*** FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER ***

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, Plaintiff-Appellant,

vs.

SUSAN REIS, aka SUZANNE REIS, Defendant-Appellee.
NO. 27171 (CR. NO. 04-1-0028)

STATE OF HAWAI'I, Plaintiff-Appellant,

vs.

SUSAN REIS, aka SUZANNE REIS, Defendant-Appellee.
NO. 27172 (CR. NO. 04-1-0675)

NO. 27171

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NOS. 04-1-0028 AND 04-1-0675)

AUGUST 21, 2007

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

OPINION OF THE COURT BY LEVINSON, J.

The plaintiff-appellant State of Hawai'i [hereinafter, "the prosecution"] appeals from the January 11, 2005 judgment of conviction and probation of the circuit court of the first circuit, the Honorable Steven S. Alm presiding, convicting the defendant-appellee Susan Reis in Criminal (Cr.) No. 04-1-0028 of promoting a dangerous drug in the third degree (Count I), in violation of Hawai'i Revised Statutes (HRS) § 712-1243 (Supp. 2002), unlawful use of drug paraphernalia (Count II), in

violation of HRS § 329-43.5(a) (1993), and prostitution, in violation of HRS § 712-1200 (Supp. 1998) (Count III), and convicting her in Cr. No. 04-1-0675 of the same drug offenses based upon a separate incident, and sentencing her, inter alia, to a five-year period of probation, pursuant to HRS § 706-622.5 (Supp. 2004).[1]

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[1] Effective July 1, 2002, the legislature enacted the predecessor statute to HRS § 706-622.5 (Supp. 2004) in Act 161, § 3, later codified at HRS § 706-622.5 (Supp. 2002), which provided in relevant part:

> **Sentencing for first-time drug offenders** . . . .
> (1) Notwithstanding any penalty or sentencing provision under [HRS ch. 712, pt. IV (concerning offenses related to drugs and intoxicating compounds)], a person convicted for the first time for any offense under [HRS ch. 712, pt. IV] involving possession . . . , not including to distribute or manufacture as defined in [HRS §] 712-1240 [(Supp. 1997)], of any dangerous drug . . . who is non-violent, as determined by the court after reviewing the:
> (a) Criminal history of the defendant;
> (b) Factual circumstances of the offense for which the defendant is being sentenced; and
> (c) Other information deemed relevant by the court;
> shall be sentenced in accordance with [paragraph] (2); provided that the person does not have a conviction for any violent felony for five years immediately prece[]ding the date of the commission of the offense for which the defendant is being sentenced.
> (2) A person eligible under [paragraph] (1) shall be sentenced to probation to undergo and complete a drug treatment program. . . .

See 2002 Haw. Sess. L. Act 161, §§ 3 and 12 at 572, 575. Effective July 1, 2004, the legislature amended HRS § 706-622.5 to read:

> **Sentencing for first-time drug offenders** . . . .
> (1) Notwithstanding [HRS §] 706-620(3) [(disallowing probation for repeat offenders)], a person convicted for the first time for any offense under [HRS ch. 712, pt. IV] involving possession . . . , not including to distribute or manufacture as defined in [HRS §] 712-1240, of any dangerous drug . . . is eligible to be sentenced to probation under [paragraph] (2) if the person meets the following criteria:
> (a) The court has determined that the person is nonviolent after reviewing the person's criminal history, the factual circumstances of the offense for which the person is being sentenced, and any other relevant information[.]
> . . . .
> (2) A person eligible under [paragraph] (1) may be sentenced

(continued...)

On appeal, the prosecution asserts that the circuit court imposed an illegal sentence in sentencing Reis to probation, inasmuch as, in light of an undisputed prior conviction, she was a repeat offender and, therefore, should have been sentenced pursuant to HRS § 706-606.5 (Supp. 1999).[2]

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[1](...continued)
to probation to undergo and complete a substance abuse treatment program if the court determines that the person can benefit from substance abuse treatment and, notwithstanding that the person would be subject to sentencing as a repeat offender under [HRS §] 706-606.5, the person should not be incarcerated in order to protect the public. . . .

See 2004 Haw. Sess. L. Act 44, §§ 11 and 33 at 214, 227; HRS § 706-622.5(1) and (2) (Supp. 2004) (emphases added). Section 29 of Act 44, absent from the codified version found at HRS § 706-622.5, reads as follows: "This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date." See 2004 Haw. Sess. L. Act 44, § 29 at 227.

[2] HRS § 706-606.5 provided in relevant part:

> (1) Notwithstanding [HRS §] 706-669 [(Supp. 1996) (providing for parole hearing and procedure therefor)] and any other law to the contrary, any person convicted of . . . [HRS §] 712-1243 . . . and who has a prior conviction . . . for . . . any of the class C felony offenses enumerated above [including HRS § 708-836, relating to unauthorized control of [a] propelled vehicle,]. . . shall be sentenced to a mandatory minimum period of imprisonment without possibility of parole during such period as follows:
>
> (a) One prior felony conviction:
>
> . . . .
>
> (iv) Where the instant conviction is for a class C felony offense enumerated above -- one year, eight months;
>
> . . . .
>
> (2) Except as in [paragraph] (3)[(concerning special terms for young adults)], a person shall not be sentenced to a mandatory minimum period of imprisonment under this section unless the instant felony offense was committed . . . :
>
> . . . .
>
> (e) Within five years after a prior felony conviction where the prior felony conviction was for a class C felony offense enumerated above[.]

Effective May 8, 2006, the legislature amended HRS § 706-606.5 in respects immaterial to the present matter. See 2006 Haw. Sess. L. Act 80, §§ 1 and 7 at 234-37.

For the reasons discussed infra in section III, we hold that the circuit court erred in sentencing Reis as a first-time drug offender rather than a repeat offender. We therefore vacate the January 11, 2005 sentence and remand for resentencing as a repeat offender, pursuant to HRS § 706-606.5.

I. BACKGROUND

On January 5, 2004, Reis was charged by complaint in Cr. No. 04-1-0028 with Counts I, II, and III in connection with events that occurred on or about December 23, 2003.

On April 13, 2004, in Cr. No. 04-1-0675, Reis was charged by complaint with new violations of HRS § 712-1243 (Supp. 2002) (Count I) and HRS § 329-0043.5(a) (1993) (Count II) in connection with events that occurred on or about April 1, 2004.

On June 22, 2004, in a consolidated proceeding, Reis pled guilty to all counts. On July 9, 2004, the prosecution filed a motion for sentencing as a repeat offender. The prosecution's motion was based on Reis's prior conviction in 2001, in Cr. No. 01-1-1533, of unauthorized control of a propelled vehicle, in violation of HRS § 708-836. Reis did not contest the fact of the prior conviction.

On January 10, 2005, the circuit court conducted a hearing. Reis stipulated to her eligibility for sentencing as a repeat offender. The prosecution opposed probation, requesting

the court to impose concurrent indeterminate five-year terms of imprisonment in all three cases.[3]

After reviewing Reis's efforts at rehabilitation since her arrest, the circuit court ultimately reasoned that

> the legislature has given the Court the discretion and the opportunity when we think it's appropriate not to be giving repeat offender and not to be giving prison time . . . . [T]alk is . . . very cheap, but you have done what you said you were going to do. Since you folks brought this up in the summer, you've gone through one place at [the] Queen's [Medical Center] and then you've transferred to Diamond Head [a drug rehabilitation program] . . . . [Y]ou've done well in there. I'm going to give you a chance to continue on this road. So I'm going to deny the motion for repeat offender. I will place you on probation for five years. The jail is credit for time served. I don't think that's appropriate right now.

On January 11, 2005, the circuit court entered its judgment of conviction and sentence, sentencing Reis to a five-year term of probation.

On January 25, 2005, the prosecution filed a motion for reconsideration of sentence, and the circuit court conducted a February 22, 2005 hearing on the motion. The prosecution argued that the circuit court erred in sentencing Reis to probation under HRS § 706-622.5 (Supp. 2004), originally enacted as Act 44, see supra note 1, noting that Act 44 did not go into effect until July 1, 2004, while Reis's convictions were based upon incidents that occurred on December 23, 2003 and April 1, 2004 and complaints that were filed on January 5, 2004 and April 7, 2004, respectively. The prosecution argued that, pursuant to our precedent in State v. Smith, 103 Hawai'i 228, 81 P.3d 408 (2003),

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[3] Reis acknowledged that her guilty pleas in Cr. No. 04-1-0028 and Cr. No. 04-1-0675, see supra, automatically revoked the probation she was serving in Cr. No. 01-1-1533.

and State v. Walker, 106 Hawai'i 1, 100 P.3d 595 (2004), Reis's repeat offender status under HRS § 706-606.5, see supra note 2 -- based upon Cr. No. 01-1-1533 -- trumped the provisions of HRS § 706-622.5, see supra note 1, "'with respect to all cases involving rights and duties that mature[d], penalties that were incurred, [and] proceedings that were begun, before the effective date of Act 44'" and contended that, insofar as both prosecutions in the present matter were begun before July 1, 2004, Reis should have been sentenced to a period of imprisonment as a repeat offender.

Reis argued that because she was sentenced after July 1, 2004, the provisions of Act 44 applied to her cases because the language of Act 44, section 29 refers to "proceedings that were begun" before the effective date of the act, and Reis's sentencing hearing (in her view a "proceeding" within the meaning of Act 44, section 29), wholly separate and apart from her plea and conviction dates, was commenced after July 1, 2004. She distinguished the prospective application of Act 44 to her case from the retroactive application at issue in Walker, noting that

> in Walker, the defendant . . . was sentenced . . . in December 2003. So his actual sentencing was prior to the July 1, 2004 [effective date] of Act 44.
>
> In the present case, . . . Reis was sentenced . . . after the July 1st, 2004 [effective date] of Act 44. And we would argue that the language in there saying proceedings begun before July 1st, 2004, are not applicable. In our particular case, the actual proceeding is the sentencing itself.

Id. Reis then argued that

> [i]t's clear from the language in . . . Act 44 that [the legislature is] intending to give the courts more or greater discretion in terms of sentencing to allow for probation even for those persons who are eligible for repeat offender. And that is exactly

> what occurred in this case. She was sentenced after the effective date of the statute.
>
> . . . So, for all those reasons, we believe that's exactly what Act 44 intended in this case, and we do not believe for that reason that Walker is dispositive.

The court conducted the following analysis:

> All right. I agree with [Reis]. [In] Walker . . . the arrest, the plea, the conviction, sentencing, all took place before Act 44's effective date, July 1, 2004. And Act 44 does say the Act . . . ["]does not affect rights and duties that mature[d], penalties that were incurred, and proceedings that were begun before the effective date.["]
>
> Here, . . . Reis was arrested, she pled, and I think the plea was approximately a week before the Act 44 date.[4] But the sentencing was well after that. And there is no question the legislature in their word intended a broader group of non-violent drug offenders will be eligible for consideration for probation in order to undergo drug treatment. And that the legislature wants to present more discretion by the Court in sentencing. I believe that Ms. Reis fits into that criteri[on], and that both she and society will be better off with her getting dual-diagnosis care and the drug treatment care that are set up for her rather than sentencing her as a repeat offender and sentencing her to prison.
>
> . . . I think [this case is] different from Walker because of the timing. . . . Penalties were incurred after the effective date of Act 44. And proceedings that were begun, the Court is of the belief that when . . . proceedings [are] being discussed, it is referring to the sentencing proceedings.
>
> . . . [I]n State v. Avilla, 69 Haw. 509, [750 P.2d 78 (1988),] there's a similar . . . clause describing that. ["]This Act does not affect the rights and duties that mature[d,] penalties incurred[,] and proceedings that were begun before its effective date.["] And the prosecution in Avilla argued that proceedings that were begun should refer to the initiation of the prosecution. The Supreme Court disagreed. They said that proceedings can also refer to bail proceedings, and in Avilla, this was a post-conviction bail proceeding. So it occurred after the conviction, and that, I think, certainly comports with our situation in this case.

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[4] It bears noting that Reis entered her guilty pleas in both Cr. Nos. 04-1-0028 and 04-1-0675 and the circuit court adjudged her guilty on all counts in both matters on June 22, 2004, nine days before the provisions of Act 44 took effect.

> In addition, the Supreme Court also pointed out in Avilla that when there is a doubt or doubleness of meaning, or indistinctness, or uncertainty of an expression used in the statute, that an ambiguity exists. And in such case, the Court should look at the intent of the legislature for guidance. And as I said before, the intent is clear, and that's to give the Court more discretion in sentencing.

The circuit court then denied the prosecution's motion. Pursuant to an extension, on March 11, 2005, the prosecution timely filed notices of appeal in both Cr. No. 04-1-0028 and Cr. No. 04-1-0675, which were docketed as Supreme Court Nos. 27171 and 27172, respectively. Our June 2, 2005 order consolidated the two appeals under No. 27171.

II. STANDARDS OF REVIEW

A. Sentencing

"'The authority of a trial court to select and determine the severity of a penalty is normally undisturbed on review in the absence of an apparent abuse of discretion or unless applicable statutory or constitutional commands have not been observed.'" State v. Aplaca, 96 Hawai'i 17, 22, 25 P.3d 792, 797 (2001) (quoting State v. Jenkins, 93 Hawai'i 87, 100, 997 P.2d 13, 26 (2000)).

B. Conclusions Of Law (COLs)

> "'A COL is not binding upon an appellate court and is freely reviewable for its correctness.'" AIG Hawaii Ins. Co. v. Estate of Caraang, 74 Haw. 620, 628, 851 P.2d 321, 326 (1993) (quoting Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 119, 839 P.2d 10, 28 (1992)). This court ordinarily reviews COLs under the right/wrong standard. In re Estate of Holt, 75 Haw. 224, 232, 857 P.2d 1355, 1359 (1993). Thus, "'[a] COL that is supported by the trial court's

> [findings of fact] and that reflects an application of the correct rule of law will not be overturned.'" Estate of Caraang, 74 Haw. at 628-29, 851 P.2d at 326 (quoting Amfac, Inc., 74 Haw. at 119, 839 P.2d at 29). "However, a COL that presents mixed questions of fact and law is reviewed under the clearly erroneous standard because the court's conclusions are dependent upon the facts and circumstances of each individual case." Id. at 629, 851 P.2d at 326 (quoting Amfac, Inc., 74 Haw. at 119, 839 P.2d at 29) (internal quotation marks omitted).
>
> State v. Furutani, 76 Hawai'i 172, [180], 873 P.2d 51, [59] (1994).

Allstate Ins. Co. v. Ponce, 105 Hawai'i 445, 453, 99 P.3d 96, 104 (2004) (some internal citations omitted) (bracketed material altered).

C. Interpretation Of Statutes

The interpretation of a statute is a question of law reviewable de novo. State v. Arceo, 84 Hawai'i 1, 10, 928 P.2d 843, 852 (1996).

> Furthermore, our statutory construction is guided by established rules:
>
> > When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.
> >
> > When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. . . .
> >
> > In construing an ambiguous statute, "[t]he meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning." HRS § 1-15(1) [(1993)]. Moreover, the courts may resort to extrinsic aids in

> determining legislative intent. One avenue is the use of legislative history as an interpretive tool.
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> Gray[v. Admin. Dir. of the Court], 84 Hawai'i [138,] 148, 931 P.2d [580,] 590 [(1997)] (footnote omitted).

State v. Koch, 107 Hawai'i 215, 220, 112 P.3d 69, 74 (2005) (quoting State v. Kaua, 102 Hawai'i 1, 7-8, 72 P.3d 473, 479-80 (2003)). Nevertheless, absent an absurd or unjust result, see State v. Haugen, 104 Hawai'i 71, 77, 85 P.3d 178, 184 (2004), we are bound to give effect to the plain meaning of unambiguous statutory language; we may only resort to the use of legislative history when interpreting an ambiguous statute. State v. Valdivia, 95 Hawai'i 465, 472, 24 P.3d 661, 668 (2001).

III. DISCUSSION

A. The Parties' Arguments

1. Reis contends that the circuit court correctly interpreted the allegedly ambiguous language of Act 44, section 29 to exclude the January 11, 2005 sentencing hearing, thereby correctly applying Act 44, section 11 *prospectively* to her case.

Reis and the prosecution disagree regarding the meaning of the following underscored phrases within Act 44's savings clause: "This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date," see supra note 1. Reis maintains that the meaning of "incurred" and "proceedings" cannot be divined with certainty from the plain language of the savings

clause[5] and that the cases cited by the prosecution, which interpret the same language in other legislation, merely illustrate how statutory interpretations have varied, thereby bolstering her argument that the language of Act 44's savings clause is inherently ambiguous. (Citing Walker; State v. Feliciano, 103 Hawai'i 269, 274, 81 P.3d 1184, 1189 (2003); Avilla, 69 Haw. at 512, 750 P.2d at 80; State v. Kai, 98 Hawai'i 137, 44 P.3d 288 (App. 2002); State v. Werner, 93 Hawai'i 290, 295, 1 P.3d 760, 765 (App. 2000); State v. Johnson, 92 Hawai'i 36, 44, 986 P.2d 987, 995 (App. 1999).)

Reis argues that, inasmuch as the foregoing terms are ambiguous, the circuit court correctly delved into the Act's legislative history to support the circuit court's COL that the word "proceedings" can refer, in isolation, to a sentencing hearing conducted after Act 44's effective date, thereby authorizing the circuit court's application of Act 44, section 11's amendments to HRS § 706-622.5, see supra note 1, so

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[5] Reis quotes HRS § 701-101(1) (1993), which provides that "amendments made by Act 314, Session Laws of Hawaii 1986, to this Code do not apply to offenses committed before the effective date of Act 314, Session Laws of Hawaii 1986" as an example of an unambiguous savings clauses that clearly excludes offenses committed prior to an effective date. She argues that the legislature, in Act 44, section 29, "chose to use the ambiguous terms of 'proceedings that were begun' and 'penalties that were incurred'" and argues that to conclude that the two phrases are not ambiguous would violate rules of statutory interpretation. (Emphasis added.)

The dissent, too, asserts that to avoid ambiguity the legislature was somehow required to use the phrase "offense committed" in the savings clause and, by failing to do so, created ambiguity. Dissenting opinion at 12-13 n.7. As discussed infra, this court, in State v. Van den Berg, 101 Hawai'i 187, 191, 65 P.3d 134, 138 (2003), implicitly concluded that the plain language of the term "proceedings" in the standard savings clause betokened -- so clearly as not to warrant further comment -- the initiation of a criminal prosecution. Contrary to the implication of Reis's and the dissent's logic, the absence of one unambiguous term does not, ipso facto, render another otherwise unambiguous term spontaneously ambiguous.

as to authorize sentencing Reis to probation.[6] In conclusion, she asserts that any ambiguity should be construed in her favor, in keeping with the rule of lenity, citing State v. Shimabukuro, 100 Hawai'i 324, 327, 60 P.3d 274, 277 (2002), State v. Vallesteros, 84 Hawai'i 295, 302, 933 P.2d 632, 639 (1997), and State v. Rogers, 68 Haw. 438, 443, 718 P.2d 275, 277-78 (1986).

In light of the dissent's insistence on arguing that the provisions of Act 44, section 11 should be applied retroactively[7] (see, e.g., dissenting opinion at 12, 33 & n.32), it is important to emphasize that Reis herself does not characterize her argument as implicating retroactive application. Reis contends only that the terms "proceedings" and "incurred" are ambiguous, which she argues justifies a review of the legislative history underlying Act 44. The legislative history, she argues, supports a construction of the term "proceedings" to include a sentencing hearing and of the term "incurred" to mean imposition of sentence, both of which would allow a prospective application of Act 44, section 11, see supra note 1, to her case

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[6] Reis cites to legislative committee reports to demonstrate that the intent underlying Act 44's amendments to HRS § 706-622.5 was "to clear up the confusion regarding repeat offenders and the criteria for eligibility for drug treatment, and permit more discretion by the court in sentencing" and thereby to increase the number of non-violent drug offenders eligible for probation under HRS § 706-622.5. (Quoting 2004 Haw. Sess. L. Act 44, § 9 at 212-13.) Reis argues that the circuit court's interpretation of the savings clause comports with that intent.

[7] The dissent argues that Act 44, section 29 does not prevent retroactive application of the ameliorative amendments to Reis's case. See, e.g., dissenting opinion at 12, 33. It is worth noting, therefore, that in State v. Brantley, 99 Hawai'i 463, 56 P.3d 1252 (2002), after analyzing an identical savings clause, compare 1999 Haw. Sess. L. Act 12, § 2 at 12 with 2004 Haw. Sess. L. Act 44, § 29 at 227, the dissent asserted that the same language represented "the legislature's express direction that the amendment was not to be applied retroactively." Id. at 483, 56 P.3d at 1272 (Acoba, J., dissenting).

by grounding the relevant events chronologically after Act 44's effective date. She does not, by contrast, characterize the application of Act 44's amendments to her case at sentencing as retroactive -- which would require viewing the sentencing proceeding as part of the unitary criminal prosecution initiated by the charging instruments dated January 5 and April 13, 2004 -- and, therefore, does not challenge this court's conclusion in Walker, 106 Hawai'i at 10, 100 P.3d at 604, that Act 44 does not apply retroactively.

Nevertheless, to the extent that Reis's arguments could be construed as implicitly arguing for retroactive application,[8] and in the interests of thorough analysis,[9] we address, infra, the dissent's arguments in favor of retroactive application of Act 44, section 11 to Reis's case.

2. The prosecution argues that Act 44, section 29 unambiguously refers to offenses that were committed and criminal proceedings that were initiated prior to Act 44's effective date.

The prosecution contends that the plain language of the savings clause bars Reis from access to Act 44's amendments because "a penalty is 'incurred' upon commission of the criminal

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[8] Black's Law Dictionary 1343 (8th ed. 1999) defines a "retroactive law" as one "that looks backward or contemplates the past, affecting acts or facts that existed before the act came into effect." Therefore, although Reis does not employ the term "retroactive" in her arguments, insofar as she does seek to apply Act 44's amendments to events that occurred prior to the Act's effective date, we can construe an implicit argument for retroactive application.

[9] The dissent notes two pending cases, State v. Cruz, No. 27242, and State v. Tactay, No. 27271, which implicate Act 44, section 29. Dissenting opinion at 6-7 n.3. The present opinion encompasses the arguments made by the parties in those matters, including the retroactivity argument made, at the most, only implicitly by Reis. We leave a discussion of the merits of those cases for another time.

offense," whereas the penalty itself "is imposed by the court at sentencing," and that Reis "incurred" the penalties at issue in December 2003 and April 2004, prior to Act 44's effective date. (Emphasis in original.) (Citing State v. McGranahan, 206 N.W.2d 88 (Iowa 1973); Bilbrey v. State, 135 P.2d 999 (Okla. Crim. App. 1943); State v. Matthews, 310 A.2d 17 (Vt. 1973).) Therefore, the prosecution argues, Reis "incurred" the penalties before July 1, 2004, and the plain language of the savings clause in Act 44, section 29, see supra note 1, prevents the sentencing court in the present matter from applying Act 44's amendments to Reis's convictions.

The prosecution further asserts that we have previously interpreted "proceedings" as unambiguously referring to unitary criminal proceedings initiated with a formal charge and have rejected the argument that a sentencing hearing can qualify as a severable "proceeding" for purposes of escaping the effect of a savings clause. (Citing, inter alia, Feliciano, 103 Hawai'i at 273, 81 P.3d at 1188; State v. Van den Berg, 101 Hawai'i 187, 191, 65 P.3d 134, 138 (2003)). The prosecution also challenges the circuit court's reliance on Avilla, insisting that bail proceedings are distinct in nature and character from criminal proceedings, distinguishing the ambiguity discerned by this court in Avilla in the term "proceeding" from the plain language of Act 44, section 29. (Citing State v. Miller, 79 Hawai'i 194, 201, 900 P.2d 770, 777 (1995) (for the proposition that during appeal, the circuit court loses jurisdiction over the criminal proceeding but retains jurisdiction over bail).)

3. The prosecution contends that, insofar as Reis committed two distinct drug-related offenses several months apart, her conviction for the latter offense precludes the circuit court from sentencing her as a first-time drug offender.

Finally, the prosecution argues that the circuit court erred by failing to note that because Reis was convicted of two separate offenses of possession of cocaine -- one occurring on December 23, 2003 and the other on April 1, 2004 -- she could not be a first-time drug offender with respect to the second of the two offenses and, hence, regardless of the interpretation of Act 44's savings clause, could not be eligible for sentencing as a first-time drug offender. (Citing Koch, 107 Hawai'i at 224, 112 P.3d at 78 (holding that Koch did not qualify as a first-time drug offender for two chronologically separate drug offenses for which he was convicted and sentenced on the same day at a consolidated hearing); State v. Rodrigues, 68 Haw. 124, 706 P.2d 1293 (1985) (holding that two offenses committed at separate times but for which sentence was imposed on the same day constituted separate convictions for purposes of HRS § 706-606.5 (Supp. 1984)).)

Reis attempts to distinguish her cases from the proceedings in Koch by noting that, while in Koch the simultaneous entry of judgment of conviction was based on two separate findings of guilt entered on different days with respect to the two charges -- one following a July 2003 jury trial and the other following an October 2003 no-contest plea -- Reis entered a change of plea to guilty on both charges on the same day at the same proceedings, with the clear intention of doing so in order to be eligible for

parole sentencing as a first-time drug offender. (Citing 107 Hawai'i at 223-24, 112 P.3d at 77-78.) She further argues that application of Koch to her cases would result in substantial prejudice to her, given her reliance on circuit court sentencing practices before the Koch decision, and would violate her right to due process because she committed the offenses in question and pled guilty prior to the date of the Koch decision. (Citing, inter alia, State v. Ikezawa, 75 Haw. 210, 220-21, 857 P.2d 593, 599 (1993) (setting forth a three-pronged test for analyzing the fairness of retroactive applicability of a decision); Bouie v. Columbia; 378 U.S. 347 (1964); United States v. Newman, 203 F.3d 700 (9th Cir. 2000).)

B. The Circuit Court Erred In Concluding That HRS § 706-622.5 (Supp. 2004) Applied To Reis's Cases.

1. "Proceedings," as it appears in Act 44, section 29, unambiguously refers to the initiation of a criminal prosecution against a defendant.

The initiation of criminal proceedings -- through "a formal felony prosecution, preliminary hearing, indictment, information or arraignment" -- "'is the starting point of our whole system of adversary criminal justice.'" State v. Luton, 83 Hawai'i 443, 449-50, 927 P.2d 844, 850-51 (1996) (footnotes omitted) (quoting State v. Masaniai, 63 Haw. 354, 360, 628 P.2d 1018, 1023 (1981) (following Kirby v. Illinois, 406 U.S. 682 (1972))). In Van den Berg, analyzing an identically worded savings clause,[10] this court construed the term "proceedings" to

[10] In Van den Berg, we noted that the act in question contained a savings clause that "expressly stated that the amendments to the act were not (continued...)

mean the initiation of prosecution through a charging instrument and concluded that the amendments in question were therefore not available to the defendants:

> In the present case, the record indicates that [the defendants'] respective proceedings were "begun" before [the effective date of the amendments]: (1) Van den Berg was indicted on October 25, 1991 . . . ; and (2) Karagianes was charged on July 8, 1992 . . . . Because the proceedings involving [the defendants] began prior to the effective date of Act 239, the 1993 Statute did not apply to [them].

101 Hawai'i at 191, 65 P.3d at 138 (emphases in original).[11]

Van den Berg raised the question whether the 1990 or 1993 version of HRS § 134-6(a), involving use of a firearm in the commission of a felony, applied to the defendants' cases. Id. at 190-91, 65 P.3d at 137-38 (majority opinion). In State v. Brantley, 99 Hawai'i 463, 469, 56 P.3d 1252, 1258 (2002), this court had concluded, based on a reading of the 1993 version of the statute and its legislative history, that the legislature intended to create a separate offense in HRS § 134-6(a) (Supp. 1993) and, therefore, that second degree murder was not a lesser included offense, overruling State v. Jumila, 87 Hawai'i 1, 950 P.3d 1201 (1998), which was similarly based on an analysis of HRS

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[10](...continued)
to 'affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date.'" Id. at 191, 65 P.3d at 138 (emphases in Van den Berg) (quoting 1993 Haw. Sess. L. Act 239, § 2 at 419).

[11] The dissent asserts that this court, "[in] Van den Berg[,] did not conclude that 'proceedings' means 'criminal prosecutions.'" Dissenting opinion at 21 n.20. A careful reading of the language immediately supra reveals just such an implicit conclusion, which this court determined did not warrant further explication or analysis in light of the normally unambiguous meaning of the term as employed in the standard savings clause. Nothing in Van den Berg's treatment of the term "proceedings," certainly, renders it inapplicable as illustrative of how this court has treated the term in the past.

§ 134-6(a) (1993). Van den Berg, 101 Hawai'i at 191, 65 P.3d at 138. By contrast, in Van den Berg, this court concluded that the plain language of HRS § 134-6(a) (Supp. 1990) revealed no legislative intent to create a separate offense; accordingly, a defendant could not be convicted of both a violation of HRS § 134-6(a) (Supp. 1990) and murder in the second degree. Id. at 192, 65 P.3d at 139. We then concluded that "proceedings" plainly meant the initiation of a criminal prosecution against both defendants,[12] and, noting that their "proceedings" had been initiated before the effective date of the 1993 amendments, held that the 1990 version of HRS § 134-6(a) applied to their cases and reversed their convictions of and sentences for the HRS § 134-6(a) offense. Id. at 191-92, 65 P.3d at 138-39.

The dissent argues that this court's interpretation in Van den Berg of "proceedings" to clearly betoken the initiation of a criminal prosecution against the defendant is inapposite to the present case because an ameliorative sentencing statute was not at issue. Dissenting opinion at 20-23 & n.24. The dissent contends that it is the ameliorative nature of an amendment that

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[12] We noted in Van den Berg that Gary Karagianes, one of the defendants, was charged and tried prior to the effective date of the 1993 amendments, but sentenced after, and concluded that his "proceedings" had begun prior to the effective date, preventing application of the 1993 version of HRS § 134-6(a) to his case. 101 Hawai'i at 191, 65 P.3d at 138. Our analysis of the savings clause as it applied to Karagianes in Van den Berg is of particular import, moreover, because it represents this court's only opinion of which we are aware, aside from Avilla, 69 Haw. 509,750 P.2d 78, discussed infra, in which a similar savings clause applied to legislation governing a criminal prosecution initiated prior to an amendment's effective date but in which a sentencing hearing was conducted after the effective date, mirroring the procedural stance of the present matter. See Walker, 106 Hawai'i at 4-5, 100 P.3d at 598-99 (defendant charged, pled no contest, and sentenced prior to Act 44's effective date); Feliciano, 103 Hawai'i at 274, 81 P.3d at 1189 (defendant indicted on September 6, 1994, sentenced on March 29, 1995, and amendments became effective July 20, 1998).

determines whether retroactive application is available to a defendant but fails to articulate how an unambiguous term can be rendered ambiguous merely because the statutory provision urged as applicable by the defendant is ameliorative.[13] See dissenting opinion at 20-23, 33-37 (citing Koch, 107 Hawai'i at 221-22, 112 P.3d at 75-76; Avilla, 69 Haw. at 509, 750 P.2d at 78; State v. Von Geldern, 64 Haw. 210, 212-15, 638 P.2d 319, 321-24 (1981)). In short, nothing in the Van den Berg analysis conflicts with our conclusion in that case that "proceedings" unambiguously commence with the initiation of a unitary criminal prosecution and the various proceedings subsumed within it.

a. *Avilla* demonstrates that the subject matter of an act can create ambiguity where normally none exists.

It is not the ameliorative nature of a statutory provision that has prompted us in the past to construe the term "proceedings" as meaning something other than the initiation of a criminal prosecution but, rather, the unique subject matter of the act in question. Avilla is illustrative.

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[13] As discussed infra in section III.B.3.b, Act 44's savings clause applies to all of Act 44, including the many amendments to the state's drug laws that increase punishments and create new crimes and liabilities. Because those provisions are not ameliorative, the dissent's position begs the question whether the default, plain language interpretation of "proceedings" in Van den Berg applies to them or whether ambiguity continues to exist, despite the lack of any ameliorative provision at issue in those provisions. Our analysis results in a cleaner construct, to wit, (1) that the term "proceedings" in the standard savings clause means criminal prosecutions, see Van den Berg, 101 Hawai'i at 191, 65 P.3d at 138, and (2) that the same meaning applies to all sections of Act 44.

Moreover, in light of the foregoing analysis concerning the lack of ameliorative provisions at issue in Van den Berg, the dissent's assertion that we ignore this distinction, dissenting opinion at 21 n.20, is curious. We do not ignore the distinction; we simply do not conclude that it is dispositive.

In Avilla, this court held that the ameliorative amendments to HRS § 804-4 (1985) provided for in Act 139 of 1987[14] -- allowing bail to convicted felons while on appeal -- were available to a defendant who was indicted prior to June 5, 1987, the effective date of the amendments, but whose motion to continue bail pending appeal was heard and denied thereafter. 69 Haw. at 511, 513, 750 P.2d at 79, 81. We so held, not because the amendments were ameliorative,[15] but because the subject matter of Act 139 -- which pertained solely to bail, its availability, and related conditions -- injected ambiguity into the term "proceedings." Id. at 512-13, 750 P.2d at 80. We noted that, while proceedings normally would mean "prosecutions," in the context of a statute concerned solely with bail, "proceedings" could also be interpreted as bail proceedings.[16] Id. at 512, 750 P.2d at 80. It was that ambiguity, and that ambiguity alone, that led us to the relevant committee reports in

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[14] See 1987 Haw. Sess. L. Act 139, §§ 1-9 at 312-16. Act 139, section 10 contained a savings clause identical to the language in Act 44, section 29.

[15] In this regard, the dissent oversimplifies the analysis in Avilla when it asserts that "[t]his court held that, in light of the ameliorative nature of the legislation, the term 'proceedings' included a bail proceeding occurring after the effective date" of the act in question, dissenting opinion at 12, citing Avilla, 69 Haw. at 513, 750 P.2d at 80-81. It was first necessary to find the term "proceedings" ambiguous before the ameliorative nature of the legislation could be relied upon as grounds for the holding. 69 Haw. at 512, 750 P.2d at 80.

[16] The dissent mischaracterizes the discussion in Avilla as recognizing "multiple" meanings of "proceedings." Dissenting opinion at 16. There were, in fact, only two, the presumptive meaning of "prosecution" and the alternate "bail proceedings" created by the unique subject matter of the act. 69 Haw. at 512, 750 P.2d at 80 ("'Proceedings,' as employed in the section of Act 139 in question, can mean prosecutions; but within the context of the statutes regulating the release of defendants on bail, it also can mean bail proceedings.").

order to determine that the legislature's concerns in enacting the measure could be addressed by allowing Avilla to benefit from the amendments. Id. at 513, 750 P.2d at 80-81.

In Avilla, this court presupposed that the term "proceedings" in the savings clause normally meant "prosecutions." Id. at 512, 750 P.2d at 80. Insofar as Act 139 dealt exclusively with bail, the distinct nature of bail proceedings[17] was sufficient to inject ambiguity into the term, Avilla, 69 Haw. at 512, 750 P.2d at 80. Act 44, however, is comprehensive legislation enacted to address the epidemic of crystal methamphetamine use in the state, and includes sections increasing penalties for exposing children to the methamphetamine industry, inflicting injuries during its production, for sales of related drug paraphernalia, and for undertaking methamphetamine production near a park or a school. See 2004 Haw. Sess. L. Act 44, §§ 3, 4, and 8 at 206-10, 212. It amends penalties for promoting the drug. Id. §§ 5-7 at 210-11. It adopts a more

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[17] Bail proceedings are indeed separate and distinct in nature. See Miller, 79 Hawai'i at 201, 900 P.2d at 777 ("When a convicted defendant is released on bail pending appeal, the circuit court is temporarily without jurisdiction under the probationary sentence that is the subject of the defendant's appeal; however, the circuit court may enforce or modify the conditions related to the defendant's release on bail pending appeal."); Dawson v. Lanham, 53 Haw. 76, 82-83, 488 P.2d 329, 333 (1971) (bail requirements survive quashing of indictment without prejudice during pendency of prosecution's appeal); Bates v. Ogata, 52 Haw. 573, 575-76, 482 P.2d 153, 155-56 (1971) (A bail hearing, as a nonjury proceeding, is limited in its purpose and is not necessarily governed by "strict adherence to exclusionary rules of evidence" but, rather, "hearsay may support a finding if in the end 'it is the kind of evidence on which responsible persons are accustomed to rely in serious affairs.'") (quoting Nat'l Labor Relations Bd. v. Remington Rand, Inc., 94 F.2d 862, 873 (2d Cir. 1938) (Hand, J.)); Bates v. Hawkins, 52 Haw. 463, 468-70, 478 P.2d 840, 843-44 (1970) ("[T]he bail hearing is not a determination of guilt or innocence but rather a determination of the preliminary issue of the right to a reasonable bail. Unless the accused insists otherwise, it may well be conducted somewhat informally, as upon affidavits.").

treatment-oriented approach with respect to first-time offenders. Id. §§ 9-12 at 212-15. It addresses tort liability for drug dealers, insurance coverage for substance abuse, and civil commitment and treatment centers for substance abusers. Id. §§ 13, 15-22 at 216-19, 221-24. It supports citizen empowerment in combating the drug. Id. §§ 24-26 at 225. In contrast to Act 139 of the 1987 legislature at issue in Avilla, which dealt solely with bail, see 1987 Haw. Sess. L. Act 139, passim at 312-16, no ambiguity is introduced by Act 44's subject matter that would lead us to question, as we did in Avilla, the standard interpretation of "proceedings" as the initiation of a criminal prosecution.[18] Cf. 69 Haw. at 512, 750 P.2d at 80.

Avilla, therefore, does not stand, as Reis contends, for the proposition that this court construes the language of the standard savings clause "in a manner that best effectuates the underlying legislative intent and purpose of that particular statute." We resort to legislative history only when there is an ambiguity in the plain language of the statute. Valdivia, 95 Hawai'i at 472, 24 P.3d at 668. Rather, Avilla stands for the unremarkable proposition that, if a statutory amendment on a single subject addresses proceedings other than criminal prosecutions -- and the numerous hearings subsumed within criminal prosecutions, including hearings on evidentiary matters, motions for reconsideration, and sentencing -- so as to give rise to an ambiguity, the defendant may benefit from the amendment if

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[18] We therefore also decline the dissent's invitation to "assum[e], arguendo, the term "proceedings" in the savings clause is viewed as ambiguous . . . ." Dissenting opinion at 1.

doing so would comport with the intent of the legislature as reflected in the amendment's underlying legislative history.

b. The inclusion of a specific savings clause within the body of the amending statute demonstrates a clear legislative intent that the contents of the act do not apply retroactively.

It is important to note that in both Koch and Von Geldern, upon which the dissent relies, see dissenting opinion at 33-37, neither of the statutes at issue contained specific savings clauses, a crucial fact that informed the discussion of the underlying legislative history and the ultimate conclusion in both cases that the ameliorative amendments could apply to the defendants.[19] See Koch, 107 Hawai'i at 221-22, 112 P.3d at 75-76, (citing 2002 Haw. Sess. L. Act 161 at 568-75); Von Geldern, 64 Haw. at 215, 638 P.2d at 323 (citing 1980 Haw. Sess. L. Act 284 at 544-46). In both cases, only the general savings clause,

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[19] The distinction between the intent expressed by the general savings clause, codified at HRS § 1-3, see infra note 20, and a specific savings clause enacted as part of particular legislation, such as Act 44, section 29, is crucial to the analysis. The dissent seeks to conflate the two, dissenting opinion at 37-39, in an attempt to reduce the express inclusion of a savings clause in Act 44 -- which by its plain language bars retroactive application of Act 44 -- to a nullity that has no more import than had it not been enacted and we were confronted only with the general savings clause contained in HRS § 1-3. Id. at 49-53 (quoting Holiday v. United States, 683 A.2d 61, 66 (D.C. 1996)) (asserting "that state courts 'favor[] retroactive application of ameliorative sentencing legislation despite a general savings statute'" and that "the generic savings language in Section 29 is reflective of the 'general savings' provisions in HRS §§ 1-3 and 1-11.") (brackets in dissent). In the present matter, we are confronted with a specific savings clause, i.e., a savings clause specifically and purposefully included in a particular piece of legislation as an expression of legislative intent regarding that legislation, and the import of the distinction becomes clear after analyzing the foreign case law upon which the dissent relies, see infra.

codified at HRS § 1-3 (1993),[20] presented an obstacle to retroactive application of the ameliorative amendments, and this court concluded that HRS § 1-3 "'is only a rule of statutory construction and where legislative intent may be ascertained, it is no longer determinative.'" Koch, 107 Hawai'i at 222, 112 P.3d at 76 (quoting Von Geldern, 64 Haw. at 213, 638 P.2d at 322).

The foreign case law upon which the dissent relies for the purpose of bolstering its argument that ameliorative amendments must be applied retroactively, regardless of savings clauses, dissenting opinion at 49-53 (citing People v. Schultz, 460 N.W.2d 505 (Mich. 1990); State v. Cummings, 386 N.W.2d 468 (N.D. 1986); People v. Oliver, 134 N.E.2d 197 (N.Y. 1956)), merely comports with our conclusion, appearing in Von Geldern and Koch, that the existence of a general savings clause does not prevent ameliorative amendments from being applied retroactively if such application would conform to specific legislative intent divined from the statute itself or from legislative history surrounding the specific statute in question.[21] See Koch, 107 Hawai'i at 222, 112 P.3d at 76; Von Geldern, 64 Haw. at 213-14, 638 P.2d at 322; Schultz, 460 N.W.2d at 511-12; Cummings, 386 N.W.2d at 478 (concluding "that, unless otherwise indicated by the Legislature, an ameliorating amendment to a criminal statute

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[20] HRS § 1-3 provides that "[n]o law has any retrospective operation, unless otherwise expressed or obviously intended."

[21] Moreover, the dissent's reliance on People v. Walker, 623 N.E.2d 1 (N.Y. 1993), contributes little to the discussion, as Walker relies heavily on Oliver and merely restates the ameliorative doctrine already recognized in Koch and Von Geldern that, absent a specific savings clause, ameliorative amendments can be applied retroactively. See id. at 5-6.

is reflective of the Legislature's determination that the lesser punishment is the appropriate penalty for the offense") (emphasis added); Oliver, 134 N.E.2d at 201). None of the cases that the dissent cites implicate a specific savings clause enacted as part of the ameliorative amendments, as is found in Act 44, section 29, see supra note 1. Indeed, Schultz, Cummings, and Oliver all relied upon legislative silence regarding solely prospective application within the four corners of the legislation at issue in order to conclude retroactive application was implicitly endorsed by the ameliorative nature of the amendments. See Schultz, 460 N.W.2d at 509; Cummings, 386 N.W.2d at 470 (observing that the legislature did not "expressly state" whether the new law or the old law would apply to offenses committed before the amendments); Oliver, 134 N.E.2d at 201-02.[22] By contrast, a specific savings clause, expressly contained within the body of the amending legislation, is clear evidence of legislative intent that the act "not affect rights and duties that matured, penalties that were incurred, and proceedings that

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[22] The cases cited by the dissent contain other infirmities. In Oliver, the court applied ameliorative amendments to a defendant who had murdered his two-year-old brother as a fourteen-year old and was indicted three years prior to the amendments, ruling that the defendant could not be tried as an adult and, hence, could not be subject to the death penalty. In applying the new law, the court reasoned that, although the legislature had clearly provided that "[t]he repeal of any statute . . . shall not affect . . . any . . . offense committed . . . prior to the time such repeal takes effect," 134 N.E.2d at 200-04, the ameliorative amendment nevertheless applied to the defendant, reasoning that the dissent characterized as "rewrit[ing] a statute and supply[ing] that which legislatures in their wisdom . . . refuse to enact," id. at 204 (Froessel, J., dissenting). Moreover, the appellate courts of Michigan have noted on several occasions "that [People v.]Schultz[, 460 N.W.2d 505 (Mich. 1990) (plurality opinion),] did not garner a majority and did not represent binding precedent" even in Michigan, People v. Doxey, 687 N.W.2d 360, 363 (Mich. Ct. App. 2004). See also People v. Minnifield, 2004 WL 1778790 at 6 (Mich. Ct. App. 2004); People v. Thomas, 678 N.W.2d 631, 637 n.1 (Mich. Ct. App. 2004).

were begun, before its effective date," i.e., that it not apply retroactively, eliminating any justification for further analysis. The dissent attempts to avoid the distinction when it asserts that, in the instant case, "[a]s was the case in Von Geldern, Avilla, and Koch, here there is simply no express indication that the legislature desired to prohibit retrospective effect to the remedial provisions," dissenting opinion at 40 (emphasis omitted), but, in doing so, ignores the very real and clear legislative intent represented by the inclusion of a specific savings clause barring retroactive application within the very body of Act 44.

2. A defendant "incurs" a penalty at the time of the commission of an offense.

This court has not previously had occasion to define the plain meaning of the term "incurred," as employed in the standard savings clause. Nevertheless, courts in other jurisdictions have analyzed the phrase "penalties incurred" in the context of a savings clause and have concluded that a defendant incurs the penalty at the time of the commission of the offense.[23] See McGranahan, 206 N.W.2d at 91 ("'The penalty is imposed by the court after the fact of guilt is legally determined. It is incurred when the act for which the law prescribed the penalty is committed.'") (quoting In re Schneck, 96 P. 43, 44-45 (Kan. 1908)); State v. Alley, 263 A.2d 66, 69

[23] This is not to suggest that we presume the defendant guilty until proven innocent but, rather, that "[u]nder a saving clause or statute[,] the statutory rights and penalties are determined by the statute in effect at the time of the occurrence of the facts and may be enforced after repeal if the underlying facts are proved" later at trial. Matthews, 310 A.2d at 19.

(Me. 1970) ("'Punishment, penalty or forfeiture is 'incurred' . . . at the time the offence for which punishment is imposed is committed.'") (ellipses in original) (quoting Patrick v. Comm'r of Corr., 227 N.E.2d 348, 351 (Mass. 1967)); State v. Johnson, 402 A.2d 876, 880 (Md. 1979) (holding that a penalty is incurred "at the time of the commission of the offense"); Commonwealth v. Benoit, 191 N.E.2d 749, 751-52 (Mass. 1963) (concluding that Massachusetts jurisprudence had settled since 1869 that a penalty is incurred at the time of the offense, "emphasiz[ing] incurrence as resulting from the offender's wrongful act as distinguished from any proceeding by public authority to impose the consequences of the wrongdoing" and that "'[p]unishment incurred' is not 'sentence imposed,' 'conviction found' or 'judgment entered'" and denying application of ameliorative amendments in effect after the date of the commission of the offense but before the issuance of the indictment) (quoting the applicable savings clause); Schultz, 460 N.W.2d at 510 ("[I]t is clear that the two defendants before this Court have incurred criminal liability for which they may be punished . . . ."); Bilbrey, 135 P.2d at 1000 ("'hold[ing] . . . that th[e] defendant was subject to any penalty imposed by law for this crime on the date of its commission, and any subsequent statute repealing such penalty can only operate prospectively, and is applicable only to offenses committed after the statute took effect'") (emphasis added) (quoting Penn v. State, 164 P. 992, 993 (Okla. Crim. App. 1917)); State v. Moore, 233 P.2d 253, 256-57 (Or. 1951) (concluding that an ameliorative amendment was unavailable to the defendant,

insofar as he incurred the original penalty before the effective date of the new statute, reasoning that "to have 'incurred penalties' implies a time past or present as to the act and a future time as to the assessment of the penalty"); State v. Petrucelli, 592 A.2d 365, 366 (Vt. 1991) ("As a result of the saving clause, a criminal irrevocably incurs liability at the time of the offense: not even the repeal of the statute imposing that liability affects that liability."); State v. Senna, 321 A.2d 5, 6 (Vt. 1974) ("'Criminal liability is incurred when the criminal act is committed.'") (quoting Matthews, 310 A.2d at 20); Matthews, 310 A.2d at 21 ("Defendant's penalty was 'incurred' when he committed the act."). But see State v. Tapp, 490 P.2d 334, 336 (Utah 1971) (concluding that "no penalty is incurred until the defendant is convicted, judgment entered and sentence imposed," thereby allowing ameliorative amendments to be applied to a defendant who was tried and convicted, but not sentenced, prior to the effective date of the act).[24]

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[24] The dissent makes Tapp the centerpiece of its argument that a defendant incurs the penalty of an offense at the time the sentence is imposed. Dissenting opinion at 27-30. In Tapp, the defendant was indicted before the effective date of the ameliorative sentencing statute but tried, convicted, and sentenced thereafter. 490 P.2d at 335. Interestingly, the Tapp court implicitly concluded in analyzing a very similar savings clause that "proceedings" do not encompass sentencing proceedings when it concluded that "[t]he only way [the] statute [in question] can apply to the problem here . . . would be through its provision that '[t]he repeal of a statute does not . . . affect . . . any penalty incurred,'" 490 P.2d at 336 (quoting the applicable savings clause). In light of the fact that the defendant, like Reis, was sentenced after the effective date of the amendment, 490 P.2d at 335, the Tapp court implicitly rejected the proposition that a sentencing proceeding was a severable proceeding that could qualify the defendant for sentencing under the new law, be it termed retroactive or prospective application. We are at a loss, therefore, as to how that reasoning supports the dissent's position that a sentencing proceeding can be a separate proceeding for the purposes of the savings clause which does qualify the defendant for sentencing under the new law, as the dissent argues. See

(continued...)

In our view, the reasoning of the foregoing authority is compelling.[25] Accordingly, we hold that a defendant incurs, at the moment he or she commits the offense, liability for the criminal penalty in effect at the time of the commission of the offense.

3. Our construction of "proceedings" and "incurred" ensures the consistent application of justice and avoids potential constitutional infirmity.

To interpret "proceedings" to mean any discrete hearing pertaining to sentencing, motions for reconsideration, or appellate review would, in practice, mean that the savings clause would not operate to exclude a defendant's case unless all stages of a prosecution and all appeals were entirely concluded prior to the effective date of an amendment. Such a construction would vitiate the very reason for enacting a savings clause, to wit, (1) to delineate clearly which defendants fall under the new

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[24](...continued)
dissenting opinion at 28-29 n.29.

In any case, the Tapp court appears to conflate the meaning of "incur" and "impose" and cites no authority supporting the conclusion that a penalty is, by its plain meaning, "incurred" at the time of sentencing, see 490 P.2d at 337-38 (Henriod, J., dissenting). Moreover, as discussed infra in section III.B.3.a, application of the Tapp rule ultimately results in greater inequities among defendants.

[25] The dissent attempts to distinguish the preceding foreign case law by characterizing it as either (1) concerning preventing abatement of criminal prosecutions, (2) not involving ameliorative statutes, or (3) drawn from jurisdictions that require express legislative statements of retroactivity. Dissenting opinion at 30-32 & nn. 30-32. Insofar as Act 44, section 29 by its plain language applies to every section of Act 44, see supra note 1, the interpretation of "incurred" also implicates preventing abatement of criminal prosecutions and must be analyzed in that light. Both the language of Act 44, section 29 and HRS § 1-3, see supra note 21, establish a presumption against retroactivity and, regardless of the ameliorative nature of amendments, none of the distinctions that the dissent urges, in the end, explain why the plain meaning of the term "incurred" should be equated with "imposed," particularly in light of the policy considerations discussed infra in section III.B.3.

statute, in order to avoid producing inconsistent and unjust outcomes among defendants arising from the vagaries of the scheduling process, and (2) to avoid rendering portions of an act -- Act 44 in the present matter -- potentially unconstitutional as ex post facto measures. To construe penalties as having been "incurred" only at the moment of the imposition of sentence would similarly generate risks of inconsistency and constitutional infirmity.

a. Avoiding inconsistent outcomes

As the District of Columbia's highest court has reasoned, in considering the application of ameliorative sentencing amendments to a defendant who committed the charged offense prior to the amendment but was sentenced thereafter,

> [w]e cannot say that a legislature could not rationally conclude that the best approach would be a purely prospective one, so that all defendants who committed crimes before the statute became effective would be treated equally. Otherwise, sentencings could get caught up in manipulations with unfair results overall. Some convicted felons, for example, might be able to arrange sentencing delays to take advantage of the new sentencing scheme, whereas others could not achieve the same result before less sympathetic judges. But, more fundamentally, we see nothing irrational in a legislative conclusion that individuals should be punished in accordance with the sanctions in effect at the time the offense was committed, a viewpoint encompassed by the savings statutes themselves.

Holiday v. United States, 683 A.2d 61, 72 (D.C. 1996) (emphasis added). Adopting Reis's contention that "proceedings" is ambiguous and could be construed to include sentencing hearings as separate and distinct "proceedings" would invite just such an arbitrary application.

The result in Tapp, discussed supra in section III.B.2 & n. 24, illustrates the danger. In Tapp, the court reviewed precedent regarding when a penalty is "incurred," citing, inter alia, State v. Miller, 464 P.2d 844 (Utah 1970), and Belt v. Turner, 479 P.2d 791 (Utah 1971). In those related cases, the defendants, Miller and Belt, were each indicted for writing fraudulent checks prior to the effective date of the same ameliorative sentencing amendment reducing the penalty, but one of them, Belt, was convicted and sentenced after the effective date while the other, Miller, was convicted and sentenced before. "Miller was subject to a felony with incarceration in State Prison for upwards of 14 years, for doing the same thing, at the same time, under the same statute, with the same penalty, for the same guilt, while Belt was subject to only six months," despite the fact that it was Belt who violated parole and fled the state. Tapp, 490 P.2d at 337-38 (Henriod, J., dissenting) (asserting that the majority's conclusion "sanctions such discrimination under the illogical, unreasonable platitude and guise that 'time of sentence,' -- not guilt . . . -- is of the essence"). Moreover, the concerns expressed in Holiday have since been borne out in Utah, where the Tapp rule has been extended to allow the application of ameliorative sentencing amendments to defendants "even where the defendant's presentence misconduct resulted in the defendant's sentencing being delayed beyond the effective date of the amendments." State v. Patience, 944 P.2d 381, 385 (Utah Ct. App. 1997) (citing, inter alia, State v. Yates, 918 P.2d 136, 139 (Utah Ct. App. 1996) (noting that the "[Utah]

supreme court has determined [that the] defendant's actions that delay sentencing are irrelevant" to receiving the benefits of the amended sanctions)).[26]

Nevertheless, the dissent insists that, by not applying the ameliorative provisions of Act 44, section 11 to Reis's case, it is we who are being "arbitrary and unjust" and that our decision runs counter to the general trend in other states. Dissenting opinion at 49-52, 57-58 (quoting In re Estrada, 408 P.2d 948, 951 (Cal. 1965)) (citing Schultz, 460 N.W.2d at 512; Cummings, 386 N.W.2d at 472; Oliver, 134 N.E.2d at 203; State v. Macarelli, 375 A.2d 944, 947 (R.I. 1977); Holiday, 683 A.2d at 66-68). Again, as discussed supra in section III.B.1.b, the cases upon which the dissent relies implicate only general savings clauses, which, as this court itself has concluded in Von Geldern, 64 Haw. at 213, 638 P.2d at 322, and Koch, 107 Hawai'i at 222, 112 P.3d at 76 (quoting Von Geldern), represent a rule of statutory construction that may yield, and often does, to more express, specific intent regarding retroactive application of ameliorative amendments. See Schultz, 460 N.W.2d at 510 (concluding that the "historical and philosophical underpinnings" of the state's general savings clause did not support barring retroactive application of ameliorative amendments); Cummings,

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[26] Further to the foregoing, in In re DeLong, 93 Cal. App. 4th 562 (2001), discussed in the dissenting opinion at 24-26 and infra in note 28, the defendant twice moved successfully to have sentencing delayed, the second extension rescheduling her sentencing hearing to July 12, 2001, after the July 1, 2001 effective date of the ameliorative amendments. Id. at 564-65. She filed a motion for sentencing under the new law on July 2, 2002. Id. at 565. By the reasoning in DeLong, similarly situated defendants who accepted their original pre-July 1, 2001 sentencing dates did not benefit from the new law.

386 N.W.2d at 471 (concluding that the applicable general savings clause "is but a canon of statutory construction to aid in interpreting statutes to ascertain legislative intent" and that "[i]t is not an end in itself"); Oliver, 134 N.E.2d at 201 (concluding that the general savings clause has "been read by this court to provide merely a principle of construction, which governs in the absence of contrary intent") (quotation signals omitted); Estrada, 408 P.2d at 952 (characterizing the general savings clause as "simply embod[ying] the general rule of construction . . . that when there is nothing to indicate a contrary intent in a statute it will be presumed that the Legislature intended the statute to operate prospectively and not retroactively[;] . . . [a] rule of construction, however, [that] is not a straightjacket"); Macarelli, 375 A.2d at 947 (relying on the unique wording of the general savings clause directing the courts to look to the record for legislative intent with regard to specific statutes to overcome the presumption against retroactive application).

However, a default presumption against retroactive application remains alive and well both in our jurisprudence and in the foreign jurisdictions that the dissent cites. See e.g., Taniguchi v. Assoc. of Apt. Owners of King Manor, 114 Hawai'i 37, 48, 155 P.3d 1138, 1149 (2007) ("[I]t is well settled that 'all statutes are to be construed as having only a prospective operation unless the purpose and intention of the legislature to give them a retrospective effect is expressly declared or is necessarily implied from the language used.'") (quoting Robinson

v. Bailey, 28 Haw. 462, 464 (1925)); Kramer v. Ellett, 108 Hawai'i 426, 432, 121 P.3d 406, 412 (2005) (quoting Gap v. Puna Geothermal Venture, 106 Hawai'i 325, 333, 104 P.3d 912, 920 (2004) ("'Hawai'i statutory and case law discourage retroactive application of laws and rules in the absence of language showing that such operation was intended.'"); Von Geldern, 64 Haw. at 215-16, 638 P.2d at 323 (clarifying that "we are not suggesting, as other courts have, see, e.g., . . . Estrada; . . . Oliver, that whenever an amendatory statute is enacted . . . , it must be presumed that the legislature intended for it to apply in every case where it could constitutionally apply" and reemphasizing that "[w]here the intention of the legislature with respect to retroactivity is incapable of ascertainment, the provisions of HRS § 1-3 will determine the statute's interpretation"); Evangelatos v. Super. Court, 246 Cal. Rptr. 629, 642 (Cal. 1988) (rejecting the characterization that Estrada eroded the strong presumption against retroactivity and asserting that "absen[t] . . . an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application.").

Therefore, insofar as the presumption remains against retroactive application, the inclusion of a specific savings clause within an amendment -- the polar opposite of an express retroactivity provision -- must operate as clear evidence of the legislature's intention that the act in question should apply prospectively only. Indeed, where a specific savings clause has

been included in amendatory legislation, the general trend among the states nationally is, in fact, not to apply the amendments retroactively, even when they are ameliorative.

In People v. Floyd, 1 Cal. Rptr. 3d 885 (Cal. 2003), the California Supreme Court refused to apply ameliorative amendments requiring probation and treatment for certain drug offenders where the amendments took effect before the defendant's conviction was final, relying on the language of a savings clause included as part of the amending statute.[27] 1 Cal. Rptr. 3d at 886-87. It concluded that the rule of Estrada allowing retroactive application for ameliorative amendments did not apply when the amendments in question contained a specific savings clause, adding that "[w]e cannot embrace an interpretation that makes [the specific savings clause] mere surplusage." Id. at 887, 889.[28] Similarly, in State v. Parker, 871 So. 2d 317 (La.

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[27] The savings clause read "[e]xcept as otherwise provided, the provisions of this act shall become effective July 1, 2001, and its provisions shall be applied prospectively." 1 Cal. Rptr. 3d at 886.

[28] Floyd stands for the proposition that the presence of a specific savings clause embodies clear legislative intent that ameliorative amendments be unavailable to defendants who were already in the system prior to the effective date of the act in question but whose convictions were still not yet final after that date. Id. at 887-89. Therefore, insofar as the proceedings against Reis and Floyd began prior to the effective date of the relevant ameliorative amendments, the reasoning of the California Supreme Court is clearly not "inapposite" to our present analysis concerning the effect of the specific savings clause contained in Act 44, section 29, despite the dissent's attempts to reduce it to "mere surplusage," id. at 889. See dissenting opinion at 24, 37-39.

In an attempt to distinguish Floyd, the dissent cites a California appellate decision from two years earlier, In re DeLong, 93 Cal. App. 4th 562 (2001), discussing the same California state proposition. Dissenting opinion at 24-26. The conclusion in DeLong, however, that the amendments were available to the defendant hinged on the term "convicted," which the court concluded was ambiguous, leading the court to interpret the term so that it best comported with the underlying purpose of the amendment. 93 Cal. App. 4th at 567-69. The DeLong court also relied upon the fact that the ameliorative

(continued...)

2004), the lower appellate court attempted to apply to the defendant's case ameliorative amendments to the state's habitual offender statute -- despite a specific savings clause that provided that "the provisions of this Act shall only have prospective effect" -- by relying on the fact that the hearing in which the lower court "found" that the defendant was an habitual offender occurred after the amendment's effective date. 871 So. 2d at 324. The Louisiana Supreme Court (1) refused to apply the ameliorative sentencing amendments (a) in light of the existence of a specific savings clause and (b) because it sought to prevent manipulation of the court schedule for the benefit of individual defendants and (2) noted that, "had the legislature intended the more lenient sentencing provisions to be immediately effective, it could have signified that intent in the Act." Id. at 322-23 (citing State v. Sugasti, 820 So. 2d 518, 520-21 (La. 2002); State v. Dreaux, 17 So. 2d 559, 560 (La. 1944)). The Washington Supreme Court reached the same conclusion in State v. Ross, 95 P.3d 1225 (Wash. 2004), wherein it rejected the defendant's argument that state precedent required that ameliorative amendments apply retroactively. Id. at 1232, 1234. The court instead concluded that, by including a specific savings clause

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[28](...continued)
amendments were, by the express provisions of the proposition, also available to both individuals already sentenced to probation and those on parole, and the court could discern no rationale for denying the benefit of the new law to more recent defendants. Id at 569. By contrast, in the present matter, we recognize no corresponding ambiguity in the term "proceedings" arising from Act 44's subject matter and do not confront in Act 44 a similarly broad extension of its ameliorative provisions to those other than newly-indicted defendants. The legislature, by including the specific savings clause in Act 44, section 29, expressed an intent that the ameliorative amendments be unavailable to defendants indicted before July 1, 2004.

that provided that the amendments in question "apply to crimes committed on or after July 1, 2002," the state legislature had expressed the opposite intent, i.e., that the ameliorative amendments applied only prospectively. Id. at 1234. Indeed, a number of other jurisdictions have refused to apply ameliorative amendments retroactively, even when only general savings clauses were implicated. See, e.g., State v. Vineyard, 392 P.2d 30 (Ariz. 1964); State v. Ismaaeel, 840 A.2d 644, 655 (Del. Super. Ct. 2004) (citing Holiday, 683 A.2d at 78-79, for its concern that to conclude otherwise would bestow a "windfall" on defendants whose sentencing proceedings had been delayed and concluding that "[j]ust as the State will not surprise a defendant with greater punishment in an ex post facto fashion, neither should a defendant feign surprise about the penalties that accompanied his [or her] conduct at the time"); Castle v. State, 330 So. 2d 10 (Fla. 1976); Tellis v. State, 445 P.2d 938 (Nev. 1968); Pollard v. State, 521 P.2d 400 (Okla. Crim. App. 1974); State v. Kane, 5 P.3d 741 (Wash. Ct. App. 2000). Our decision today is not, therefore, out of step with the jurisprudence of other states, nor is our analysis of specific versus general savings clauses, despite the dissent's disparagement of the distinction, dissenting opinion at 50 n.51 (discussing the "so-called specific savings clause in Section 29").

b. Preserving the constitutionality of the statute as a whole

We must also interpret the language of the savings clause to preserve, if possible, the constitutionality of the statute. Kamal, 88 Hawai'i at 294, 966 P.2d at 606. Interpreting the savings clause such that any hearing conducted after the effective date could be considered a separate proceeding or that the defendant has not incurred the penalties set forth in Act 44 until the date sentence is imposed could expose some provisions of Act 44 to constitutional challenges.

This court has stated that

> [t]he ex post facto clause of the United States Constitution[,] U.S. Const. art. I, § 10, cl. 1[,] prohibits states from enacting retrospective penal legislation.
>
> In Collins v. Youngblood, 497 U.S. 37 (1990), the United States Supreme Court was presented with the question "whether the application of a Texas statute, which was passed after respondent's crime and which allowed the reformation of an improper jury verdict in respondent's case, violate[d] the Ex Post Facto Clause . . . ." Id. at 39. In summarizing the meaning of the ex post facto clause, the Court stated:
>
> > "It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute [(1)] which punishes as a crime an act previously committed, which was innocent when done[, (2)] which makes more burdensome the punishment for a crime, after its commission, or [(3)] which deprives one charged with [a] crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto."
>
> Id. at 42 (quoting Beazell v. Ohio, 269 U.S. 167, 169-70 (1925)). "The Beazell formulation is faithful to our best knowledge of the original understanding of the Ex Post Facto Clause: Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts." Id. (emphasis added); see also State v. Von Geldern, 64 Haw. 210, 212, 638 P.2d 319, 321 (1981) ("no new

> punitive measure may be applied to a crime already consummated . . . . Such legislation would be [an] ex post facto law[.]").

State v. Nakata, 76 Hawai'i at 375, 878 P.2d at 714 (emphasis in original) (footnote and some citations omitted) (some brackets added and some in original) (some underlining omitted in original).

By its plain language, the savings clause set forth in section 29 applies to the entirety of Act 44.[29] See supra note 1. Act 44, section 3 provides for enhanced penalties for exposing children to the process of manufacturing or distributing methamphetamine, as well as new penalties for injuries to others arising out of the manufacture or distribution of the drug. See 2004 Haw. Sess. L. Act 44, § 3 at 206-08. If "proceedings" and "incurred" are interpreted to allow application of Act 44 to a defendant charged before July 1, 2004 but sentenced thereafter, the provisions of Act 44, section 3, as an example, if properly pled and proven, could be susceptible to challenge as unconstitutional ex post facto measures because, at sentencing, they would (1) "punish[] as a crime an act previously committed,

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[29] The dissent recognizes the ex post facto danger of many of Act 44's provisions, a danger addressed by the inclusion of the savings clause, dissenting opinion at 44-45, but it appears to argue (1) that the savings clause does not apply uniformly to Act 44 and (2) that the interpretation of the terms of the clause can shift depending on the punitive or ameliorative nature of the amendment. Specifically, the dissent asserts that

> [t]he Act, as noted previously, substantially addresses penalties related to drug possession, trafficking, and manufacturing. The savings clause here was of a general nature obviously included to prevent the ex post facto application of those penalty provisions.

Id. at 45 (footnote omitted).

which was innocent when done[, or (2)] . . . make[] more burdensome the punishment for a crime, after its commission," Collins, 497 U.S. at 42.

4. The legislature unambiguously intended that the provisions of Act 44 would not be available to defendants whose criminal prosecutions commenced prior to July 1, 2004.

The language of Act 44, section 29 does not present us with a situation "[w]here the intention of the legislature . . . is incapable of ascertainment," Von Geldern, 64 Haw. at 215, 638 P.2d at 323. Rather, we must presume that the legislature knows the law when enacting statutes, Agustin v. Dan Ostrow Constr. Co., 64 Haw. 80, 83, 636 P.2d 1348, 1351 (1981) ("the legislature is presumed to know the law when enacting statutes," including this court's interpretations of statutory language), and, hence, we must presume that the legislature, in enacting Act 44, was aware (1) of this court's interpretation, in Van den Berg, 101 Hawai'i at 191, 65 P.3d at 138, of the term "proceedings" as being synonymous with the initiation of a prosecution through the issuance of criminal charges and (2) of the crucial analytical role the absence of a savings clause played in Koch and Von Geldern; yet the legislature nevertheless chose to include a savings clause that plainly states that its provisions do not apply to proceedings begun prior to July 1, 2004.[30]

[30] While there is no dispute that the legislature, in enacting Act 44, intended to give the lower courts more discretion in applying probation and access to drug treatment in lieu of imprisonment, that intention is not mutually exclusive with the act's savings clause, which, as demonstrated above, plainly affords that increased discretion prospectively to new violations occurring after July 1, 2004.

The preceding analysis, in sum, leads to the conclusion (1) that "proceedings," absent ambiguity arising from subject matter peculiar to the legislation, means criminal prosecutions of which sentencing hearings are an inseparable component[31] and (2) that the legislature did not intend to allow the sentencing provisions of Act 44, section 11 to apply "prospectively" to a sentencing hearing conducted after July 1, 2004, which resulted from a criminal prosecution initiated prior to that date. Therefore, we hold that the term "proceedings," as employed in Act 44, section 29, unambiguously means the initiation of a criminal prosecution against a defendant through a charging instrument and subsumes within its scope hearings and other procedural events that arise as a direct result of the initial charging instrument.

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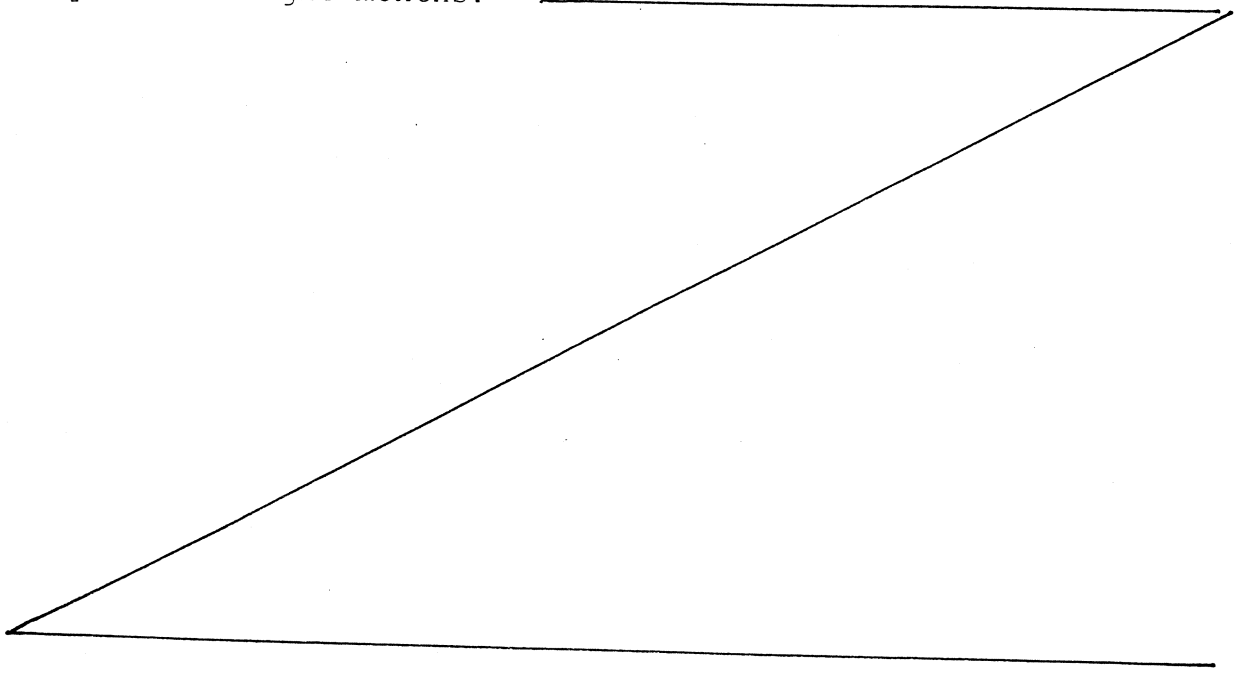
[31] The conclusion that sentencing is an inseparable stage in the progression of a unitary criminal prosecution is one shared by the United States Supreme Court. See Bradley v. United States, 410 U.S. 605, 609 (1973) (noting that, "[i]n the legal sense, a prosecution terminates only when sentence is imposed" and concluding that a defendant who committed drug offenses prior to the effective date of an ameliorative sentencing amendment could not avail himself of its terms despite his conviction and sentencing occurring after the effect date of the amendment); Warden, Lewisburg Penit. v. Marrero, 417 U.S. 653, 657, 658 (1974) (reiterating that, in Bradley, the Court "held that sentencing is part of the concept of 'prosecution'" and "reasoned that, since a . . . decision to make an offender eligible for early parole is made at the time of entering a judgment of conviction, the decision was part of the sentence and therefore also part of the 'prosecution'"); Holiday, 683 A.2d at 72 ("[T]he [United States Supreme] Court confirmed in Bradley that sentencing is part of the prosecution; the sentence is not part of a subsequent, severable proceeding.").

The dissent asserts that the preceding authority is "inapposite" because the savings clause at issue in Bradley and Marrero interpreted the term "prosecutions" and not "proceedings." Dissenting opinion at 8-10 n.4. Insofar as we have demonstrated that this court, in Van den Berg, interpreted "proceedings" to unambiguously betoken the initiation of criminal prosecutions, see supra at 16-19, it follows that United States Supreme Court precedent interpreting "prosecutions" to include sentencing proceedings as unseverable proceedings part and parcel of any prosecution is far from inapposite but, rather, quite persuasive.

Hence, because Reis was charged on January 5 and April 13, 2004, prior to Act 44's effective date of July 1, 2004, the circuit court erred in applying Act 44's ameliorative amendments to her sentence by failing to observe the statutory command of Act 44, section 29, Aplaca, 96 Hawai'i at 22, 25 P.3d at 797. Furthermore, in keeping with this court's holdings in Smith, 103 Hawai'i at 234, 81 P.3d at 414, and Walker, 106 Hawai'i at 10, 100 P.3d at 604, and insofar as Reis conceded that she qualified as a repeat offender under HRS § 706-606.5 in light of a prior conviction of unauthorized control of a propelled vehicle, the circuit court could not sentence Reis to probation pursuant to HRS § 706-622.5 (Supp. 2002), the first-time drug offender statute in effect at the time of the commission of her offenses. Rather, the circuit court was required to apply HRS § 706-606.5 to sentence her to a mandatory minimum sentence of one year and eight months.



IV. CONCLUSION

In light of the foregoing, we vacate the January 11, 2005 judgment and sentence of the circuit court, sentencing Reis to probation, and remand for resentencing as a repeat offender, pursuant to HRS § 706-606.5 (Supp. 1999).[32]

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[32] In light of our disposition, we need not reach the prosecution's argument, see supra section III.A.3, asserting that the separate nature of Reis's two drug-related offenses prevented the circuit court from sentencing her to probation as a first-time drug offender, pursuant to HRS § 706-622.5 (Supp. 2004).