover," said the court, "when the same act constitutes two separate crimes, the very essence of double jeopardy principles prevents two separate convictions." Id. (emphasis added). Hence, in addressing the defendant's convictions for both murder and neglect of a dependent, the court held that "double jeopardy precludes [the] conviction and sentence for both offenses," id. at 718, as follows:

> At trial, the evidence showed that the acts which caused the victim's death were the combination of malnutrition, dehydration, and blunt force trauma over a period of time; these acts cannot be used as the factual basis for both the neglect of a dependent charge and the murder charge, to do so would be to punish [the defendant] twice for the same acts.

Id. at 717-18 (emphasis added.)

Shipley was based upon the Indiana Supreme Court case, Hall v. Indiana, 493 N.E.2d 433 (Ind. 1986), which pre-dated Grady and Dixon. In Hall, the Indiana Supreme Court, noting that "the double jeopardy clause has been the subject of much intellectual struggle in American courts," relied on "Indiana precedent" to conclude that "[s]ince the [defendants'] continuous pattern of neglect was the factual basis for the neglect and reckless homicide convictions, they were punished twice for the same acts." Id. at 436 (emphasis added.) Thus, the convictions and sentences for neglect of a dependent were vacated, but the convictions and sentences for reckless homicide were affirmed. Id.

Fifth Amendment to the United States Constitution."[18] Id. Justice Dickson, authoring the plurality opinion,[19] recognized that the Indiana Supreme Court "ha[d] not distinguished between double jeopardy protections in multiple punishment cases and those in subsequent prosecution cases." Id. at 43. Upon extensive analysis of the origins of double jeopardy protection, including Indiana common law, the plurality adopted a two-pronged "statutory elements test" and "actual evidence test."

> Synthesizing these considerations, we therefore conclude and hold that two or more offenses are the "same offense" in violation of Article I, Section 14 of the Indiana Constitution, if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense. Both of these considerations, the statutory elements test and the actual evidence test, are components of the double jeopardy "same offense" analysis under the Indiana Constitution.

Id. at 49-50 (emphases in original) (emphasis added). Hence, "believing the original application of the Indiana Double Jeopardy Clause to be broader than" both the Blockburger test and the "manner in which the offenses are charged" analysis, the

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[18] The Indiana double jeopardy clause is similar to the Hawai'i double jeopardy clause, providing that "[n]o person shall be put in jeopardy twice for the same offense." 717 N.E.2d at 38 (quoting Ind. Const. art. I, § 14).

[19] The remaining four justices concurred or concurred in the result as follows: Shepard, C.J. concurred; Sullivan, J., concurred with a separate opinion; Selby, J., concurred in the result with a separate opinion; and Boehm, J., concurred in the result with a separate opinion, in which Selby, J., joined. 717 N.E.2d at 55. The concurring justices agreed "that the test for permitting convictions on two or more counts in the same trial is as the majority formulates it." Id. at 58 (Boehm, J., concurring, joined by Selby, J.). Justice Boehm, however, believed that the "dual convictions in a single case do not present an Indiana constitutional double jeopardy claim at all[,]" and would have reached the same result "without resort to constitutional doctrine because the dual convictions . . . [were] barred by statutory and common law doctrines, irrespective of constitutional consideration." Id.

Indiana Supreme Court adopted both tests.[20] Id. at 53-54.

The "objective" of the statutory elements test

> is to determine whether the essential elements of separate statutory crimes charged could be established hypothetically. In this test, the charged offenses are identified by comparing the essential statutory elements of one charged offense with the essential statutory elements of the other charged offense. . . . Once the essential elements of each charged offense have been identified, the reviewing court must determine whether the elements of one of the challenged offenses could, hypothetically, be established by evidence that does not also establish the essential elements of the other charged offense.[21]

Id. at 50. Applying this test to robbery and battery, it was determined that the state "could hypothetically prove separate offenses without using the same evidence." Id. at 52. "Thus, under the statutory elements test, there [was] no double jeopardy violation." Id.

However, according to that court, "[e]ven if the first consideration, the statutory elements test, does not disclose a double jeopardy violation, the actual evidence test may." Id. at 53. Under the actual evidence test,

> the actual evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. To show that two challenged offenses constitute the "same offense" in a claim of double jeopardy, a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense.

Id. (emphasis added). In applying the actual evidence test, the

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[20] To reiterate, all five justices agreed "that the test for permitting convictions on two or more counts in the same trial is as the majority formulates it." 717 N.E.2d at 58 (Boehm, J., concurring, joined by Selby, J.).

[21] The Indiana Supreme Court noted that this first "component" of its "'same offense' analysis under the double jeopardy provision of the Indiana Constitution, is similar to the 'same elements' test, which comprises the federal double jeopardy analysis under Blockburger." 717 N.E.2d at 50 n.41.

appellate court concluded that "[f]rom the evidence presented, . . . the defendant ha[d] demonstrated a reasonable probability that the evidentiary facts used by the jury to establish the essential elements of robbery were also used to establish the essential elements of the class A misdemeanor battery." Id. at 54. Thus, it was held that "convicting and sentencing defendant on both of these offenses violate[d] the Indiana Double Jeopardy Clause."[22] Id.

Although termed "the actual evidence test," the approach adopted by the Indiana Supreme Court, ensuring that each offense is "established by separate and distinct facts," id. at 53, is essentially the "same conduct" test of Lessary. See supra.

Following Richardson, in Guyton v. Indiana, 771 N.E.2d 1141, 1145 (Ind. 2002), the Indiana Supreme Court addressed a factual scenario similar to this case, upholding convictions for murder and carrying a gun without a license. A plurality of the Indiana Supreme Court referred to but did not apply Richardson, opting instead to "adhere[] to a series of rules of statutory construction and common law that are often described as double jeopardy, but are not governed by the constitutional test set forth in Richardson." Id. at 1143 (internal quotation marks and citation omitted). That court concluded that the defendant's

[22] The court remedied the violation by vacating the conviction "with the less severe penal consequences" and leaving the robbery conviction to stand. 717 N.E.2d at 55.

convictions for murder and carrying a gun without a license did not fall under one of the common law areas of protection. The appellate court succinctly noted that "[c]arrying the gun along the street was one crime and using it was another." Id. (internal quotation marks and citation omitted).

In a concurring opinion, Justice Dickson, the author of the plurality opinion in Richardson, upon observing that the Guyton plurality did "not address th[e] constitutional claim," id. at 1145 (Dickson, J., concurring), undertook an application of the Richardson test.[23] Justice Dickson determined that the state had demonstrated that the defendant had caused the victim's death by shooting him twice and that the state had showed that the defendant carried the gun before the shooting and later when he used it to shoot the victim. Id. Thus, according to Justice Dickson, "there was direct evidence, apart from [the defendant's] firing the weapon, that he carried a handgun without a license." Id. (emphasis added). The concurring justice agreed that the convictions were proper, but on the alternate basis that the defendant "failed to establish his claimed violation of the Indiana Double Jeopardy Clause." Id. at 1146.

[23] Justice Boehm also wrote a separate concurring opinion to emphasize that the Guyton plurality made "no reference to the 'reasonable probability' standard" under Richardson, and, therefore, "this represents an abandonment of Richardson and a return to the pre-Richardson methodology of reviewing the evidence, instructions, charging instrument and argument of counsel under a de novo standard to determine whether it is more probable than not that the facts supporting one conviction are embraced within those supporting another." 771 N.E.2d at 1149 (Boehm, J., concurring).

The result in Guyton, whether based on the plurality's reasoning or the Richardson analysis undertaken by Justice Dickson, is consistent with the "same conduct" approach. If the prosecution establishes a factual basis or "acts" to satisfy the "conduct element" in murder, independent of the factual basis or "acts" to satisfy the "conduct element" in place to keep a firearm, both "offenses" are separate for double jeopardy purposes. However, where, as here, Defendant's three convictions are based on the same act, the Hawai'i double jeopardy clause precludes three separate convictions and punishments.

In any event, a sound regard for the purpose of the double jeopardy clause, as was expounded in Lessary, must ultimately guide us in the interpretation of our own constitution.

VIII.

An analysis based on the same conduct test[24] should be applied to this case. Following a jury waived trial, the court made the following findings of fact (findings):

> 16. . . . [A]t about 11:50 a.m. on June 2, 2002, in the City and County of Honolulu, State of Hawai'i, [Defendant] intentionally and knowingly used a .22 caliber revolver to fire a single shot into Stoesser's right eye.
>
> 17. When [Defendant] shot Stoesser in the right eye, he intentionally engaged in conduct constituting a substantial step in a course of conduct that he was aware

[24] Defendant urges this court to extend the "same conduct" test applied in Grady and in Lessary to "multiple punishment" cases because the "same conduct test" (1) "is simpler to apply," (2) "comports with double jeopardy law under the state constitution in 'successive prosecution' cases," (3) "comports with the commonsense notion of double jeopardy protections," and (4) "prohibits legislative end-runs around the constitutional prohibition against double jeopardy via enactment of multiple statutes which each express a legislature's intent to violate double jeopardy."

was practically certain to cause Stoesser's death.

18. At all relevant times, [Defendant] did not have a license to carry the revolver and was aware that this was so.

(Emphasis added.)

The court also rendered the following conclusions of law (conclusions):

1. Each essential element of the offense of Attempted Murder in the Second Degree in violation of HRS [§§] 705-500, 707-701.5, and 706-656, together with the state of mind applicable to each of those elements, has been proved beyond a reasonable doubt by the prosecution.

. . . .

3. Each essential element of the offense of Place to Keep Pistol or Revolver in violation of HRS [§] 134-6(c) and (e), together with the state of mind applicable to each of those elements, has been proved beyond a reasonable doubt by the prosecution.

4. Each essential element of the offense of Carrying, Using or Threatening to Use a Firearm in the Commission of a Separate Felony in violation of HRS [§] 134-6(a) and (e), together with the state of mind applicable to each of those elements, has been proved beyond a reasonable doubt by the prosecution.

Based on the foregoing, on November 19, 2003, the court convicted Defendant on the following three counts: (1) attempted murder in the second degree, HRS §§ 705-500 (1993),[25] 707-701.5

[25] HRS § 705-500, entitled "Criminal attempt," states that

(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.

(3) Conduct shall not be considered a substantial

(continued...)

(1993),[26] and 706-656 (1993 & Supp. 2002)[27] (attempted second degree murder) (Count I); (2) place to keep pistol or revolver, HRS §§ 134-6(c) & (e) (Supp. 2002)[28] (place to keep a firearm)

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[25](...continued)
step under this section unless it is strongly corroborative of the defendant's criminal intent.

(Emphases added.)

[26] HRS § 707-701.5, entitled "Murder in the second degree," provides that:

> (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.
> (2) Murder in the second degree is a felony for which the defendant shall be sentenced to imprisonment as provided in section 706-656.

(Emphasis added.)

[27] HRS § 706-656 (Supp. 2002), entitled "Terms of imprisonment for first and second degree murder and attempted first and second degree murder," provides in relevant part that:

> (2) Except as provided in section 706-657, pertaining to enhanced sentence for second degree murder, persons convicted of second degree murder and attempted second degree murder shall be sentenced to life imprisonment with possibility of parole. The minimum length of imprisonment shall be determined by the Hawaii paroling authority; provided that persons who are repeat offenders under section 706-606.5 shall serve at least the applicable mandatory minimum term of imprisonment.

(Emphases added.)

[28] HRS § 134-6(c) states that

> [e]xcept 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 firerarm 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.

(continued...)

(Count II); and (3) carrying, using or threatening to use a firearm in the commission of a separate felony, HRS §§ 134-6(a) & (e) (Supp. 2002)[29] (use of a firearm) (Count III). The court sentenced Defendant on November 19, 2003 as follows: (1) Count I, life with the possibility of parole; (2) Count II, ten years; and (3) Count III, twenty years. In addition, the court sentenced Defendant on Count I to a mandatory minimum term of three years pursuant to HRS § 706-660.1 (1993).[30]

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[28](...continued)
(Emphases added.)

HRS § 134-6(e) states that

> [a]ny 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 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.

(Emphases added.)

HRS § 134-9(c) states, in relevant part, that "[n]o person shall carry concealed or unconcealed on the person a pistol or revolver without being licensed to do so under this section or in compliance with section[] . . . 134-6."

[29] HRS § 134-6(a) provides in pertinent part that

> [i]t 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[.]

(Emphasis added.) See supra note 28 for relevant language of HRS § 134-6(e).

[30] HRS § 706-660.1, entitled "Sentence of imprisonment for use of a firearm, semiautomatic firearm, or automatic firearm in a felony," states in (continued...)

IX.

To convict Defendant of attempted second degree murder, the prosecution was required to prove that he: either (1) "intentionally engage[d] in conduct which would constitute [second degree murder] if the attendant circumstances were as [Defendant] believe[d] them to be" or (b) "intentionally engage[d] in conduct, which under the circumstances as [Defendant] believe[d] them to be, constitute[d] a substantial step in the course of conduct intended to culminate in [his] commission of [second degree murder]." HRS § 705-500. Second degree murder requires proof that a person "intentionally or knowingly cause[d] the death of another person." HRS § 707-701.5. Finding no. 16 by the court that "[Defendant]

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[30](...continued)
relevant part that:

> (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:
>
> (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.
>
> 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).

(Emphases added.)

intentionally and knowingly used a .22 caliber revolver to fire a single shot into Stoesser's right eye" and finding no. 17 that he was aware such conduct was a substantial step that would lead to Stoesser's death, establish that Defendant's conduct constituted attempted second degree murder, i.e. the act of shooting Stoesser in an attempt to cause Stoesser's death.

Applying the same conduct test to Count III, to prove use of a firearm in violation of HRS §§ 134-6(a) & (e), the prosecution was required to prove "conduct," such that, while engaged in a felony, Defendant (1) "knowingly carr[ied]" on his person a firearm, or (2) "knowingly ha[d]" within his "immediate control" a firearm, or (3) "intentionally use[d]" a firearm, or (4) "intentionally threaten[ed] to use a firearm." HRS § 134-6(a). See supra notes 28 and 29. The evidence that Defendant shot Stoesser is the same evidence that proves any one of the first three alternative conduct requirements establishing use of a firearm in violation of HRS §§ 134-6(a) & (e), i.e., that Defendant knowingly carried, or had, or intentionally used a firearm in the commission of the felony, in this case, attempted second degree murder. Because the same conduct constitutes proof of both attempted second degree murder and use of a firearm, Defendant was convicted of two offenses for the same act.

Applying the same conduct test to Count II, place to keep a firearm, as charged, the prosecution was required to prove under its complaint that Defendant (1) knowingly (a) "carr[ied]

or possess[ed] a loaded firearm," or (b) "carr[ied] or possess[ed] a loaded or unloaded [firearm] without a license," HRS § 134-6(e), and (2) knowingly failed to "confine" such firearm to designated places, HRS 134-6(c). As noted above, findings no. 16 and 17 by the court establish that the same act was used to prove attempted second degree murder and use of a firearm. Similarly, the findings subsume proof of the conduct for place to keep a firearm in HRS §§ 134-6(c) & (e), i.e., that Defendant knowingly carried or possessed a loaded firearm when he shot Stoesser and, thus, failed to confine the weapon to the possessor's place of business, residence, or sojourn. Accordingly, in proving attempted murder in the second degree, the prosecution established proof of a violation of place to keep a firearm by the same conduct.

Under the findings of the court, the conduct used to prove attempted second degree murder was the same conduct employed to establish violations of use of a firearm and place to keep a firearm. Hence, the same conduct was punished three times by virtue of the separate charges brought in the same trial. Such conduct did not constitute "separate acts that independently constitute separate offenses." Lessary, 75 Haw. at 459, 865 P.2d at 156. Insofar as the same act by Defendant resulted in three separate convictions, the sentences imposed for three offenses constituted multiple punishments for the same conduct violative of the Hawai'i double jeopardy clause.

X.

In order to correct the double jeopardy violations, the convictions and sentences for Count II, place to keep a firearm, and Count III, use of a firearm, must be reversed, leaving conviction of Count I, attempted murder in the second degree, to stand. See Jumila, 87 Hawai'i at 3, 950 P.2d at 1203, overruled on other grounds, Brantley, 99 Hawai'i 463, 56 P.3d 1252. "This solution is fair to [Defendant] because it remedies the [double jeopardy] violation[s], and it is fair to the prosecution and the public because it sustains the conviction of the offense of the highest class and grade of which [Defendant] was convicted." Id. at 4, 950 P.2d at 1204. The only "punishment" that remains is the sentence for Count I.

Defendant "does not challenge the lower court's sentence of life imprisonment with possibility of parole in Count I [(attempted murder in the second degree)], nor imposition of the mandatory minimum in Count I pursuant to HRS § 706-660.1." Rather, Defendant challenges the sentences for both use of a firearm and HRS § 706-660.1 as imposing "multiple punishments for the same act in violation of double jeopardy." Although I would reverse the convictions and sentences under both Counts II and III for stemming from the same act, and, hence, resulting in impermissible multiple punishments, I address Defendant's implied argument that a mandatory minimum sentence constitutes a separate "punishment" for double jeopardy purposes and because the

majority refers to the mandatory minimum sentence imposed.

A mandatory minimum sentence imposed as a result of a conviction is not another "offense." On its face HRS § 706-660.1 is not an offense, i.e., a crime separate and independent from that of attempted murder in the second degree. See Monge v. California, 524 U.S. 721, 728 (1998) ("Historically, [the United States Supreme Court] ha[s] found double jeopardy protections inapplicable to sentencing proceedings because the determinations at issue do not place a defendant in jeopardy for an 'offense.'" (citations omitted)). Although the mandatory sentence imposed is based upon the use of a gun, the predicate facts for such a sentence inhere in the conviction of attempted murder itself. HRS § 706-660.1 provides, in relevant part, as follows:

> (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:
>
> (a) For murder in the second degree and attempted murder in the second degree -- up to fifteen years.

(Emphases added.) Indeed, the prosecution's motion for the imposition of a mandatory minimum term under HRS § 706-660.1 was "based on the trial court's finding that 'Defendant had a firearm in his possession and used said firearm while engaged in the offense of Attempted Murder in the Second Degree.'" Because HRS § 706-660.1 does not constitute an offense but derives from the

attempted murder conviction, it is not governed by the double jeopardy clause.

Second, the mandatory minimum sentence allowed under HRS § 706-660.1 does not create multiple punishments flowing from multiple charges or "prosecutions." The mandatory minimum sentence does not extend the indeterminate term of life imprisonment imposed for attempted murder in this case. The mandatory sentence, although allowed to be imposed with the indeterminate term, does not exceed that term, but only directs how a certain period of the indeterminate term is to be served, in this case, mandating that Defendant be imprisoned for at least three years out of the indeterminate term. The application of § 706-660.1, then, does not impose dual punishment inasmuch as the mandatory minimum is coincident with the host sentence.

Hence, Defendant is not punished twice for the same act; he is punished once, the mandatory minimum indicating how he must serve the initial part of his sentence. In effect, the mandatory minimum, then, is a restriction on the parole board's discretion on setting the mandatory minimum sentence a convicted person must serve. See HRS § 706-656 (1993 & Supp. 2004).[31]

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[31] HRS § 706-656(2) (Supp. 2004) states in relevant part as follows:

> (2) Except as provided in section 706-657, pertaining to enhanced sentence for second degree murder, persons convicted of second degree murder and attempted second degree murder shall be sentenced to life imprisonment with possibility of parole. The minimum length of imprisonment shall be determined by the Hawaii paroling authority; provided that persons who are repeat offenders under section 706-606.5 shall serve at least the applicable mandatory minimum term of imprisonment.

(continued...)

Finally, I note that in this case, the court imposed all sentences simultaneously[32] and ordered that they be served "concurrently."[33] Application of HRS § 706-660.1, then, did not "add" on a second punishment that related to a separate act constituting a separate offense. Lessary, 75 Haw. at 459, 865 P.2d at 156.

XI.

The majority states that its decision is consistent with State v. Vellina, 106 Hawai'i 441, 106 P.3d 364 (2005), State v. Ambrosio, 72 Haw. 496, 824 P.2d 107 (1992), and State v. Coelho, -- Hawai'i --, -- P.3d -- (App. 2005). The decisions in Vellina[34] and Ambrosio[35] rested upon principles of statutory

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[31](...continued)

> If the court imposes a sentence of life imprisonment without possibility of parole pursuant to 706-657, as part of that sentence, the court shall order the director of public safety and the Hawaii paroling authority to prepare an application for the governor to commute the sentence to life imprisonment with parole at the end of twenty years of imprisonment; provided that persons who are repeat offenders under section 706-606.5 shall serve at least the applicable mandatory minimum term of imprisonment.

(Emphasis added.)

[32] However, a defendant's expectation of finality may preclude sentences imposed or amended on separate occasions. See Ashley v. State, 850 So.2d 1265, 1267 (Fla. 2003) ("Once a sentence has been imposed and the person begins to serve the sentence, that sentence may not be increased without running afoul of double jeopardy principles."). In this case, all terms of imprisonment were imposed simultaneously in a single final judgment and sentence, and, therefore, constituted one punishment.

[33] The final judgment and sentence states that "SENTENCE TO BE SERVED CONCURRENTLY WITH EACH OTHER AND WITH ANY OTHER TERM OF INCARCERATION THE DEFENDANT IS NOW SERVING."

[34] In Vellina, we determined that "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[, and a]s such, Vellina's conduct [fell] outside the ambit of HRS § 706-660.1." 106 Hawai'i at 448, 106

(continued...)

construction, not double jeopardy analyses. These cases, then, would necessarily be "consistent with" the majority's decision to restrict its constitutional inquiry to a legislative intent analysis. Majority opinion at 36. But, as stated supra, where a claim under the Hawai'i double jeopardy clause is brought, Lessary requires us to look beyond legislative intent and consider whether a defendant has been prosecuted or punished twice for the same act or acts.

As for Coelho, the facts there were similar to the facts in Vellina. In Coelho, the Intermediate Court of Appeals (ICA) concluded as follows:

> [The defendant] was convicted of being a felon in possession of a firearm; the felonious conduct was the possession of the firearm itself. There was no underlying felony that [the defendant] committed while possessing or using a firearm. Convicting [the defendant] of being a felon in possession of a firearm pursuant to HRS § 134-7(b) and sentencing him to a mandatory minimum term of imprisonment pursuant to HRS § 706-660.1(3)(c) essentially punished [the defendant] twice for a single possession of a firearm.

-- Hawai'i at --, -- P.3d at - (emphasis added). For reasons explained supra, I do not agree with the ICA's characterization of the mandatory minimum term as being a second "punishment."

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[34](...continued)
P.3d at 371 (emphasis in original and emphasis added). The majority agrees with this interpretation of Vellina. Majority opinion at 37.

[35] In Ambrosio, the trial court, pursuant to HRS § 706-660.1(a)(2), imposed a mandatory minimum of five years for kidnapping and a mandatory minimum of seven years for possession or use of a firearm in the commission of the felony of kidnapping. 72 Haw. at 497, 824 P.2d at 108. The defendant challenged the imposition of the latter mandatory minimum for the possession or use of a firearm charge. Id. This court sustained the mandatory minimum for the kidnapping conviction, but vacated the mandatory minimum for the possession or use of a firearm conviction, holding that the "clear and unambiguous" language of HRS § 706-660.1(a)(2) "applie[d] to the conviction for the felony in which the firearm was used[,]" id., and not for the separate felony of possession or use of a firearm. The majority apparently agrees with this interpretation of Ambrosio. See Majority opinion at 36 n.21.

However, the ICA further reasoned that "[a] rational, sensible, and practicable interpretation of HRS § 706-660.1 is that the legislature did not intend its application for felonies where the entirety of the felonious conduct is the use or possession of a firearm. To interpret the statute otherwise would be unreasonable since it would punish a person twice for a single act." Id. at --, -- P.3d at -- (emphasis in original and emphasis added). While it relied on the canon of statutory construction favoring reasonable interpretations, the ICA employed language of the "same conduct" test, perceiving the crux of the protections afforded under Lessary: that a person cannot be prosecuted or punished more than once for the same act or acts. Coelho, then, transcended a pure legislative intent analysis. As such, it is not entirely "consistent" with the majority's position in this case.

XII.

The double jeopardy violations in this case arose out of the multiple charges and resulting convictions that were all based upon Defendant's "same conduct," as established by the one "act" of "fir[ing] a single shot into Stoesser's right eye." Hence, only the conviction for the highest grade offense, attempted murder in the second degree, can stand, while the convictions of place to keep a firearm and use of a firearm must be reversed. The remaining sentence of life imprisonment with possibility of parole subject to a mandatory minimum term of

three years' imprisonment does not place Defendant twice in jeopardy of the same offense, nor subject him to multiple punishments. Therefore, I would affirm the court's judgment and sentence with respect to Count I and under HRS § 706-660.1, but reverse its judgment and sentence as to Counts II and III.