

DISSENTING OPINION BY ACOBA, J.,  
IN WHICH MOON, C.J., JOINS

I respectfully dissent and would accept certiorari herein because under the standards set forth in State v. Balanza, 93 Hawai'i 279, 1 P.3d 281 (2000), and State v. Davalos, 113 Hawai'i 385, 153 P.3d 456 (2007), there was insufficient evidence to support the determinations of the first circuit court (the court) that (1) Petitioner/Defendant-Appellant Yvonne McMillen (Petitioner) made an offer or an agreement (as the court concluded) to sell methamphetamine and (2) Petitioner's actions did not fall under the "procuring agent" defense. Therefore, respectfully, the court erred as a matter of law in concluding that Petitioner was guilty beyond a reasonable doubt of methamphetamine trafficking in the second degree.

I.

A.

Petitioner was charged with Methamphetamine Trafficking in the Second Degree under Act 230, Section 4, Session Laws of Hawai'i, Regular Session of 2006, now codified as Hawai'i Revised Statutes (HRS) § 712-1240.8 (Supp. 2007). HRS § 712-1240.8, which is identical to Act 230, Section 4, provides that "[a] person commits the offense of methamphetamine trafficking in the second degree if the person knowingly distributes methamphetamine in any amount." (Emphasis added.) As Petitioner points out, in order to establish guilt, Respondent/Plaintiff-Appellee State of Hawai'i (Respondent) must

"adduce sufficient evidence to support each and every element of the charged offense beyond a reasonable doubt." (Citing HRS § 701-114 (1993).)<sup>1</sup> Under HRS § 712-1240 (Supp. 2007), which provides the definitions for that section, "[t]o distribute" means "to sell, transfer, prescribe, give, or deliver to another, or to leave, barter, or exchange with another, or to offer or agree to do the same."

Additionally, in this case, the burden was on Respondent to disprove the defense of procuring agent beyond a reasonable doubt. As this court recognized in Davalos,

[t]he procuring agent defense is not an affirmative defense. See HRS § 701-115(3) (1993) (explaining that "a defense is an affirmative defense if: (a) it is specifically so designated by the Hawai'i Penal Code or another statute; or (b) if the Code or another statute plainly requires the defendant to prove the defense by a preponderance of the evidence"). Hence, like all non-affirmative defenses, the prosecution must disprove the defense beyond a reasonable doubt. See Commentary to HRS § 701-115 (1993) (Explaining that the Hawai'i Penal Code "places an initial burden on the defendant to come forward with some credible evidence of facts constituting the defense, unless . . . those facts are supplied by the prosecution's witnesses. As to the burden of persuasion, . . . in the case of defenses which are not affirmative, the defendant need only raise a reasonable doubt as to the defendant's guilt.").

Davalos, 113 Hawai'i at 387 n.6, 153 P.3d at 458 n.6 (brackets omitted) (emphases added).

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<sup>1</sup> HRS § 701-114 provides in relevant part that:

(1) Except as otherwise provided in section 701-115, no person may be convicted of an offense unless the following are proved beyond a reasonable doubt:

- (a) Each element of the offense;
- (b) The state of mind required to establish each element of the offense;

(2) In the absence of the proof required by subsection (1), the innocence of the defendant is presumed.

B.

Assuming that deference is owed to the court's findings,<sup>2</sup> the court made the following relevant findings of fact:

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<sup>2</sup> It is important to note that in this case Petitioner and Respondent agreed to proceed without a jury and upon a stipulated record consisting of the transcript from the probable cause hearing and affidavits submitted by the various law enforcement personnel associated with the buy/bust operation. Therefore, the court did not have the benefit of live testimony, and, thus, it would be appropriate for this court to step into the shoes of the trial judge and review the record de novo.

In criminal cases, states have held that "findings based on documentary evidence available to an appellate court are not entitled to deference[,] because the trial court judge "is in no better position" than the appellate court to evaluate the evidence. Commonwealth v. Novo, 812 N.E.2d 1169, 1173 (Mass. 2004) (reviewing documentary evidence de novo to determine whether criminal confession was coerced). See also People v. Falbe, 727 N.E.2d 200, 203 (Ill. 2000) ("Since neither the facts nor the credibility of witnesses is contested, the constitutional issue having come before the circuit court on stipulated facts, a purely legal question is presented for which de novo review is appropriate."); State v. Schmitter, 933 P.2d 762, 766 (Kan. App. 1997) ("Because the instant case was decided on stipulated facts, this court exercises de novo review."); State v. Binette, 33 S.W.3d 215, 217 (Tenn. 2000) (stating that "when a trial court's findings of fact on a motion to suppress are based solely on evidence that does not involve issues of credibility, appellate courts are just as capable to review the evidence and draw their own conclusions"); State v. Rowe, 609 P.2d 1348, 1349 (Wash. 1980) (noting that "trial court's findings stem exclusively from the stipulation and attached standards rather than from the testimony of witnesses[,] and that court was "therefore not bound by the findings"); State v. Shepherd, 41 P.3d 1235, 1237-38 (Wash. App. 2002) (concluding that de novo review was appropriate because "conviction rest[ed] upon stipulated facts and exhibits" and "[t]he court considered no live testimony in concluding that [defendant] was guilty").

However, some states and circuit courts, relying on civil rules and cases, have held that findings made by the trial court on the basis of a written record, without live testimony, are reviewed under a deferential standard. E.g., United States v. Stevenson, 396 F.3d 538, 543 (4th Cir. 2005); United States v. Cheshier, 678 F.2d 1353, 1358 (9th Cir. 1982); United States v. Jabara, 644 F.2d 574, 577 (6th Cir. 1981); State v. Shellito, 594 N.W.2d 182 (Minn. App. 1999). However, in Shellito, the Minnesota Court of Appeals applied a deferential standard to the trial court's findings based on a videotape. Unlike the case at bar, in Shellito, the trial court did hear live testimony. 594 N.W.2d at 186. Therefore, in that case, deference to the trial court's findings was appropriate because the trial court had the opportunity to weigh witness credibility. Shellito is further distinguishable because it relied on Minnesota Rule of Civil Procedure Rule 52.01, which states that "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous[.]" (Emphasis added). 594 N.W.2d at 186. But, by contrast, Hawai'i Rules of Civil Procedure (HRCP) Rule 52 states that "[f]indings of fact shall not be set aside unless clearly erroneous," without the qualification that this standard is to be applied whether the findings are based on "oral or documentary evidence."

1. Officer Joselito Obena [(Obena)] of the Honolulu Police Department's Narcotics Vice Division was working in an undercover capacity on August 8, 2006 at approximately 9:30 in the evening.
2. [Obena] was traveling in an unmarked vehicle with Detective Howard Fu [(Fu)], also of the Honolulu Police Department's Narcotics Vice Division.
3. Both [Obena] and [Fu] were dressed in plain clothes.
4. In the area of Mahoe and Waipahu streets, the two were approached by [Petitioner].
5. [Obena] asked [Petitioner] if anyone was selling.
6. [Petitioner] stated that she did not have the drug with her but her line was expected to arrive at 10 pm.
7. "Line" is street vernacular for supply.
8. [Petitioner] asked [Obena] how much he wanted.
9. [Obena] said "hundred" which is street vernacular for \$100 worth of [m]ethamphetamine.
10. [Petitioner] told [Obena] to come back around 10 pm.
11. [Obena] told [Petitioner] that he would come back at 10pm.
12. [Obena] returned to the scene at 10pm with [Fu].
13. [Obena] noticed approximately four males gathered in front of [t]he [s]hack located at 94-1133 Waipahu [S]treet.
14. [Petitioner] again approached [Obena] and explained that the line hadn't arrived yet.
15. [Petitioner] said that she would check with a group of nearby males to see if they had methamphetamine to sell.
16. [Petitioner] approached the above referenced males; among them was the co-[d]efendant in this case Jorden Kuoha [(Kuoha)].
17. Kuoha then approached [Obena] and asked him if he was looking for a hundred.
18. [Obena] informed Kuoha that he was looking.
19. Kuoha demanded the money up front and stated he would go and pick up the drugs.
20. Kuoha took the \$100 from [Obena] and headed back towards [t]he [s]hack.
21. Within minutes, Kuoha returned and presented [Obena] with a pink plastic packet containing a crystalline substance resembling [m]ethamphetamine.

(Emphases added.) Findings of fact are generally reviewed on appeal under the "clearly erroneous" standard.<sup>3</sup>

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<sup>3</sup> As discussed supra note 2, because this case was decided upon a stipulated record, it is more appropriate for this court to review the facts under the de novo standard. Under that formulation, this court would review the record de novo. That means that the court's findings that Petitioner entered into an agreement to sell and that she was not acting as a procuring agent would both be subject to de novo review.

Nevertheless, even applying a deferential standard, as discussed infra, there was insufficient evidence to support the conviction, looking solely at the court's findings. Additionally, there were other relevant facts in the record, not recognized in the court's findings, which support a determination that Petitioner was acting as a procuring agent and not on  
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A [finding of fact] is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made. Substantial evidence is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion.

Office of Hawaiian Affairs v. Housing & Cmty. Dev. Corp. of Hawaii (HCDCH), 117 Hawai'i 174, 189, 177 P.3d 884, 899 (2008).

In its conclusions of law, the court stated that

4. [Petitioner] entered into an agreement to distribute methamphetamine[;]
5. Unlike Balanza, [Petitioner's] conduct in this case was not that of a mere procuring agent as she participated in the negotiation of the sale[;] and]
6. Unlike [Davalos], the court entertained argument of the procuring agent defense and concluded that [Petitioner's] actions were not undertaken in an effort to partake in the usage of the product sold.

(Emphases added.) "A trial court's conclusions of law are reviewed de novo, under the right/wrong standard of review." State v. Kido, 109 Hawai'i 458, 461-62, 128 P.3d 340, 343-44 (2006) (quoting Child Support Enforcement Agency v. Roe, 96 Hawai'i 1, 11, 25 P.3d 60, 70 (2001)). Therefore, this court will review de novo the court's interpretations of the law.

The court determined as to Methamphetamine Trafficking in the Second Degree, "that each and every material allegation of the offense charged has been proven beyond a reasonable doubt." In reviewing a guilty determination, "[t]he test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion

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<sup>3</sup>...continue

behalf of the seller. If reviewing the entirety of the record de novo as would other states, I would have to conclude that the court was wrong to decide that Petitioner entered into an agreement to sell and that she was not acting as a procuring agent.

of the trier of fact." State v. Souza, 119 Hawai'i 60, 72, 193 P.3d 1260, 1272 (App. 2008) (quoting State v. Richie, 88 Hawai'i 19, 33, 960 P.2d 1227, 1241 (1998) (citation omitted)).

Substantial evidence has been defined "as credible evidence which is of sufficient quality and probative value to enable a [person] of reasonable caution to support a conclusion.'" Balanza, 93 Hawai'i at 283, 1 P.3d at 285.

## II.

Petitioner in this case argued that she was, at most, acting as a procuring agent. It has become a well-established principle that "[t]he procuring agent defense [is] available where the defendant is charged with the sale of drugs[,] because "the act of buying is not included in distributing." Id. at 286, 1 P.3d at 288. As this court stated in Balanza, "[t]he principle behind the procuring agent defense is that 'one who acts merely as a procuring agent for the buyer is a principal in the purchase, not the sale, and, therefore, can be held liable only to the extent that the purchaser is held liable.'" Id. at 285, 1 P.3d at 287 (quoting State v. Reed, 77 Hawai'i 72, 79, 881 P.2d 1218, 1225 (1994)) (emphasis added).

As described by this court, the facts in Balanza consisted of the following:

[1 The undercover officer] approached Balanza, who was sitting on another planter. When [the officer] made eye contact, Balanza said, "Howzit." [The officer] returned the greeting and asked where he could buy drugs. [2] Balanza asked [the officer] what he wanted and [the officer] indicated that he wanted rock cocaine. Balanza then asked [the officer] if he was a police officer; [the officer] said that he was not and asked Balanza if he was a police

officer. [3] Balanza said that he was not, and then pointed toward [the sellers], who were standing together, and said, "He get[.]" [4] Balanza called out to [one of the sellers] and motioned for him to come over. Balanza told [the seller], "He like pick up."

Id. at 282, 1 P.3d at 284 (emphases added). Further, (5) at that point, the two sellers engaged in negotiations with the officer over the purchase price, exchanged money and the cocaine, and the sellers walked off. Id. This court emphasized that "Balanza did not participate in the negotiation of the purchase price and quantity, nor did he come into physical contact with the money or the cocaine." Id. at 287-88, 1 P.3d at 289-90. It was concluded that "the evidence adduced at trial did not support an inference that Balanza was acting on behalf of the seller in promoting the sale of cocaine[,]" and, therefore, "[t]here was insufficient evidence to support Balanza's conviction of promoting a dangerous drug in the second degree." Id. at 288, 1 P.3d at 290 (emphasis added).

### III.

I note, first, that the court's determinations of law apparently misapply our cases construing the procuring agent defense. In determining whether Petitioner was acting on behalf of the buyer or the seller, in its Conclusion 5, the court decided that Petitioner, "[u]nlike [in] Balanza," was not acting as "a mere procuring agent[,]" as she participated in the negotiation of the sale." (Emphasis added.) Seemingly the court concluded that a defendant's participation in negotiations forecloses the procuring agent defense. The ICA apparently

agreed with that determination on appeal, stating in its SDO that "[Petitioner] did not merely help [Obena] locate methamphetamine. [Petitioner] negotiated the sale with [Obena], resulting in an agreement to sell methamphetamine to [Obena]." State v. McMillen, No. 28768, 2008 WL 2898227, at \*1 (Haw. App. 2008) (emphasis added).

However, this court in Davalos clarified that "the reference in Balanza to . . . not participating in the negotiation of the transaction, or coming into contact with the money or the drugs[,] "should not be interpreted as setting rigid requirements for satisfying the procuring agent test." 113 Hawai'i at 392, 153 P.3d at 463. Davalos held that "the question of whether a defendant was acting on the seller's behalf rests in the specific facts of the case." Id. (emphasis added). Hence, although in Davalos, the petitioner had participated in the negotiation and handled both the money and the drugs, "[t]he evidence arguably conflicted as to whether [the p]etitioner was acting on behalf of [the officer] and himself as buyers when he handed the drugs to [the officer], or on behalf of [the seller] as an agent of the drug seller[,] " and therefore, "the court was wrong in refusing the procuring agent instruction." Id. at 392-93, 153 P.3d at 463-64.

Consequently, under Davalos, although, as described infra, Petitioner's actions in this case should not necessarily be construed as a "negotiation," whether or not Petitioner

participated in negotiations is not conclusive as to whether she was acting on behalf of the buyer or the seller. It is the totality of the circumstances that is to be considered when determining whether the government has proved beyond a reasonable doubt that the defendant was not acting as a procuring agent; therefore, the court's conclusion that Petitioner was not acting as a "mere procuring agent" because "she participated in the negotiation of the sale[,]'" is a misapplication of the law as it was propounded by this court in Davalos.

Furthermore, the court also erred in distinguishing this case from Davalos by "conclud[ing] that [Petitioner's] actions were not undertaken in an effort to partake in the usage of the product sold." (Emphasis added.) The court's conclusions 5 and 6 indicate that the court interpreted Davalos as holding that, where there is evidence of negotiations, the evidence must also show that the defendant intended to share the drugs with the buyer via a joint purchase in order to prove a procuring agent defense. Although in Davalos, the petitioner's interest in partaking in the drugs would have likely been an important factor for the jury to consider in determining whether he was acting on behalf of the buyer or the seller, as stated supra, "the question of whether a defendant was acting on the seller's behalf or on the purchaser's behalf rests on the specific facts of the case." Davalos, 113 Hawai'i at 392, 153 P.3d at 463. Davalos did not hold that negotiations must be coupled with an express interest

on the part of the defendant in partaking in the drugs in order to satisfy the procuring agent defense, but that, based on the circumstances of any particular case, a negotiation in and of itself does not mean that the defendant was necessarily acting on behalf of the seller.

Thus, contrary to the court's conclusions, the appropriate standard for determining whether Petitioner was acting as a procuring agent is whether, looking at all of the relevant facts, Petitioner was acting on behalf of the buyer or the seller. If Petitioner was acting on behalf of the buyer, then there was insufficient evidence as a matter of law that she offered or entered into an agreement to sell to Obena.

#### IV.

##### A.

Second, I observe that even deferring to the court's findings of fact, this case is factually analogous to Balanza, in which the evidence was held by this court to be insufficient as a matter of law. According to the court's findings in this case, (1) Petitioner approached the undercover vehicle and "[Obena] asked [Petitioner] if anyone was selling." This is similar to the initial interaction in Balanza, wherein Balanza and the officer made some type of initiating interaction, followed by the officer's request to buy. In this case, Petitioner (2) asked Obena "how much he wanted," to which Obena responded "hundred," which, according to the findings, "is street vernacular for \$100

worth of [m]ethamphetamine."<sup>4</sup> Thus, like Balanza, who discovered that the officer sought "rock cocaine" by asking what he wanted, Petitioner in this case obtained information about what the officer was looking to buy. Further, (3) Petitioner informed Obena that "she did not have the drug with her but her line [or supply] was expected to arrive at 10pm." Similarly, in Balanza, Balanza informed the officers that he did not have the drugs and that someone else did by pointing to the sellers and stating "he get."

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<sup>4</sup> There was disputed testimony over the meaning of "hundred." According to Obena's affidavit, "[h]undred is street vernacular for one hundred dollars worth of [m]ethamphetamine, commonly used when purchasing [m]ethamphetamine." (Emphasis added.) Similarly, according to Officer Fu, "hundred" is a street vernacular for [o]ne [h]undred [d]ollars [\$100.00] worth and commonly used when buying [m]ethamphetamine." (Emphasis added.)

However, Lieutenant David C. Passmore (Passmore), the Operation Supervisor for the buy/bust operation, testified that "'[a] hundred' is street vernacular for \$100.00 worth of illegal drugs." (Emphasis added.) Similarly, according to Officer Paul Wood (Wood), "'hundred' [is] a street term asking to purchase hundred dollars worth of narcotics." (Emphasis added.) Despite the fact that the court did not have the benefit of live testimony, it apparently adopted Obena's version of the term "hundred." However, the other officers also overheard the entire interaction, and therefore, evidence based on those officers' testimony must also be considered.

On this point, it is unclear why Officers Obena's and Fu's statements, rather than Lieutenant Passmore's and Officer Wood's, should be accepted as to the meaning of "hundred," especially considering that Passmore was the Operation Supervisor. While Officers Obena and Fu interacted with Petitioner first hand, that fact has no relevance to the definition of a vernacular term. Moreover, neither Obena nor Fu definitively claimed that "hundred" always is associated with methamphetamine, but only that it is "commonly used." It is worth noting that, from the officers' testimony, it is far from established that the meaning of "hundred" only pertains to methamphetamine, especially considering the beyond a reasonable doubt standard that the court must apply and the differing testimony of the officers.

If, as discussed supra note 2, a de novo standard were applied to the facts, I would conclude that the court was wrong to rule under the beyond a reasonable doubt standard that Petitioner was guilty of methamphetamine trafficking in the second degree, absent clear evidence that the term "hundred" did in fact mean methamphetamine, as opposed to some other illicit drug. That can be the only reasonable conclusion to draw in light of the reports of Lieutenant Passmore and Officer Wood, who referred to "hundred" as "illegal drugs," without limiting that term to methamphetamine.

B.

From that initial interaction alone, and based solely on the findings made by the court, there is no evidence that would lead "a person of reasonable caution," Balanza, 93 Hawai'i at 283, 1 P.3d at 285, to conclude that Petitioner entered into an agreement to sell drugs to the officers, rather than offering to assist in the procurement of the drugs. In concluding that Petitioner in this case in fact entered into an agreement to sell, rather than to facilitate a purchase, the court seems to have relied on the distinction that Petitioner, unlike the petitioner in Balanza, actually negotiated with the officer. The court stated in its conclusions of law that "[u]nlike Balanza, [Petitioner's] conduct in this case was not that of a mere procuring agent as she participated in the negotiation of the sale." (Emphasis added.)

The only action on Petitioner's part that could be encompassed by the court's statement, was her question to Obena of "how much?" In Balanza, the petitioner asked what kind of drugs the officer wanted. However, the court in this case found that the officer's response to that question, "'hundred[,]'. . . is street vernacular for \$100 worth of [m]ethamphetamine." Therefore, in asking "how much," under the findings made by the court, Petitioner was in effect asking what kind of drug the officer wanted to buy, just as in Balanza. The result of the interaction in each case, was to ascertain what the officer

sought to procure. Therefore, to construe a query as to the type or quantity of drug sought, without more, as "negotiation," would lead to conviction of those who were only acting on behalf of the buyer.

Moreover, as explained supra, in Davalos, this court rejected application of a per se rule as to whether or not the defendant engaged in "negotiations[,]'" recognizing that such activity is not determinative of whether the defendant was acting on behalf of the buyer or the seller. Instead, this court propounded a totality-of-the circumstances test, wherein each conviction should turn on the particular facts of the case.

C.

Based on the foregoing, there is no indication from Petitioner's first interaction with Obena in and of itself that Petitioner was acting on behalf of some unknown seller. The facts, as found by the court, support nothing more than a conclusion that Petitioner discovered that Obena was looking to purchase drugs, purportedly methamphetamine, and related to him that the area supplier should be arriving soon. At that point in the interaction, that was all that the evidence related. Therefore, the circumstances of Petitioner's initial interaction with the officers, even looked at in the light most favorable to Respondent, would be inadequate as a matter of law in the eyes of a reasonably cautious person, to prove that Petitioner offered to

sell or entered into an agreement to sell to Obena, as the court concluded.

V.

Looking again solely at the facts found by the court, Petitioner's subsequent interaction with Obena supports the inference that she only assisted him to purchase drugs, and is analogous to above-stated facts (4) and (5) from Balanza. According to the court's findings, "Obena returned to the scene at 10pm" and "[Petitioner] again approached [Obena] and explained that the line hadn't arrived yet." She then "said she would check with a group of nearby males to see if they had methamphetamine to sell[;]" "among [the group] was the co-[d]efendant in this case [Kuoha];"<sup>5</sup> and "Kuoha then approached [Obena] and asked him if he was looking for a hundred."

Analogizing to Balanza, this is akin to when "Balanza called out to [one of the sellers] and motioned for him to come over" and "told [the seller], "[h]e (the officer) like pick up." In this case, at the most, like Balanza, it may be inferred Petitioner informed the seller, Kuoha, that Obena was looking to "pick up." What happened next in both cases is virtually identical. In this case Kuoha approached Obena, discussed the

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<sup>5</sup> As described more fully infra, although not acknowledged by the court's findings, there is undisputed evidence in the record that none of the officers could hear what was said between Petitioner and the group of males in which Kuoha was standing. Therefore, it can be inferred only that Petitioner may have informed the group of what the officers were looking for, but not that she was a participant in the subsequent sale by Kuoha.

amount of drugs, took Obena's money, went back over to the shack, returned with the drugs, and then returned to the shack. This is just like in Balanza, wherein the sellers negotiated with the officer over the price, exchanged the money and the drugs, and then walked off. Petitioner, like Balanza, had no involvement with the transaction in which the sale was negotiated and made by Kuoha.

As demonstrated in the court's findings, Kuoha was the sole actor who negotiated and orchestrated the sale. In fact, several of the court's findings, all those having to do with the sale, all make reference to Kuoha, but not Petitioner. Thus, it was Kuoha who "approached [Obena] and asked him if he was looking for a hundred." It was Kuoha who "demanded the money up front and stated he would go and pick up the drugs"; "took the \$100 from [Obena] and headed back towards [t]he [s]hack"; and "returned and presented [Obena] with a pink plastic packet containing a crystalline substance resembling [m]ethamphetamine." It is undisputed that Petitioner was not involved in any of those actions, and, accordingly, the court's findings regarding the actual sale make no mention of Petitioner.

Additionally, the second interaction makes manifest that Petitioner did not ever offer or agree to sell to Obena, but only assisted in procuring drugs. Like the petitioner in Balanza, "[a]t no time did [Petitioner] handle the purchase money or the [drugs,]" nor was she found with any drugs or money on her

person indicating that she may have "participate[d] in the negotiation of the [sale]." <sup>6</sup> See 93 Hawai'i at 287, 1 P.3d at 289.

VI.

Third, I note that based on the totality of the circumstances in this case, there was insufficient evidence as a matter of law that Respondent met its burden of disproving the procuring agent defense beyond a reasonable doubt. See Davalos, 113 Hawai'i at 387 n.6, 153 P.3d at 458 n.6 (recognizing that "[t]he procuring agent defense is not an affirmative defense" and "[h]ence, like all non-affirmative defenses, the prosecution must disprove the defense beyond a reasonable doubt"). Respectfully, in concluding that Petitioner "entered into an agreement to distribute [m]ethamphetamine" and that she was "not . . . a mere

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<sup>6</sup> The testimony of Lieutenant Passmore, who apparently overheard the entire interaction over the radio, makes Petitioner's potential involvement as a distributor appear to be even more tenuous. According to Passmore, Obena informed Petitioner that he wanted to "pick up," Petitioner asked Obena how much he wanted, to which Obena responded "a hundred." Passmore testified that Petitioner then "related that she didn't think that anyone had that much over here, but 'the line' was coming at 10" and to "come back." (Emphasis added.) That interaction reveals that Petitioner was not seeking to sell on behalf of any individual, as she was aware that he would be unable to obtain "a hundred" from anyone at "the shack" at that time.

Passmore related that when Obena returned, he spoke with Petitioner "about the guy not here yet so [Obena] told her that he would just wait" and that Petitioner then told Obena "that she would be over there and [Obena] relayed to the arrest team that the female went to the 'shack.'" Based on Passmore's testimony, it appears that at that point, Petitioner anticipated that Obena was waiting for the "line" in order to procure "a hundred."

Passmore testified that a few minutes later, "Obena was approached by a male" who asked "Obena if he wanted a 'hundred,'" and "told Obena to give him the money." Upon returning with the drugs, apparently Obena complained that "this doesn't look like a hundred, it looks more like forty." That interaction would apparently indicate that Petitioner was correct in her initial assumption that none of the people at the shack had "a hundred." Passmore's depiction of the events makes it apparent that Petitioner was not acting on behalf of any particular seller.

procuring agent," several salient facts in the record were not rendered as findings, all of which facts would cast doubt on the court's conclusion that Petitioner made an offer or "agreement to distribute," and instead support a conclusion that Respondent failed to adduce sufficient evidence to overcome the procuring agent defense.<sup>7</sup>

A.

The findings are absent of any reference to the fact that, according to Obena's uncontroverted testimony, it was Obena who initiated contact with Petitioner. Obena testified that he "must have made some kinda' contact or said something . . . to have [Petitioner] come over to me . . . . I must have said something like some kinda' noise like . . . [t]o get her attention." Therefore, the court's findings that the officers were "traveling in an unmarked vehicle" and then "[i]n the area of Mahoe and Waipahu streets, the two were approached by [Petitioner,]" (emphasis added), are misleading, as those findings clash with the fact that Petitioner did not initiate the interaction. Obena's testimony is uncontradicted by the other officers and thereby establishes that Petitioner approached the

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<sup>7</sup> As discussed supra note 2, based on the fact that this was a stipulated fact hearing, a de novo standard of review is appropriate. Furthermore, because it appears that the court failed to look at the totality of the facts in finding that Petitioner was not acting as a procuring agent, but rather relied on what it interpreted to be limited standards from Balanza and Davalos, it is appropriate for this court to review the record using the correct legal standard. Therefore, based on the totality of the facts discussed herein, both those found by the court and those not acknowledged, I would conclude that the court was wrong in determining that Petitioner was not acting as a procuring agent and entered into an agreement to sell to Obena.

vehicle in response to some initiating conduct on the part of Obena. There is no evidence that she otherwise would have approached the vehicle. Relatedly, the court also did not take notice of the fact that, according to Obena's testimony at the probable cause hearing, Petitioner was by herself outside her own home when the officers first approached the area and again when they returned, making it likely that she was in the area because she resided there.

B.

The findings are also silent as to three important facts relative to Petitioner's second interaction with Obena, which occurred when Obena returned at 10 p.m. First, the court does not mention in its findings that, according to Obena's testimony, Petitioner's conversation with the men standing outside the shack was not audible to the officers. As Obena admitted in his testimony at the probable cause hearing, he did not know whether Petitioner told Kuoha to approach the car:

[Defense Counsel]: So, can we say with some reasonable certainty on your part that you don't know if [Petitioner] told [Kuoha] to come over to the vehicle?

[Obena]: No.

[Defense Counsel]: You don't know that, right?

[Obena]: I don't know that.

Therefore, what was communicated by Petitioner regarding Obena's request to a potential seller, is not in the evidence. Hence, it is mere speculation as to what information, if any, Petitioner actually passed along to Kuoha and for what reason.

Second, the court did not take any notice of the fact that, according to the officers' sworn testimony, somewhere between ten and twenty-five minutes passed between the time that Petitioner approached the group outside the shack and the time that Kuoha approached the vehicle to offer to sell to Obena.<sup>8</sup> The lengthy lapse in time makes it unlikely that Petitioner approached the group intent on making a sale happen.

Third, the court did not make any findings regarding the officers' testimony that when Kuoha returned to the shack, he did not interact with Petitioner, or with the group with whom she was standing.<sup>9</sup> That testimony further indicates that Petitioner was not involved in the sale.

#### VII.

Viewing the totality of the circumstances as compared to those in Balanza, as discussed supra, there is no indication that Petitioner was acting on behalf of the seller, any more than Balanza was, in Balanza. In fact, there were several

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<sup>8</sup> Testimony on this point varies. Obena claimed at the probable cause hearing that Petitioner spoke with the men for "about ten, fifteen minutes" before Kuoha approached. In his sworn affidavit, however, he indicated that about 25 minutes passed from the time he and Officer Fu arrived back on the scene, soon after which Petitioner approached the vehicle, and the time that Kuoha approached Obena. Officer Fu also indicated that he and Obena returned to the scene at around 10pm, after which Petitioner approached, and then at about 10:25pm, Kuoha approached the vehicle.

<sup>9</sup> Again, the testimony on this point varies slightly, but is consistent in that it is undisputed that Kuoha had no subsequent interaction with Petitioner. According to Obena, he "didn't see [Kuoha] go back to the shack, but I saw him in the front by the truck . . . parked on the side of the shack." Obena further testified that he did not see Kuoha get the drugs from Petitioner. According to Officer Wood's affidavit, after his interaction with Obena, "[Kuoha] walked back over to [the shack] and met with an unknown person," (emphasis added) prior to returning with the drugs.

distinguishing facts in Balanza that actually make Balanza's case a weaker one for the procuring agent defense than Petitioner's:

(1) Balanza was interacting with the sellers even before the officer approached.

In Balanza, before the officer ever approached Balanza, the officers "observed three men, later identified as Balanza and codefendants Albert Brady and Ricky Moore [the sellers], speaking to each other." 93 Hawai'i at 282, 1 P.3d at 284. On the other hand, Petitioner in this case was not ever seen to interact with "the line" and did not approach anyone who might be construed as a "seller" until after Obena indicated that he would like to find some drugs.

(2) Balanza, while sitting on a planter in Waikiki nearby the sellers, initiated the conversation with the officer, who to Balanza was a total stranger walking down the street in a crowded area.

By contrast, Petitioner was outside her own home when the officers approached across the street, and, according to Obena's testimony, as explained supra, he did something to "get her attention," only after which she approached the car. Moreover, Obena initiated the conversation. Therefore, any evidence that Petitioner might have been on the street looking to sell was non-existent.

(3) Balanza physically pointed to the sellers and physically brought the buyer and the sellers together.

There is no evidence that Petitioner in this case ever definitively identified a seller with whom Obena could complete

the transaction, or eventually brought the buyer and the seller together. Although she referred generally to "the line[,]" there was never any evidence that she actually communicated with the line. Balanza, while he was within the purview of the officer, actually "called out" to the sellers and was audibly heard to tell the sellers that the officer was looking for drugs, 93 Hawai'i at 282, 1 P.3d at 284, whereas here, Petitioner's interactions with Kuoha, as with the rest of the group in front of "the shack," were completely unknown and inaudible to the officers.

(4) Balanza was present for the negotiation and sale.

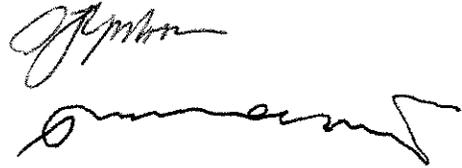
There is plainly no evidence that Petitioner is linked to the actual negotiation of the transaction and the sale in this case.

Based upon the foregoing totality of the circumstances, the "specific facts" of this case fall even below the standard of criminal liability established in Balanza. On principle, inasmuch as this court reversed Balanza's conviction, the same result should be a foregone conclusion in this case inasmuch as this court should rule consistent with its precedent.

#### VIII.

In sum, from the viewpoint of "a person of reasonable caution," Balanza, 93 Hawai'i at 283, 1 P.3d at 285, there was insufficient evidence in this case to support a conviction based on an offer to sell or, as the court found, "an agreement" to sell methamphetamine. Consequently, as in Balanza, Petitioner's

conviction for Methamphetamine Trafficking in the Second Degree  
should be reversed.

Two handwritten signatures in black ink. The top signature is cursive and appears to read 'H. M. ...'. The bottom signature is also cursive and appears to read 'J. ...'.