DISSENTING OPINION BY ACOBA, J.

I respectfully dissent.

In my view, the majority in this case incorrectly applies the terms "proceedings" and "penalty incurred" in the generic savings clause in Section 29 of Act 44, 2004 Haw. Sess. L. Act 44 [hereinafter Act 44], § 29 [hereinafter Section 29], to preclude the application of Section 11 of Act 44 [hereinafter, Section 11] to Defendant-Appellee Susan Reis (Reis). In light of its ameliorative and remedial purpose of allowing first-time drug offenders to be sentenced to probation, Section 11 should be applied to Reis because (1) under a plain reading of Section 29, Reis's sentencing "proceeding" took place after the effective date of Act 44, (2) alternatively, and assuming, arguendo, the term "proceedings" is ambiguous, the fact that prosecution of the case was initiated prior to the effective date of the Act does not preclude application of Section 11 under State v. Avilla, 69 Haw. 509, 750 P.2d 78 (1988), and also (3) Reis's sentence may be treated as "a penalty incurred," after the effective date of the Act.

Ultimately, the majority's interpretive construct is unsound because "nothing is to be gained by imposing the more severe penalty," Wayne LaFave, 1 Substantive Criminal Law, § 2.5 (2007) [hereinafter, Substantive Criminal Law], that existed before the most recent legislative policy embodied in Section 11, -- especially when our case law permits this court to confirm

application of Section 11. Unfortunately, the real "losses" are suffered by those individuals whose opportunity for rehabilitation is again forfeited by a decision of this court, and by the legislature in its efforts to combat the methamphetamine or "ice" problem. The consequences will invariably have an adverse effect for such persons in their personal lives, for those around them, and for our community as a whole.

Such considerations have obviously been at the heart of our trial courts' application of Section 11 and I view their positions in these cases as legally correct and judicially appropriate. Thus, I would affirm the decision of the Honorable Steven Alm of the circuit court of the first circuit (the court), applying Section 11 and sentencing Reis to probation.

I.

First, a plain reading of "proceedings" in Section 29 supports the view that the sentencing proceeding took place after the effective date of Act 44. In enacting Section 11, the legislature made clear, in the text of the Act, that a first-time drug offender may be "sentenced to probation to undergo and complete a substance abuse treatment program . . . notwithstanding that the person would be subject to sentencing as a repeat offender under [Hawai'i Revised Statutes (HRS) §] 706-606.5[.]" Act 44, pt II, § 11 at 214 (emphases added). Section 11 allows the court discretion in sentencing first-time drug offenders to probation provided the court has determined certain

criteria are met. Id. These criteria include a determination that "the person is nonviolent" and that "[t]he person has been assessed by a certified substance abuse counselor to be in need of substance abuse treatment[.]" Id. Further, the court must also determine that "the person can benefit from substance abuse treatment" and if such criteria are met, "the person should not be incarcerated in order to protect the public." Id.

Act 44 announced the legislature's intention to give courts "more discretion . . . in sentencing" and stated that it "intend[ed] that a broader group" of drug offenders would be eligible to undergo drug treatment.

> The Task Force recommended that [2002 Haw. Sess. L.] Act 161 [hereinafter Act 161] should be amended 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. The legislature finds that diversion to drug treatment instead of prison is consistent with the solution to cure the ice epidemic. Accordingly, the legislature intends that a broader group of nonviolent drug offenders will be eligible for consideration for probation in order to undergo drug treatment. The purpose of this amendment is to provide the court with discretion in sentencing a first-time nonviolent drug offender to probation regardless of whether the offender has prior convictions. The legislature strongly urges courts to consider transferring the most severely addicted offenders or addicted offenders with criminal histories to the jurisdiction of the drug court as a condition of being sentenced to probation.

Act 44, pt II, § 9 at 213 (emphasis added). In Act 44, Section 29 is a generic savings clause to the effect that "[t]his Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date." Act 44, pt IX, § 29 at 227 (emphasis added). Section 33 of the Act states that "[t]his Act shall take effect on July 1, 2004[.]" Act 44, pt IX, § 33 at 227.

There is no question that Section 11 is an ameliorative or remedial sentencing provision. An ameliorative statute can be defined as a "legislative change[] which . . . reduce[s] the penalty for criminal behavior." See Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation, Comment, 121 U. Pa. L. Rev. 120, 120 (1972); see also Black's Law Dictionary 1319-20 (8th ed. 2004) (defining a "remedial law" as "[a] law passed to correct or modify an existing law"). Act 44 is ameliorative in nature because it amends prior legislation requiring mandatory minimum sentences for persons who would be first-time nonviolent drug offenders and, instead, grants the court discretion to impose probation. Act 44, pt II, § 9 at 212-13. Where such provisions are concerned, "this court has taken the position that remedial legislation is to be construed liberally in order to accomplish the purpose for which it was enacted." State v. Von Geldern, 64 Haw. 210, 215, 638 P.2d 319, 323 (1981) (emphasis added) (citing Roe v. Doe, 59 Haw. 259, 581 P.2d 310 (1978) (other citation omitted)).

II.

In sentencing Reis, the court determined that the sentencing proceeding took place after the effective date of the Act, that the term proceedings may apply to a separate sentencing proceeding in a criminal case where the prosecution was begun before the effective date of the subject act, and the penalty, i.e., sentence, was incurred after the effective date of the Act.

> Here [Reis] was arrested, she pled, and I think the plea was approximately a week before the Act 44 [effective] date. But the sentencing was well after that. And there is no question the legislature on their word intended that a broader group of non-violent drug offenders will be eligible for consideration for probation in order to undergo drug treatment. And the legislature wants to present more discretion by the [c]ourt in sentencing. I believe that [Reis] fits into that criteria and both she and society will be better off with her getting dual-diagnosis care and the drug treatment that are set up for her rather than sentencing her as a repeat offender and sentencing her to prison.
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> . . . I think [this case is] different from [State v.] Walker[, 106 Hawai'i 1, 100 P.3d 595 (2004,] because of the timing. . . . Penalties were incurred after the effective date of Act 44. And proceedings that were begun, the [c]ourt is of the belief that when . . . proceedings [are] being discussed, it is referring to the sentencing proceedings.
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> . . . And the prosecution in *Avilla* argued that proceedings that were begun should refer to the initiation of the prosecution. The [s]upreme [c]ourt disagreed. [It] 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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> In addition, the [s]upreme [c]ourt also pointed out in Avilla that when there is a doubt . . . , that an ambiguity exists. And in such case, the [c]ourt 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 [c]ourt more discretion in sentencing.

(Emphases added.)

III.

The court stated that it was "of the belief that when . . . proceedings is being discussed [in Act 44], it is referring to sentencing proceedings." Consistent with the court's reasoning, the term proceeding in Section 29 includes "[a]n act or step that is part of a larger action." Black's Law Dictionary at 1241.[1] As such, a sentencing proceeding is obviously an "act

[1] When construing a statute, "'the fundamental starting point is the language of the statute itself' . . . and 'where the statutory language is plain and unambiguous, [the appellate courts'] sole duty is to give effect to its plain and obvious meaning.'" State v. Kalama, 94 Hawai'i 60, 63, 8 P.3d 1224, 1228 (2000) (citations omitted). However, even when a statute is unambiguous, the legislative history may be consulted to confirm our

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or step" within the larger criminal action and, thus, fits within the definition of proceeding.

Liberally construing the remedial provisions of Act 44 as we must, see Von Geldern, 64 Haw. at 215, 638 P.2d at 323, a plain reading of the statute permits the remedial provision to be applied in sentencing proceedings that were begun after the effective date of the Act.[2] Inasmuch as the sentencing proceeding was a separate step that took place after the effective date of Act 44, and in view of the liberal construction this court has said must be given to remedial legislation, see id., the court could, as it did, treat Section 11 as incorporating a sentencing proceeding that occurred after the effective date of the Act.[3]

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interpretation. See Hawaii Elec. Light Co. v. Dep't. of Land & Natural Res., 102 Hawai'i 257, 270, 75 P.3d 160, 173 (2003) ("Although we ground our holding in the statute's plain language, we nonetheless note that its legislative history confirms our view." (Citing State v. Entrekin, 98 Hawai'i 221, 227, 47 P.3d 336, 342 (2002).)).

[2] This section addresses the majority's contention that "'proceedings'. . . unambiguously refers to the initiation of criminal proceedings[,]" majority opinion at 16, and as this section makes clear, under the plain language of the savings clause "proceedings" can refer to sentencing proceedings that were begun after the effective date of the statute.

[3] In its statement of related cases, Plaintiff-Appellant State of Hawai'i (the prosecution) indicates that No. 27242, State v. Cruz, and No. 27271, State v. Tactay, are cases that relate to the issue of sentencing pursuant to Act 44's ameliorative provisions. In these cases the circuit courts held, as did Judge Alm, that the ameliorative provisions applied in sentencing hearings occurring after the effective date of Act 44.

In Cruz, pursuant to Act 44, the defendant was sentenced to five years probation for committing and being charged with drug offenses on June 9, 2004 and June 16, 2004, respectively, prior to the July 1, 2004 effective date of Act 44. With respect to sentencing, the Honorable Virginia Lea Crandall orally ruled:

> [T]he court adopts the arguments set forth by the defense in its memorandum filed January 21, 2005, and the court finds and concludes that it has the discretion with respect to

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IV.

Despite the foregoing, the majority maintains that the term "'proceedings,' as it appears in Act 44, Section 29, unambiguously refers to the initiation of a criminal prosecution[,]" majority opinion at 16 (emphasis added), and, as such, obviates application of the remedial provisions to Reis. However, applying a plain language approach, the term proceedings is not defined in Act 44 as the "initiation of a criminal prosecution," as the majority would have it. There is nothing on the face of the statute or in the legislative history with respect to Section 11 that states the legislature intended that

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> this case to sentence the defendant to probation. Accordingly, the court sentences Mr. Cruz to a term of probation of five years subject to the following mandatory and special terms and conditions.

(Emphasis added.)

Likewise, in Tactay, the defendant was charged on June 30, 2004 for offenses occurring on June 21, 2004, prior to the July 1, 2004 effective date of Act 44. With respect to sentencing, the Honorable Michael A. Town sentenced the defendant pursuant to Act 44:

> And to me this is clearly a proceeding under [Avilla], the intent of "incur." I don't think they were that precise and it's clear to me that the legislative intent was to give discretion, be it "imposed," "incurred." I would hate someone's future to turn without -- and I don't think -- I think there is not clear direction in . . . Act 44 to do otherwise so unless and until they tell me otherwise, or an appellate court.
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> And I think under HRS 1-1, my favorite statute, in the absence of clear statute or case law the [c]ourt should look at other states. Notwithstanding what -- the good work [the prosecution] did, I think that there's discretion on what "incurred" is versus "imposed."

(Emphases added.)

The majority maintains that although "[t]he present opinion encompasses the arguments made by the parties in [Cruz and Tactay] . . . [,] [w]e leave a discussion of the merits of those cases for another time." Majority opinion at 13 n.9. Although the merits of Cruz and Tactay are not decided here, these cases indicate that at least three circuit court judges have interpreted the savings clause similarly.

"proceedings" would refer only to "the initiation of a criminal prosecution."

But assuming, arguendo, that a prosecution includes, inter alia, a sentencing proceeding, the majority's conclusion that "'proceedings,' . . . subsumes . . . other procedural events" does not follow. Majority opinion at 41 (emphasis added). Although a sentencing "proceeding" is part of a prosecution, the majority erroneously equates the term "proceeding" with the term "criminal prosecution." See majority opinion at 41. Manifestly, this conflicts with the plain meaning of "proceedings," which, as discussed supra, includes an "[a]n act or step that is part of a larger action[,]" Black's Law Dictionary at 1241, such as a prosecution, id. at 1258 (defining "prosecution" as "[a] criminal proceeding in which an accused person is tried"). Thus, the majority's underlying premise -- namely that "'proceedings' . . . means criminal prosecutions," majority opinion at 41, is faulty.[4] Indeed, that a sentencing

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[4] The majority attempts to bolster its conclusion with inapposite authority from the United States Supreme Court. See majority opinion at 41 n.31 (stating that "[t]he conclusion that sentencing is an inseparable stage in the progression of a unitary criminal prosecution is one shared by the United States Supreme Court" (citations omitted)). Despite the majority's protestation, the fact that the U.S. Supreme Court interpreted the federal statute's reference to "prosecution" rather than "proceedings" is plain enough to establish the infirmity of the majority's contention.

Moreover, in Bradley v. United States, 410 U.S. 605, 606 (1973), cited by the majority, the Court interpreted the term "prosecution" (and not "proceedings") in the context of the particular savings clause of the Comprehensive Drug Abuse Prevention and Control Act of 1970. Id. at 607-10. That savings clause specifically stated, "Prosecutions for any violation of the law occurring prior to the effective date of (the Act) shall not be affected by the repeals or amendments made by (it) . . . or abated by reason thereof." Id. at 608 (internal quotation marks and citation omitted) (ellipses in original) (emphases added). In interpreting the term "prosecutions" in its "familiar legal sense[,]" the Court stated that "a

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prosecution terminates only when sentence is imposed." Id. at 609. The Court held that "[s]o long as sentence has not been imposed, then, [the specific savings clause of the Comprehensive Drug Abuse Prevention and Control Act of 1970] is to leave the prosecution unaffected" and, thus affirmed the petitioners' sentence under the mandatory minimum sentencing provisions. Id.

However, the new legislation involved in Bradley and this case each contain a savings clause completely distinguishable from one another. To reiterate, the specific savings clause in Bradley precluded the application of the new legislation to "prosecutions . . . occurring prior to the effective date of (the Act)[.]" Id. at 608 (internal quotation marks and citations omitted) (emphasis added). On the other hand, in this case, pursuant to Section 29, Act 44 "does not affect . . . proceedings that were begun, before its effective date." Act 44, pt. IX, § 29 at 227. As discussed supra, "proceedings" and "prosecutions" are not synonymous. Bradley does not suggest that the they are. Thus, Bradley does not support the majority's position.

Likewise, Warden, Lewisburg Penit. v. Marrero, 417 U.S. 653, [653, 657, 658] (1974), is inapposite. See majority opinion at 41 n.31. Marrero did not disturb the holding in Bradley, but instead answered the "expressly reserved" question of Bradley, namely, whether the repeal of the parole ineligibility provision requiring that certain narcotics offenders be sentenced to mandatory minimum prison terms survived the repealer by the Comprehensive Drug Abuse and Prevention Control Act of 1970 so that a narcotics offender who had served more than one-third of a sentence imposed before the effective date of the new legislation remained ineligible for parole consideration under the general parole statute. The Court held that "[e]ligibility for parole under [the general parole statute] is . . . determined at the time of sentencing and, under the teaching of Bradley, is part of the 'prosecution' saved by [the specific savings clause of the Comprehensive Drug Abuse Prevention and Control Act of 1970]." Id. at 658. Thus, Warden does not aid in the interpretation of "proceedings" as employed in Section 29.

Finally, the majority's reliance on Holiday v. United States, 683 A.2d 61 (D.C. 1996), also does not support its position. See majority opinion at 41 n.31. Although the Holiday court stated that "the Court confirmed in Bradley that sentencing is part of the prosecution; the sentence is not part of a subsequent, severable proceeding[,]" Holiday, 683 A.2d at 72 (citing Bradley, 410 U.S. at 608), Bradley did not expressly reach such a conclusion. Instead, as stated previously, the Bradley court concluded that under the specific savings clause of the Comprehensive Drug Abuse and Prevention Control Act of 1970, the prosecution is unaffected "[s]o long as the sentence has not been imposed[.]" 410 U.S. at 609 (citations omitted). In other words, the Bradley court concluded that a prosecution includes sentencing, but did not express an opinion as to the severability of a sentencing proceeding. Contra Holiday, 683 A.2d at 72 (stating that the Bradley court concluded that "the sentence is not part of a subsequent, severable proceeding" (citing Bradley, 410 U.S. at 608)).

In sum, Bradley, Marrero, and Holiday do not support the majority's conclusion that "'proceedings,' as employed in Act 44, Section 29, means the initiation of a criminal prosecution[.]" Majority opinion at 41. But the majority insists that the U.S. Supreme Court cases are "quite persuasive." Id. at 41 n.31. This is not only belied by the facts of the cases themselves, as analyzed supra, but by the fact that the majority's entire basis for this assertion rests on an "implicit" conclusion that "the term 'proceedings' . . . betoken[s] . . . the initiation of a criminal prosecution[,]" that the majority draws from State v. Van den Berg, 101 Hawai'i 187, 65 P.3d 134 (2003), majority opinion at 11 n.5, which never stated that "'proceedings'" "unambiguously betoken the initiation of criminal prosecutions[,]" id.; a conclusion that is absent in Avilla and foreign to the

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proceeding occurring after the enactment of Act 44 must be viewed as inclusive of the remedial provision of Section 11 is accredited by this court's stated adherence to "the position that remedial legislation is to be construed liberally . . . to accomplish the purpose for which it was enacted." Von Geldern, 64 Haw. at 215, 638 P.2d at 323.

V.

A.

Second, in the alternative, and assuming, arguendo, the term proceedings in a generic savings clause is viewed as ambiguous, as this court indicated in Avilla, Section 11 should apply to defendants sentenced after the effective date of Act 44.[5] As the court declared, Avilla is directly on point because it addressed an ameliorative statute, Act 139, 1987 Haw. Sess. L. Act 139 [hereinafter Act 139], that contained an identical savings clause. The savings clause in Avilla, like the one in the instant case, stated that it did "not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date." 69 Haw. at 511, 750 P.2d at 79.

The issue in Avilla was whether the savings clause precluded the defendant from petitioning for release on bail

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legislative intent behind section 11.

[5] This part responds to the majority's argument that Avilla does not indicate that the term proceedings as used in the "standard savings clause" is ambiguous. Majority opinion at 22.

pursuant to HRS § 804-4, as amended on June 5, 1987. Id. at 509, 750 P.2d at 78. Prior to June 5, 1987, the statute in issue had read that "no bail shall be allowed pending appeal of a felony conviction where a sentence of imprisonment has been imposed." Id. at 510, 750 P.2d at 78. But "[i]n 1987 the legislature amended the statute to allow a criminal defendant who is sentenced to imprisonment to be released pending appeal in given circumstances." Id. at 510, 750 P.2d at 78-79.

Avilla was indicted prior to the passage of the Act. Like the majority approach in this case, the trial court concluded that the Act was "not applicable to this case because under Section 1[0], [the savings clause], the proceedings of July 1986 began before the effective date of the amendment of June 5, 1987." Id. at 511, 750 P.2d at 79.

Reading the savings clause at issue, this court found "no clue on how the legislature intended 'proceedings' to be read." Id. at 513, 750 P.2d at 80. Avilla noted that the relevant legislative committee reports related the amendment of the statute "was prompted by a concern for those criminal defendants whose appeals are eventually deemed meritorious." Id. Based on that concern, this court stated that it could not "conclude the legislature meant to deny every convicted criminal whose prosecution began before the amendment [of the statute] became effective an opportunity to seek release on bail pending appeal." Id. Further, "[a]n acceptance of the State's position would be inconsistent with the legislative purpose to prevent the

injustice of a criminal defendant, particularly one whose release would pose no danger to others, being imprisoned while there is pending a substantial question of law or fact that casts doubt on the validity of his conviction." Id.

This court held that, in light of the remedial nature of the legislation, the term proceedings included a bail proceeding occurring after the effective date of Act 139, even though the criminal action involved had begun before the effective date of that act. Id. at 513, 750 P.2d at 80-81.[6] Thus, Avilla determined that the trial court erred "when it ruled the Act did not apply to prosecutions [that were] begun before its effective date[.]" Id. (emphasis added); see id. (finding that despite the savings clause, retroactive application was appropriate but that defendant could not be released on bail because he had not shown "he is not one likely to flee or pose a danger to others" as required by the statute).[7] Even the

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[6] This conclusion in Avilla directly contradicts the majority's assertion that "proceedings" refers to "the initiation of a criminal prosecution" because it is "unambiguous[.]" Majority opinion at 16.

[7] As Reis contends, if the legislature did not intend to apply the clause to "offenses" committed prior to the effective date of the statute, as the majority argues, the legislature could have expressly said so, as it has done in the past. For example, Reis cites to 1986 Haw. Sess. L. Act 314 [hereinafter Act 314], which expressly stated that "amendments made by [Act 314] to this Code do not apply to offenses committed before the effective date of Act 314." Reis properly distinguishes the clause in this case on the ground that the term "offenses committed" is omitted. Reis thus argues that "the ambiguous terms of 'proceedings that were begun' and 'penalties that were incurred'" are used.

The majority also misapplies Van den Berg, 101 Hawai'i 187, 65 P.3d 134, by arguing that Van den Berg "concluded that the plain language of the term 'proceedings' . . . betokened . . . the initiation of a criminal prosecution." Majority opinion at 11 n.5 (citing Van den Berg, 101 Hawai'i at 191, 65 P.3d at 138) (emphasis added). The majority's response ignores an explicit interpretation of the term "proceedings" from Avilla in favor of a purported "plain language" interpretation of the term proceedings that Van den

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majority acknowledges that "[i]n Avilla, this court held that the ameliorative amendments . . . were available to a defendant who was indicted . . . prior to . . . the effective date of the amendments." Majority opinion at 20.

Therefore, assuming, arguendo, ambiguity in the term proceedings,[8] in the instant case, as in Avilla, we cannot "conclude the legislature meant to deny every [qualified] convicted criminal whose prosecution began before the amendment" of Section 11 the opportunity to seek probation. 69 Haw. at 513, 750 P.2d at 80. Consequently, as the trial court in Avilla erred in "rul[ing] that Act [139] did not apply to prosecutions [that were] begun before its effective date," id. at 513, 750 P.2d at 81, so does the majority err in ruling the term "proceedings" must apply to a "unitary criminal prosecution" that were begun

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Berg itself never draws. See infra. But consistent with Avilla, "proceedings that were begun" may be interpreted as including sentencing proceedings that occurred after the effective date of the act, as noted above.

And, as discussed infra, both State v. Koch, 107 Hawai'i 215, 112 P.3d 69 (2005) and Von Geldern support retrospective application of ameliorative statutes where legislative intent is not expressly stated to the contrary. The majority states that "an unambiguous term [cannot] be rendered ambiguous merely because the statutory provision urged as applicable by the defendant is ameliorative." Majority opinion at 19. However, insofar as it implicates precedent of our jurisdiction, Avilla instructs that the term "proceedings[,]" when interpreted in light of an ameliorative amendment, can be viewed as ambiguous, whereas in a case involving a non-remedial statute such as in Van den Berg, the term may be viewed as unambiguous. The use of "offenses," not proceedings, simply indicates that if the legislature intended the savings clause to bar application of the amendments to offenses already committed, it could have done so expressly as it has done in the past.

[8] The majority maintains that it is only by the dissent's "invitation" that "'the term "proceedings" in the savings clause [could be] viewed as ambiguous.'" Majority opinion at 22 n.18 (quoting dissenting opinion at 11) (internal quotation marks, brackets, and ellipses omitted). The majority misreads this dissent as inviting a discussion on ambiguity, however Reis and the court, as have other trial courts, relied on Avilla and a discussion on appeal would be wanting if not responsive to those issues. Nevertheless, the majority declines to grapple with the question of ambiguity when interpreting the savings clause language.

before the effective date of Act 44, majority opinion at 41 n.31.

This is because such a ruling is "inconsistent with the [remedial] purpose," Avilla, 69 Haw. at 513, 750 P.2d at 80, of Section 11. Accordingly, the court was correct in determining that, consistent with Avilla, remedial provisions in acts that include identical savings clauses can be applied to prosecutions that were begun before the effective date of such acts, absent express legislative intent to the contrary,[9] such as that lacking in this case.

Moreover, if any ambiguity exists, despite the history of the legislature's ongoing explicit effort to divert first time drug offenders into drug rehabilitation programs, the rule of lenity commands the same result. See State v. Aiwohi, 109 Hawai'i 115, 129, 123 P.3d 1210, 1224 (2005) ("In the absence of clear statutory language, and with no legislative guidance vis-á-vis legislative history, the applicable doctrine is the rule of lenity." (Citation omitted.)); State v. Shimabukuro, 100 Hawai'i 324, 328, 60 P.3d 274, 278 (2002) ("Where a criminal statute is ambiguous, it is to be interpreted according to the rule of lenity." (Citing State v. Kaakimaka, 84 Hawai'i 280, 292, 933 P.2d 617, 629 (1997) ("Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." (Citations

[9] The majority's contention that the savings clause of Act 44 was "specifically and purposefully included . . . as an expression of legislative intent" majority opinion at 23 n.19, flies in the face of Avilla, which held that the same language did not bar the remedial provisions in that case from applying to prosecutions that began before the effective date of the act in Avilla.

omitted.))). Hence, in this case, the generic savings clause appended to Act 44 must be construed against the prosecution with respect to Section 11, in consonance with the rule of lenity.

B.

The majority's attempt to distinguish Avilla is inconsistent with Avilla itself.[10] Its first argument, see supra note 10, does not dispute that Avilla had an "identical" savings clause; however the majority maintains that Avilla is distinguishable because "the subject matter of Act 139 . . . pertained solely to bail." Majority opinion at 20. In that respect, the majority ignores the precedential weight of Avilla, paring the opinion down to the unsubstantiated proposition that "Avilla demonstrates that the [unique] subject matter of an act can create ambiguity where normally none exists." Majority opinion at 19.[11] This assertion is unsupported by case law and

[10] The majority's argument may be distilled as follows: (1) unlike Avilla, the savings clause at issue here is unambiguous because there is no "unique subject matter" at issue sufficient to "inject ambiguity" into the legislation, majority opinion at 20 & n.16; (2) Avilla "presupposed that the term 'proceedings' in the savings clause normally mean[s] 'prosecutions,'" majority opinion at 21 (citing Avilla, 69 Haw. at 512, 750 P.2d at 80); (3) as such, there is no need to examine legislative history because "[w]e resort to legislative history only when there is an ambiguity in the plain language of the statute, majority opinion at 22 (citing State v. Valdivia, 95 Hawai'i 465, 472, 24 P.3d 661, 668 (2001)); and (4) "[i]t is not the ameliorative nature of a statutory provision that has prompted us 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." Majority opinion at 19 (emphasis omitted).

[11] As noted, Avilla concluded the identical savings clause was ambiguous. However here, the majority concludes that the same language is clear and "unambiguously refers to the initiation of a criminal prosecution[.]" Majority opinion at 16. The majority provides no authority or basis for this conclusion and it cannot square with a principled approach to statutory construction.

Avilla.[12] Avilla said nothing about the "unique subject matter" of bail but plainly concluded that the word "proceedings" as used in Act 139 was subject to multiple interpretations.[13] 69 Haw. at 512, 750 P.2d at 80.

As to its second argument, see supra note 10, the majority misstates the case. There is no indication in Avilla that this court made any presupposition that "proceedings"

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[12] Contrary to the majority's contention, majority opinion at 21 n.17, the cases cited by it simply do not stand for the stand-alone proposition that "[b]ail proceedings[, in themselves,] are indeed separate and distinct in nature[,]" (emphasis added), and shed no authoritative light on whether a bail hearing per se should be considered a part of "proceedings" or not, without reference to the context in which the term is used. Indeed, were what the majority contends true, the entire analysis in Avilla as to the term proceedings meaning separable bail proceedings would be superfluous. Avilla makes no such assertion and, thus, does not cite to any of the cases the majority relies upon.

Additionally, the majority's cases cited in footnote 17 are not relevant on the grounds set forth in the following parentheticals. See State v. Miller, 79 Hawai'i 194, 201, 900 P.2d 770, 777 (1995) (holding that "[w]hen 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" (citation omitted)); Dawson v. Lanham, 53 Haw. 76, 82-83, 488 P.2d 329, 333 (1971) (ruling that bail requirements survive quashing of indictment without prejudice during pendency of prosecution's appeal but not as discrete proceedings); Bates v. Ogata, 52 Haw. 573, 575-76, 482 P.2d 153, 155-56 (1971) (explaining that the full panoply of evidentiary rules regarding hearsay do not apply at bail hearings, but nowhere opining whether bail proceedings are separate and distinct, for the purpose of applying ameliorative measures (citing Nat'l Labor Relations Bd. v. Remington Rand, Inc., 94 F.2d 862, 873 (2d Cir. 1938) (involving an employee-association filing an unfair labor charge with petitioner National Labor Relations Board and discussing evidentiary matters as they apply to situations wholly unrelated to criminal matters or bail proceedings))); Bates v. Hawkins, 52 Haw. 463, 468-70, 478 P.2d 840, 843-44 (1970) (involving the charge of murder in the first degree where the subject centered on the burden of proof in bail proceedings, not bail proceedings in relation to other kinds of proceedings, or in relation to the entire adjudicative process, or as separate and distinct events).

[13] The majority contends that this dissent "mischaracterizes the discussion in Avilla as recognizing 'multiple' meanings of 'proceedings'" but that "[t]here were, in fact, only two" interpretations suggested in that case. Majority opinion at 20 n.16. Not much more need be said than that "multiple" is defined as "consisting of, including, or involving more than one[,]" Webster's Third New Int'l Dictionary 1485 (1961). This dissent maintains what the majority apparently acknowledges that if there is "more than one" way to interpret "proceedings" as in Avilla, the term may be viewed as ambiguous, as this court in Avilla in fact did.

generally or "normally" means prosecutions, as the majority maintains, see majority opinion at 21, inasmuch as Avilla specifically stated that "'[p]roceedings,' as employed in the section of [the act] in question, can mean prosecutions; but within the context of statutes regulating the release of defendants on bail, it can also mean bail proceedings." 69 Haw. at 512, 750 P.2d at 80 (emphases added). Because the term proceedings was broad enough to encompass several steps in a criminal action, this court determined that the savings clause was ambiguous.[14] See id.

Similarly, here, "proceedings" is a multifaceted term and if viewed as ambiguous, may reasonably be construed in remedial legislation to include sentencing proceedings, as the court decided. As such, the majority's far-reaching inference that the above statement from Avilla means proceedings are "normally" prosecutions, majority opinion at 21, is, with all due respect, erroneous as applied to remedial statutes, and conflicts with the rule of liberal construction. Von Geldern, 64 Haw. at 215, 638 P.2d at 323. Similar to the reasoning in Avilla, "within the context of statutes regulating" the discretion to

[14] Consequently, to acknowledge ambiguity on one hand in Avilla and assert clarity on the other in this case, (see majority opinion at 22, concluding that "the standard interpretation of 'proceedings' [is] the initiation of a criminal prosecution") in the same savings clause language is plainly inconsistent. Rather, under Avilla, the "standard interpretation" would be that the term "proceedings" is a multifaceted term. Here the court correctly decided that in light of the ameliorative nature of Section 11 a sentencing hearing was a "proceeding." The majority's attempt to distinguish Avilla by maintaining that it was "the subject matter of Act 139 -- which pertained solely to bail" that "injected ambiguity into the term proceedings[,]" majority opinion at 20, is simply without textual or historical support.

afford probation, proceedings "can also mean" sentencing hearings. Avilla, 69 Haw. at 512, 750 P.2d at 80

As to the majority's third argument, see supra note 10, consistent with Avilla, if proceedings in the savings clause is viewed as ambiguous, legislative history may be consulted in order to discern legislative intent.[15] See Hawaii Providers Network, Inc. v. AIG Hawaii Ins. Co., 105 Hawai'i 362, 369, 98 P.3d 233, 240 (2004) (stating that "[i]f statutory language is ambiguous or doubt exists as to its meaning, courts may take legislative history into consideration in construing a statute" (internal quotation marks, brackets, and citation omitted)).[16] The majority appears to argue that the term proceedings is not ambiguous and, thus, the legislative history need not be consulted. See majority opinion at 22-23, 22 n.18. But the majority does not quote a single opinion that defines proceeding as "the initiation of a criminal prosecution," see majority opinion at 16, in support of its position.[17] On the other hand,

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[15] Again, despite the majority's attempt to portray this dissent as stating otherwise, it should be noted that this discussion revolves around an alternative reading of the statute as ambiguous.

[16] As observed before, an examination of the legislative history surrounding Act 44 is appropriate whether or not the term proceeding is viewed as ambiguous. See Entrekin, 98 Hawai'i at 227, 47 P.3d at 342 (explaining that even where ambiguity does not exist, legislative history may consulted to "confirm[] our view"). Therefore, although this dissent's first position is grounded in a plain reading of the savings clause, the legislative history also supports the dissent's interpretation.

[17] Indeed, the majority inconsistently employs the same approach it criticizes. When examining the cases from foreign jurisdictions, the majority conversely states that "ameliorative amendments [may be] . . . 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." Majority opinion at 24 (emphasis added).

(continued...)

the legislative history behind section 11 supports a liberal interpretation of the remedial provision, not a narrow one.

As to the fourth argument, see supra note 10, the majority argues that this "dissent oversimplifies the analysis in Avilla" because it was not the "ameliorative nature" of the Act that caused the court to rule thusly but the "ambigui[ty]" in the term "'proceedings.'" Majority opinion at 20 n.15. Irrespective of whether the majority is willing to correctly acknowledge the rule of construction confirmed in Von Geldern, 64 Haw. at 215, 638 P.2d at 323, it cannot refute that if the term proceedings is ambiguous, such an ambiguity must be resolved in favor of the defendant, as it was in Avilla or must otherwise be resolved under the rule of lenity. The majority's decision to sever application of ameliorative statutes after a prosecution has begun, obviously contradicts Avilla inasmuch as the remedial statute was applied to Avilla even though his prosecution began prior to its effective date.

Avilla had been tried, convicted, and sentenced before the effective date of Act 139. Accordingly, even if the term proceedings is viewed from the majority perspective, i.e., as the initiation of a criminal prosecution, then Avilla may still be read as applying the statutory act to prosecutions that were begun before the act's effective date. 69 Haw. at 515, 750 P.2d

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[17](...continued)
Thus, the majority would allow the consultation of legislative history in cases from other jurisdictions applying ameliorative amendments, but deems it improper to do so here.

at 81 (stating that "the Act [applied] to prosecutions begun before its effective date"). Avilla applied the new amendment because this court concluded that the term proceedings was not limited to the initiation of criminal "prosecutions" as the majority argues.

VI.

Eschewing the precedential weight of Avilla in which remedial legislation was construed, the majority instead relies heavily upon Van den Berg,[18] which, as the majority notes, "raised the question whether the 1990 or 1993 version of HRS § 134-6(a), involving use of a firearm applied to the defendants' case." Majority opinion at 17 (citing Van den Berg, 101 Hawai'i

[18] The defendants in Van den Berg argued that based on the doctrine of stare decisis, State v. Jumila, 87 Hawai'i 1, 950 P.2d 1201 (1998), should apply and their convictions should be reversed. 101 Hawai'i at 190, 65 P.3d at 137. The majority of this court explained that Jumila's holding, having been overruled by State v. Brantley, 99 Hawai'i 463, 56 P.3d 1252 (2002), was inapplicable. 101 Hawai'i at 191, 65 P.3d at 138. Although the Van Den Berg majority concluded that the statutes at issue in the defendants' cases were based on 1990 amendments to the relevant statute rather than the 1993 amendments addressed in Jumila and Brantley, "the core legal analysis in both Brantley and Jumila [was] still good law and applicable to the discussion in [the] case." Id.

Accordingly, the majority applied the reasoning of Jumila and Brantley, concluding that, like Brantley, there was also no "clear legislative intent to create an exception to the statutory prohibition" against being "convicted of more than one offense if one of those offenses is included within another." Id. at 192, 65 P.3d at 139. In addition to this reasoning the majority of this court also stated that "[a]dditionally . . . [the savings clause] expressly stated that the amendments to the act were not to 'affect rights and duties that matured, penalties that were incurred and proceedings that were begun prior to its effective date.'" Id. (quoting Act 239, § 2 at 419).

Thus, the Van den Berg majority, although disagreeing that the overruled Jumila case would dictate the outcome, applied the reasoning of Jumila and Brantley to reverse the defendants' convictions. Id. Accordingly, the majority of this court plainly responded to the defendants' arguments that Jumila dictated the result based on stare decisis, determined that the reasoning of Jumila and Brantley was "good law" and then mentioned that "additionally . . . [the defendants'] respective proceedings were 'begun' before [the effective date of the statute]." Id. (emphasis added).

In any event, because Van den Berg, does not involve an ameliorative statute, as the majority acknowledges, it is inapplicable here.

at 190-91, 65 P.3d at 137-38).[19] Although the statute at issue had a similar savings clause, it did not involve any ameliorative provisions.[20] The majority disregards[21] this dispositive distinction and is left with merely noting that "nothing in the Van den Berg analysis conflicts with our conclusion in that case that 'proceedings' unambiguously commence with the initiation of

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[19] The majority implies that my concurrence in Brantley interpreting "the same language" or savings clause, which stated that "'the legislature's express direction that the amendment was not to be applied retroactively[,]'" is inconsistent with this dissent. Majority opinion at 21 n.7 (quoting Brantley, 99 Hawai'i at 483, 56 P.3d 1252). In making this assertion, the majority once again ignores our precedent establishing that an ameliorative amendment, as in Avilla and the instant case, may apply retroactively, and a non-ameliorative sentencing statute may not, as in Brantley.

[20] The majority incorrectly posits that "[b]ecause 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 . . . or whether ambiguity continues to exist," and asserts that its analysis results in a "cleaner construct[.]" Majority opinion at 19 n.13. The majority repeatedly misstates the position here. As indicated before, a plain language construction validates the prospective event of the sentencing proceeding. This result is confirmed by legislative history. Assuming arguendo, however, if the contention is that the term proceeding is ambiguous, Avilla countenances the same result.

Also, contrary to the majority's assertion that its construct is "cleaner," majority opinion at 19 n.13, its interpretation is, with all due respect, wrong. For, as noted infra, Van den Berg did not conclude that "proceedings" means "criminal prosecutions." This is further emphasized by the majority's pinpoint citation to the portion of Van den Berg which states that both defendants in that case had been tried and convicted prior to the effective date of the statute, 101 Hawai'i at 191, 65 P.3d at 138, which plainly does not indicate that "'proceedings' . . . means criminal prosecutions." Majority opinion at 19 n.13. There is no virtue in a purportedly "cleaner" result bereft of precedential support, and achieved by ignoring Avilla, which involved an ameliorative amendment and an identical savings clause, and by relying on Van den Berg, which did not involve a remedial statute and, thus, is not germane.

[21] The majority maintains that it does "not ignore the distinction" between an ameliorative and a non-ameliorative statute; it merely does "not conclude that it is dispositive." Majority opinion at 19 n.13. However, this statement is patently incorrect. For the reasons noted in our case law, an ameliorative criminal statute must be read liberally and may be applied retroactively, while a non-ameliorative statute does not apply retroactively largely because of ex post facto concerns. That the majority ignores the dispositive import of this distinction could not be plainer.

a unitary criminal prosecution[.]"[22] Majority opinion at 19. The truth of the matter is that the question of the existence of a "unitary criminal prosecution" was never posed or decided in Van den Berg.[23] Therefore, as contrasted with Koch, Avilla, and Von Geldern, and the other cases explaining the doctrine of amelioration discussed in greater detail infra, Van den Berg cannot, in principle, be viewed as relevant or controlling.

The majority mischaracterizes this dissent as "fail[ing] to articulate how an unambiguous term can be rendered ambiguous merely because the statutory provision . . . is ameliorative." Majority opinion at 19. As noted repeatedly in this dissent, the term proceedings on its face can plainly include a sentencing proceeding occurring after the effective date of Act 44. Alternatively, however, if the word proceedings is viewed as ambiguous -- the majority acknowledging at least two interpretations of the term, majority opinion at 20 n.16 -- proceedings can refer to different stages of a larger action, including the sentencing stage. In that case, the rationale in Avilla controls and a sentencing proceeding must be upheld, even if the underlying offense or charge occurred before the effective

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[22] This contention is a revision and recharacterization of the language in Van den Berg by the majority, and is not reflected in the Van den Berg opinion itself. Notwithstanding the majority's assertion that Van den Berg "plain[ly]" concluded the term "proceedings" meant "the initiation of a criminal prosecution[,]" majority opinion at 11 n.5, the fact remains that Van den Berg, unlike Avilla, did not concern the interpretation of an ameliorative statute, as the majority acknowledges. See supra.

[23] Based on this court's reasoning in Avilla, see supra, there is simply no a way to conform Avilla with the majority's interpretation of it and maintain any accuracy in applying that opinion.

date of Act 44. Hence, the majority can only reach its result by disregarding Avilla's precedential force and by resting on a case that had nothing to do with remedial legislation.[24]

In this case, Reis was not sentenced prior to the effective date of Act 44 and, consistent with Avilla, her sentencing hearing constitutes a proceeding within the meaning of the Act. Because the issue is not before us, we need not decide what other hearings might be encompassed by the term proceedings in various contexts. Nevertheless, as noted infra, our own case law supports the application of ameliorative sentencing proceedings that become effective even while the case is on appeal. See Von Geldern, 64 Haw. at 215, 638 P.2d at 324 (concluding that the ameliorative provisions apply because "[a] judgment is not final for this purpose while the case is on appeal or where the time for appeal has not yet run" (citation omitted)).

VII.

Cases from other jurisdictions also support a liberal reading where ameliorative sentencing statutes are involved. For example, the majority points to People v. Floyd, 72 P.3d 820

[24] The majority further states that its analysis of the savings clause in Van den Berg "is of particular import . . . because it represents this court's only opinion of which we are aware, aside from Avilla, . . . in which a similar savings clause applied to legislation governing a criminal proceeding prior to an amendment's effective date but in which a sentencing hearing was conducted after the effective date[.]" Majority opinion at 18 n.12 (some emphasis added and some emphases in original). As conceded by the majority, Avilla interpreted an identical savings clause under the same order of proceedings. Thus, *Avilla* controls rather than *Van den Berg*, because as the majority does not dispute, *Van den Berg* does not involve a remedial statute and *Avilla* does.

(Cal. 2003), for the proposition disputed here that "the general trend among the states nationally is . . . not to apply" "a specific savings clause" "retroactively[.]" Majority opinion at 34-35. In Floyd, the California Supreme Court concluded the savings clause in Proposition 36[, The Substance Abuse and Crime Prevention Act of 2000,] ("[e]xcept as otherwise provided, the provisions of this act shall become effective July 1, 2001, and its provisions shall be applied prospectively[,]"), precluded application to Floyd who had already been sentenced. Id. at 821 (quoting Proposition 36 § 8, as approved by voters, Gen. Elec. (Nov. 7, 2000) (emphasis added)). However, Floyd is inapposite inasmuch as it addressed "whether Proposition 36 . . . applie[d] to defendants who were sentenced prior to the act's effective date of July 1, 2001, but whose judgments were not yet final as of that date." Id. (emphasis added). In contrast, here Reis was not sentenced prior to the effective date of Act 44, but after its effective date.

In a case more factually similar to ours, the California court of appeals, in In re Delong, 93 Cal. App. 4th 562, 564 (Cal. Ct. App. 2001), considered whether the same Proposition would apply to a defendant who had not yet been sentenced.[25] According to Delong, "[t]he essential issue

[25] The majority asserts that in Delong, "the defendant twice moved successfully to have sentencing delayed" and that because "the second extension" was rescheduled after the "effective date of the ameliorative amendments[,]" the ameliorative amendments were applicable to the defendant. Majority opinion at 32 n.26. The majority's argument here is unclear but it seems to suggest that there was something wrong with the California court of (continued...)

presented is the applicability of Proposition 36 to a defendant such as DeLong who was adjudged guilty prior to the initiative's effective date of July 1, 2001, but not sentenced until afterwards." Id. (emphasis added).

The appeals court focused on the ameliorative provision of Proposition 36 that "any person convicted of a nonviolent drug possession offence shall receive probation." Id. at 565. Delong determined that the term "convicted" "must be given a meaning that comports with the purpose of Proposition 36, which is aimed at diverting nonviolent defendants from incarceration into substance abuse programs" and was "intended to have a far-ranging application to nonviolent drug offenders." Id. at 568-69. (emphasis added). As such, that court concluded that "'convicted' within the meaning [of the Proposition meant] adjudication of guilt and judgment thereon." Id. Reading the term liberally, it concluded that because "Delong . . . was found guilty but had not yet been sentenced when the initiative took effect, . . . [she] had not yet been convicted as of that date

[25](...continued)
appeals' reasoning because "similarly situated defendants who accepted their original . . . sentencing dates" could not benefit from the new law." Id.

First, it is inconsistent for the majority to rely on Floyd, see majority opinion at 35 (discussing Floyd, 72 P.3d 820), while at the same time rejecting Delong inasmuch as both opinions discuss Proposition 36 and represent California's approach to interpreting sentencing clauses where ameliorative amendments are involved, but only one, Delong, addresses a situation factually similar to the instant case. Second, a statute that reduces the penalty for a particular crime represents a legislative judgment that the prior penalty was too harsh and that the new penalty is sufficient. See infra. As such, there is nothing inconsistent about applying section 11 to defendants who are sentenced after the effective date of Act 44.

and [was] eligible for sentencing pursuant to Proposition 36."[26] Id. at 570 (emphases added).

Likewise, the New York Court of Appeals explained that where a defendant has not yet been sentenced, the case does not involve "'retroactivity' in the classic sense.

> This appeal only involves application of the new law to prosecutions before sentence, not to final cases or cases on direct review. Thus, it does not involve "retroactivity" in the classic sense (see, Matter of Mulligan v Murphy, 14 [N.Y.]2d 223, 227 [(N.Y. 1964)]; Griffith v Kentucky, 479 [U.S.] 314 [(Ky. 1987)]). However, because the cases use the terms "retroactively" or "retroactive", for ease of discussion those terms will be used in the opinion.

People v. Behlog, 543 N.E.2d 69, 70 n.1 (N.Y. 1989) (emphasis added). The New York courts have also said that "[w]hen, prior to sentencing, the Legislature makes a judgment that the crime a defendant has committed warrants a lesser punishment, the defendant may be punished in accordance with the new standards

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[26] The majority is wrong in maintaining that Delong is distinguishable from the instant case. The majority maintains the conclusion in Delong "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." Majority opinion at 35 n.28 (citing Delong 93 Cal. App. 4th at 567-69). As related above, the savings clause at issue stated that "[e]xcept as otherwise provided, the provisions of this act shall become effective July 1, 2001, and its provisions shall be applied prospectively[,]" Delong, 93 Cal. App. 4th at 566 (emphasis added). Nevertheless, as the majority acknowledges, and to reiterate, the Delong court stated that, "[a]pplying this rule in the instant case, we conclude . . . use of the term 'convicted' must be given a meaning that comports with the purpose of Proposition 36, which is aimed at diverting nonviolent defendants from incarceration into substance abuse programs[,]" id. at 568-69, and, as such, "should be interpreted so as to give the initiative a broad application[,]" id. at 570 (emphasis added).

Similarly here, where the ameliorative amendments are also to be interpreted liberally, where there is also a legislative intent aimed at steering eligible defendants into probation and treatment, and where there is also a term subject to more than one interpretation, see majority opinion at 20 n.16, the same logic should apply, i.e., the term "proceedings" should be interpreted "broadly," in line with the legislative intent, allowing section 11 to apply to Reis. In this framework, the majority's argument that there "is no corresponding ambiguity in the term 'proceedings' arising from Act 44's subject matter" and there is not "a similarly broad extension of [Act 44's] ameliorative provisions to those other than newly-indicted defendants[,]" majority opinion at 35-36 n.28, is simply misplaced.

because they represent society's most up-to-date evaluation of the nature of his offense." People v. Walker, 623 N.E.2d 1, 5 (N.Y. 1993) (emphasis added). Thus, these courts, in line with our own principle requiring liberal construction of ameliorative sentencing statutes, have applied ameliorative amendments that become effective after a defendant has committed the offense or been convicted, and have not characterized such application as retroactive.

VIII.

A.

Third, the court, in interpreting the savings clause in Section 29 could, as it did, properly determine that the penalty, i.e., sentence, was incurred after the effective date of the act and therefore Section 11 was applicable to Reis.[27] In interpreting ameliorative amendments, the phrase "penalties that were incurred" has been determined to mean penalties that a defendant faces after he has been convicted of a crime. Consequently, where ameliorative provisions are involved, some courts have found that no "penalty is incurred" until the defendant is sentenced.

For example, in State v. Tapp, 490 P.2d 334 (Utah 1971), under facts similar to the instant case, the Utah supreme court considered whether a savings clause precluded the trial

[27] This part responds to the majority's argument that "[a] defendant 'incurs' a penalty at the time of the commission of an offense." Majority opinion at 26.

judge from imposing a lesser sentence attributable to a statutory amendment adopted between the time the defendant was charged with possessing marijuana and the date of sentencing.[28] Id. at 336. The defendant argued that "he was entitled to the benefit of the lesser statutory penalty in effect at the time of trial, judgment and sentence, rather than the more severe penalty which was in effect at the time the offense was committed." Id. at 335. The Utah court, like the majority here, focused on the language of a similar savings clause but concluded, instead, that "[t]he only way that statute can apply to the problem here involved" would be through its "penalty incurred" provision. Id. at 336.

Tapp decided that the savings clause did not bar the application of the ameliorative sentencing statute because "[i]nasmuch as no penalty is incurred until the defendant is convicted, judgment entered and sentence imposed, that statute does not affect the propriety of [retroactive application of the ameliorative statute] in accordance with the law as it exists at that time" and "if the statute reducing the penalty has become effective before the sentence . . . the defendant is entitled to the lesser penalty as provided by the law at the time of the judgment and sentence."[29] Id. (emphases added). The majority's

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[28] The similar savings clause stated that "[t]he repeal of a statute does not . . . affect any right which has accrued, any duty imposed, any penalty incurred, or any action or proceeding commenced under or by virtue of the statute repealed." Tapp, 490 P.2d at 336.

[29] The majority attempts to distinguish Tapp by stating that "[i]n Tapp, the defendant was indicted before the effective date of the ameliorative sentencing statute but tried, convicted, and sentenced thereafter[,]" majority (continued...)

assertion that Tapp "cites no authority supporting its conclusion that a penalty is, by its plain meaning, 'incurred' at the time of sentencing[,]" majority opinion at 28-29 n.24 (emphasis omitted), is simply not true. In fact, the Tapp court relies heavily on case law. It stated that:

> There are several considerations which in our minds tend to support our conclusion that where an enactment reducing the penalty for an offense has become effective prior to the conviction, a defendant is entitled to the benefit thereof by having [a] penalty imposed in accordance with the law at the time of the sentence. The first of these is that it is the prerogative of the legislature, expressing the will of the people, to fix the penalties for crimes; and the courts should give effect to the enactment and the effective date thereof as so declared. There are some other fundamental principles [i]ngrained in our law which, though not directly controlling on the problem at hand, are generally in harmony with the policy considerations which lead to the conclusion we have reached herein. One of these is that to insist on the prior existing harsher penalty is a refusal to accept and keep abreast of the process which has been continuing over the years of ameliorating and modifying the treatment of antisocial behavior by changing the emphasis from vengeance and punishment to treatment and rehabilitation. In the same tenor are the time-honored rules of the criminal

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[29](...continued)
opinion at 28 n.24. However, according to the majority, a penalty is incurred at the time an offense is committed, majority opinion at 26, and a proceeding begins when a prosecution is initiated, majority opinion at 16. Thus, that the Tapp defendant was "tried, convicted, and sentenced" after the effective date of the statute should have no bearing on the majority's approach as the defendant in Tapp committed the offense and was indicted prior to the effective date of the ameliorative statute.

The majority states that "[i]nterestingly, 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' penalty incurred provision." Majority opinion at 28 n.24 (quoting Tapp, 490 P.2d at 336). However, this statement appears to support this dissent's position that "a sentencing proceeding can be a separate proceeding for the purposes of the savings clause." Majority opinion at 28 n.24.

Puzzlingly, the majority then maintains that "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." Id. (emphasis omitted) However, inasmuch as the Tapp court expressly stated that "[i]f a statute reducing the penalty has been effective before the sentenc[ing proceeding], as in this case, the defendant is entitled to the lesser penalty as provided by the law at the time of the judgment and sentence[,]" it is unclear then why the majority is "at a loss . . . as to how [the above] reasoning supports the dissent's position." Majority opinion at 28 n.24.

> law generally favorable to one accused of crime: that in case of doubt or uncertainty as to the degree of crime, he is entitled to the lesser; and correlated thereto: that as to an alternative between a severe or a lenient punishment, he is entitled to the latter.

Tapp, 490 P.2d at 335-36 (footnotes omitted) (emphases added) (citing In re Falk, 414 P.2d 407 (Cal. 1966); In re Ring, 413 P.2d 130 (Cal. 1966); In re Estrada, 408 P.2d 948 (Cal. 1965); In re Fink, 433 P.2d 161 (Cal. 1967); State v. Pardon, 157 S.E.2d 698 (N.C. 1967) (other citations omitted)).

B.

The same rationale is applicable here and this court can "give effect to the enactment and the effective date thereof as so declared" and apply the statute in effect at the time of Reis's sentencing. Id. Factually, like the defendant in Tapp, Reis was not sentenced until after the effective date of the statute and, as such, under Tapp's approach to ameliorative statutes, no penalty had been incurred until after the statute's effective date. The savings clause in Section 29, then, would not preclude the application of ameliorative sentencing provisions.

The majority cites to several cases, arguing that "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." Majority opinion at 26-28. However, these cases are plainly distinguishable because the cases concern

preventing abatement of criminal prosecutions,[30] or do not involve ameliorative statutes[31] or unlike our case law, see Koch, 107 Hawai'i at 272, 112 P.3d at 76 (legislative intent to give retroactive effect may be express or implied), require an express legislative statement of retroactivity.[32] The majority does

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[30] Some of the cases address the very reason that savings clauses were created -- to prevent the abatement of criminal prosecutions that occurred at common law where a statute was amended or repealed. See infra; State v. McGranahan 206 N.W.2d 88, 90 (Iowa 1973) (where defendant, charged with sale of marijuana under a statute that was repealed and replaced after he was charged, argued that "the prior repeal of the law under which he was charged vitiated his conviction" the Iowa court obviously held that the claim was "without merit" as this is exactly the situation in which savings clauses are designed to guard against); Bilbrey v. State, 135 P.2d 999, 1000 (Okla App. 1943) (concluding that the defendant's argument that the court lacked jurisdiction because "the repeal of a penal statute without a saving clause operates as a bar to any further prosecution under the repealed statute" was inapplicable where, as in that case, a savings clause existed); Commonwealth v. Benoit, 191 N.E.2d 749 (Mass. 1963) (stating that the issue was whether the repeal of the legislation under which defendants were charged invalidated their indictments and concluding that the savings clause prevented such an action); State v. Senna, 321 A.2d 5, 5 (Vt. 1974) (allowing the defendant to be prosecuted although the statute was repealed and redefined so that there was no longer a "penalty for the crime of breach of peace by assault").

[31] The second category of cases relied on by the majority does not involve ameliorative statutes and so call for different modes of construction and policy considerations. See supra. For example, the majority relies on State v. Mathews, 310 A.2d 17, 20 (Vt. 1973), which concludes that in the "absence of an amendment reducing the penalty or punishment . . . we hold that the legislative intent of the saving statute . . . was to preserve the right to prosecution and sentence in this case, and not to exculpate him by reason of the repeal of the criminal statute[.]" (Emphasis added.) See also State v. Petrucelli, 592 A.2d 365, 366 (Vt. 1991) (holding that an amendment which lengthened the statute of limitations for sexual assault from three to six years and became effective before the statute of limitations had run against the defendant was retroactively applicable because defendants do not acquire a right to the statute of limitations in effect at the time an offense is committed); State v. Moore, 233 P.2d 253, 255 (Or. 1951) (involving the repeal of the Habitual Offender Statute and replacement with a new code which required that an "information should be filed within two years after [the defendant's] last conviction" which was not required under the old law).

[32] The final category of inapplicable cases involves those jurisdictions that allow retroactive application of ameliorative amendments only where the legislature explicitly requires it. See State v. Johnson, 402 A.2d 876, 879 (Md. 1979) (stating that "a general savings statute preserves penalties imposed under prior law except where a subsequent repealing act manifests the legislative intention to the contrary"); See State v. Alley, 263 A.2d 66, 68 (Me. 1970) (interpreting applicable savings clause as precluding application of ameliorative amendment where defendant was tried, convicted and sentenced prior to the effective date of the ameliorative statute).

nothing to dispute the foregoing, only stating that "none of the[se] distinctions that the dissent urges, in the end, explain why . . . the term 'incurred' should be equated with 'imposed[.]'" Majority opinion at 29 n.25. However, as noted throughout this opinion, it is the context that gives meaning to the savings clause, i.e., where an ameliorative statute is at issue, the savings clause is to be read liberally in terms of its purpose. Thus, inasmuch as the context of each of these cases is inapposite to the present case, they furnish no support for the majority.

IX.

A.

Even though not necessary to validate Reis's sentencing proceeding beyond the aforesaid grounds, it may be observed that if the term proceeding is viewed as "the initiation of a criminal prosecution against a defendant[,]" as the majority insists, majority opinion at 16, the retroactive application of such a remedial statute, if within the legal discretion of the court, is authorized by case law in this jurisdiction.[33] For example, as

[33] The majority maintains that "it is important to emphasize that Reis herself does not characterize her argument as implicating retroactive application" and that it only discusses such application because of "the dissent's insistence on arguing that the provisions of Act 44, section 11 should be applied retroactively." Majority opinion at 12. Inconsistently, however, the majority acknowledges that "although Reis does not employ the term 'retroactive' in her arguments . . . [because] 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." Majority opinion at 13 n.8 (emphasis added).

Further, as Reis relies predominantly on Avilla, a case which, as discussed, allows for the retroactive application of an ameliorative amendment, the discussion of retroactivity is entirely germane. See State v. (continued...)

noted above, in Avilla, this court held that an ameliorative statute may be applied to prosecutions that were begun before the effective date of the act. 69 Haw. at 509, 750 P.2d at 78. The majority does not dispute that Avilla retroactively applied the amendment even though "the initiation of [the] criminal prosecution[,]" majority opinion at 16, had already taken place and despite the inclusion of the same savings clause used in Act 44.

Aside from Avilla, this court has expressly authorized the retroactive application of ameliorative amendments, i.e., to prosecutions preceding the effective date of the amendment, notwithstanding the absence of a specific, expressed legislative intent. In Von Geldern, a criminal case where the charge was promotion of a dangerous drug, this court distinguished the application of penalty-increasing statutes from ameliorative amendments. With regard to penalty-increasing amendments, it said that "no new punitive measure may be applied to a crime already consummated, where its application would work to the detriment or material disadvantage of the wrongdoer. Such legislation would be ex post facto law as to the offender." Von Geldern, 64 Haw. at 212, 638 P.2d at 321 (emphasis added).

However, the ameliorative statute, in that case, 1980

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[33](...continued)
Heapy, 113 Hawai'i 283, 304, 151 P.3d 764, 785 (2007) (explaining that where case law is "part and parcel" of the issue raised, discussion of such case law is germane). Finally, the prosecution, recognizing the import of our ameliorative provision cases, argues against the retrospective effect to be given our case law. See infra note 34.

Haw. Sess. L. Act 284 [hereinafter Act 284], had become effective on June 16, 1980,[34] and was held applicable to a defendant who had filed his notice of appeal on August 31, 1979, after the effective date of Act 284. Id. This court said Act 284 "added a subsection to the mandatory minimum sentence statute . . . to provide the sentencing court with the discretionary authority to impose a lesser mandatory minimum sentence where the court found strong mitigating circumstances to warrant such action." Id. It was declared that Act 284 is "ameliorative in its intent and effect and its application . . . would neither be detrimental nor materially disadvantageous to the defendant[,]" because "[i]t authorizes the trial court to impose less than the mandatory minimum sentence of imprisonment where strong mitigating circumstances are shown to exist." Id. at 213, 638 P.2d at 322.

Von Geldern stated that, "[t]hat being the case, the only possible obstacle to its application in this case would be HRS [§] 1-3 which provides that '(n)o law has any retrospective operation, unless otherwise expressed or obviously intended.'"

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[34] The cases relied on by the prosecution for its contention that this court "has ruled against retrospective application of statutes containing similar or identical saving[s] clauses even when the defendant is convicted and sentenced after a statute's effective date" are plainly inapposite. (Citing Van den Berg, supra; State v. Feliciano, 103 Hawai'i 269, 81 P.3d 1184 (2003); State v. Werner, 93 Hawai'i 290, 1 P.3d 760 (App. 2000); State v. Johnson, 92 Hawai'i 36, 44, 986 P.2d 987, 995 (App. 1999)). Because the majority relies heavily on Van Den Berg, that case is discussed supra in the text of this opinion.

Feliciano, Werner, and Johnson all involve the same statute allowing a "victim to enforce a criminal restitution order in a civil court as if the restitution order were a civil judgment." See Johnson, 92 Hawai'i at 44, 986 P.2d at 995. Because allowing a victim to enforce a restitution order against a defendant is not a remedial measure, these cases are obviously inapplicable to the instant case.

Id. (citing Oleson v. Borthwick, 33 Haw. 766 (1936) (other citation omitted)). According to this court, however, HRS § 1-3 is only a "rule of statutory construction and where the legislative intent may be ascertained, it is no longer determinative." Id. Also, although it discerned that there was "nothing in the language of Act 284 to indicate, one way or the other, that its ameliorative provisions may be applied retrospectively,"[35] this court nevertheless concluded that "such application where they may still be applied was obviously the intent of the legislature." Id. at 213-14, 638 P.2d at 322 (emphases added).

It was concluded that "[t]he legislature, we think, has thus established a pattern of conduct evidencing an inclination to allow the trial court in the exercise of its sound discretion to apply, in individualized circumstances, the 'more enlightened sentencing provisions' of the Code, even where the crime was committed before its effective date." Id. at 214-15, 638 P.2d at 323. Consequently, although the defendant had been convicted and sentenced prior to the effective date of Act 284, because the defendant's appeal was still pending, the *Von Geldern* court concluded that "the Act's ameliorative provisions were still capable of application" and "reversed and remanded for resentencing consistent with this opinion." Id. at 215, 638 P.2d at 323-24 (emphasis added).

[35] Section 3 of Act 284, which amended HRS § 706-606.5 states, "This Act shall take effect upon its approval." Act 284, § 3 at 546.

The same applies here. As in Von Geldern, id. at 214, 638 P.2d at 322, a retrospective application is congruent with a "pattern of [legislative] conduct," id. at 214-15, 638 P.2d at 322, inasmuch as Section 9 of Act 44 vested the court "with discretion in sentencing a first-time nonviolent drug offender to probation regardless of whether the offender has prior convictions." Act 44, pt. II, § 9 at 213.

Therefore, as in Von Geldern, the "[legislative] inclination . . . to vest in the sentencing court the discretionary authority . . . [to implement a] more enlightened sentencing provision" applies here, despite the fact the prosecution had begun before the effective date of Act 44. 64 Haw. at 214, 638 P.3d at 322. Reis had not been sentenced before the effective date of Act 44, and, consequently, falls well within the holding in Von Geldern that extended Act 284 after judgment and sentence had been entered and during the pendency of appeal.

B.

Similarly, with respect to the earlier version of HRS § 706-622.5 contained in Act 161 (2002), this court in Koch[36] said that HRS § 706-622.5 may be applied retroactively because the statute is "'ameliorative in its intent and effect . . . [and this court has] repeatedly validated the retrospective application of several remedial statutes on the basis of express

[36] Act 161 by its terms became "[e]ffective July 1, 2002[.]" Act 161 § 8 at 575.

or implied intent.'" 107 Hawai'i at 222, 112 P.3d at 76 (quoting Von Geldern, 64 Haw. at 216, 638 P.2d at 322); see also State v. Nakata, 76 Hawai'i 360, 376-77, 878 P.2d 699, 715-15 (1994) (determining that the retroactive application of a remedial sentencing scheme was not prohibited based on the express intent of the legislature).

In Koch, the defendant was "entitled to sentencing under the provisions of HRS § 706-622.5, which were in effect at the time of his sentencing but not at the date he committed the offenses of which he was convicted[.]" 107 Hawai'i at 221, 112 P.3d at 75 (emphasis added). Thus, based on Koch, and like Act 161, retroactive application of Act 44 is appropriate where it plainly fits within the legislative purpose of vesting more discretion in sentencing courts in order to reach a larger group of people. See Act 44, pt II, § 9 at 212-13. Reis's sentence, then, should be affirmed.

X.

The majority fails to validly distinguish Koch and Von Geldern. It maintains that "neither of the statutes [in those cases] contained specific savings clauses, a crucial fact . . . underlying . . . the ultimate conclusion in both cases that the ameliorative amendments could apply to the defendants." Majority opinion at 23 (emphasis omitted).

First, neither case contains any discussion of a "specific" versus a "general" savings clause nor do any of the

precedents from this jurisdiction support the majority's contention that the inclusion of a "specific savings clause[]" is a "crucial fact." Id. The majority makes a significant unsubstantiated leap by inferring that the addition of a generic savings clause, such as the one at issue here, in either Koch or Von Geldern, would have negated an implied legislative intent as to Section 11.

Second, the fact that the statutes in Koch and Von Geldern did not contain savings clauses like that in Act 44 would not be dispositive of whether Section 11 may be retroactively applied (i.e. to a case in which the offense preceded the effective date of Act 44) since such statutes were still subject to HRS § 1-3 which, as noted, states that "[n]o law has any retrospective operation, unless otherwise expressed or obviously intended" and HRS § 1-11 (1993) which states that "[n]o suit or prosecution pending at the time of the repeal of any law, for any offense committed, or for the recovery of any penalty or forfeiture incurred under the law so repealed, shall be affected by such repeal."[37] Ordinarily, then, those statutes in Koch,

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[37] Statutory savings provisions have been held applicable to both legislative acts that expressly repeal prior legislation as well as acts that amend prior legislation. See 1 Substantive Criminal Law, § 2.5 (stating that "[w]hen these saving provisions are applied in instances in which there has been an amendment increasing the penalty or a repeal and substantial reenactment, they produce a sound result" (emphasis added)); Today's Law and Yesterday's Crime, Comment, 121 U. Pa. L. Rev. at 127 ("The solution to legislative inadvertance was devised in the legislatures in the form of general saving legislation applicable to all repeals, amendments, or re-enactments . . . and the consequent shifting of the legislative presumption from one of abatement unless otherwise specified to one of non-abatement in the absence of contrary legislative direction." (Emphasis added.)); Holiday, 683 A.2d at 66-67 & n.6 (stating that "when legislatures failed to provide (continued...)

Avilla, Von Geldern, and in the instant case would be given prospective effect as in Van den Berg. Yet, this court confirmed retrospective effect was permissible for the remedial provisions in both Koch and Von Geldern.

Third, unlike Act 44,[38] the statutes in Koch and Von Geldern only contained ameliorative provisions which did not create new or enhanced penalties. Hence, contrary to the purported distinction drawn by the majority, a generic savings clause was not necessary to guard against ex post facto violations in those cases. By contrast, Act 44 is a multi-statute amendment containing both ameliorative and penalty enhancing provisions, thus necessitating a generic savings clause.

XI.

The majority further maintains that Von Geldern and Koch are inapplicable because "the legislature knows the law when

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[37](...continued)
special savings clauses in the repealing legislation, state legislatures began in the last century to adopt general savings statutes applicable thereafter to all repeals, amendments, and reenactments of criminal and civil liabilities" in order to shift "the legislative presumption from one of abatement unless otherwise specified to one of non-abatement in the absence of contrary legislative direction" (emphasis added) (citation omitted)); see also Von Geldern, 64 Haw. at 213, 638 P.2d at 322 (deciding whether an ameliorative amendment applied retroactively, and explaining that "[n]o law has any retrospective operation, unless otherwise expressed or obviously intended[,]" (quoting HRS § 1-3), and citing to Hawaii's general savings clause, HRS § 1-11 (other citation omitted)). As such, HRS § 1-11, along with HRS § 1-3, is applicable whenever a statute is amended or repealed to determine which law applies to a particular defendant.

[38] Act 44 is legislation which deals predominantly with new and enhanced penalties. Section 1 notes that "[t]he legislature finds that comprehensive legislation is needed to ensure the safety of Hawaii residents due to the use of and addiction to crystal methamphetamine (especially in the form known as 'ice')[.]" Act 44 § 1 at 204.

enacting statutes" and therefore, it was aware, "in enacting Act 44 . . . 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" in Act 44. Majority opinion at 40 (citation omitted). But, because of the "doubt" that must accompany such an assertion, see 1 Substantive Criminal Law, § 2.5 infra, "[a]bsent an indication that the legislature intends a statute to supplant common law [such as our precedent in Von Geldern, Avilla, and Koch], the courts should not give it that effect." Sutherland Statutory Construction (Singer, 6th ed.) § 50:01 at 140 (citations omitted).

As 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. Those foregoing cases never discussed the lack of a savings clause as the reason for applying the ameliorative amendments to cases that originated before the effective date of the Acts. Rather, as noted, Avilla applies the ameliorative amendment in spite of the same savings clause contained in Act 44.[39]

[39] The majority further maintains that "we are confronted with a specific savings clause, i.e., a savings clause specifically and purposefully included in a particular piece of legislation[,]" majority opinion at 23 n.19, and as such Section 11 should not be retroactively applied. However, this position is incorrect inasmuch as it was the same savings clause language that was viewed as no obstacle to application in Avilla. Further, the "specific" savings clause at issue here employs the same generic language attached to every criminal statute during the 2004 legislative session and thus it is (continued...)

Indeed, the legislature's imputed knowledge of these cases would support the opposite view from that taken by the majority -- that based on the statements in the cases as quoted supra, this court will apply ameliorative amendments retroactively even in the absence of express legislative intent. See, e.g., Von Geldern, 64 Haw. at 215, 638 P.2d at 324 (concluding that where the "legislature amended the mandatory sentencing provisions for repeat offenders for the purpose of remedying its inflexibility," the retroactive "application of the new, more flexible law . . . would be in keeping with this legislative objective"). Thus the presumption that the legislature is aware of this court's rulings supports rather than detracts from the retroactive application of Section 11.[40]

XII.

The majority's assertion that "the inclusion of a specific savings clause [(Section 29)] . . . operate[s] as clear evidence of the legislature's intention that the act in question should apply prospectively only[,]" majority opinion at 34, is subject to further rejoinder. One commentator has noted retroactive application of ameliorative amendments is appropriate

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[39](...continued)
incorrect to argue that it was "specifically and purposefully" included to apply to Section 11.

[40] The majority is also plainly wrong in contending that this dissent's interpretation is an attempt "to reduce the express inclusion of a savings clause in Act 44 . . . to a nullity." Majority opinion at 23 n.19. As noted before, the savings clause was obviously intended to obviate ex post facto concerns and serves that purpose for the bulk of the provisions in Act 44. See supra.

because, "it is to be doubted that the savings statutes represent either sound policy or the actual intent of the legislature" because "[a] legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty . . . is sufficient to meet the legitimate ends of the criminal law." 1 Substantive Criminal Law, § 2.5 (emphasis added). Consequently, "[n]othing is to be gained by imposing the more severe penalty after such a pronouncement; the excess in punishment can, by hypothesis, serve no purpose other than to satisfy a desire for vengeance." Id. (emphasis added) (citations omitted).

According to LaFave, as such, "appellate courts have consequently given seemingly broad savings statutes a narrow reading in order not to deprive the defendant before them of the benefit of a prior legislative judgment that the conduct should not be criminal or should be subjected to lesser punishment." Id. (citations and internal quotation marks omitted) (emphasis added). Similarly, a broad savings clause repetitive of such savings statutes should be given a narrow reading in the context of an ameliorative statute.

At issue here is the same provision the legislature first attempted to pass in 2002, but that was negated by this court in State v. Smith, 103 Hawai'i 228, 81 P.3d 408 (2003). Smith concluded that the repeat offender sentencing laws took precedence over the mandatory requirement to sentence a first-

time drug offender to probation. Thus, as noted before, the legislature, in enacting Section 11, intended to "clear up the confusion regarding repeat offenders" and to make it clear that "first time nonviolent drug offenders" were "eligible for diversion to treatment." Act 44, pt II, § 9 at 212-13. Nothing in the Act indicates the legislature intended that the people identified as eligible for treatment would lose the benefit of the prior act (Act 161) simply because the legislature clarified the act to pass this court's muster. Nothing in the legislative history or in the majority draft contradicts this point. Nothing, then, mandates this court to deny extension of Section 11 to persons like Reis.

In light of the foregoing history of this particular ameliorative statute, it is to be "doubted" that the legislature "actual[ly] intend[ed]," 1 Substantive Criminal Law, § 2.5, the generic savings clause in Act 44 to abrogate application of Section 11 by appending the so called "specific savings clause" to Act 44, as it had done in all other criminal acts in 2004.[41]

[41] Although the majority maintains that Section 29 is a "specific" savings clause, a closer look indicates that it is nothing more than a generic savings clause, one that was appended to the end of every criminal provision enacted by the legislature during the 2004 legislative session. See 2004 Haw. Sess. L. Act 18, § 3 at 36-37 ("Bill for an Act Related to Stalking" stating "[t]his Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date"); 2004 Haw. Sess. L. Act 49, § 2 at 242-43 ("A Bill for an Act relating to Crime" stating "[t]his Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date"); 2004 Haw. Sess. L. Act 82, § 4 at 335, 337 ("A bill for an Act Relating to Prostitution" stating "[t]his Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date"); 2004 Haw. Sess. L. Act 59, § 8 at 296, 300 ("A Bill for an Act Relating to Chapter 846E, [HRS]"); 2004 Haw. Sess. L. Act 60 § 6 at 301-302 ("A Bill for an Act Relating to Sexual Assault"); 2004 Haw.

(continued...)

See discussion supra.

Thus, contrary to the majority's position, the inclusion of a standard savings clause in this case does not indicate a "very real and clear legislative intent" to preclude application of Section 11. Majority opinion at 26. The majority's argument that it "is not mutually exclusive" with the intent of the legislature to apply Section 11 prospectively and only allow the court "increased discretion . . . to new violations occurring after July 1, 2004[,]" majority opinion at 40 n.30, is manifestly irreconcilable with sound policy, our precedent, and the evolution of Section 11. To reiterate, as noted by LaFave, there is "nothing to be gained by imposing the more severe penalty" that existed before the passage of Section 11, and the historical evolution of Section 11 portends none. 1 Substantive Criminal Law, § 2.5.

XIII.

The majority's contention that this dissent would allow other provisions of Act 44 to "be susceptible to challenge as unconstitutional ex post facto measures" must also fall by the

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[41](...continued)
Sess. L. Act 61, § 6 at 302, 304 ("A Bill for an Act Relating to Chapter 707, [HRS]"); 2004 Haw. Sess. L. Act 90, § 15 at 354, 364 ("A Bill for an Act Relating to Habitual Operation of a Vehicle Under the Influence of an Intoxicant"). Consequently, Section 29 appears to be anything but "specific" inasmuch as it employs the same language used in every criminal statute of that legislative year, and merely reflected the "general" savings provisions in HRS §§ 1-3 and 1-11.

wayside.[42] Majority opinion at 39. The Act, as noted previously, substantially addresses penalties related to drug possession, trafficking, and manufacturing.[43] The savings clause here was of a general nature obviously included to prevent the ex post facto application of those penalty provisions. Where the legislature enacts legislation that includes penalties it would be charged with knowing that the savings clause is necessary to avoid an ex post facto violation. See State v. Guidry, 105 Hawai'i 222, 235, 96 P.3d 242, 255 (2004) (explaining that the "ex post facto clause prohibits legislatures from retroactively altering the definition of crimes or increasing the punishment for criminal cases" (citations, internal quotations, brackets, and ellipses omitted)). Accordingly, under our precedent a liberal reading is required as to the ameliorative provision. On the other hand, the non-remedial provisions are subject to the basic prohibition against retroactivity stated in the savings clause.

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[42] This part responds to the majority's argument that portions of Act 44 will be rendered "susceptible to challenge as unconstitutional ex post facto measures." Majority opinion at 39.

[43] See, e.g., Act 44, pt I, §§ 3, 7, 13, and 14 at 205-12, 216-19, 219-21 (creating and enhancing penalties such as "[m]anufacturing a controlled substance with a child present," HRS § 712-A; "[u]nlawful methamphetamine trafficking," HRS § 712-B; "promoting a controlled substance through a minor," HRS § 712-C; and "[p]romoting a dangerous drug in the first degree . . . second degree . . . [and] third degree," HRS § 712-1241; adding a new chapter on "Drug Dealer liability" and creating a "zero tolerance policy" in public schools, HRS § 302A-1134.6).

XIV.

A.

The majority maintains that a "default presumption[44] against retroactive application remains alive and well both in our jurisprudence and in the foreign jurisdictions that the dissent cites." Majority opinion at 33. But except for Von Geldern, the cases cited by the majority for this proposition do not involve ameliorative statutes.[45]

The majority also cites to cases purportedly exhibiting a "general trend among the states nationally . . . not to apply the amendments retroactively, even when they are ameliorative." Majority opinion at 34-37 (emphasis in original). However, all of the cases cited by the majority are distinguishable on various grounds. In some of the cases cited by the majority, the savings clause specifically provided for a prospective application

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[44] The reference to a "presumption" is antithetical to the express provisions of HRS § 1-3, HRS § 1-11, and Section 29 of Act 44, none of which refer to this legal term of art.

[45] See cases cited by majority, Taniguchi v. Ass'n of Apt. Owners of King Manor, 114 Hawai'i 37, 48, 155 P.3d 1138, 1149 (2007) (a case involving application of statute to an apartment association's bylaws did not address ameliorative provisions at all); Kramer v. Ellett, 108 Hawai'i 426, 432, 121 P.3d 406, 412 (2005) (in a suit against a county involving an injured driver, insurance commissioner could not retroactively apply a medical rehabilitative limit unless "such operation was intended" and without any discussion of the retroactive application of criminal statutes); Gap v. Puna Geothermal Venture, 106 Hawai'i 325, 333, 104 P.3d 912, 920 (2004) (in a case involving sanctions against an attorney under court rules, this court did not discuss any separate treatment of ameliorative provisions); Robinson v. Bailey, 28 Haw. 462, 464 (1925) (in a case involving a contract for the sale of land between a private person and the Territory of Hawai'i no mention of ameliorative provisions made); Evangelatos v. Super. Court, 246 Cal. Rptr. 629, 642 (Cal. 1988) (in a negligence case between a high school student who was injured while attempting to make fireworks at home and the retailer of the fireworks components, no ameliorative statute mentioned).

only.[46] Other cases cited held that the retroactive application must be expressed as opposed to case law in our jurisdiction.[47] Yet other cases did not afford retroactive effect because of specific statutes or constitutional provisions.[48] Indeed, in one

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[46] See Floyd, 72 P.3d at 822 (savings clause applied only to the purely ameliorative amendment in question passed by Proposition, "ameliorat[ing] the punishment for those persons convicted of nonviolent drug possession offenses who are eligible for its programs" and "shall be applied prospectively"); State v. Ross, 95 P.3d 1225, 1232 (Wash. 2004) (act specifically sets forth that the act pertaining to the ameliorative amendments shall apply to crimes committed after the specified date; the court noting that the statute in question was amended by section 3 of the act and that "[t]he legislature . . . provided that [s]ections 2 and 3 of this act take effect July 1, 2002, and apply to crimes committed on or after July 1, 2002"); State v. Vineyard, 392 P.2d 30, 33 (Ariz. 1964) (although under the amended statute the crime with which the defendant was charged was changed from first degree rape to second degree rape, it did not change the crime "from a felony to a misdemeanor . . . [and second degree rape] remains a felony unless and until a court in its discretion imposes a sentence of imprisonment in the county jail for not to exceed one year" and "[f]or all purposes a violation of this provision is a felony up to the judgment and sentencing").

[47] See Tellis v. State, 445 P.2d 938, 941 (Nev. 1968) (stating that although the statute under which the defendant was convicted was amended to reduce the sentence, the court correctly imposed the sentence in force at the time the defendant committed the felony pursuant to NRS 193.130, which provided that "[e]very person convicted of a felony . . . shall be sentenced to a definite term of imprisonment . . . within the limits prescribed by the applicable statute, unless the statute in force at the time of commission of such felony prescribed a different penalty" (emphasis added) (ellipses and internal quotation marks omitted)); Pollard v. State, 521 P.2d 400, 401-02 (Okla. Crim. App. 1974) (adopting the view that although the defendant's prior felony conviction was subsequently classified by legislature as a misdemeanor, the court noted that ameliorative statutes never apply retroactively but that "the [l]egislature may make retroactive a statute lessening the punishment and classification of an offense, but the intent to do so mu[st] be affirmatively expressed in said statute" (emphasis added)); State v. Kane, 5 P.3d 741, 744, (Wash. Ct. App. 2000) (stating that ameliorative statute may be given retroactive application but "if the amendment is silent as to intent for retroactive application, it will be given prospective application only").

[48] See State v. Parker, 871 So.2d 317, 326 (La. 2004) (stating that "[t]he general rule long applied in this state is that the law in effect at the time of the commission of the offense determines the penalty to be applied to the convicted accused," without regard to whether the amendment was ameliorative or not); State v. Ismaaeel, 840 A.2d 644, 647-48 (Del. Super. Ct. 2004) ("Reviewing the amendment, a specific savings clause is not provided . . . Given this background, the general savings statute must be considered," and it states that "[a]ny action, case, prosecution, trial or other legal proceeding in progress . . . shall be preserved and shall not become illegal or terminated in the event that such statute is later amended . . . irrespective of the stage of such proceedings, unless the amending act expressly provides[.]"); Castle v. State, 330 So. 2d 10, 11 n.1 (Fla. 1976) (continued...)

case cited by the majority, the statute was not deemed "ameliorative" at all.[49]

B.

On the other hand, the majority disregards the fact that "under the doctrine of amelioration, a defendant who is sentenced after the effective date of a statute providing for more lenient sentencing is entitled to be sentenced pursuant to that statute rather than the sentencing statute in effect at the time of the commission or conviction of the crime." Cotton v. Ellsworth, 788 N.E.2d 867 (Ind. 2003) (citing DeSantis v. State, 760 N.E.2d 641, 645 (Ind. Ct. App. 2001)) (emphasis added) (other citation omitted). See People v. Estela, 800 N.Y.S.2d 352, 2005 WL 517452 *2-3 (N.Y. 2005) (finding that the amelioration doctrine did not bar application where the act stated that it "shall apply to crimes committed on or after the effective date

[48](...continued)
(stating that to allow appellant the benefit of the later-enacted lower maximum sentence would be a violation of the Florida constitution entitled, "Limitation of repeal as to criminal cases," which states that

> [n]o offense committed, and no penalty and forfeiture incurred, prior to the taking effect of these statutes, shall be affected thereby, and no prosecution had or commenced, shall be abated thereby, except that when any punishment, forfeiture or penalty shall have been mitigated by the provisions of these statutes, such provisions shall apply to and control any judgment or sentence to be pronounced, and all prosecutions shall be conducted according to the provisions of law in force at the time of such further prosecution and trial applicable to the case.

(Quoting Fla. Const. Article V, section 3(b)(1)).

[49] See Lunsford v. State, 640 N.E.2d 59, 61 (Ind. Ct. App. 1994) (stating that the statute in question is not ameliorative because "[a]lthough the new version of the habitual offender statute reduces the maximum enhancement for class C and class D felonies, the maximum enhancement of a class B or class A felony remains thirty years, as provided by the old statute").

thereof[,]" because the amendments "covered a wide range of issues including sentencing, the definition of certain crimes, and other related matters" and it could not interpret the clause "so narrowly when it is considering only the issue of the reduction in applicable sentences" inasmuch as it "would be illogical to find that the legislative intent was that this defendant should serve a longer period of time than someone who committed exactly the same crime a month or a day later"); People v. Behlog, 543 N.E.2d at 71 ("The general rule is that nonprocedural statutes are not to be applied retroactively absent a plainly manifested legislative intent"; "[t]here is an exception, however, when the Legislature passes an ameliorative amendment that reduces the punishment for a particular crime." (Other citations and internal quotation marks omitted.) (Emphasis added.)).

XV.

The majority relies on Holiday for the proposition that defendants should be punished according to the statute in existence at the time of the offense.[50] Majority opinion at 29.

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[50] The portion of the case quoted by the majority is extracted from the discussion of the District of Columbia savings clause which is comparable to the federal savings clause. The savings clause at issue in Holiday stated as follows:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

(continued...)

But Holiday is generally supportive of the position herein, for Holiday affirms the view that state courts "favor[] retroactive application of ameliorative sentencing legislation despite a general savings statute." Id. As noted before, the generic savings language in Section 29 is reflective of the "general savings" provisions in HRS §§ 1-3 and 1-11.[51]

As recognized by Holiday, state courts have determined that ameliorative sentencing provisions should apply retroactively where the legislature expressly intends to give sentencing discretion to the trial court, as the Hawai'i legislature has in this case. In People v. Schultz, 460 N.W.2d 505 (Mich. 1990), the Michigan supreme court determined that an ameliorative sentencing provision would apply to the defendant even though he had been tried, convicted, and sentenced prior to the effective date of the provision. Schultz construed the general savings clause at issue to allow application of the new sentencing legislation which "authorized the trial court to depart from" mandatory minimum sentencing because it was "the

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[50](...continued)
683 A.2d at 70. The holding in Holiday itself is inapplicable, in that, that court explained that none of the state cases could be "used to interpret the federal and District of Columbia general savings statutes, which are distinguishable either by reference to their terms or by virtue of federal court-including Supreme Court-interpretations that dictate a different result." Id. at 67. In other words, the District of Columbia Court did not use state court precedent. The District of Columbia, plainly, not a state.

[51] In persisting repeatedly that this dissent implicates only general savings clauses, the majority misrepresents the dissent's position herein, that a plain reading of proceeding is not foreclosed by the so-called specific savings clause in Section 29 and that under Avilla an identical savings clause was not an impediment to applying a remedial provision to a prosecution that had begun before the effective date of the salient statute based even on the majority's view.

clear intent of the [l]egislature . . . to vest discretion in the trial courts to determine whether a departure from the mandatory minimum terms . . . is warranted." Id. at 508, 512. See also State v. Cummings, 386 N.W.2d 468, 472 (N.D. 1986) (determining that the ameliorative sentencing statute at issue would apply retroactively because "the former penalty was too harsh and that the [new] and lighter punishment was . . . appropriate").

Assuming, arguendo, the legislature's intent to give retroactive application to Act 44 is implied, courts have inferred legislative intent to retroactively apply remedial statutes. In People v. Oliver, 134 N.E.2d 197 (N.Y. App. 1956), a similar savings clause[52] was involved. Oliver determined that "[a] legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law" and "it is safe to assume . . . that it was the legislative design that the lighter penalty should be imposed in all cases that subsequently reach the courts." Id. at 202 (emphasis added).[53]

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[52] The relevant savings clauses provide that "[t]he repeal of a statute or part thereof shall not affect or impair any act done, offense committed . . . penalty, forfeiture or punishment incurred prior to the time such appeal takes effect," and all proceedings commenced and pending at the time a statute is repealed "may be prosecuted . . . to final effect in the same manner as they might if such provisions were not so repealed." Oliver, 134 N.E.2d at 201 (ellipses in original).

[53] The Oliver court then went on to conclude that despite the general savings clause at issue, "where an ameliorative statute takes the form of a reduction of punishment for a particular crime, the law is settled that the lesser penalty may be meted out in all cases decided after the effective date of the [statute], even though the underlying act may have been committed

(continued...)

Holiday noted that Oliver discerned this intent "from objective scrutiny of the purposes underlying sentencing statutes" and concluded that "once the legislature had seen the folly of harsher penalties than those newly enacted, any further enforcement of the repealed penalties could serve no legitimate purpose-only 'vengeance or retribution.'" Holiday, 683 A.2d at 67-68 (quoting Oliver, 134 N.E.2d at 203). Therefore, Oliver concluded that "the legislature must have intended the new law to apply immediately, at least in all cases where sentences had not yet been pronounced and finally adjudicated." Id. at 68 (citing Oliver, 134 N.E.2d at 202) (emphasis added).[54]

Similarly, in the instant case, whether viewed as "express or implied[,]" Koch, 107 Hawai'i at 222, 112 P.3d at 76, the legislature's intent to apply Act 44 retroactively is manifest because, as in Schultz, it "vest[ed] discretion in the

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[53](...continued)
before that date." 134 N.E.2d at 201 (citations omitted) (emphasis added).

[54] The majority maintains that "Schultz, Cummings, and Oliver all relied upon legislative silence regarding solely prospective application . . . in order to conclude retroactive application was implicitly endorsed" whereas here there is a "very real and clear legislative intent . . . barring retroactive application within the very body of Act 44." Majority opinion at 25, 26. That those courts allowed retroactive application where the legislature was "silent" as to its intent only further indicates that this court should apply Section 11 retroactively because the legislature had made its intent express.

Here, the legislature wished to "clear up" an already existing law to ensure that those who were identified as needing treatment obtained that treatment. See Act 44, pt II, § 9 at 212-13 (stating that "[f]ewer than half" of the approximately "two hundred fifty offenders [who] were identified as eligible for diversion to treatment . . . actually began treatment" and as such "the legislature strongly urges courts to consider transferring the most severely addicted offenders or addicted offenders with criminal histories to the jurisdiction of the drug court as a condition of being sentenced to probation" (emphasis added)). As such, the legislature evinced the view that those "offenders with criminal histories" currently within the system should be sentenced to probation, thus, presumably, not only those who committed drug-related offenses after July 1, 2004.

trial courts to determine whether a departure from mandatory minimum terms . . . [was] warranted[,]" 460 N.W.2d at 512, because the legislature has determined the "former penalty" may be too harsh for some and the new "lighter punishment was . . . appropriate," Cummings, 386 N.W.2d at 472; and because the sentence had not yet been pronounced and finally adjudicated, Holiday, 683 A.2d at 68. As such, the court's action does not offend legislative intent.

XVI.

The majority maintains that all of the foreign cases[55] "merely comport[] 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[.]" Majority opinion at 24 (citing Koch, 107

[55] The majority contends that the cases this dissent cites from other jurisdictions contain "infirmities" to the extent that in Oliver "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[.]'" Majority opinion at 24-25 n.22 (citing Oliver, 134 N.E.2d at 200-04) (ellipses in original). This contention is difficult to comprehend as the majority maintains on one hand, that "[t]he 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[,]" majority opinion at 23 (emphasis omitted), and that Oliver is distinguishable because it relied on "legislative silence" and only implicated a "general savings clause[,]" majority opinion at 25, while on the other hand quoting the "general savings clause" at issue in Oliver for the proposition that "the legislature had clearly provided that [the new amendment] shall not affect any offense committed," majority opinion at 25 n.22 (internal quotation marks and ellipses omitted).

The majority cannot "have it both ways," or randomly decide when a general savings clause indicates specific legislative intent and when it does not. As to the only other "infirmit[y]" the majority identifies, that Schultz was a plurality opinion, majority opinion at 25 n.22, is hardly an infirmity inasmuch as the plurality in Schultz is reflective of the predominant state court view allowing for the retroactive application of ameliorative sentencing provisions. As Holiday explained, "[o]ther state courts have reached the same result with somewhat different emphases" in applying remedial statutes retroactively. 683 A.2d at 68 (citations omitted).

Hawai'i at 222, 112 P.3d at 76; Von Geldern, 64 Haw. at 213-14, 638 P.2d at 322 (emphasis omitted) (other citations omitted)). This is plainly not a conclusion supported by Koch or Von Geldern which, as noted above, do not distinguish between a general and a specific savings clauses, as the majority does.

Instead, as noted before, the generic savings clause in Act 44 -- the same one included in all of the criminal acts in the 2004 legislative session, was plainly intended to prevent ex post facto violations -- not to prevent the sentencing courts from exercising discretion the legislature deemed necessary to interdict an ice epidemic. That in Act 44 the legislature intended merely to clarify what it had already attempted to do via Act 161 is further evidence that it did not expect the amendment to preclude first-time offenders from receiving the treatment deemed necessary.

Finally, assuming arguendo the relevance of the majority's distinction between specific and general savings, the inclusion of the same savings clause within an act does not, in and of itself bar an ameliorative provision from applying retroactively. As demonstrated by Avilla, an ameliorative amendment may be implemented retroactively despite the inclusion of the same "specific" savings clause the majority relies on and despite the fact that the postulated "unitary" criminal prosecution had been initiated before passage of the amendment.

XVII.

Contrary to the majority's position, this dissent's interpretation will not produce "unjust[,]" "inconsistent[,]" or "arbitrary" "outcomes among defendants, which would vary as a function of the vagaries of the scheduling process." Majority opinion at 29, 30. There is nothing "unfair" or "arbitrary" about applying Section 11 in this case, as there was nothing unfair or arbitrary about applying ameliorative provisions in Avilla and Von Geldern, or in the numerous state decisions cited supra, where the subject proceedings took place after the effective date of the statute. The legislative intent was to provide more discretion to the sentencing courts in order to extend drug treatment to a broader group of defendants. See Act 44, pt II, § 9 at 212-13. Under Act 44, these considerations were well within the discretion of the courts to implement insofar as they related to scheduling of sentencing hearings.[56]

The majority insists that the danger of "inconsistent" results is evidenced by Tapp. Majority opinion at 30. Initially, it should be noted that the situation addressed in Tapp is not the case before this court since Reis's sentencing took place after the effective date of the amendment. However, in response to the majority, it may be observed that Tapp concerned two cases in which two defendants were convicted of

[56] This part responds to the majority's argument that this dissent will "produce[] inconsistent and unjust outcomes among defendants[.]" Majority opinion at 28-29.

committing the same crime. One defendant was sentenced prior to the effective date of an ameliorative statute, while the other was sentenced after the effective date. The defendant sentenced after the effective date then reaped the "benefit" of the ameliorative amendment while one sentenced before did not because "the judge followed the law in force and effect at that time." Tapp, 490 P.2d at 335 (concluding that "[a]s to those defendants who were sentenced prior to the amendment, the statute gives no aid" (citation omitted)).

Tapp offered several rationales as supportive of remedial legislation for its decision, recognizing, e.g., that where the legislature has expressed an intent to give a lesser penalty, "the courts should give effect to the enactment . . . [on] the effective date[,]" "to insist on the prior existing harsher penalty is a refusal to accept . . . the [shift in] emphasis from vengeance and punishment to treatment and rehabilitation" and "in case of doubt or uncertainty as to the degree of crime, [the defendant] is entitled to the lesser [penalty.]"[57] Id.

Nevertheless, the majority asserts additional Utah case

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[57] The majority maintains that its application of Section 11 is not "arbitrary" or "unjust[,]" instead it argues that general savings clauses "represent a rule of statutory construction that may yield, and often [do], to more express, specific intent regarding retroactive application of ameliorative amendments." Majority opinion at 32 (citation omitted). This position is plainly not supported by our case law. As discussed earlier, in Von Geldern, this court noted that although it could not find any specific intent in the act itself or within the legislative history, it nevertheless applied the amendment retroactively based on a pattern of legislative behavior. Further, this court in Avilla, even according to the majority reading, applied an ameliorative statute retroactively despite the inclusion of a savings clause within the Act.

law purportedly supports its charge of inconsistency. For example, the Utah Court of Appeals, relying on the same reasons discussed in Tapp, concluded that a "'defendant's actions that delay sentencing are irrelevant' to receiving the benefits of the amended sanctions[,]" majority opinion at 31-32 (citing State v. Patience, 944 P.2d 381, 385 (Utah Ct. App. 1996) (citation omitted)), because it was necessary to apply the "statute in effect at the time of . . . sentencing[,]" Patience, 944 P.2d at 392. The Utah approach is consistent with the general view interpreting savings clauses liberally in the case of ameliorative sentencing statutes, but employing various rationales.

In any event, no inconsistency would result in our jurisdiction because this court has allowed retroactive application of ameliorative sentencing even after prior sentencing has already occurred and while a case is on appeal. See Von Geldern, 64 Haw. at 215, 638 P.2d at 323 (stating that "[w]hen Act 284 became effective, the judgment and sentence of the trial court in the defendant's case was not final since his appeal was still pending" (citation omitted)). As related before, some courts, such as our own, have eschewed a literal interpretation of a savings clause to avoid what the majority characterizes as an "inconsistent" result and have allowed retroactive application of ameliorative amendments, even throughout the appeals process.

XVIII.

The majority claims its "construction of 'proceedings' and 'incurred' ensures the consistent application of justice and avoids potential constitutional infirmity." Majority opinion at 29. To the contrary, (including the reasons discussed supra,) it would be arbitrary and unjust not to apply the ameliorative provisions in this case. As Oliver stated, it would serve "no legitimate purpose[.]" 134 N.E.2d at 203. Further, the California Supreme Court pointed out in Estrada, 408 P.2d at 951, that where the legislature amends a statute to reduce the penalty, the "lighter penalty now deemed to be sufficient should apply[.]"

> When the [l]egislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the [l]egislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. . . . [T]o hold otherwise would be to conclude that the [l]egislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology.

Id. (emphases added). See also State v. Macarelli, 375 A.2d 944, 947 (R.I. 1977) (adopting Oliver's "sound judicial philosophy" because any other interpretation "would amount to nothing more than arbitrary retribution in contravention of the obvious legislative purpose behind the mitigation of the penalty" (emphasis added)).

XIX.

Similarly here, as the court insightfully opined, "the

intent of the legislature [in Act 44] . . . is clear, and that's to give the [c]ourt more discretion in sentencing"; and any other interpretation would amount to "arbitrary retribution" in contradiction to "the obvious legislative purpose[,]" Macarelli, 375 A.2d at 947, of Sections 9 and 11 of Act 44 to "provide the court with discretion in sentencing" to "diver[t offenders] to drug treatment instead of prison" and to find a "solution to cure the ice epidemic." Act 44, pt II, § 9 at 212-13. Where the legislature has created a lesser penalty it is "an inevitable inference that the [l]egislature must have intended" that it apply "to all cases . . . it constitutionally could apply to." Estrada, 408 P.2d at 951.

In the instant case, there is no constitutional obstacle to extending the ameliorative provisions to Reis. To interpret the statute in any other way is to "conclude that the [l]egislature was motivated by a desire for vengeance[,]" id., despite its expressed concern of "treat[ing] the present generation of ice abusers and prevent[ing] future generations from becoming substance abusers," Act 44, § 1 at 204. This is especially true in the case of Reis who appears to be the type of candidate the legislature envisioned would benefit from Act 44. As the court noted, "[s]eparate and apart from the legal issues" it felt "compelled to express [its] disappointment in the State using its prosecutorial discretion" because "this does not appear to be the appropriate case[.]"

The court indicated that "[Reis] has a long and tough road ahead of her" but she has gone to "Queen's," is currently "in a dual-diagnosis program . . . under the supervision [of] Diamond Head Mental Health Clinic and, "that plus the term in jail she did, . . . is exactly what the legislature intended[.]" The court further opined that "under court supervision, people can prove that they are deserving" and "the [c]ourt wants to support [that] . . . I can't imagine either [Reis] or society being better off by me sentencing her as a repeat offender at this time and giving her five years in prison." Therefore, contrary to the majority's contention, precluding the application of remedial provisions to Reis attributes to the legislature an intent to impose "arbitrary retribution" for no legitimate reason within the scope of Act 44.

XX.

Lastly, the majority maintains that its opinion is consistent with Smith and Walker.[58] Majority opinion at 42. In enacting Act 44, the legislature was obviously attempting to reverse the effect of Smith. In Smith, this court held with respect to Act 161 (2002), the prior version of Act 44, "that the repeat offender sentencing laws took precedence over the mandatory requirement to sentence a first-time drug offender to probation." Walker, 106 Hawai'i at 4, 100 P.3d at 598 (emphasis

[58] This part responds to the majority's argument that Walker and Smith are dispositive of the case here, insisting that "in keeping with this court's holdings in Smith . . . and Walker . . . the [court] could not sentence Reis to probation." Majority opinion at 38-39.

added) (citing Smith, supra). This court recognized that "in response to [Smith], the legislature amended HRS § 706-622.5" by way of Act 44. Id.

Walker was not concerned with the ameliorative application of Act 44. Hence, any reference to the retroactive application of Act 44 in Walker must be considered dicta inasmuch as this court said in that case that "our decision in Smith is entirely dispositive of the present matter." Id. at 9, 100 P.3d at 603 (citing Smith, supra) (emphasis added). Walker is further distinguishable from the instant case, as the court noted, because in Walker, "the arrest, the plea, the conviction, sentencing, all took place before Act 44's effective date[.]" Majority opinion at 7. Thus, definitively, the entire case proceeding in Walker was completed prior to the effective date of Act 44, whereas, here, Reis was not sentenced until after Act 44 became effective. Accordingly, neither case dictates the result here.

XXI.

It cannot be plainer then, that this savings clause is not a bar to application of a remedial sentencing provision. The legislature has expressed its intent that persons with prior convictions are not (nor, apparently, were ever intended to be) precluded from the remedial recourse of a probationary sentence for the purpose of drug rehabilitation. Accordingly, I would

affirm the court's sentence.[59]

[59] The majority states that, "[i]n light of our disposition, we need not reach the prosecution's argument, asserting that the separate nature of Reis's two drug-related offense[s] prevented the circuit court from sentencing her to probation as a first-time drug offender, pursuant to HRS § 706-622.5 (Supp. 2004)." Majority opinion at 43 n.32. In that regard, on appeal to this court, the prosecution contends that "even if Act 44 applied retrospectively, [Reis] is not eligible for sentencing under HRS [§] 706-622.5 because she is not a first-time drug offender" inasmuch as "she was being sentenced for offenses committed on different dates and charged in two separate criminal cases." However, the prosecution raises this argument for the first time on appeal. As the prosecution accurately states in its opening brief to this court, in its motions to reconsider before the court, the prosecution "argued that the court's sentence of probation was illegal because although Act 44 allows 'a select class of defendants who are eligible for repeat offender sentencing to be sentenced to probation if specific criteria are met,' in the present case, the dates of the offenses and the dates of the cases were charged were before July 1st, 2004, the effective date of Act 44." (Emphasis added.) At the hearing on the prosecution's motion held on February 22, 2005, the prosecution reiterated the same argument.

In sum, the prosecution's position before the court was solely that because "the dates of the offenses and the dates of the cases were charged were before July 1st, 2004, the effective date of Act 44[,]" Reis should be sentenced as a repeat offender pursuant to HRS § 706-606.5. However, to this court, the prosecution raises the new argument that Reis is not a first-time drug offender within the meaning of HRS § 706-622.5. Consequently, "[a]s a general rule, if a party does not raise an argument at trial, that argument will be deemed to have been waived on appeal; this rule applies in both criminal and civil cases." State v. Moses, 102 Hawai'i 449, 456, 77 P.3d 940, 947 (2003) (citing State v. Ildefonso, 72 Haw. 573, 584, 827 P.2d 648, 655 (1992) ("Our review of the record reveals that [the defendant] did not raise this argument at trial, and thus it is deemed to have been waived."); State v. Hoglund, 71 Haw. 147, 150, 785 P.2d 1311, 1313 (1990) ("Generally, the failure to properly raise an issue at the trial level precludes a party from raising that issue on appeal."); Ass'n of Apartment Owners of Wailea Elua v. Wailea Resort Co., Ltd., 100 Hawai'i 97, 107, 58 P.3d 608, 618 (2002) ("Legal issues not raised in the trial court are ordinarily deemed waived on appeal.")).

Inasmuch as the prosecution's argument that Reis is not a first-time drug offender for purposes of HRS § 706-622.5 is a "new legal theor[y] as to why [it] should have prevailed at trial[,]" id., it should be deemed waived. See State v. Cuntapay, 104 Hawai'i 109, 113 n.9, 85 P.3d 634, 638 n.9 (2004) (recognizing that "the record [did] not indicate that the prosecution raised the issue of abandonment in the circuit court" and, therefore, "waived this point as a matter for appeal" (citing State v. Rodrigues, 67 Haw. 496, 498, 692 P.2d 1156, 1158 (1985)); see also State v. Harada, 98 Hawai'i 18, 30, 41 P.3d 174, 186 (2002) (acknowledging that "[o]n appeal, the prosecution alternatively contends that exigent circumstances at the time the warrant was executed excused the police officers' compliance with HRS § 803-37" but agreeing with the defendant that "the prosecution failed to properly preserve the issue whether there were exigent circumstances and, therefore, has waived the issue" (citing Rodrigues, 67 Haw. at 498, 692 P.2d at 1158)); Rodrigues, 67 Haw. at 498, 692 P.2d at 1158 (stating that "[a] review of the record reveals that the [prosecution] had never presented the issue of exigent circumstances, nor the issue of a 'good faith' exception to the exclusionary rule to the trial court" and these issues were deemed waived).