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No. CAAP-23-0000063

IN THE INTERMEDIATE COURT OF APPEALS
STATE OF HAWAII

STATE OF HAWAII Plaintiff-Appellant/ Cross-Appellee vs. ALVIN TRAN Defendant-Appellee/ Cross-Appellant	1CPC-20-0000890 APPEAL FROM THE FIRST CIRCUIT COURT FOR THE STATE OF HAWAII HON. CATHERINE H. REMIGIO OPENING BRIEF APPENDICES A & B

DEFENDANT-APPELLEE/CROSS-APPELLANT TRAN'S

OPENING BRIEF

&

APPENDICES A & B

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INTRODUCTION

1. *State v. Arceo*, 84 Hawaii 1, 27–33, 928 P.2d 843, 869–875 (Haw. 1996), holds that the Hawaii Constitution's due process and jury trial clauses require a trial jury to be unanimous about the particular act that constitutes the conduct element of a single-act offense, when the accusation against the defendant embraces several acts and any of them suffices to constitute the charged crime. *State v. Rabago*, 103 Hawaii 236, 81 P.3d 1151 (Haw. 2003), applied *Arceo*'s rule to the offense of continuous sexual assault of a minor under the age of fourteen (u14csa), then codified at HRS §707-733.5 (2002), now codified at HRS §707-733.6 (2006). Instead of consisting of just a single act, u14csa's conduct element consists of a series of "three or more acts of sexual penetration or sexual contact" with the same minor.[1] HRS §707-733.5(1)(b). *Rabago* held that, if the allegations against the accused embrace more than the minimal three acts, then the *Arceo* rule requires jury unanimity as to the series of acts constituting u14csa's conduct element, because "any combination of" at least three acts suffices to "constitute the crime." *Rabago*, 103 Hawaii at 252–254, 81 P.3d at 1167–1169.

As a corollary to that holding, *Rabago* also held that HRS §707-733.5(2) was invalid. *Rabago*, 103 Hawaii at 254, 81 P.3d at 1169. Section 707-733.5(2) sought to turn off *Arceo*'s rule in u14csa cases by providing that the jury "need unanimously agree only that the requisite number of acts have occurred, … not … which acts constitute the requisite" series of at least three acts. HRS §707-733.5(2). This provision's inconsistency with *Arceo*'s rule rendered it unconstitutional as a matter of state constitutional law, so *Ragabo* struck it down. *Rabago*, 103 Hawaii at 254, 81 P.3d at 1169.

In *Rabago*'s wake, the legislature successfully promulgated article I, section 25 of the Hawaii Constitution to undo it. Section 25 provides: "In continuous sexual assault crimes against minors younger than fourteen years of age, the legislature may define: (1) what behavior constitutes a continuing course of conduct; and (2) what constitutes the jury unanimity that is required for a conviction." Haw. Const. art. I, §25 (2006). The purpose and object of the amendment was to "make it easier to prosecute those who repeatedly sexually assault a child" because, under *Rabago*, it is too "difficult to prosecute those who repeatedly assault a child."

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[1] In this brief, quotations frequently are silently cleaned up in minor ways that do not affect sense, by altering immaterial typographic choices—such as changing capitalization and changing "1." to (1), or eliding internal quotation marks, brackets, and the like—or by shifting tense, number, or pronouns. The goal is to ease reading the brief, not to mislead the State or this Court.

State v. Young, 150 Hawaii 365, 373, 502 P.3d 45, 53 (Haw. Ct. App. 2021) (quoting the amendment's legislative history). That rationale—given *Arceo*'s and *Rabago*'s grounding in the Hawaii Constitution's due process a jury trial clauses—amounts to saying that we need to dilute child molesters' due process and jury trial rights, because if we give them the same amount of due process we give everyone else, and make their trials as fair as those for others, then we can't prove they are child molesters.

The same legislative session that saw adoption of §25(2) also repealed §707-733.5 and enacted the present u14csa statute, section 707-733.6, which differs from its predecessor only in immaterial ways. The conduct element of the offense remains "three or more acts of sexual penetration or sexual contact." HRS §707-733.6(1)(b). And the statute again provides that, "to convict under this section, the trier of fact, if a jury, need unanimously agree only that the requisite number of acts have occurred; the jury need not agree on which acts constitute the requisite number." HRS §707-733.6(2). Since then, everyone has assumed that §25(2) provides a safe harbor for §707-733.6(2)'s special non-unanimity rule, sheltering it from *Arceo*'s rule and from being struck down as a matter of state constitutional law—even though, as *Rabago* said of §707-733.5(2)'s identical provision, section 707-733.6(2) violates the state constitutional rights to due process and jury trial. *Young*, 150 Hawaii at 373–374, 502 P.3d at 53–54 (noting the defendant conceded that §25(2) undoes *Rabago*); *see also*, *e.g.*, *State v. Barrios*, 139 Hawaii 21, 31 n.5, 383 P.3d 124, 134 n.5 (Haw. Ct. App. 2014) (remarking that the "constitutional deficiencies" of u14csa's non-unanimity rule "were overcome not by any change of language in the statute itself, but by an amendment to the Hawaii Constitution"), affirmed in part and vacated in part on other grounds by *State v. Barrios*, 139 Hawaii 321, 389 P.3d 916 (Haw. 2016).

Some time after all of that, *Ramos v. Louisiana*, 140 S.Ct. 1390 (2020), came along and unequivocally held that states may not experiment with unanimity among trial jurors as to the truth of every accusation required to convict in a criminal case. *Ramos*, 140 S.Ct. at 1393–1402. In *Ramos*'s wake, the Intermediate Court of Appeals rejected a claim that *Ramos* directly invalidated §707-733.6(2)'s non-unanimity rule. *Young*, 150 Hawaii at 369–376, 502 P.3d at 49–56. And because Young neither contested the validity of §25(2) nor questioned the assumption that it provided a safe harbor for §707-733.6(2) from *Arceo*'s rule, the ICA did not address the upstream question of whether *Ramos* invalidates §25(2). *Young*, 150 Hawaii 369–370, 502 P.3d at 49–56. *Young* was wrongly decided. But the argument advanced in this brief does not require

overturning *Young*; on the other hand, nothing prevents this case from serving as a vehicle to right what *Young* got wrong.

Defendant-appellee/cross-appellant Alvin Tran's cross-appeal challenges §25(2)'s constitutional carveout and, downstream, section 707-733.6(2)'s non-unanimity rule. He, that is, makes the argument that Young did not. Tran's argument on this point proceeds in several steps to reach the result that, as with any other crime and as *Rabago* held, *Arceo*'s rule applies to §707-733.6(1)'s conduct element. Summarized, here are those steps.

- Either *Ramos* and the federal constitution's jury trial and due process clauses or, alternatively, the federal constitution's equal protection clause invalidates §25(2).
- Without §25(2)'s safe harbor, section 707-733.6(2)'s non-unanimity rule for u14csa cases violates the state constitution, as *Rabago* held prior to §25(2)'s adoption, or alternatively, violates the federal constitution's equal protection clause.
- Because §707-733.6(2) is invalid, state criminal law defaults to where *Rabago* set it: *Arceo*'s rule applies to §707-733.6(1) and, consequently, unanimity must be reached as to the series of acts that comprise u14csa's conduct element, be that unanimity achieved by not charging more than three acts, or by prosecutorial election thereafter, or by an *Arceo*-compliant unanimity instruction at trial.

If he's right, then at a minimum Tran should get a new trial—if the trial court's dismissal is set aside—because the State's prosecution of him failed to comply with *Rabago* and with *Arceo*'s rule. If the dismissal order is affirmed, these issues should still be addressed, so as to provide guidance to the parties and the lower courts in this case and other u14csa cases.

2. Relatedly, this case also presents a rare opportunity to revisit the entire enterprise of constitutional carveouts. Twice now, the Hawaii Constitution has been amended to adopt provisions that purport to subordinate constitutional rights that everyone else enjoys to legislative whim when it comes to a particular group of people. These two amendments—article I, section 23 of the Hawaii Constitution is the other—purport to carve a group of people out from receiving state constitutional rights that are guaranteed to everyone else. Hawaii caselaw has yet to explain how such a gambit is consistent with principles of due process and equal protection under the federal constitution and, too, with the separation of powers doctrine that is embedded within the

structure of our state constitution. This case provides a rare opportunity to either provide that missing explanation or, instead, to repudiate the assumed legitimacy of the carveout gambit.

3. The last issue Tran's cross-appeal raises is whether dismissal with prejudice should be the remedy on his post-verdict *Jardine* claim, because the *Jardine* error that occurred here amounts to a structural error and allowing the State to further prosecute Tran under a *Jardine*-compliant indictment would only serve to perpetuate that structural error, not remedy it.

CASE STATEMENT

Pertinent facts are not in dispute.

On July 24, 2020, the State obtained an indictment from a grand jury that accused Tran of violating §707-733.6. JIMS Dkt. 6 (RA at 1). Using §707-733.6(1)'s language, the indictment alleged, among other things, that Tran intentionally or knowingly engaged "in three or more acts of sexual penetration and/or sexual contact" with NK over the five-year period between January 1, 2015, through January 31, 2020, while NK was a minor under the age of fourteen.[2] JIMS Dkt. 6 at 1 (RA at 1). The indictment did not memorialize the sexual acts that grand jurors found probable cause to believe occurred and on which they relied to indict. JIMS Dkt. 6 (RA at 1).

The State put Tran on trial before a jury during April of 2022. JIMS Dkts. 115–149 (RA at 11–23). In her testimony, NK described Tran committing more than three sexual acts with her, in two different residences, while she was under fourteen years old. Tr. 04/08/2022 at 11–87 (JEFS Dkt. 35); JIMS Dkt. 120 (RA at 14–15). As to all those various acts, the circuit court instructed jurors that, as to u14csa's conduct element, they needed "to unanimously agree only that the requisite number of acts have occurred, … not … which acts constitute the requisite" series of at least three acts. Tr. 04/21/2022 at 23 (JEFS Dkt. 28); JIMS Dkt. 148 (RA at 22); *see also* JIMS Dkt. 140 at 23 (RA at 21) (court's written instructions). In its closing argument to the jury, the State emphasized the §707-733.6(2) instruction, inviting jurors to mix-and-match the acts each of them believed, and telling them that the instruction

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[2] The other things that the indictment alleged were that the offense occurred in Honolulu, that NK wasn't married to Tran, and that Tran either resided in the same home with her or had recurring access to her. The indictment also quoted the statutory definitions, set out in HRS §707-700, of the terms: married, sexual penetration, deviate sexual intercourse (a term used in the definition of sexual penetration), and sexual contact. In charging Tran, the indictment did not stray from statutory language and did not include crime-specific facts beyond identifying the minor involved as "N.K." JIMS Dkt. 6 at 1–2 (RA at 1).

> just means that you just have to agree that three or more acts occurred. But you don't all have to agree on the same three acts. If you believe that, for example, one act of hand on breast occurred in one house and another hand on private occurred in another house and hand on breast in another house, but you don't all agree on the same actual acts, that's okay. Just as long as the jury believes that three acts of sexual assault occurred, that's enough for you to find the defendant guilty. Three touchings, three acts of penetration, two touchings and one act of penetration. And you don't have to unanimously agree to the same act. That's what that elements means, or that's what that instruction means.

Tr. 04/21/2022 at 39–40 (JEFS Dkt. 28); JIMS Dkt. 148 (RA at 22). Present counsel was not trial counsel and did not observe trial. But the line itself implies that the prosecutor may well have looked at three different jurors when saying the "three touchings, three acts of penetration, two touchings and one act of penetration" line, so as to emphasize her point about the kind of non-unanimous disagreement the §707-733.6(2) instruction allowed. As the prosecutor correctly noted, the statute and instruction allowed individual jurors to disagree about the truth of the accusations establishing u14csa's conduct element.

The jury returned a general verdict that found Tran "guilty as charged." JIMS Dkt. 144 (RA at 22) (executed verdict form); *see also* Tr. 04/22/2022 at 3–5 (JEFS Dkt. 29) (oral return of verdict); JIMS Dkt.149 (RA at 23). The jury's general verdict did not identify the sexual acts that trial jurors relied upon to convict. JIMS Dkt. 144 (RA at 22); Tr. 04/22/2022 at 3–5 (JEFS Dkt. 29); JIMS Dkt. 149 (RA at 23).

Prior to sentencing, Tran's trial counsel timely filed a motion for a new trial and then withdrew from further representing Tran. JIMS Dkt. 150–157 (RA at 23–24). With present counsel, Tran thereafter filed a motion to amend and/or supplement trial counsel's pending new trial motion, raising the issues this brief primarily pursues. JIMS Dkt. 159 (RA at 24). The circuit court conducted a hearing on those motions on July 26, 2022. JIMS Dkt. 177 (RA at 25); Tr. 07/26/2022 (JEFS Dkt. 36). At that hearing, the circuit court allowed amendment, denied trial counsel's new trial claims, and took the issues raised in the motion to amend under advisement. Tr. 07/26/2022 at 13–16, 32–33 (JEFS Dkt. 36); JIMS Dkt. 177 (RA at 25). On October 6, 2022, the circuit court filed a written order denying the issues raised in the motion to amend. JIMS Dkt. 183 (RA at 26). Appendix A to this brief, infra at 40–54, provides a copy of that order.

Meanwhile, Tran's present counsel also filed a post-trial motion to dismiss, contending that *State v. Jardine*, 151 Hawaii 96, 508 P.3d 1182 (Haw. 2022), required vacatur of the conviction and dismissal with prejudice, because the indictment failed to adequately state the

offense that the grand jury accused him of committing and, in his case, the error amounted to a structural one that further prosecution would perpetuate rather than remedy. JIMS Dkt. 161 (RA at 24). The circuit court conducted a hearing on Tran's dismissal motion on July 26, 2022, and on November 2, 2022. Tr. 07/26/2022 at 33–59 (JEFS Dkt. 36); Tr. 11/02/2022 (JEFS Dkt. 37). At the November 2nd hearing, the circuit court orally granted dismissal but, contrary to Tran's request, ruled that dismissal was without prejudice, thereby giving rise to the secondary issue this brief addresses. Tr. 11/02/2022 at 2–8 (JEFS Dkt. 37); JIMS Dkt. 187 (RA at 26–27). The circuit court thereafter filed a written order dismissing Tran's case without prejudice on January 9, 2023. JIMS Dkt. 194 (RA at 27). Appendix B, infra at 55–62, provides a copy of that order.

The State took a timely appeal from the circuit court's ruling granting dismissal on Tran's *Jardine* claim. JIMS Dkt. 196 (RA at 27); JEFS Dkt. 1. Tran thereafter took a timely cross-appeal from the circuit court's ruling that dismissal was without prejudice and the circuit court's order rejecting the arguments he raised in his motion to amend his new trial motion. JIMS Dkt. 198 (RA at 27); JEFS Dkt. 14.

POINTS OF ERROR

1. The circuit court erred in rejecting Tran's argument that the federal constitution invalidates §25(2); that, without §25(2)'s safe harbor, section 707-733.6(2) violates the state constitution; and that, as a result, *Arceo*'s rule applies to §707-733.6(1)'s conduct element. JIMS Dkt. 183 at 2–15 (RA at 26) (infra at 41–53). Subsidiary error under this point includes:

- the circuit court's narrow reading of *Ramos*, and its failure to reckon with *Ramos*'s broad prohibition on state experimentation with the unanimity required as to the truth of every accusation in order to convict in criminal cases, JIMS Dkt. 183 at 4–5 (RA at 26) (infra at 43–44);
- the circuit court's reading of §25(2) and its conclusion that §25(2) "does not, on its face, contradict *Ramos*," JIMS Dkt. 183 at 5–6 (RA at 26) (infra at 44–46);
- the circuit court's failure to reconcile any ambiguity in §25(2) against the State, JIMS Dkt. 183 at 6–12 (RA at 26) (infra at 46–51);
- the circuit court's turn to *Young*, JIMS Dkt. 183 at 13–14 (RA at 16) (infra at 52–53); and
- the circuit court's failure to address the equal protection argument Tran advanced against §25(2), JIMS Dkt. 183 at 2–15 (RA at 26) (infra at 41–53).

Tran's motion to amend his new trial motion preserved these points for appellate review. JIMS Dkt. 159 (RA at 24). As did his argument at the hearing on his motions. Tr. 07/26/2022 at 16–28 (JEFS Dkt. 36); JIMS Dkt. 177 (JRA at 25).

2. The circuit court erred in failing to address the equal protection argument Trans advanced against §707-733.6(2). JIMS Dkt. 183 at 2–15 (RA at 26) (infra at 41–53). Tran's motion to amend his new trial motion preserved this point for appellate review. JIMS Dkt. 159 (RA at 24). As did his argument at the hearing on his motions. Tr. 07/26/2022 at 25–26 (JEFS Dkt. 36); JIMS Dkt. 177 (JRA at 25).

3. The circuit court erred in ruling that dismissal for *Jardine* error should be without prejudice. JIMS Dkt. 194 at 8 (RA at 27) (infra at 8); *see also* Tr. 11/02/2022 at 7 (JEFS Dkt. 37). Tran's motion to dismiss preserved this point for appellate review. JIMS Dkt. 161 (RA at 24). The point was not additionally aired at the hearing on that motion. Tr. 07/26/2022 (JEFS Dkt. 36); JIMS Dkt. 177 (RA at 25).

4. The first two points of error embrace a structural question of constitutional law—whether a provision of the Hawaii Constitution can legitimately carve a group of people out from otherwise generally applicable provisions of the Hawaii Constitution. Admittedly, Tran did not clearly delineate this point for the circuit court's review below. But the question is one of law, reviewed de novo, and is of fundamental importance. It's a question that should be answered, be the rubric for answering it in his case plain-error review or, more simply, an exercise of the Hawaii Supreme Court's supervisory authority. *State v. David*, 141 Hawaii 315, 317, 409 P.3d 719, 731 (Haw. 2017) (invoking supervisory authority to address a question of law to provide guidance to litigants and lower courts, even though the question was not essential to disposing of the appeal); HRS §602-4 (vesting the Hawaii Supreme Court with supervisory authority over the lower courts "to prevent errors and correct errors and abuses therein"); *State v. Domut*, 146 Hawaii 183, 190, 457 P.3d 822, 829 (Haw. 2020) (discussing plain-error review); *cf.*, *e.g.*, *United States v. Evans-Martinez*, 611 F.3d 635, 642 (CA9 2010) (reaffirming that plain-error review can be set aside when "we are presented with a question that is purely one of law and where the opposing party will suffer no prejudice as a result of the failure" to air the issue in the trial court (quoting *United States v. Saavedra-Velazquez*, 578 F.3d 1103, 1106 (CA9 2009) (quoting *United States v. Echavarria-Escobar*, 270 F.3d 1265, 1267–1268 (CA9 2001)))).

STANDARDS OF REVIEW

Questions of law, such as those asking what constitutional and statutory provisions mean and how they interact with each other, are reviewed on appeal de novo. *State v. Canosa*, 152 Hawaii 145, 155, 523 P.3d 1059, 1069 (Haw. 2023). Typically, the trial court's ruling that dismissal be with or without prejudice is reviewed on appeal for an abuse of discretion. *State v. Fukuoka*, 141 Hawaii 48, 55, 404 P.3d 314, 321 (Haw. 2017). Here, however, Tran's argument contends that constitutional considerations required dismissal with prejudice and, thus, review of such constitutional questions of law should be de novo. If the circuit court got its constitutional or statutory law wrong, then it necessarily will have abused its discretion. *Fukuoka*, 141 Hawaii at 55, 404 P.3d at 321 ("an abuse of discretion occurs when the decisionmaker … disregards … principles of law"); *State v. Taylor*, 126 Hawaii 205, 214–215, 269 P.3d 740, 749–750 (Haw. 2011); *State v. Cullen*, 86 Hawaii 1, 15, 946 P.2d 955, 969 (Haw. 1997) ("the circuit court abused its discretion" because "its decision was based upon an incorrect construction" of a statute).

ARGUMENT

I. *Arceo*'s rule applies to u14csa's conduct element.

A. Article I, section 25(2) of the Hawaii Constitution does not survive scrutiny under the federal constitution's jury trial and due process clauses.

Ramos holds that the Sixth Amendment's jury trial right requires that "a jury must reach a unanimous verdict in order to convict" the accused. *Ramos*, 140 S.Ct. at 1395. *Ramos* further held that two state laws—allowing 12-member juries to convict upon the agreement of only 10 jurors—violated that right, as made applicable to the states through the Fourteenth Amendment's due process clause, and, accordingly, struck those state laws down. *Ramos*, 140 S.Ct. at 1393–1402; *see also* Ore. Const. art. I, §11; La. Const. art. I, §17(A). The takeaway that matters here is that *Ramos*, and the Sixth and Fourteenth Amendments, prohibit states from experimenting with the jury unanimity that is required to convict. Instead, *Ramos* requires that trial jurors agree upon "the truth of every accusation" constituting the alleged crime in order to convict. *Ramos*, 140 S.Ct. at 1396.

Section 25(2) expressly authorizes experimentation that *Ramos* expressly precludes. Section 25(2) provides that, as to one type of crime, "the legislature may define … what constitutes the jury unanimity that is required for a conviction." Haw. Const. art. I, §25(2). That

is broad, sweeping language. It's also quite plainly said. When construing a constitutional or statutory provision, this Court gives words their ordinary meaning. *State v. Obrero*, 151 Hawaii 472, 479, 517 P.3d 755, 762 (Haw. 2022) (reaffirming that when the language at issue "is plain and free of all uncertainty," then it "speaks its own construction," and there is no need to root about for other ways to make sense of it). Section 25(2) could not be plainer in authorizing the legislature to experiment—however it may, session to session, see fit to do so—with what makes up, forms, and composes the jury unanimity that is required to convict someone accused of committing u14csa. *Merriam-Webster Dictionary* (online ed.) (defining "constitutes" to primarily mean "make up, form, compose"). *Ramos*, however, precludes *any* such experimentation. *Ramos*, 140 S.Ct. at 1395–1397. By purporting to authorize what *Ramos* precludes, section 25(2) is unconstitutional under the Sixth and Fourteenth Amendments.

The notion—proposed by the State and espoused by the circuit court—that §25(2) limits what it authorizes and *only* allows the legislature to say what jurors must be unanimous *about* is a mistaken one. It is, if nothing else, inconsistent with §25(2)'s broad wording. None of the words actually used in §25(2) imposes any such limitation. And it is hard to spot how its plain language, as opposed to what various extrinsic sources might say about it, is fairly and reasonably read to target—at all, much less exclusively so—the content of what jurors must be unanimous about. At the very least, one would think some words would need to be added to what's already there in order to have it authorize nothing more than legislative policing of what jurors must agree about. *But see*, *e.g.*, *State v. Abella*, 145 Hawaii 541, 552, 454 P.3d 482, 493 (Haw. 2019) (reaffirming that courts can't "change the language" of what it's construing or "supply a want or enlarge upon" that language).

Moreover, even if §25(2) reasonably leant itself to such a limiting construction, it would still be irreconcilable with *Ramos*. The right to jury trial, which *Ramos* so forcefully reaffirmed, requires juror consensus on "the truth of every accusation" in order to convict. *Ramos*, 140 S.Ct. at 1396. The Sixth Amendment jury trial right hits not just unanimity among the jurors, whatever their number may by law be, that comprise a jury; it also hits what they must agree about—the truth of every accusation comprising the crime as it has been alleged against the accused. *Ramos*, 140 S.Ct. at 1396; *see also*, *e.g.*, *United States v. Haymond*, 139 S.Ct. 2369, 2376 (2019); *Southern Union Co. v. United States*, 567 U.S. 343, 356 (2012); *United States v. Booker*, 543 U.S. 220, 238–239 (2005); *Blakely v. Washington*, 542 U.S. 296, 301–302 (2004); *Apprendi v.*

New Jersey, 530 U.S. 466, 476–478 (2000); *Duncan v. Louisiana*, 391 U.S. 145, 151–156 (1968).

As was often said in the *Apprendi* line of cases, the right to jury trial requires unanimity among jurors as to the truth of every accusation in order to "guard against a spirit of oppression and tyranny on the part of rulers" and as a "great bulwark of our civil and political liberties." *Apprendi*, 530 U.S. at 477. Those cases further recognize that the right embraces "two longstanding tenets of common-law criminal jurisprudence: that the truth of every accusation against a defendant should afterwards be confirmed by the unanimous" agreement of the trial jurors, and "that an accusation which lacks any particular fact which the law makes essential to the punishment is no accusation" at all. *Blakely*, 542 U.S. at 301–302. Hawaii caselaw similarly recognizes that the right to jury trial requires unanimity as to what the defendant is accused of having done:

> The right to trial by jury is a common law right, of which it is said in Blackstone, Book 4, p. 349: "The antiquity and excellence of this trial for the settlement of civil property has before been explained at large. And it will hold much stronger in criminal cases; since in times of difficulty and danger, more is to be apprehended from the violations and partiality of judges appointed by the Crown, in suits between the King and the subject, than in disputes between one individual and another, to settle meets and boundaries of private property. Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the Crown. …. But the founders of English law have, with excellent forecast, contrived that *no man should be called to answer to the King for any capital crime, unless upon the preparatory accusation of twelve or more of his fellow subjects, the grand jury, and that the truth of every accusation, whether preferr[e]d in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors indifferently chosen and superior to all suspicion.*" … [T]he common law right of trial by jury in criminal cases is … recognized in this jurisdiction[.]

Territory v. Nishimura, 22 Haw. 614, 617, 1915 WL 1413, at **2–3 (Haw. Terr. 1915) (emphasis added). And, as Tran anticipates elaborating on in his answering brief in the State's appeal from the circuit court's dismissal order, *Jardine*'s detailed approach, as much as it serves the due process need for notice, also serves the congruity principle animating the jury trial clause's call for all to agree as to the truth of every accusation, by ensuring that the crime the trial jury finds the defendant committed is the same crime the grand jury found probable cause to charge.

It is no out, then, to say that §25(2) is consistent with the federal constitutional right to jury trial because it does nothing more than authorize the legislature to say jurors don't need to be unanimous about the truth of *every* accusation, but may disagree about *some* of the accusations, that comprise the u14csa crime alleged against the accused. *Ramos*, 140 S.Ct. at 1396; *Nishimura*, 22 Haw. at 617, 1915 WL 1413 at **2–3. If all §25(2) does is allow the legislature to say some jurors may believe this accusation but others may believe that accusation and yet the jury as a whole may still convict, then the unanimity required as to the "truth of every accusation" necessary for conviction is still being violated by what §25(2) purports to authorize. As Oliver Wendell Holmes, Jr., colloquially put it, "the law threatens certain pains if you do certain things." *Apprendi*, 530 U.S. at 476 (quoting O. Holmes, The Common Law 40 (M. Howe. ed. 1963)). Those "certain things" are what the right to jury trial requires each member of the jury to agree the accused did. *Ramos*, 140 S.Ct. at 1396; *Apprendi*, 530 U.S. at 476–478; *Nishimura*, 22 Haw. at 617, 1915 WL 1413 at **2–3. Section 25(2) thus violates the right to jury trial even if all it does is authorize legislative removal of some of those "certain things" from the Sixth Amendment's unanimity requirement in u14csa cases—on a rationale, it bears emphasizing, that candidly recognizes that, all too often, those things are left *un*certain when one's accuser is a minor.

Tran, to be clear, does not believe that §25(2) is ambiguous. Its language plainly subjects jury unanimity in u14csa cases to legislative whim—be a session's whim to enact §707-733.6(2) or be the next session's whim to enact a law saying that the required unanimity need only be among ten of the twelve jurors in the box. But if this Court disagrees, and believes that §25(2) does admit some ambiguity about what it authorizes, then this Court should construe the provision in accord with "the ancient doctrines of lenity and contra proferentem," *Buffington v. McDonough*, 143 S.Ct. 14, 19 (2022) (Justice Gorsuch, dissenting from denial of certiorari), which "have played an essential role in our law for centuries, resolving ambiguities where they persist," *Wooden v. United States*, 142 S.Ct. 1063, 1086 n.6 (2022) (Justice Gorsuch, joined by Justice Sotomayor, concurring). The latter canon, contra proferentem, holds that, "as between the government and the individual, the benefit of the doubt about the meaning of an ambiguous law must be given to the individual, not to authority; for the state makes the laws." *Buffington*, 143 S.Ct. at 19. And the rule of lenity similarly provides that "penal laws should be construed strictly," so as to ensure "that an individual's liberty always prevails over ambiguous laws."

Wooden, 142 S.Ct. at 1082; *see also*, *e.g.*, *State v. Guyton*, 135 Hawaii 372, 380–381, 351 P.3d 1138, 1146–1147 (Haw. 2015); *State v. Lora*, 147 Hawaii 298, 312, 465 P.3d 745, 759 (Haw. 2020). Under these ancient doctrines, even if the State puts forward a reasonable alternative construction of §25(2), this Court should nonetheless favor Tran's (significantly more) reasonable reading of it.[3]

Howsoever §25(2) is read, though, be it as Tran suggests or as the State suggested and the circuit court read it below, the foregoing discussion establishes that §25(2) violates the right to jury trial under the Sixth and Fourteenth Amendments.

B. Section 25(2) also violates the Fourteenth Amendment's equal protection clause.

Alternatively, section 25 violates the Fourteenth Amendment's equal protection clause, even if it does not violate the federal constitutional rights to jury trial and due process.[4] "The

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[3] If this Court turns to lenity, it should clarify when the rule is triggered. Some cases turn to it as a first resort upon concluding that the language at issue is not plain. *See*, *e.g.*, *State v. Shimabukuro*, 100 Hawaii 324, 326–328, 60 P.3d 274, 276–278 (Haw. 2002). Others suggest the rule is a *last* resort. *See*, *e.g.*, *State v. Borge*, __ Hawaii __, __ P.3d __, 2023 WL 2519973, at *10 (Haw. 2023). Justices Kavanaugh and Gorsuch air the two different approaches in *Wooden*. Tran urges this Court to adopt Justice Gorsuch's view that when the language at issue is not plain, then "the judge's next step isn't to legislative history or the law's unexpressed purposes. The next step is to lenity." *Wooden*, 142 S.Ct. at 1086. Beyond lenity's other virtues, a first-resort approach encourages those drafting penal law to write clearly.

[4] The argument in this section tends to focus on §25(2), but reaches §25(1) as well. Section 25(1) purports to take the authority to say what constitutes a "continuing offense" in u14csa cases, but no others, away from the judiciary and give it to the legislature instead. Counsel remains puzzled by that provision, given that Hawaii caselaw makes perfectly clear what the legislature must say when defining an offense in order for the courts to construe the offense to be a continuing one in accord with principles of due process. *See*, *e.g.*, *State v. Shaw*, 150 Hawaii 56, 62, 497 P.3d 71, 77 (Haw. 2021); *State v. Hoey*, 77 Hawaii 17, 38, 881 P.2d 504, 525 (Haw. 1994). More puzzlingly, section 25(1) seems to miss the point that much of the caselaw about continuous offenses makes, which is that many, if not nearly all, offenses can be committed in a continuous way—think of committing murder by way of tucking someone away and starving them over the span of a few weeks or poisoning someone for months, as opposed to, more expeditiously and instantaneously, shooting someone dead. All, really, that the continous-offense caselaw is trying to do is set out sensible rules for discerning when a prosecution of an offense has triggered the need to pay attention to whether it was committed in a continuous manner or not. All of that is not really about "defining" an offense as a continuous one (especially not in each and every instance of its occurrence), so much as it is simply about spotting one in the wild when it comes before the court. A final oddity is that nothing in the u14csa statute provides a new definition for what constitutes a continuing offense, much less one that departs from the way the judiciary has developed the concept; nothing in the statute, that is, defines the term

Fourteenth Amendment requires that all persons … shall be treated alike, under like circumstances and conditions." *Engquist v. Ore. Dept. of Agr.*, 553 U.S. 591, 602 (2008) (quoting *Hayes v. Missouri*, 120 U.S. 68, 71 (1887)). To survive scrutiny under the federal constitution's equal protection clause, a state's disparate treatment of similarly situated people must, at a minimum, have a rational basis: "When those who appear similarly situated are nevertheless treated differently, the equal protection clause requires at least a rational reason for the difference, to ensure that all persons subject to [a law] are indeed being treated alike, under like circumstances and conditions. Thus, when it appears that an individual," or a class of individuals, "is being singled out by the government, the specter of arbitrary classification is fairly raised, and the equal protection clause requires a rational basis for the difference in treatment." *Engquist*, 553 U.S. at 602 (quoting *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)).

Section 25(2) adopts a special rule for a single offense defined in the Hawaii Penal Code, subjecting the right that those accused of u14csa have to unanimity to legislative whim, when everyone else accused of a crime in Hawaii has a state constitutional right to unanimity and the right to be prosecuted only in accord with *Arceo*'s rule. Under §25(2)'s special rule, those accused of u14csa do not receive the same state constitutional protections that those accused of any other crime receive in Hawaii. It is hard to spot how that doesn't trigger rational basis scrutiny under the federal constitution's equal protection clause, because it singles out a class of people (those accused of u14csa) and treats them differently from others (those accused of any other crime) who are situated similarly (they all being accused of crimes). *Cf.*, *e.g.*, *Halbert v. Michigan*, 545 U.S. 605, 610 (2005) (reaffirming that a state may not "bolt the door to equal justice" on lines of indigency); *Miller-El v. Dretke*, 545 U.S. 231, 237 (2005) (recognizing the way race can "operate in some cases to deny" a defendant of a particular race "the full enjoyment of that protection which others enjoy").

"continuing offense" to be something other than the commission of "a continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy." *State v. Lavoie*, 145 Hawaii 409, 421, 453 P.3d 229, 251 (Haw. 2019). As such, it would seem that nothing in the current incarnation of §707-733.6 actually implements the authority that §25(1) vests in the legislature. Be all of that as it may, and to get back to the point of this footnote, if §25(2) does not survive scrutiny under the federal constitution's equal protection clause for the reasons discussed above, then neither does section 25(1) for the those same reasons.

Looking at what the current legislative whim is only makes the equal protection problem more stark. As implemented by §707-733.6(2), section 25(2) is working to "bolt the door" to *Arceo*'s state constitutional rule for those accused of u14csa, while that door stands open for anyone else accused of a crime. *Halbert*, 545 U.S. at 610. And, as implemented by §707-733.6(2), section 25(2) works to deny those accused of U14csa of "the full enjoyment" of the "protection which others enjoy" under *Arceo*'s rule. *Miller-El*, 545 U.S. at 237. No matter how it is statutorily implemented, moreover, be it by a statute like §707-733.6(2) or some other statute tinkering with unanimity in some other way, section 25(2) carves those accused of u14csa out from being protected by the same right to jury unanimity that protects those accused of other crimes. The question, then, is whether section 25(2) has a rational basis for doing such a thing.

It doesn't. Section 25(2) was enacted because those promulgating the amendment believed "it is difficult to prosecute" u14csa under *Arceo*'s rule and section 25(2) "would," by allowing for a statutory end-run around *Arceo* and *Rabago*, "make it easier to prosecute *those who repeatedly sexually abuse a child*." *Young*, 150 Hawaii at 373, 502 P.3d at 53 (quoting section 25(2)'s enactment history; emphasis added). Such a basis for section 25(2) cannot be deemed rational for a very simple reason. That basis rests on a presumption of guilt—we must make it easier to convict those accused of committing continual sexual abuse of a minor under fourteen because they have repeatedly abused a child sexually. But those accused of u14csa, no less than those accused of committing other crimes, are presumed innocent. *Estelle v. Williams*, 425 U.S. 501, 503 (1976); *State v. Samonte*, 83 Hawaii 507, 518–519, 928 P.2d 1, 12 (Haw. 1996); *State v. Tanaka*, 92 Hawaii 675, 681, 994 P.2d 607, 681 (Haw. Ct. App. 1999). Building a constitutional provision and its implementing statute on the denial of the presumption of innocence is not something the law should deem rational. The denial of equal access to *Arceo*'s rule to those accused of u14csa is not made reasonable by denying them the presumption of innocence too. Because it is based on a presumption of guilt, section 25(2) accordingly lacks a rational basis.[5] And, as noted above, because section 25(1) is animated by the same irrational

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[5] Hawaii caselaw typically describes the default rational-basis test as requiring a showing that "the classification is not rationally related to the statutory purpose, or that the challenged classification does not rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *KNG Corp. v. Kim*, 107 Hawaii 73, 82, 110 P.3d 397, 406 (Haw. 2005). Here, the history of §25(2) set forth in *Young* reveals that the purpose and object of §25(2), and the u14csa statute that it seeks to protect, are themselves irrational. A classification

train of thought, the Fourteenth Amendment's equal protection clause invalidates section 25 in its entirety.

Thus, even if §25(2) does not violate the right to jury trial under *Ramos* and the Sixth and Fourteenth Amendments, section 25(2) nonetheless violates the Fourteenth Amendment's equal protection clause. Either way, section 25(2) is not good law. And because it is therefore a nullity, it does not provide a safe harbor for §707-733.6(2) from *Arceo*'s rule. *State v. Taylor*, 49 Haw. 624, 425 P.2d 1014 (Haw. 1967) (reaffirming that unconstitutional laws are null and void and that the judiciary is the branch of government that gets to say what constitutional provisions mean and whether a law violates a constitution).

C. Without §25(2)'s protection, HRS §707-733.6(2) violates the Hawaii Constitution and *Arceo* applies to §707-733.6(1)'s conduct element.

Once §25(2) is struck down, state law governing u14csa prosecutions defaults to where *Rabago* set it. As *Rabago* explained, the Hawaii Constitution does not allow the legislature to dispense with *Arceo*'s rule in u14csa cases and §707-733.6(2) is unconstitutional as a matter of state law. *Rabago*, 103 Hawaii at 246–254, 81 P.3d at 1161–1169. As a result, section 707-733.6(1)'s conduct element is subject to *Arceo*'s unanimity rule and jurors must unanimously agree as to the series of acts that constitute u14csa's conduct element. *Rabago*, 103 Hawaii at 246–254, 81 P.3d at 1161–1169.

D. Section 707-733.6(2) can be struck down directly under the Fourteenth Amendment's equal protection clause.

The foregoing discussion of equal protection law suggests a more direct, expedient way to get to the same place the argument, up to this point, has taken us. To the extent that §707-733.6(2), as enacted in 2006 along with §25(2), is based on the same presumption of guilt animating §25(2), the statute independently violates the Fourteenth Amendment's equal protection clause. The federal constitutional questions about §25(2)'s validity could, accordingly, be saved for another day, because whatever protection §25(2) might be thought to provide to §707-733.6(2) from the rest of the Hawaii Constitution, a provision of a state constitution cannot carve out exemptions to what the federal constitution requires or forbids. Thus, even if §25(2)

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rationally related to an irrational purpose and object is no more tolerable on rational-basis review than a classification that is not rationally related to a legitimate purpose and object. Though the situation at issue here appears to be novel in Hawaii law, there should be no room to say that §25(2)—or, for that matter, section 707-733.6(2) standing alone—survives rational-basis review because it adopts rational means to further irrational ends.

stands for some reason Tran fails to fathom, section 707-733.6(2) is not immune from being struck down on the ground that it violates principles of equal protection under the Fourteenth Amendment all on its own. Which it does, for all the same reasons discussed above that invalidate §25(2) on equal protection grounds. If §25(2) is upheld or, instead, determination of its doubtful constitutionality is deferred to another day, section §707-733.6(2) should nonetheless fall under the Fourteenth Amendment's equal protection clause.

E. The circuit court's missteps.

The circuit court's order rejecting all of the foregoing stumbles with each step it takes. JIMS Dkt. 183 (RA at 26) (infra at 41–54).

The circuit court mistakenly construed §25(2). Focusing on the word unanimity, the circuit court ruled that word required all 12 jurors of a trial jury to agree and, thus, that the word did not allow a legislature to say something less would do, because "a 10-2 jury vote, by definition, is not unanimous." JIMS Dkt. 183 at 5 (RA at 26) (infra at 44). That reading of "unanimity" in hand, the circuit court concluded that "the question 'what constitutes … unanimity' answers itself: unanimity is the vote or agreement of all (jurors)." *Id.* And, thus, "the full inquiry, 'What constitutes the jury unanimity that is required for conviction' simply means 'what is it that all 12 jurors must agree on before a defendant can be convicted?' or 'what do the jurors all have to consent to?'" *Id.* The end result being that §25(2), as the circuit court construed it, "on its face does not permit a vote other than 12-0 to secure a conviction. It simply provides the authority for the legislature to define the actus reus that all 12 jurors must agree upon" and it, therefore, "does not, on its face, contradict *Ramos*." JIMS Dkt. 183 at 6 (RA at 26) (infra at 45).

The circuit court's principal failing here is in defining the word "unanimity" to mean the agreement of all 12 jurors and then having that tail wag its construction of the rest of §25(2)'s language. The circuit court entirely failed to reckon with the plain meaning of the word "constitutes." Nor did the circuit court sufficiently engage with §25(2)'s initial clause, which makes clear that the amendment purports to vest the power to define in the legislature.

The word unanimity, along with all of §25(2)'s other words, must be read "in the context of the entire" provision, not in isolation from each other. *Matter of Kanahele*, __ P.3d __, 2023 WL 2520679, at *13 (Haw. 2023). Section 25(2) provides: "in continuous sexual assault crimes against minors younger than fourteen years of age, *the legislature may define* … what *constitutes* the jury unanimity that is required for a conviction." Haw. Const., art. I, §25(2) (emphases

added). Section 25(2) says that the legislature, not a circuit court, gets to "define" what "constitutes" the "unanimity" required for a u14csa conviction. *Id.* True enough, one way to define the jury unanimity that is required for a conviction is to say it means agreement among all 12 jurors. But another way to define the jury unanimity that is required for a conviction is to say it means agreement among only 10 of the 12 jurors, that only 10 jurors need to be unanimous to convict.[6] The circuit court's reading of §25(2) erases the word "define" from §25(2) and then narrowly defines the very term the amendment says the legislature gets to define.

The circuit court's reading of the amendment also packs too much into the word "constitutes," which the circuit court has picking up what jurors must be unanimous about. As has been noted, the word "constitutes" ordinarily means "make up, form, compose." *Merriam-Webster Dictionary* (online ed.) (primary definition of "constitutes"). "Unanimity" ordinarily means the state of being unanimous, which, in turn, is ordinarily defined to mean agreeing with each other and, particularly, "having the agreement and consent of all." *Merriam-Webster Dictionary* (online ed.) (definitions of "unanimity" and "unanimous"). And, of course, "define" ordinarily means such things as "to determine or identify the essential qualities or meaning of," and to "set forth the meaning of (something, such as a word)," and "to fix or mark the limits of," as in to demarcate something. *Merriam-Webster Dictionary* (online ed.) (defining "define").

Plainly read, then, what §25(2) says is that the legislature may identify the essential qualities and fix and mark the limits of and otherwise demarcate what makes up, forms, and composes the state of being unanimous; who the 'all' are who must agree on and consent to conviction in a u14csa case. That's just a cluttered way to say that §25(2) authorizes legislative experimentation with how many jurors must agree in order to convict—it, that is, gives the

[6] Glancing at the Louisiana law that *Ramos* struck down undermines the circuit court's take that §25(2) does not speak to what constitutes unanimity and that unanimity can only mean the agreement of all twelve jurors in the deliberation room. The Louisiana provision at issue in *Ramos* stratified the number of jurors, out of the twelve comprising the jury, who had to agree on guilt. It provided that a capital case "shall be tried before a jury of twelve persons, all of whom must concur" to convict; that offenses punishable by "confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur" to convict; and so on. La. Const. art. I, §17. Such a law defines what constitutes the jury unanimity required for conviction—if it didn't, why *Ramos*?—and, accordingly, provides a model for exactly the type of thing that §25(2)'s plain language purports to say our legislature may enact. Here is as good a place as any to point out that the broad language that is used in §25(2) ill fits the far narrower goal of trying to change what *Rabago* said state constitutional law requires. Such a drafting faux pas does not, however, excuse the words used in §25(2) from carrying their plain meaning.

legislature the freedom to define what counts as jury unanimity in u14csa cases as something other than what it means in any other criminal case. None of the provision's plain terms readily captures the idea that it *limits* the legislative experimentation it authorizes to what jurors must be unanimous about. None of the provision's plain terms, really, appears to even embrace, much less invite, legislative tinkering with what jurors must be unanimous about, rather than experimentation with demarcating who comprises the 'all' who must agree in order to convict.[7]

Going yet a step further, as the circuit court did, to read §25(2) as plainly limiting itself to authorizing the legislature to "define the actus reus" of u14csa, not only favors a non sequitur over the ordinary import of the provision's words. It also renders the entire provision superfluous. Well settled is that the legislature gets to define what constitutes a crime, including what the crime's actus reus is, and that there are no judge-made common-law crimes in Hawaii. *State v. Feliciano*, 107 Hawaii 469, 480, 115 P.3d 648, 659 (Haw. 2005) (reaffirming that the "legislative power to define offenses and to prescribe the punishments to be imposed upon those found guilty of them resides wholly with" the legislature (quoting *Whalen v. United States*, 445 U.S. 684, 689 (1980))); *State v. Friedman*, 93 Hawaii 63, 74, 996 P.2d 268, 279 (Haw. 2000) (reaffirming that, "pursuant to its police powers, the legislature may define criminal offenses" (citing *State v. Buch*, 83 Hawaii 308, 926 P.2d 599 (Haw. 1996))); *State v. Rosa*, 2019 WL 5858197, at *2 (Haw. Ct. App.) (Nov. 8, 2019) (unpublished) ("prominence is given to the power of the legislature to define crimes and their punishment" (quoting *State v. Freitas*, 61 Haw. 262, 267, 602 P.2d 914, 919 (Haw. 1979), overruled on other grounds by *State v. Auld*, 136 Hawaii 244, 361 P.3d 471 (Haw. 2015))); *State v. Paris*, 138 Hawaii 254, 264, 378 P.3d 970, 980 (Haw. 2016) ("there are no common-law offenses in Hawaii"); HRS §701-102 & Commentary on §701-102 (same); *accord* Haw. Const., art. III, §1 ("the legislative power of the State shall be vested in a legislature" and "shall extend to all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States"). Reading §25(2) to do nothing but authorize the legislature to define the conduct element of u14csa thus renders the provision

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[7] If section 25(2)'s language is indeed mute as to what jurors must agree on, and speaks instead only to how many of them must agree (as a plain construction of the provision's language suggests it should be), then yet another problem arises for the State. For if that is the case, then §25(2) isn't doing the work it has been thought to do and does not provide a safe harbor for §707-733.6(2) from *Arceo*'s rule, because §707-733.6(2) is not a statute that defines the number of jurors who must agree, but instead is one proclaiming, out on the open sea, what they must agree on. It wouldn't, in other words, be implementing §25(2) at all.

superfluous, because article III and well-settled authority already says the legislature gets to do that. Courts must avoid, not embrace, readings that would render what's being read superfluous. *State v. Baker*, 146 Hawaii 299, 306–307, 463 P.3d 956, 963–964 (Haw. 2020) ("courts are bound, if rational and practicable, to give effect to all parts of a statute, and no clause, sentence, or word shall be construed as superfluous, void, or insignificant"); *State v. Gomes*, 117 Hawaii 218, 232, 177 P.3d 928, 942 (Haw. 2008).

Which leads to the circuit court's second main mistake, misreading *Ramos*. The circuit court did not devote much of its order to explicating what *Ramos* is about. All it said about *Ramos* was that it struck down a state law allowing conviction on the vote of 10 of 12 jurors, "determined that the Sixth Amendment's guarantee of an impartial jury trial meant the jury must unanimously agree before there can be a conviction," and "found that the requirement of jury unanimity is passed on to the States by way of the Fourteenth Amendment." JIMS Dkt. 183 at 3–4 & n.1 (RA at 26) (infra at 42–43). The circuit court's gloss of *Ramos* overlooks and, consequently, fails to unpack the case's greater import in making the jury trial right to unanimity applicable to the states.

As explained above, the jury trial right to unanimity not only imposes a requirement that each juror in the deliberation room agree; it also requires that each juror agree as to the truth of every accusation, among those submitted to them, that is necessary for conviction. *Ramos* forbids the states from watering down the latter requirement as much as the former one. Thus, even if the circuit court's reading of §25(2) is correct, and all §25(2) does is allow legislative tinkering with what jurors "must agree on before a defendant can be convicted" and what they "all have to consent to," then it still violates the Sixth and Fourteenth Amendments, because it allows the legislature to change whether the jury must agree as to the truth of every accusation necessary to convict and allows the legislature to say that a conviction may rest on disagreement about which accusations are true, when various subsets of those accusations suffice to sustain a conviction.

Turning to the purpose that animated the adoption of §25(2), the circuit court similarly failed to see the forest for the trees. JIMS Dkt. 183 at 6–12 (RA at 26) (infra at 45–51); *State v. Woodhall*, 129 Hawaii 397, 406, 301 P.3d 607, 616 (Haw. 2013) (reaffirming that courts should adopt the "sense of the words used which best harmonizes with the design of the [law] or the end in view"). We all agree that *Rabago* sparked §25's adoption. And all agree that undoing *Rabago*'s holding that the *Arceo* rule applies to u14csa's conduct element results from the

(assumed) safe harbor that §25(2) provides from *Arceo*'s rule for §707-733.6(2). But it is a mistake to take such cause and effect (two trees) for purpose (the forest).

As *Young* spelunked from the amendment's legislative history, the purpose of §25 is to make it easier to convict defendants who are accused of u14csa. *Young*, 150 Hawaii at 373, 502 P.3d at 53. Those who promulgated §25(2) anticipated the recodification of the u14csa law *Rabago* struck down, true. *Young*, 150 Hawaii at 373, 502 P.3d at 53. But the ultimate goal of both §25 and the recodified §707-733.6(2) was "to make it easier to prosecute those who repeatedly sexually assault a child." *Young*, 150 Hawaii at 373, 502 P.3d at 53 (quoting the amendment's legislative history). Construing §25(2) as Trans suggests it plainly reads—to allow the legislature to water down the unanimity that is required to convict in u14csa cases in any way the legislature may wish, be it by lowering the number of people in the room who must agree or, instead, by allowing those in the room to disagree on the conduct predicating conviction or, someday, maybe both or something completely different—is more, not less, in keeping with §25(2)'s purpose to make it easier to convict those accused of u14csa.

The circuit court's take that *Young* disposes of Tran's challenge to §25(2) is a third mistake. JIMS Dkt. 183 at 13–14 (RA at 26) (infra at 52–53). *Young* rejects the claim that, in light of *Ramos*, section "707-733.6(2) violates the Sixth and Fourteenth Amendments to the United States Constitution." *Young*, 150 Hawaii at 369–376, 502 P.3d at 49–56. In doing so, the ICA underread *Ramos*, as did the circuit court here and as explained above, by failing to reckon with the aspect of the jury trial right that requires unanimity as to the truth of every accusation necessary to convict. *Young*, 150 Hawaii at 370, 502 P.3d at 50. Then, through some rather labyrinthine reasoning that commenced with rummaging about in the statute's legislative history instead of turning to the rule of lenity, the ICA read §707-733.6(2) as allowing for disagreement on "alternative means" rather than disagreement on u14csa's conduct element. *Young*, 150 Hawaii at 370–376, 502 P.3d at 50–56. And the ICA concluded that allowing jurors to disagree about alternative means is consistent with federal constitutional law. *Id.* That last bit is, indeed, true—federal constitutional law draws a line between a crime's conduct element, as to which jurors must be unanimous, and the means by which that element was committed, as to which jurors may disagree. *Schad v. Arizona*, 501 U.S. 624, 631–632 (1991) (plurality opinion).

That alternative-means | elements line, however, is not as clear in Hawaii state law as it is in federal law, because our state law puts "multiple acts" cases on the elements side of the

unanimity line, rather than on the alternative-means side of that line, and distinguishing multiple-acts cases from alternative-means cases is a more amorphous task than is distinguishing alternative means from elements under federal criminal law. *State v. Jones*, 96 Hawaii 161, 170–172, 29 P.3d 351, 360–362 (Haw. 2001). The darkening of the glass that results from placing multiple-acts cases on the elements side of the line, as state law does, and placing them on the alternative means side of the line, as federal law (typically, but not invariably) does, is made stark by looking at the crime of prohibited possession of a firearm. In a state prosecution of a felon's possession of "any firearm" under HRS §134-7, possession of multiple firearms are deemed discrete acts of possession, any one of which could support a conviction, and, thus, the trial jury is "required to unanimously agree as to which firearm(s)" a defendant unlawfully possessed to convict. *State v. Jenkins*, 93 Hawaii 87, 113, 997 P.2d 13, 39 (Haw. 2000). In a federal prosecution for a felon's possession of a "any firearm" under 18 U.S.C. §922(g), on the other hand, the trial jury does not need to be unanimous as to the firearm predicating conviction, because "the particular firearm possessed is not an element of the crime …, but instead the means used to satisfy the element of 'any firearm.'" *United States v. Pollock*, 757 F.3d 582, 588 (CA7 2014); *see also*, *e.g.*, *United States v. DeJohn*, 368 F.3d 533, 542 (CA6 2004); *United States v. Verrecchia*, 196 F.3d 294, 298–301 (CA1 1999).

As well as anything might, trespassing provides a way to at least try to explain the difference, under state law, between alternative means, as to which jurors may disagree, and multiple acts, as to which they may not disagree but must unanimously agree about. *Jones*, 96 Hawaii at 171–172, 29 P.3d at 361–362. Trespassing occurs when a person "knowingly enters or remains unlawfully in or upon premises." HRS §708-815. The conduct element of the offense, best conceptualized simply as unlawful presence, consists of entering or remaining somewhere where you've been told you may not be. Those two choices—entering or remaining—are alternative means, because they are "statutory alternatives," because, that is, the statute itself lists them as alternative ways that the crime's conduct element can be committed. *Jones*, 96 Hawaii at 362, 29 P.3d at 172; *see also*, *e.g.*, *State v. Klinge*, 92 Hawaii 577, 586–589, 994 P.2d 509, 518–521 (Haw. 2000). When, however, the State's prosecution rests on "multiple acts or incidents," each of which suffices to support conviction, then unanimity is required as to which act or incident constitutes the crime of conviction. *Jones*, 96 Hawaii at 171–172, 29 P.3d at 361–362.

Thus, the accusation that the defendant trespassed on his neighbor's property is proven even if jurors disagree about whether he, after being told to stay away, entered the backyard or, instead, remained there—which might arise when, say, the evidence is not entirely clear on precisely when the neighbor told the defendant he can't come into the backyard, but everyone agrees that the neighbor issued such an edict at some point, be it before the defendant entered, or be it after he entered but then overstayed his welcome and he didn't leave. *Jones*, 96 Hawaii at 171–172, 29 P.3d at 361–362. In such a situation, the State's theory of guilt rests on a single act of unlawful presence, but varies as to how it occurred. When, on the other hand, the State's prosecution rests on evidence that the defendant trespassed on the neighbor's property on Monday and then again on Friday or, as *Jones* hypothesized, trespassed on the property of two different neighbors, then the State is not submitting alternative means as to a single criminal act to the jury, but is instead submitting two different and distinct crimes to the jury. *Jones*, 96 Hawaii at 171–172, 29 P.3d at 361–362. When the prosecution elects to do that under a single count, then the jury must be unanimous about which crime the defendant committed—the one that happened on Monday or the one that occurred on Friday, the one against the makai neighbor or the one against the mauka neighbor. *Jones*, 96 Hawaii at 171–172, 29 P.3d at 361–362.

Young did not correctly parse u14csa's conduct element in light of the foregoing. *Young* 150 Hawaii at 374–376, 502 P.3d at 54–56. By resting the prohibited conduct on a series of "three or more" sexual acts, the statute makes a distinct crime out of each combination of three or more sexual acts. *Rabago*, 103 Hawaii at 253, 81 P.3d at 1168. Whatever work §25(2) and §707-733.6(2)'s non-unanimity rule may be thought to do, they do not undo that aspect of *Rabago*, which rests on the distinction state law draws between alternative means of committing an offense's conduct element and multiple instances of that conduct element's occurrence.

Running the point as we just did with trespassing may help solidify what *Young* missed. If the State's evidence is that the defendant molested the child on Monday, Wednesday, and Friday, but, while being consistent on contact occurring on the latter two days, the child's testimony variably says, on direct, that Monday's molestation involved penetration and then equivocates, on cross, to saying that maybe it involved nothing more than contact, then jurors may disagree about Monday's molestation, some finding sexual penetration has been proven, some that sexual contact has been proven, and the jury as a whole may still convict upon agreeing that the requisite series of three sexual acts occurred on Monday, Wednesday, and

Friday. Such a scenario presents an alternative means situation as to Monday's single sexual act, but not as to the accusation that three seriatim sexual acts occurred on three different days.

But when the State's evidence is that molestation occurred on Monday, Tuesday, Wednesday, and Thursday, without equivocation as to what kind of molestation occurred, then the case is a rote multiple-acts one, because each combination of three acts of molestation suffices to convict. Jurors would thus ordinarily (under *Areco*'s rule) have to agree that conviction rests on the seriatim acts that occurred on Monday, Tuesday, and Wednesday; or on those that occurred on Monday, Tuesday, and Thursday; or on Monday, Wednesday, and Thursday; or Tuesday, Wednesday, and Thursday; or that all four acts occurred. Things get significantly more muddy when the state of the evidence supports finding that two discrete acts of molestation occurred on the same day, say one in the morning and one in the evening, which would count as two multiple acts; or when there is equivocation on whether the morning molestation involved penetration or just a touching, which would count as alternative means for proving the act of morning molestation. But the question that typically suffices to distinguish between the two concepts is whether the accuser—or the State's evidence as a whole—delineates separate and discrete acts or, instead, equivocates on how any given single act was committed.

Separate and apart from the foregoing and *Rabago*'s construction of the offense's conduct element, the u14csa statute itself confirms that its conduct element contemplates that each set of three (or more) sexual acts constitutes a distinct instance of u14csa. The statute's third subsection provides that "a defendant may be charged with only one count under this section, unless more than one victim is involved, in which case a separate count may be charged for each victim." HRS §707-733.6(3). If the "three or more acts" element of the offense describes only alternative means, then subsection (3)'s stacking prohibition would be superfluous. As *Jones* makes clear, alternative means do not give rise to the possibility of conviction on separate counts—rather, the possibility of conviction on separate counts is another tool that helps distinguish the concepts of multiple acts and alternative means from each other. *Jones*, 96 Hawaii at 170–174, 29 P.3d at 360–364.

Some cases, which the State will surely throw into the mix to make this topic even more confusing, condone charging the alternative "ways" that a crime can be committed in separate counts. *See State v. Caleb*, 79 Hawaii 336, 339, 902 P.2d 971, 974 (Haw. 1995) ("it has long been the approved practice to charge, by several counts, the same offense as committed in

different ways or by different means, to such extent as will be necessary to provide for every possible contingency in the evidence"). But when the State charges alternative means in separate counts, it walks away with only one conviction. *See Caleb*, 79 Hawaii at 340, 902 P.2d at 975. The reason for that—though *Caleb* glosses over it—is because double jeopardy precludes multiple convictions and imposition of multiple punishments for a single crime. *United States v. Chilaca*, 909 F.3d 289, 296–297 (CA9 2018) (reaffirming that principles of double jeopardy dictate that the "remedy for a conviction for multiplicitous charges is to vacate the multiplicitous count convictions"); *cf.*, *e.g.*, *United States v. Keen*, 104 F.3d 1111, 1119–1120 (CA9 1996) (as amended) (holding that double jeopardy precludes imposition of multiple punishments under §922(g) based on the number of guns possessed or, to say it a different way, based on the alternative means that the defendant used to violate the statute). Thus if all §707-733.6(1) does is describe alternative means, then section 707-733.6(3) isn't doing any meaningful work, because then the latter provision would simply prevent what existing double jeopardy law already prevents—multiple convictions for conduct that constitutes only one crime. The only way that the §707-733.6(3) bar does anything meaningful is if each combination of three or more acts establishes a distinct instance of u14csa, such that, absent §707-733.6(3), there would be no bar on multiple convictions and sentences for each combination of at least three acts.

Section 707-733.6(3) thus signals that u14csa's call for a series of at least three acts does not set out alternative means. Rather, the signal that §707-733.6(3) sends is that the series requirement will often, if not invariably, give rise to the presentation of more than the minimal three acts, the various combinations of which each constitute a violation of the u14csa statute. Hence the need for an explicit prohibition against stacking multiple u14csa counts and convictions atop each other, lest the over-zealous prosecutor bloat the accused's exposure to criminal liability. Were there no such prohibition, a four-act case would allow for five counts, five convictions, and five twenty-year ordinary imprisonment terms; a five-act case for sixteen; and so on. There is no reckoning with this aspect of §707-733.6(3) in *Young*, nor, as far as counsel's research attests, any other u14csa appellate case in Hawaii.

In sum, the circuit court erred in turning to *Young* because *Young* is wrongly decided, both as to result and as to the reasoning it used to get there. More importantly, the circuit court's turn to *Young* is nonetheless a mistake even if *Young* is not wrongly decided, because *Young* does not discuss—but instead expressly avoids reckoning with—the constitutionality of §25(2)

under *Ramos* and the Sixth and Fourteenth Amendments. *Young*, 150 Hawaii at 368–370 and 373–374, 502 P.3d at 48–50 and 53–54. The argument that Tran is making is quite different than the argument Young made. Young argued that §707-733.6(2) was unconstitutional under *Ramos* and the Sixth and Fourteenth Amendments. *Id.* Trans argues that §707-733.6(2) is unconstitutional under the Hawaii Constitution, because §25(2) is unconstitutional under *Ramos* and the Sixth and Fourteenth Amendments and therefore does not shield §707-733.6 from the Hawaii Constitution's due process and jury trial clauses—the very things *Young* expressly opted not to delve into. *Young*, 150 Hawaii at 373–374, 502 P.3d at 53–54. The ICA's rejection of Young's argument thus does not foreclose, nor even speak to, the argument Tran raises. *Young*, 150 Hawaii at 369–376, 502 P.3d at 49–56. And that being so, *Young* does not need to be overruled to hold in Tran's favor here. (But Tran would have no objection to this Court overruling it anyway.)

Moreover, *Young* does not address the lurking—the way Lurch lurked, so noticeably as to make the least whisper boom—equal protection problems §25 and §707-733.6(2) pose. Tran squarely raises those equal protection issues. The circuit court thus also erred by overlooking Tran's equal protection claims and not confronting the irrationality of using a presumption of guilt to justify denying the u14csa accused of the same amount of due process, and the same degree of fairness at a jury trial, that those accused of any other crime receive in our state courts.

II. The enterprise of constitutional carveouts should be repudiated.

Misplaced under the Hawaii Constitution's "Bill of Rights" are two sections that envision depriving some people of otherwise generally applicable state constitutional rights by subjecting *their* rights to legislative whim. Section 23 of the state constitution's bill of rights provides that "the legislature shall have the power to reserve marriage to opposite-sex couples." Haw. Const. art. I, §23. Section 25 provides that the legislature may, as to u14csa, define what constitutes a continuing course of conduct and the jury unanimity required to convict. Haw. Const. art. I, §25. Ordinarily, we adhere to a hierarchy of law (or, as some cases put it, to a "rule of priority"), under which, as is pertinent here, the federal constitution trumps state law and, as to the latter, the state constitution trumps state statutes. *Va. Uranium, Inc. v. Warren*, 139 S.Ct. 1894, 1901 (2019); *see also*, *e.g.*, *Obrero*, 151 Hawaii at 480, 517 P.3d at 763 (reaffirming that rules "give way" to statutes); *League of Women Voters of Honolulu v. State*, 150 Hawaii 182, 192–193, 499 P.3d 382, 392–393 (Haw. 2021) (reaffirming primacy of state constitutional provisions over

legislative rules); *Queen v. Lau Kin Chew*, 8 Haw. 370, 374 (Haw. King. 1892) (recognizing that state statutes "give way" to constitutional provisions). Sections 23 and 25 disrupt this accepted hierarchy of law, by saying that two state constitutional rights—the right to marry and *Arceo*'s rule—are subject to legislative whim as to some people, thereby allowing a state statute to trump the state constitution as to those rights and those people. That gambit should be repudiated.

Section 23 arose in response to the judicial recognition, as a matter of state constitutional law, that the right to marriage wasn't just something for heterosexual couples. *Baehr v. Lewin*, 74 Haw. 645, 852 P.2d 44 (Haw. 1993), held that same-sex couples constituted a class that, as a matter of equal protection under the state constitution, triggered strict scrutiny of HRS §572-1 (1985), which, at the time, restricted marriage to opposite-sex couples. *Lewin* remanded for the parties to litigate the issue under the strict scrutiny standard. But the legislature, meanwhile, successfully promulgated §23, carving same-sex marriage out from the reach of the state constitution's equal protection clause, by decreeing that the legislature could reserve marriage to opposite-sex couples. Thereafter, *Baehr v. Miike*, 1999 WL 35643448, at *1 (Haw.) (Dec. 9, 1999) (unpublished), tersely acquiesced to what §23 attempted to do and accepted the idea that it legitimately provided a safe harbor for §572-1's restriction of marriage to opposite-sex couples from the state constitution's equal protection clause; all *Miike* said on the point was that §23 "validated" the statute "by taking the statute out of the ambit of the equal protection clause of the Hawaii Constitution." *Miike*, 1999 WL 356434448, at *1.

Miike did not explain how §23 did that work. *Miike*, that is, did not explain how one provision of the state constitution could poke such a hole in other provisions of the state constitution, thereby carving certain people out from having a state constitutional right that everyone else has, all without running afoul of the federal constitution, or the separation-of-powers doctrine embedded in our state constitution, in some way. A more enlightened and compassionate legislature has since rewritten §572-1 so that it now extends Hawaii's right to marry to all couples, without regard to gender identity. *See* HRS §572-1 (2013). And, too, the United States Supreme Court has since recognized that the right to marriage is a fundamental due process right under the federal constitution. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

Obergefell's recognition that the right to marriage is a fundamental right as a matter of substantive due process under the federal constitution clearly invalidates section 23, insofar as a state legislature may not, after *Obergefell*, restrict that fundamental right, be it by reserving it to

same-sex couples or in some other way. And after *Obergefell*, any future flip-flop back to a codified heterosexual definition of marriage would not find a safe harbor in section 23 from the state constitution's equal protection clause. Thus, *Obergefell* effectively reverts state law back to where *Lewin*, more or less, aspired to set it. As this brief has attempted to explain, *Ramos* and state law interact much the same as state law and *Obergefell* do.

Be all of that as it may, *Miike*'s unexplained acquiescence to §23 clearly emboldened the enactment of §25's provisions back in 2006. As noted, section 25 similarly seeks to carve out a group of people from the protection the judiciary has said the state constitution provides, by resort to the same gambit of subjecting that protection to legislative whim. This case accordingly provides an opportunity to provide the explanation that *Miike* did not for how that can be reconciled with the federal constitution. Or, as Tran urges, to repudiate the gambit as one that violates the federal constitution.

When state law sets what process is due, it may not walk that back by then saying that process is due for some but not others, absent a rational basis for the difference. The issue can be dressed up as either an equal protection one (as above) or, as some cases do, as a due process one. *Kim v. United States*, 121 F.3d 1269, 1273–11274 (CA9 1997) (reaffirming that due process as a matter of federal constitutional law is violated by an irrational state law). Consider, for instance, the right to appeal. There is no federal constitutional right to appeal in a criminal case. But once state law grants defendants such a right, the federal constitutional rights to due process and equal protection kick in to ensure that the state law right to appeal is not arbitrarily infringed nor unequally provided. *Evitts v. Lucey*, 469 U.S. 387, 400–405 (1985).

Section 25 would seem to violate the federal constitution in just such a way. *Rabago* settled what state law required as a matter of state constitutional law in u14csa cases by applying *Arceo*'s generally applicable rule to u14csa's conduct element. Section 25 seeks to deprive one group of defendants of the state constitutional rights that underlay *Arceo*'s rule. And it does so for an irrational reason, given the antipathetic presumption of guilt as to the u14csa accused animating it. Section 23 did a similar thing. *Lewin* set what state constitutional law required. And §23 arbitrarily carved a group of people out from that protection, subjecting their constitutional right to marriage to legislative whim. Both provisions would seem to contravene what's said in *Evitts*, as would any other similar gambit in the future.

It is one thing when the judiciary construes a statute. When a court says a statute means X, a legislature can easily undo that by amending that statute to more clearly say what the legislature intended it to say or by repealing that statute entirely and enacting a new one that says Y in its place. That is what has occurred in response to *Obrero*, for instance, as to HRS §801-1. The new statute may raise its own constitutional problems, but the judicial construction of the old statute is rendered a dead letter by the new statute. But when the judiciary says a provision of the state *constitution* means X, then the kettle is boiling different fish. Undoing a judicial pronouncement of what the state constitution means and requires is a more onerous task, one that would seem, at a minimum, to require abrogating the state constitutional provision at issue entirely or, at the very least, amending it (such as has been done to article I, section 10 of the Hawaii Constitution), rather than leaving it in place and trying to chip away at it in some kind of arbitrarily piecemeal way that *Evitts* forbids (such as §23 and §25 do).

What §25 and §23 attempt to do, moreover, is very hard to reconcile with what state caselaw has said about the separation-of-powers doctrine embedded in the structure of the Hawaii Constitution. *State v. Bani*, 97 Hawaii 285, 36 P.3d 1255 (Haw. 2001), for example, confronted a provision of Hawaii's take on Megan's Law, which "attempted to exempt" it "from the constitutional right to privacy," by legislatively decreeing that sex offenders had "a diminished expectation of privacy" in their registration information. *Bani*, 97 Hawaii at 291 n.4, 36 p.3d at 1261 n.4. That attempt failed for two reasons: (1) because allowing "the legislature to exempt the statute from constitutional requirements, without independent review by this court and the judiciary, would effectively nullify" the state constitutional right to privacy; and (2) because "the legislature's intent to preclude judicial review" of our Megan's Law "violates the doctrine of separate of powers." *Id.* Because "the question as to the constitutionality of a statute is not for legislative determination, but is vested in the judiciary, … a statute cannot survive constitutional challenge based on legislative declaration alone." *Id.* Any other result would allow the legislature to grab that judicial power at will and, thus, would impermissibly commingle "different powers of government in the same hands" and, thereby, cancel the check the judiciary provides against legislative over-reaching. *Alaka'i Na Keiki, Inc. v. Matayoshi*, 127 Hawaii 263, 275, 277 P.3d 988, 1000 (Haw. 2012). If, as *Bani* held, the separation-of-powers doctrine precludes a legislative power-grab when it comes to carving sex offenders out from the state

constitutional right to privacy, the doctrine should preclude such hijacking when it comes to carving those accused of u14csa out from the state constitutional rights animating *Arceo*'s rule.

This Court should take the opportunity this case presents to hold that the gambit §25 and §23 deploy is not a legitimate one. It violates principles of due process and equal protection under the federal constitution. And it contravenes the separation-of-powers doctrine embedded in our state constitution.

III. Dismissal for *Jardine* error should be with prejudice in Tran's case.

This section of this brief assumes familiarity with Tran's dismissal claim and the circuit court's dismissal ruling. JIMS Dkt. 161 (RA at 24); JIMS Dkt. 194 (RA at 27) (infra at 55-62).

Ordinarily, a defective charge triggers dismissal without prejudice. Here, however, the circuit court abused its discretion in adhering to that typical remedy, because doing so does not adequately account for the structural and systemic error that has arisen in this case. JIMS Dkt. 194 at 8 (RA at 27) (infra at 62); *State v. Loher*, 140 Hawaii 205 222–223, 398 P.3d 794, 811–812 (Haw. 2017) (discussing structural error); *State v. Moriwake*, 65 Haw. 47, 647 P.2d 705 (Haw. 1982) (applying a balancing test to determine when a hung jury warrants dismissal with prejudice).

The State's interest in prosecuting a violation of §707-733.6 is, of course, significant. HRS §707-733.6(4) (deeming u14csa a class A felony); HRS §706-659 (providing for an indeterminate 20-year term of imprisonment on a class A felony); HRS §701-108(1) (providing that U14csa prosecution may be commenced at any time). But that interest is outweighed by the constellation of constitutional and statutory rights that the State's prosecution of Tran, on a defective u14csa indictment, has violated. That, really, is the poison in the well—that this is not only a case in which the State subjected Tran to trial on a defective u14csa indictment, but also a case in which §707-733.6(2) turned off *Arceo*. Because the trial and the grand jury proceedings were neither *Arceo*- nor *Jardine*-compliant, the record here fails to provide any clue as to the series of acts that grand and trial jurors actually relied upon. As a result, we don't know which instance of u14csa, from all of those NK's accusations allege, the grand jury charged and the trial jury convicted on. We don't know which series of acts any individual trial juror found proven beyond a reasonable doubt, much less what the trial jury as a whole believed. We don't know which series of acts any individual grand juror relied upon to find probable cause, nor what the grand jury as a whole believed. We do not know these things because the proceedings conducted

before both juries assumed that §707-733.6(2) validly cancels *Rabago* (in its entirety)—and thereby exempted the State's prosecution of Tran from *Arceo*'s rule—and because the indictment was not *Jardine* compliant as to the details that would tell us these things.

Ordinarily, when an indictment has failed to do the work *Jardine* requires, and the State exploits that lack of detail to submit more than one factual theory of guilt to the trial jury, *Arceo*'s rule picks up the slack and does the work *Jardine* requires. Ordinarily, a trial jury's guilty verdict—when returned under an *Arceo* instruction or after an *Arceo* election—tells us what factual theory the trial jurors relied upon to convict. And, if the indictment is not detailed enough, we can at least then comb the grand jury transcript to ensure, before dismissing a defective charge without prejudice, that the State indeed presented that theory to the grand jury. In such an ordinary case, we are able to further police the State and ensure that any subsequently-filed, *Jardine*-compliant indictment does not stray beyond the factual theory that the State previously relied upon. And in such an ordinary case, the *Jardine* error thus does not amount to structural error, even when the error is caught only after trial has occurred, because giving the State a second chance to clean up a *Jardine* error in the indictment—by dismissing the defective one without prejudice—does not compound the problem. When, that is, *Arceo*'s rule has been abided, remedying a *Jardine* error by post-trial dismissal without prejudice does not further infringe the constitutional guarantees that the defective indictment violated. Notice aside, the record an *Arceo*-complaint prosecution creates guards against dissonance in and deviation from the theory of guilt animating the State's prosecution.[8]

A u14csa prosecution conducted under §707-733.6(2)'s non-unanimity rule is, however, a different animal. By turning off *Arceo*'s rule during the grand jury proceeding and then again at trial, section 707-733.6(2) leaves behind a record that does not allow for policing the State's factual theory of guilt in the absence of a *Jardine*-compliant indictment. When a *Jardine* error occurs in a u14csa case prosecuted under §707-733.6(2)'s non-unanimity rule, we cannot discern, after the fact, what factual theory or theories grand jurors thought, individually or collectively, established probable cause on u14csa's conduct element. Nor is it possible to know

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[8] Lest he be misunderstood, Tran does not mean what's just been said to suggest that the State is limited in a criminal case to a single theory of guilt. It may rely on more one theory of guilt, but when it does so, those theories of guilt need to be evident in the charging document and trial jurors need to agree as to the theory (and, if more than one, each theory) that they rely on to convict.

what factual theory or theories the trial jurors individually or collectively relied upon to find that element proven beyond a reasonable doubt at trial. Thus, the harmlessness of the *Jardine* error in a u14csa case that has gone to trial on a defective indictment cannot be fully assessed once the trial jury returns a general verdict and is discharged. The harmlessness of the notice problem can be assessed by resort to the trial and discovery record (perhaps—Tran's answering brief in the State's appeal will explain why it doesn't); but when it comes to policing the State's factual theory or theories of guilt, harmlessness defies reckoning. The error is, consequently, structural. *Loher*, 140 Hawaii at 224–226, 398 P.3d at 813–815 (recognizing that when harmless-error analysis devolves into "unguided speculation" and harmlessness is, consequently, "virtually impossible" to determine, the error is a structural one that necessarily triggers, at the very least, vacatur and a new trial).

Even were none of that so, the error here should be deemed structural because of the constellation of constitutional rights the State has violated in prosecuting Tran on a defective u14csa indictment under §707-733.6(2)'s non-unanimity rule. *Loher*, 140 Hawaii at 222 and 224–225, 398 P.3d at 811 and 813–814 (reaffirming that structural error can arise from the violation of multiple complementary rights). As has been discussed at length above, the *Jardine* error that occurred here does not stand alone. In addition to violating *Jardine*, the State's indictment in this matter also failed to ensure that *Arceo*'s rule would be followed at trial and, indeed, it was not followed at trial. Thus far, then, the State's prosecution of Tran has trampled not only on his right to be informed of the nature and cause of the u14csa accusation against him. It has also trampled on his rights to due process, to a fair trial, and to the jury trial right of unanimity as to the truth of every accusation against him. It also violated §801-1 (as it stood then as well as now), which presumes a *valid* charging document (either an indictment or a prosecutor's complaint) in order to subject someone to trial on u14csa. All of these these various violations of Tran's constitutional and statutory rights prompted him to move for dismissal and, in doing so, technically turned off a double jeopardy claim arising from all of this. *State v. Wilmer*, 97 Hawaii 238, 242–243, 35 P.3d 755, 759–760 (Haw. 2001). But the values animating the double jeopardy clauses of the state and federal constitutions are nonetheless implicated by subjecting Tran to further prosecution. *State v. Quitog*, 85 Hawaii 128, 141–143, 938 P.2d 599, 572–574 (Haw. 1997) (explaining that "the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial" because a "second prosecution … increases the

financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted" (quoting *Arizona v. Washington*, 434 U.S. 497, 503–505 (1978))); Haw. Const. art. I, §10; U.S. Const. amend. V.

What tips things in favor of dismissing with prejudice, however, is not merely that the error is structural and systemic in Tran's case—though that, really, ought to be enough. What compels dismissal with prejudice here is that doing anything less will compound and perpetuate the error. Since we have no way of knowing what factual theory or theories the grand jury and trial jury relied upon the first time round, we have no way of ensuring that the State does not stray from that theory when, downstream, the State accepts the invitation that dismissal without prejudice extends, and returns to the grand jury (or simply files a prosecutor's complaint) and starts a second round of prosecution in this case, presumably on the basis of the same evidence it relied upon in round one. The risk of dissonance is, accordingly, impossible to assuage, and that risk—of the State's own devise—demands that this matter be dismissed with, not without, prejudice.

Even were the foregoing insufficient to compel dismissal with prejudice outside the framework of *Estencion*'s factors,[9] running the point through that framework does not produce a different result. Under *State v. Estencion*, 63 Haw. 264, 269, 625 P.2d 1040, 1044 (Haw. 1981), the factors that should weigh in on the prejudice determination consist of the seriousness of the offense, the facts and circumstances that led to dismissal, and the impact a second prosecution would have on the administration of justice, along with anything else that's pertinent. *State v. Fukuoka*, 141 Hawaii 48, 55–56, 404 P.3d 314, 321–322 (Haw. 2017). The seriousness of the offense, of course, weighs in favor of dismissal without prejudice, but little else does. The facts and circumstances that led to dismissal here are all of the State's own making, by failing to draft its indictment correctly and then proceeding to subject Tran to trial on that defective indictment. The only reason we don't know what acts the grand jury and trial jury relied upon to charge and convict Tran—the only reason, that is, we don't know the crime of accusation and the crime

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[9] *State v. Michaeledes*, 152 Hawaii 217, 223–224, 524 P.3d 1241, 1247–1248 (Haw. 2023), decided after the circuit filed its dismissal order, appears to limit *Estencion* to determinations of whether dismissal under HRPP 48 on speedy trial grounds should be with or without prejudice. If it indeed does so, then the circuit court erred in turning to *Estencion* instead of to *Moriwake*, as Tran did in his dismissal motion.

conviction (and, moreover, whether they match) out of all those that NK's allegations embraced—is because the State never deigned to enumerate those acts, be it in its indictment, or by way of some sort of instruction or interrogatory in the grand jury proceeding or at trial. As Tran's briefing in this matter attests, allowing a second prosecution under such circumstances as his case presents undermines, it does not further, the fair administration of justice, by allowing the State to impose the hardships of a second prosecution on Tran after it has subjected him to the hardship of a first trial on an indictment that is defective for reasons that are wholly attributable to the State. And further prosecution undermines the administration of justice because, as explained above, the structural error that trial on a defective u14csa indictment has birthed in Tran's case is only perpetuated, not remedied, by any further prosecution of him. Thus, even under the *Estencion* factors, dismissal should be with prejudice here, and the circuit court erred in ruling to the contrary. JIMS Dkt. 194 at 8 (RA at 27) (infra at 62).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Appendix C, infra at 64–65, gathers pertinent constitutional and statutory provisions.

CONCLUSION

If this Court affirms the circuit court's dismissal ruling, it should further hold that dismissal should be with prejudice and, thus, that the circuit court erred in dismissing *without* prejudice; upon so holding, this Court should then remand this matter for entry of an order granting dismissal with prejudice. If this Court affirms both the circuit court's dismissal ruling and its "without prejudice" ruling and, thus, remands with the possibility that the State will reinitiate its prosecution of Tran, then this Court should address Tran's arguments as to whether *Arceo*'s rule applies in u14csa prosecutions, so as to provide guidance to the parties and the lower courts in this matter, as well as in other u14csa cases. If this Court holds that the circuit court erred in granting dismissal, then this Court should further hold that a u14csa prosecution must abide *Arceo*'s rule and, thus, that the circuit court erred in denying the merits of Tran's motion to amend and/or supplement his new trial motion; upon so holding, this Court should then remand this matter for a new, *Arceo*-compliant, trial.

DATED: Honolulu, Hawaii, April 24, 2023.

/ s / Thomas M. Otake
THOMAS M. OTAKE
Attorney for Defendant-Appellee/Cross-Appellant
Alvin Tran

APPENDICES

A. Order denying motion to amend and/or supplement Tran's new trial motion, JIMS Dkt. 183 (RA at 26) (Oct. 6, 2022). 40

B. Order granting in part and denying in part Tran's motion to dismiss, JIMS Dkt. 194 (RA at 27) (Jan. 9, 2023). 55

C. Pertinent constitutional and statutory provisions. 63

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAIʻI

STATE OF HAWAIʻI, vs. ALVIN TRAN, Defendant.	Case No. 1CPC-20-0000890 CONTINUOUS SEXUAL ASSAULT OF A MINOR UNDER THE AGE OF FOURTEEN YEARS §707-733.6, HRS ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL, PURSUANT TO SUPPLEMENTAL ARGUMENT, FILED MAY 25, 2022 HON. JUDGE: CATHERINE H. REMIGIO HEARING DATE: July 26, 2022

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL, PURSUANT TO SUPPLEMENTAL ARGUMENT, FILED MAY 25, 2022

On July 26, 2022, this court heard Defendant Alvin Tran's Motion for a New Trial, filed May 2, 2022 ("Motion for New Trial"), and Defendant's Motion to Amend and/or Supplement His Pending Motion for a New Trial, filed May 25, 2022 ("Supplemental Argument for New

Trial"). Deputy Prosecuting Attorney Thalia B.P. Murphy represented the State of Hawai`i ("State"). Thomas M. Otake, Esq. represented Defendant Alvin Tran, ("Defendant"), who was present for the hearing. The court takes judicial notice of the records and files of this case. After consideration of the reliable and credible evidence, and considering the arguments of counsel, the court enters the following decision.

DECISION

I. FACTS

On July 24, 2020, an Indictment was filed charging Defendant with Continuous Sexual Assault of a Minor Under the Age of Fourteen Years under Hawai`i Revised Statutes (hereinafter "HRS") § 707-733.6.

Defendant was arraigned on August 3, 2020. Jury trial commenced on April 7, 2022, and the jury returned a unanimous verdict of guilty as charged on April 22, 2022.

II. LEGAL ANALYSIS

Hawai`i Revised Statutes § 707-733.6 provides:

> § 707-733.6. Continuous sexual assault of a minor under the age of fourteen years
>
> (1) A person commits the offense of continuous sexual assault of a minor under the age of fourteen years if the person:
>
> (a) Either resides in the same home with a minor under the age of fourteen years or has recurring access to the minor; and

> (b) Engages in three or more acts of sexual penetration or sexual contact with the minor over a period of time, while the minor is under the age of fourteen years.
>
> (2) To convict under this section, the trier of fact, if a jury, need unanimously agree only that the requisite number of acts have occurred; the jury need not agree on which acts constitute the requisite number.
>
> (3) No other felony sex offense involving the same victim may be charged in the same proceeding with a charge under this section, unless the other charged offense occurred outside the period of the offense charged under this section, or the other offense is charged in the alternative. A defendant may be charged with only one count under this section, unless more than one victim is involved, in which case a separate count may be charged for each victim.
>
> (4) Continuous sexual assault of a minor under the age of fourteen years is a class A felony.

HRS § 707-733.6 was enacted in 2006, after Article 1, Section 25 of the Hawai`i Constitution was ratified and became law. It replaced an almost identical statute, HRS § 707-733.5 – which was repealed. The legal and legislative history of HRS §§ 707-733.5 and 707-733.6 are discussed *infra.*

A. Article 1, Section 25 of the Hawai`i Constitution and the Right to Jury Trial

Defendant asserts Article 1, Section 25 of the Hawai`i Constitution violates the mandate of jury unanimity provided by the Sixth Amendment to the U.S. Constitution as it applies to the states through the Fourteenth Amendment. Specifically, the defense argues that Ramos v. Louisiana, 140 S. Ct. 1390 (2020) "does not allow a state to alter the

verdict unanimity that the Sixth Amendment's jury trial clause requires to convict on a criminal offense." *Supplemental New Trial Argument at 6* (citing *Ramos*, 140 S. Ct. at 1395) ("A jury must reach a unanimous verdict in order to convict.")[1]

In support of this argument, Defendant points to the plain language of Article 1, Section 25, which states:

> In continuous sexual assault crimes against minors younger than fourteen years of age, the legislature may define:
>
> 1. What behavior constitutes a continuing course of conduct; and
>
> 2. *What constitutes the jury unanimity that is required for a conviction.*

Haw. Const. art. I, Sec. 25 (emphasis added). The term "[w]hat constitutes the jury unanimity", according to the defense, impermissibly allows the state legislature to define the "jury unanimity" that is sufficient for a conviction. This gave the legislature the ability to define "jury unanimity" as anything other than a 12-0 decision to convict – something that is specifically prohibited under *Ramos*. The defense argues that any subsequent definition chosen by the legislature - even if it is a 12-0 decision - is inconsequential since it is the ability to define

[1] In *Ramos*, the U.S. Supreme Court struck down a Louisiana law allowing a defendant to be convicted of a serious crime by a guilty verdict of 10-2 (meaning 2 jurors voted to acquit). The Court determined that the Sixth Amendment's guarantee of an impartial jury trial meant the jury must unanimously agree before there can be a conviction. The Court further found that this requirement of jury unanimity is passed on to the states by way of the Fourteenth Amendment. *Ramos*, 140 S.Ct. at 1393-95.

something that the U.S. Supreme Court has already defined that is wrong.

1. The plain language of Haw. Const. art. I, Sec. 25 does not on its face allow for an other-than 12-0 jury vote.

What constitutes the jury unanimity that is required for a conviction. Haw. Const. art. I, Sec. 25(2) (emphasis added).

"Unanimity," or the state of being unanimous, requires the agreement and consent of all involved. *Unanimity,* MERRIAM-WEBSTER (11th ed. 2020). In the context of a jury trial, it means all 12 jurors must agree. It does not mean anything less than 12 (such as 10-2 or 9-3). This term is clear and unambiguous and it does not authorize anything less than unanimity or provide a mechanism to declare, for example, 10-2 to be unanimous. A 10-2 jury vote, by definition, is NOT unanimous.

The court declines to read section subsection (2) to authorize the legislature to declare jury unanimity to be anything but 12-0. There is no other reasonable definition of unanimity.

In the context of Haw. Const. art. I, Sec. 25, the question "what constitutes ... unanimity" answers itself: unanimity is the vote or agreement of all (jurors).

The full inquiry: "What constitutes the jury unanimity that is required for a conviction" simply means "what is it that all 12 jurors must agree on before a defendant can be convicted?" or "what do the jurors all have to consent to?"

As such, Haw. Const. art. I, Sec. 25, on its face, does not permit a vote other than 12-0 to secure a conviction. It simply provides the authority for the legislature to define the actus reas that all 12 jurors must agree upon. Haw. Const. art. I, Sec. 25 does not, on its face, contradict *Ramos*.

2. The Historical Context of Haw. Const. art. I, Sec. 25

Even if the language of Haw. Const. art. I, Sec. 25 were ambiguous, a look at the law and cases that preceded its enactment – the motivating factors - supports the conclusion that it was not meant to provide an other-than unanimous jury to convict. Its very purpose was to allow the legislature (as opposed to the judiciary) to define the continuing course of conduct that constitutes an element of the offense, and further clarify that the jury must unanimously agree on that defined course of conduct, rather than the individual acts that comprise the course of conduct.

A. State v. Arceo

The genesis of Haw. Const. art. I, Sec. 25 began with State v. Arceo, 84 Haw. 1, 928 P.2d 843 (1996). In *Arceo*, Defendant-appellant Anthony Arceo was found guilty of committing one count of sexual assault in the third degree and one count of sexual assault in the first degree – both upon his six-year-old son. From the evidence presented to the grand jury, it appears defendant's son alleged at least 9 incidents of sexual abuse, but the prosecution failed to identify which incident applied to each count. Defendant moved to require the

prosecution to select two incidents and exclude reference to the remaining incidents as prior bad acts. The prosecution responded that it was charging defendant with:

> two continuous offenses based on repeated acts occurring over a period of time. ... [that defendant] essentially engaged in two continuous offenses, sexual contact with a minor and sexual penetration of a minor.

Arceo, 84 Haw. at 6, 928 P.2d at 848.

The Hawai`i Supreme Court held that sexual assault in the third degree and sexual assault in first degree "are not—and cannot be—'continuing offenses' and that each distinct act in violation of these statutes constitutes a separate offense under the HPC." *Arceo*, 84 Haw. at 21, 928 P.2d at 863. The Court went on to confirm the defendant's sixth amendment right to a unanimous jury verdict in criminal cases, and hold that the same is guaranteed by article I, sections 5 and 14 of the Hawai`i Constitution. *Arceo*, 84 Haw. at 30, 928 P.2d at 872.

In her dissent, Justice Nakayama wrote:

> [I] agree with the majority's holding ... that under the current Hawaiʻi Penal Code (HPC), sexual assault in the first degree pursuant to Hawaiʻi Revised Statutes (HRS) § 707–730(1)(b) (1993), and sexual assault in the third degree pursuant to HRS § 707–732(1)(b) (1993) are not "continuing offenses" because they represent distinct acts and therefore, separate offenses. However, I urge the Hawaiʻi legislature to enact a "continuous sexual abuse of a child" statute under the HPC, similar to the statute enacted by the State of California, to cure the problems inherent in the criminal prosecution of sexual abuse cases involving a minor of tender years who is unable to specifically recall dates, instances or circumstances surrounding the abuse.

Arceo, 84 Haw. at 38, 928 P.2d at 880.

B. HRS § 707-733.5

In response to *Arceo*, the legislature passed HRS § 707-733.5, creating an offense of "continuous sexual assault of a minor under the age of fourteen years."[2]

C. State v. Rabago

In State v. Rabago, 103 Hawai`i 236, 81 P.3d 1151 (2013), the defendant was charged and convicted of two counts of continuous sexual assault of a minor under age 14, in violation of HRS § 707-733.5.

The evidence in *Rabago* included testimony from 12 year old and 9 year old girls that defendant would separately, and on various occasions, touch each girl's vulva with his hand and mouth. The 12 year old recalled that each time it happened, it was in the afternoon, after school, and each time it happened in the same manner – but she could not recall the dates of any incident, or the last time it happened. The 9 year old

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[2] HRS § 707-733.5 provided: Continuous sexual assault of a minor under the age of fourteen years.
(1) Any person who: (a) Either resides in the same home with a minor under the age of fourteen years or has recurring access to the minor; and (b) Engages in three or more acts of sexual penetration or sexual contact with the minor over a period of time, but while the minor is under the age of fourteen years, is guilty of the offense of continuous sexual assault of a minor under the age of fourteen years.(2) To convict under this section, the trier of fact, if a jury, need unanimously agree only that the requisite number of acts have occurred; the jury need not agree on which acts constitute the requisite number.(3) No other felony sex offense involving the same victim may be charged in the same proceeding with a charge under this section, unless the other charged offense occurred outside the time frame of the offense charged under this section or the other offense is charged in the alternative. A defendant may be charged with only one count under this section unless more than one victim is involved, in which case a separate count may be charged for each victim.(4) Continuous sexual assault of a minor under the age of fourteen years is a class A felony.

did not recall any particular time when this happened and gave conflicting testimony as to the number of times it happened.

Defendant Rabago appealed his convictions on the basis that HRS § 707–733.5 was unconstitutional because it violated his right to due process, his right to a unanimous verdict, and the aforementioned *Arceo* decision. *Rabago*, 103 Haw. at 238, 81 P.3d at 1153.

The Hawai`i Supreme Court agreed with Rabago, finding that, under the terms of HRS § 707–733.5, "several acts are alleged and any [combination] of them could constitute the crime charged." *Rabago*, 103 Haw. at 236, 81 P.3d at 1151 (citing State v. Jones, 96 Haw. 161, 170, 29 P.3d 351, 360 (2001), *as amended on reconsideration in part* (Aug. 30, 2001)) (citation and internal quotation signals omitted). Based on this finding, the Court concluded that jury unanimity was required as to the act(s) which constitute the crime, adding:

> [t]o ensure jury unanimity ..., we require that either the [prosecution] elect the particular criminal acts upon which it will rely for conviction, or that the trial court instruct the jur[ors] that all of them must agree that the same underlying criminal act[s] ha[ve] been proved beyond a reasonable doubt.

Rabago, 103 Haw. at 253, 81 P.3d at 1168.

In rejecting the State's argument that HRS § 707–733.5 was intended to create a continuing course (or alternate course) of conduct offense, the Court stated:

> [I]t is the province of this court, and not the legislature, ultimately to ascertain whether, for purposes of HRS § 707–733.5, multiple acts of sexual penetration or sexual contact may be deemed a "continuing offense." ... [w]e hold that such acts are, by nature, separate and discrete and therefore may not form the basis of a "continuing offense."

Id.[3]

D. Haw. Const. art. I, Sec. 25

In direct response to the *Rabago* decision, Hawai`i voters were asked to ratify the following proposed amendment to the Hawai`i Constitution:

> In continuous sexual assault crimes against minors younger than fourteen years of age, the legislature may define: (1) what behavior constitutes a continuing course of conduct; and (2) what constitutes the jury unanimity that is required for a conviction.

S.B. 2246, S.D.1, H.D.1, C.D.1, 23rd Leg., Reg. Sess. (2006). (Emphasis added).

Art 1, Section 25 of Hawai`i Constitution was ratified and became law on November 7, 2006.

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[3] Justice Nakayama's dissent in regards to this part of the majority decision is instructive:

> The majority's attempt to disregard the legislature's intent in enacting HRS § 707–733.5 and circumvent HRS § 707–733.5's express terms, while at the same time acknowledging that the legislature "has deemed HRS § 707–733.5 to be a continuing offense," Majority at 253, 81 P.3d at 1168, should not be permitted.

Rabago, 103 Haw. at 257, 81 P.3d at 1172.

E. HRS § 707-733.6

As noted above, HRS § 707-733.6 was then enacted in 2006, via House Bill No. 2227.[4] *Id.*

The events that led to the ratification of Haw. Const. art. I, Sec. 25 evidence a clear intention.

In *Arceo,* the Court found that the charges of sexual assault in the first degree and sexual assault in the second decree are not "continuing offenses" because they allege distinct and separate acts. Finding otherwise would violate a defendant's constitutional right to a unanimous jury verdict in criminal cases, guaranteed by the Sixth Amendment to the U.S. Constitution and article I, sections 5 and 14 of the Hawai`i Constitution.

In *Rabago,* the Court found the legislature could not define a "continuing offense" as multiple acts of sexual penetration or sexual contact because sexual penetration and sexual contact are separate and

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[4] HB2207 HD1 SD1 appears in the legislative archives as follows:

Measure Title:	RELATING TO SEXUAL ASSAULT.
Report Title:	Crimes; Sexual Assault of a Minor
Description:	Amends the law defining continuous sexual assault of a minor to permit the jury to convict if it is unanimous in finding that defendant committed at least three prohibited acts, even if it cannot unanimously agree which 3 acts constitute the offense. (SD1)
Introducer(s):	B. OSHIRO, LUKE
Current Referral:	JHW

discrete acts. Finding otherwise violates a defendant's right to due process and right to a unanimous verdict.

Haw. Const. art. I, Sec. 25 was therefore intended to give the legislature constitutional authority to define the "continuing course of conduct" that constituted the criminal offense of continuous sexual assault against minors younger than fourteen years of age.

Once the "continuing offense" was defined, the *Arceo* and *Rabago* issue of separate and discrete acts, requiring unanimity as to each act, was addressed.

And because the actus reas is a "continuing offense", the jury must be unanimous in deciding that the "continuing offense" occurred, and not the individual acts that make up the "continuing offense". In other words, the answer to the question of "what constitutes the jury unanimity that is required for a conviction" is that the jury must be unanimous that the 3 acts that constitute a continuing course of conduct occurred. They need not unanimously agree on each individual act – as previously required in *Arceo* and *Rabago*.[5]

A statute is presumed constitutionally valid unless it has been shown to be, beyond all reasonable doubt, in violation of the Constitution. Bishop v. Mahiko, 35 Haw. 608, 641 (1940) (citations omitted). Based on the analysis above, the court declines to find that Haw. Const. art. I, Sec. 25 violates Defendant's right to jury unanimity

[5] The court notes that no one has indicated a jury can convict a defendant of HRS §707-733.6 with anything less than a 12-0 jury vote of guilty as charged.

provided by the Sixth Amendment to the U.S. Constitution as it applies to the states through the Fourteenth Amendment.

B. Constitutional Challenge to HRS § 707-733.6

In State v. Young, 150 Haw. 365, 502 P.3d 45 (Ct. App. 2021), the defendant was convicted of HRS § 707.733.6 - continuous sexual assault of a minor under the age of 14 under. Defendant Young appealed, asserting that his Sixth and Fourteenth Amendment right to a unanimous verdict before conviction of a serious crime was violated.

In *Young*, the complaining witness testified to three incidents of sexual contact in the bedroom and one in the living room. Defendant denied all the allegations against him.

The ICA in *Young* also considered the case of *Ramos* (cited by the defense herein) in its decision. It concluded that "Ramos did not address the issue presented by Young in this appeal: whether the juror unanimity requirement extends to deciding which of several possible means the defendant used to commit an element of the crime." *Young,* 150 Haw. at 370, 502 P.3d at 50.

The ICA then conducted a similar review of the history of HRS § 707-733.6 as appears *supra*. It appears that Young conceded the ratification of Art 1, Section 25 of Hawai`i Constitution precluded a *Rabago*-type of argument under the Hawai`i Constitution. Instead, much like Defendant Tran herein, Young asserted a violation of federal

constitutional law, specifically the Sixth and Fourteenth Amendment right to trial by an impartial jury. The ICA found this argument to be "without merit":

> HRS § 707-733.6 is a continuing-course-of-conduct offense. See State v. Shaw, 150 Hawai'i 56, 62, 497 P.3d 71 (2021) (noting that "if the act proscribed by the statute 'describes an ongoing course of conduct,' that 'connotes a legislative design to make an aspect of [the crime] continuing[.]' ") (quoting State v. Temple, 65 Haw. 261, 267, 650 P.2d 1358, 1362 (1982)). The United States Constitution does not require jury unanimity about specific incidents of underlying conduct to convict a defendant of a continuing-course-of-conduct offense.

Young, 150 Haw. at 374, 502 P.3d at 54.

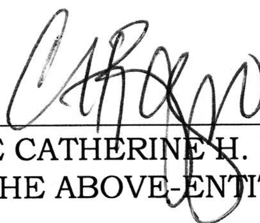
The ICA went on to also conclude that Haw. Const. art. I, Sec. 25 specifically authorized the legislature to criminalize a continuing course of conduct. The jury must unanimously agree only on the actus reas or the course of conduct. The jury does not have to unanimously agree to "means by which the course of conduct was committed – that is, the underlying brute facts." *Young*, 150 Hawai`i at 374, 503 P.3d at 54.

Pursuant to Y*oung*, HRS § 707-733.6(2) does not violate the Defendant's constitutional right to an impartial jury (unanimous verdict) or due process under either the U.S. or Hawai`i Consitutions.

In all other respects, Defendants Supplemental Argument for New Trial is denied.

APPROVED AND SO ORDERED:

DATED: Honolulu, Hawai`i, OCT 06 2022



HONORABLE CATHERINE H. REMIGIO
JUDGE OF THE ABOVE-ENTITLED COURT

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAIʻI

STATE OF HAWAIʻI Plaintiff vs. ALVIN TRAN, Defendant	CASE NO. 1CPC-20-0000890 CONTINUOUS SEXUAL ASSAULT OF A MINOR UNDER THE AGE OF FOURTEEN YEARS, HRS §707-733.6 ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS, FILED MAY 27, 2022 THE HONORABLE CATHERINE H. REMIGIO

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS

Defendant Alvin Tran filed a motion to dismiss on May 27, 2022, after trial but before sentencing. The State opposed the motion. This Court heard argument on the motion on July 26, 2022, and November 2, 2022. At the November 2nd hearing, this Court orally granted Tran's dismissal motion, but denied his request to dismiss with prejudice. This order memorializes this Court's oral ruling granting dismissal without prejudice.

1. Pertinent Facts.

The State indicted Tran on July 24, 2020. The single-count indictment alleged that Tran violated HRS §707-733.6, which prohibits continuous sexual assault of a minor under the age of

fourteen (u14CSA). Echoing statutory language, the indictment alleged that Tran "did intentionally or knowingly engage in three or more acts of sexual penetration and/or sexual contact with N.K. over" a five year period, from about January 1, 2015, through about January 31, 2020. The indictment quoted statutory definitions of sexual contact, sexual penetration, and deviate sexual intercourse, a phrase used in the statutory definition of sexual penetration. It also identified the minor. But the indictment did not set forth any factual details about the three or more sexual acts it accused Tran of committing; it did not, that is, specify what type of contact or penetration Tran allegedly committed, where those sexual acts allegedly occurred, how they allegedly occurred, or when, specifically, they allegedly occurred (apart from the general allegation that they all occurred during at some point during the alleged five-year window).

The State tried Tran before a jury in April of 2022. In support of the charge, the State adduced evidence of more than three acts of sexual contact and penetration. This Court instructed jurors that the State bore the burden to prove beyond a reasonable doubt that Tran "intentionally or knowingly engaged in three or more acts of sexual penetration or sexual contact with N.K." And, in accord with HRS §707-733.6(2), this Court instructed jurors: "you need to unanimously agree only that the requisite number of acts have occurred; you need not agree on which acts constitute the requisite number." On April 22, 2022, the jury returned a general verdict finding Tran guilty as charged.

A week later, the Hawai'i Supreme Court published *State v. Jardine*, 151 Hawai'i 96, 508 P.3d 1182 (Haw. 2022). In the wake of that case, Tran filed a post-trial, pre-sentencing motion to dismiss. He contended that this matter should be dismissed because the indictment merely recited generic statutory language and did not include factual details about the three or more sexual acts that the State accused him of committing. He further contended that this matter should be

dismissed with prejudice, because on the record of his case the error was a structural one. The State opposed Tran's dismissal motion and, after conducting a hearing, this Court orally granted Tran's *Jardine* claim, but rejected his request to dismiss with prejudice. This Court accordingly dismissed this matter without prejudice on November 2, 2022.

2. Timeliness and Standard of Review.

Tran's motion is timely. To charge an offense, an indictment must set forth "a plain, concise and definite statement of the essential facts constituting" the alleged offense. HRPP 7(d); *see also Jardine*, 151 Hawai'i at 100–101, 508 P.3d at 1186–1187; *State v. Garcia*, ___ Hawai'i ___, ___ P.3d ___, 2022 WL 5403805, at *5 (Haw. 2022). "A charge defective in this regard amounts to a failure to state an offense, and a conviction based upon it cannot be sustained, for that would constitute a denial of due process." *Jardine*, 151 Hawai'i at 100, 508 P.3d at 1186 (cleaned up; citation omitted). A claim that an indictment fails to state an offense can be raised at any time during the pendency of the proceedings in the trial court. *See* HRPP Rule 12(b)(2) ("objections" that "the charge … fails to … charge an offense … shall be noticed by the court at any time during the pendency of the proceedings"). Tran raised his claim while this matter remained pending in this Court, the trial court; thus, he timely raised his *Jardine* claim. *See, e.g.*, *State v. Walker*, 126 Hawai'i 475, 490 n.25, 273 P.3d 1161, 1176 n.25 (Haw. 2012) (reaffirming that a defective-charge claim is timely when raised "before the circuit court enter[s] judgment"), overruled on other grounds by *Schwartz v. State*, 136 Hawai'i 258, 361 P.3d 1161 (Haw. 2015).

Review of Tran's *Jardine* claim, moreover, does not call for application of the liberal construction standard of review set forth in *State v. Motta*, 66 Haw. 89, 657 P.2d 1019 (Haw. 1983). That standard, sometimes called the *Motta-Wells* standard, triggers a presumption that the charge is valid, but the standard and its presumption only apply to a claim that is untimely raised

for the first time on appeal. *See State v. Kauhane*, 145 Hawaiʻi 362, 369 n.6, 452 P.3d 359, 366 n.6 (Haw. 2019); *State v. Wells*, 78 Hawaiʻi 373, 375 and 381, 894 P.2d 70, 72 and 79 (Haw. 1995). Tran timely raised his claim so the *Motta-Wells* standard and its presumption do not apply to his claim.

3. Legal Analysis.

An indictment serves two purposes that are pertinent here. One is to provide notice to Tran of the crime that the State says he committed. *See Jardine*, 151 Hawaiʻi at 100, 508 P.3d at 1186. The second is to ensure congruence between the crime that the grand jury found probable cause to charge and the crime that the State asked the trial jury to convict Tran of committing. *See State v. Jess*, 117 Hawaiʻi 381, 397, 184 P.3d 133, 149 (Haw. 2008) ("an indictment must make clear the charges so as to avoid the defendant's conviction on facts not found, or perhaps not even presented to, the grand jury that indicted him" (cleaned up; citation omitted)); *see also, e.g.*, *Russell v. United States*, 369 U.S. 749, 770 (1962) (making the same point as a matter of federal criminal law).

Both of these purposes are furthered by the "detailed approach" that *Jardine* embraced. *Jardine*, 151 Hawaiʻi at 100–101, 508 P.3d at 1186–1187. Under that approach, generic statutory terms—terms that mean more than one thing—must be narrowly tailored to the alleged crime. *See Jardine*, 151 Hawaiʻi at 100–101, 508 P.3d at 1186–1187. In addition to such tailoring, the detailed approach also requires alleging the specific factual details that make up the "core of criminality" in which the accused allegedly engaged. *Jardine*, 151 Hawaiʻi at 101, 508 P.3d at 1187. This latter aspect of the detailed approach requires that an indictment set forth "[d]etails about the who, what, where, when, and how of the alleged offense[.]" *Garcia*, 2022 WL 5403805, at *5 (citing *Jardine*). Narrowly tailored statutory terms and factual detail in an

indictment provide notice to the accused about the specific crime alleged against her. And locking such tailoring and detail down in the indictment ensures that the defendant is not convicted for doing something that the grand jury did not find probable cause to believe he had done. In Tran's case, the indictment fails on both fronts.

First, the indictment does not narrowly tailor generic statutory terms. The terms "sexual contact" and "sexual penetration" are generic terms because they are statutorily defined to mean more than one type of sexual act. *See* HRS §707-700; *Jardine*, 151 Hawai'i at 100–101, 508 P.3d at 1186–1187 (deeming the term "substantial bodily injury" generic because it was statutorily defined to mean more than one type of injury); *Merriam-Webster's Dictionary* (online; defining "generic" to mean "relating to or characteristic of a whole group or class"). Alleging that Tran engaged in three or more acts of "sexual contact and/or sexual penetration" and then setting forth the entire statutory definitions of those terms fails to winnow out the types of sexual contact and penetration that Tran is not accused of committing. As *Jardine* instructs, the indictment must tailor the allegation against Tran to the specific types of sexual contact and penetration—from those set forth in the statutory definitions of those terms—in which he allegedly engaged.[1] The indictment here does not narrowly tailor the sexual contact and sexual penetration allegations, but instead broadly accuses Tran of committing every type of sexual contact and sexual

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[1] Sexual penetration, for example, is defined to include (among other things) both fellatio and deviate sexual intercourse (which, in turn, is defined as, among other things, intercourse with a corpse). If a living complainant accuses someone of engaging only in fellatio and does not assert that the accused had intercourse with a corpse, then *Jardine*'s detailed approach calls for the charge to accuse the defendant only of engaging in fellatio and to set the rest of the statutory definition of sexual penetration aside—because the only part of the sexual penetration definition that pertains to what allegedly occurred is that the term means fellatio. What else sexual penetration means is not relevant to the allegation at hand in such a case and, thus, should not be in the indictment.

penetration captured by the statutory definitions of those terms. Trial belied such sweeping allegations.

Second, the indictment against Tran also fails to set forth factual details circumscribing the core of criminality in which he allegedly engaged. The indictment identifies the who, by initials. But what specific sexual acts occurred, where they occurred, and how they occurred are all elided from the indictment. When they occurred is also left unspecified, beyond the broad allegation that three or more of them occurred during a five-year period. The indictment thus fails to factually detail the core of criminality it accuses Tran of committing.[2]

The State contends that fulfilment of its discovery obligations and the evidence adduced at trial cured, by rendering harmless, any notice problem that the indictment against Tran created. Even if so, that contention does not solve the congruence problem that the indictment

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[2] The parties dispute the degree of specificity that *Jardine*'s detailed approach requires to charge u14CSA properly. The State asserts that sexual contact and sexual penetration are not generic terms to begin with and do not trigger *Jardine*'s detailed approach at all. That position is rejected for the reasons discussed above. Tran, on the other hand, posits two alternatives. First, and by way of incorporating the reasoning set out in his motion to amend his new trial motion, he asserts that grand jurors and trial jurors must unanimously agree as to each act that comprises u14CSA's three-act continuity element. His argument on this point is that HRS §707-733.6(2)'s special unanimity rule is not protected by article I, section 25(2) of the Hawai'i Constitution, because §25(2) is unconstitutional under the United States Constitution, and, left without the protection that §25(2) was thought to provide, section 707-733.6(2) reverts to being unconstitutional under the Hawai'i Constitution, for the reasons set forth in *State v. Rabago*, 103 Hawai'i 236, 81 P.3d 1151 (Haw. 2003). As a result, Tran concludes, *Rabago* and *State v. Arceo*, 84 Hawai'i 1, 928 P.2d 843 (Haw. 1996), require unanimity across the board as to the three (or more) sequential acts that satisfy u14CSA's three-act continuity element. Second, Tran's fallback position is that, even if none of that is so and §707-733.6(2) is good law, an u14CSA count must nonetheless allege the full corpus of acts that grand jurors found probable cause to believe the accused had committed, so as to ensure that trial jurors do not pick and choose an act that was not found by, or perhaps was not even presented to, the grand jury. Pushing back on that idea, the State points to cases carving lawful factual variances out from unlawful constructive amendment of a charge to posit that the State may submit a factual theory of guilt to a trial jury that the State did not present to the grand jury. Because the indictment is defective by any measure, this Court need not and does not reach the question of what level of factual detail is minimally necessary to comply with *Jardine*'s detailed approach in u14CSA cases.

against Tran created and that the general verdict returned at trial has brought to fruition. Discovery and trial evidence do not solve a congruence problem, even if such things might solve a notice problem. *See State v. Israel*, 78 Hawai'i 66, 73, 890 P.2d 303, 310 (Haw. 1995) (the requirement that an indictment "be specific enough to ensure that the grand jury had before it all the facts necessary to find probable cause ... is not satisfied by the fact that the accused actually knew them and was not misled by the failure to sufficiently allege all of them" (citation omitted)). Because the indictment does not identify the core of criminality that the grand jury found probable cause to believe Tran committed, the indictment fails to ensure that the trial jury did not convict Tran on the basis of a factual theory of guilt that the State did not present to the grand jury or that the grand jury rejected.[3] *See Jess*, 117 Hawai'i at 397, 184 P.3d at 149.

The lesson *Jardine* and cases like *Garcia* are trying to teach is that a criminal accusation in our state courts must be writ small, not large—the charge must tap the tree, not gesture towards the entire forest. The charge must capture only *pertinent* statutory language, rather than statutory surplusage that is not relevant to the allegation at hand. And the charge must capture the facts that bring the defendant's alleged conduct within reach of the pertinent statutory language. Sometimes the two will be one in the same; sometimes not. Here, not. Because it is writ large and does not descend to the particulars of the crime Tran allegedly committed, the

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[3] Tran points out that, with HRS §707-733.6(2)'s rule in place, each combination of three sexual acts is a distinct factual theory of guilt when the alleged offense involves more than the minimal three acts. If Tran is correct, then evidence of three acts generates a one theory of guilt; but evidence of four acts generates four distinct factual theories of guilt (or five if a juror runs with an "or more" theory); evidence of five acts generates at least ten factual theories of guilt; six, a minimum of twenty; and so on. Tran posits that if, in an u14CSA case, the grand jury's probable cause finding as to the offense's three-or-more continuity element was based on just four sexual acts, then trial jurors may not rely on additional (a fifth, or sixth, or so on) to convict the accused on the basis of a theory of guilt the additional act or acts generates. Under Tran's view, if the State wishes to give trial jurors, say, six acts to choose from at trial to find, in accord with §707-733.6(2), the offense's three-act continuity element, then the grand jury must find probable cause as to, and indictment must set forth, each of those six acts.

indictment against Tran is defective, his conviction must be set aside, and this matter must be dismissed. *See Jardine*, 151 Hawai'i at 100, 508 P.3d at 1186.

Finally, although Tran's structural error argument has some appeal, this Court nonetheless declines to dismiss this matter with prejudice, in light of the evidence adduced at trial, the jury's verdict, the seriousness of the offense, and the lack of any statute of limitations. *See State v. Estencion*, 63 Haw. 264, 625 P.2d 1040 (Haw. 1981); *see also, e.g., State v. Shaw*, 150 Hawai'i 56, 59, 497 P.3d 71, 74 (Haw. 2021) (remanding for dismissal without prejudice upon holding a charge defective); *State v. Slavik*, 150 Hawai'i 343, 353–354, 501 P.3d 312, 322–323 (Haw. Ct. App. 2022) (reaffirming that the ordinary remedy for a defective charge is dismissal without prejudice).

In accord with the foregoing, this matter is dismissed without prejudice.

DATED: Honolulu, Hawai'i, JAN 09 2023.

HONORABLE CATHERINE H. REMIGIO
First Circuit Court Judge

STATE OF HAWAII V ALVIN TRAN; 1CPC-20-0000890; ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS, FILED MAY 27, 2022

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury …; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; … nor be deprived of life, liberty, or property, without due process of law[.]" U.S. Const., amend. V.

2. "In all criminal prosecutions, the accused shall enjoy the right to a … trial, by an impartial jury …, and to be informed of the nature and cause of the accusation[.]" U.S. Const., amend. VI.

3. "No State shall … deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV.

4. "The Constitution of the United States of America is adopted on behalf of the people of the State of Hawaii." Haw. Const., Fed. Const. Adopted.

5. "No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws[.]" Haw. Const., art. I, §5.

6. "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury or upon a finding of probable cause after a preliminary hearing as held provided by law or upon information in writing signed by a legal prosecuting officer under conditions and in accordance with the procedures that the legislature may provide …; nor shall any person be subject for the same offense to be twice put in jeopardy[.]" Haw. Const., art. I, §10.

7. "In all criminal prosecutions, the accused shall enjoy the right to a … trial by an impartial jury …; to be informed of the nature and cause of the accusation …. Juries, where the crime charged is serious, shall consist of twelve persons." Haw. Const., art. I, §14.

8. "The legislature shall have the power to reserve marriage to opposite-sex couples." Haw. Const., art. I, §23.

9. "In continuous sexual assault crimes against minors younger than fourteen years of age, the legislature may define: 1. What behavior constitutes a continuing course of conduct; and 2. What constitutes the jury unanimity that is required for a conviction." Haw. Const., art. I, 25.

10. HRS §707-733.6 (2006) is titled, "Continuous sexual assault of a minor under the age of fourteen years," and provides:

> (1) A person commits the offense of continuous sexual assault of a minor under the age of fourteen years if the person:
> (a) Either resides in the same home with a minor under the age of fourteen years or has recurring access to the minor; and

(b) Engages in three or more acts of sexual penetration or sexual contact with the minor over a period of time, while the minor is under the age of fourteen years.

(2) To convict under this section, the trier of fact, if a jury, need unanimously agree only that the requisite number of acts have occurred; the jury need not agree on which acts constitute the requisite number.

(3) No other felony sex offense involving the same victim may be charged in the same proceeding with a charge under this section, unless the other charged offense occurred outside the period of the offense charged under this section, or the other offense is charged in the alternative. A defendant may be charged with only one count under this section, unless more than one victim is involved, in which case a separate count may be charged for each victim.

(4) Continuous sexual assault of a minor under the age of fourteen years is a class A felony.

Prior to being repealed in 2006, HRS §707-733.5 (2002) was titled, "Continuous sexual assault of a minor under the age of fourteen years" and provided:

(1) Any person who:

(a) Either resides in the same home with a minor under the age of fourteen years or has recurring access to the minor; and

(b) Engages in three or more acts of sexual penetration or sexual contact with the minor over a period of time, but while the minor is under the age of fourteen years, is guilty of the offense of continuous sexual assault of a minor under the age of fourteen years.

(2) To convict under this section, the trier of fact, if a jury, need unanimously agree only that the requisite number of acts have occurred; the jury need not agree on which acts constitute the requisite number.

(3) No other felony sex offense involving the same victim may be charged in the same proceeding with a charge under this section, unless the other charged offense occurred outside the time frame of the offense charged under this section or the other offense is charged in the alternative. A defendant may be charged with only one count under this section unless more than one victim is involved, in which case a separate count may be charged for each victim.

(4) Continuous sexual assault of a minor under the age of fourteen years is a class A felony.

STATEMENT OF RELATED CASES

Appellant is not aware of any related cases pending in Hawaii's courts or agencies.