OPINION BY MOON, C.J., CONCURRING IN PART, AND DISSENTING, IN PART, IN WHICH NAKAYAMA, J., JOINS

I concur in the majority's affirmance of Petitioner's consecutive sentence based upon the application of the presumption that the sentencing court considered all of the factors set forth in Hawai'i Revised Statutes (HRS) § 706-606 before imposing a consecutive sentence, originally promulgated in State v. Sinagoga,[1] 81 Hawai'i 421, 918 P.2d 228 (App. 1996), overruled on other grounds by State v. Veikoso, 102 Hawai'i 219, 227, 74 P.3d 575, 583 (2003). I cannot, however, agree with the inclusion of the majority's new "rule," mandating that, "henceforth, the sentencing court must state its reasons for imposing a consecutive sentence on the record," majority op. at 5 (emphasis added), for several reasons. First, mandating the sentencing court to state specific reasons when imposing a consecutive sentence -- without overruling the long-standing presumption set forth in Sinagoga violates the doctrine of *stare decisis*. Second, the majority concludes, based on its application of the Sinagoga presumption, that the ICA correctly affirmed the sentencing court's imposition of a consecutive sentence in this case. See Majority op. at 17. As such, the majority's entire discussion of its new "rule" is wholly unnecessary to dispose of this case and, thus, constitutes *obiter*

[1] I observe that then-Intermediate Court of Appeals (ICA)-Judge Acoba authored the opinion for the court.

*dicta*, or more commonly referred to as dicta. Third, mandating the sentencing court to state specific reasons when imposing a consecutive sentence, without overruling Sinagoga, creates confusion in our jurisprudence. As importantly, the conflicting case law creates an untenable situation for our sentencing judges because it places them at risk of violating Hawai'i Revised Statutes (HRS) § 806-73 (Supp. 2008), quoted infra, which dictates that the information contained in pre-sentence investigation (PSI) reports be kept confidential. And, finally, inasmuch as the majority agrees with "the result reached by the ICA . . . that all mitigating factors that were known at the time of sentencing were presented to the sentencing court, and, therefore, counsel's decision not to file a [Hawai'i Rules of Penal Procedure (HRPP)] Rule 35 motion post-sentencing to present those same factors did not fall outside the range of competence expected of criminal lawyers[,]" majority op. at 36, I believe this certiorari proceeding should have been terminated via an order affirming the ICA's judgment on appeal. However, rather than simply affirming the ICA's judgment, the majority -- in my view -- exploits the certiorari process by creating a new "rule" that is wholly unnecessary to the disposition of Hussein's conviction or sentence, and attempts to justify its grant of Petitioner's application by conjuring up an issue surrounding HRPP Rule 35 under the guise of providing clarification.

Therefore, I respectfully dissent from those portions of the majority's opinion.

## I. DISCUSSION

### A. Violation of the Doctrine of *Stare Decisis*

As related by the majority, Petitioner, at the time of sentencing

> was concurrently serving a ten-year term and two five-year terms of imprisonment. The sentencing judge ordered the ten-year mandatory minimum for the instant matter to run consecutively to the prior ten-year term, as opposed to the prior five-year term. Thus, by virtue of adding the mandatory minimum repeat offender ten-year term for the instant matter to the previous ten-year term already being served, as recognized by the court, "in all of her cases, [Petitioner] will be serving a [twenty]-year term of incarceration."

Majority op. at 6-7. Petitioner contends on application, as she did on direct appeal, that the sentencing court failed to consider running the ten-year-term of imprisonment consecutive to the shorter, prior five-year-term, i.e., that the sentencing court failed to consider "the kinds of sentences available," HRS § 706-606(3). The majority acknowledges that, because the plain language of HRS § 706-606.5(5) provides that "a sentencing court may order a repeat offender mandatory minimum term to run consecutively to 'any' prior sentence," id. at 9 (emphasis added) (footnote omitted), a sentencing judge has the discretion to impose a mandatory minimum term consecutively to the shortest of any previously imposed sentences. Id. at 9. Recognizing the Sinagoga presumption -- although labeling it as "the 'clear

evidence' standard" -- as controlling, the majority affirms Petitioner's sentence, stating:

> Under that standard, the [sentencing] court in this case acted correctly with respect to HRS § 706-606, inasmuch as the court heard argument from both parties as to Respondent's motion for consecutive sentences, took notice of the records and files, and reviewed the pre-sentence report. Under the "clear evidence" standard, we cannot conclude the ICA gravely erred in deciding that the court did not err in imposing a consecutive sentence in this respect.

Id. at 17.

In Sinagoga, decided in 1996, the ICA reviewed the defendant's challenge to the sentencing court's imposition of three consecutive terms of imprisonment on three counts of terroristic threatening. In imposing the consecutive terms, the sentencing judge:

> orally reviewed [d]efendant's prior criminal record, which included convictions in various jurisdictions for burglary, assault, driving under the influence, and drug and concealed weapon possession. [The sentencing judge] noted that the offenses [d]efendant was charged with in the present case were felonies involving violence, and that [d]efendant was not a young man. [The sentencing judge] then declared that [d]efendant would be "a danger to people, whether in Hawaii or any other state where he happens to be; and that as long as he's free to do so, he's going to continue to be a danger to both people and to property."

Sinagoga, 81 Hawai'i at 425, 918 P.2d at 232. On appeal, the defendant alleged that the sentencing court failed to consider

the factors listed in HRS § 706-606(2)(a), (2)(d), and (3).[2] Disagreeing with the defendant, the Sinagoga court stated:

> In light of the [trial] court's finding that [d]efendant posed "a danger to people" and if "free[d]" would "continue to be a danger," the court undoubtedly considered "[t]he need for the sentence . . . [t]o reflect the seriousness of the offense[s], to promote respect for [the] law, and to provide just punishment. . . ." HRS § 70[6]-606(2)(a). Arguably, the "needed . . . correctional treatment" factor in HRS § 706-606(2)(d) was implicit in the court's sentence of incarceration, along with the court's consideration of "[t]he kinds of sentences available" as the factor in HRS § 706-606(3) required.
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> The fact that a court does not orally address every factor stated in HRS § 706-606 at the time of sentencing does not mean the court failed to consider those factors. **The statute contains no requirement that the court expressly recite its findings on the record for each of the factors set forth in HRS § 706-606.** Nevertheless, under HRS § 706-668.5, judges are duty-bound to consider HRS § 706-606 factors before imposing sentence. The information relevant to HRS § 706-606 factors is made available to the judges in pre-sentence reports. HRS § 706-601 (1993). The law presumes that judges will conscientiously fulfill their duty to obey the directive of HRS § 706-668.5, and that counsel will offer factor-relevant information at sentencing hearings mandated by HRS § 706-604 (Supp. 1992). Therefore, **absent clear evidence to the contrary, it is presumed that a sentencing court**, following the receipt of a pre-sentence report under HRS § 706-601 and a mandated sentencing hearing under HRS § 706-604, **will have considered all the factors in HRS § 706-606 before imposing concurrent or consecutive terms of imprisonment under HRS § 706-668.5**.

Id. at 428, 918 P.2d at 235 (emphases added) (citation and footnote omitted); see also State v. Vellina, 106 Hawai'i 441,

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[2] Factors (2)(a), (2)(d), and (3) state:

> (2) The need for the sentence imposed:
> (a) To reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense;
> . . . ;
> (d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; [and]
> (3) The kinds of sentences available[.]

HRS § 706-606.

449, 106 P.3d 364, 372 (2005), and State v. Tauiliili, 96 Hawai'i 195, 199-200, 29 P.3d 914, 918-19 (2001). Accordingly, at least since 1996, it has been the law in this jurisdiction that, "[a]bsent clear evidence to the contrary, it is **presumed** that a sentencing court will have considered all factors before imposing concurrent or consecutive terms of imprisonment under HRS § 706-606." Sinagoga, 81 Hawai'i at 428, 918, P.2d at 235 (emphases added); Vellina, 106 Hawai'i at 449, 106 P.3d at 372; Tauiliili, 96 Hawai'i at 199-200, 29 P.3d at 918-19.

Clearly, the majority's application of the Sinagoga presumption is consistent with the doctrine of *stare decisis*, which is

> "a doctrine that demands respect in a society governed by the rule of law." While the doctrine of stare decisis does not absolutely bind [a c]ourt to its prior opinions, a decent regard for the orderly development of the law and the administration of justice **requires** that directly controlling cases be either followed or candidly overruled.

Solem v. Helm, 463 U.S. 277, 311-12 (1983) (Burger, C.J., dissenting, joined by White, Rehnquist, and O'Connor, JJ.) (quoting City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. 2481, 2487 (1983)) (emphases added). Moreover, this court previously held in State v. Garcia, 96 Hawai'i 200, 29 P.3d 919 (2001), that:

> While there is no necessity or sound legal reason to perpetuate an error under the doctrine of stare decisis, we agree with the proposition expressed by the United States Supreme Court that **a court should "not depart from the doctrine of stare decisis without some compelling justification**." Hilton v. South Carolina Pub. Ry. Comm'n, 502 U.S. 197, 202 (1991) (emphasis added). Cf. Dairy Road Partners v. Island Ins. Co., Ltd., 92 Hawai'i 398, 421, 992

> P.2d 93, 116 (2000) (stating that "a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it") (internal quotation marks and citations omitted). Thus, when the court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 854 (1992). In this calculus, considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and the legislative branch remains free to alter what we have done." Hilton, 502 U.S. at 202.

Garcia, 96 Hawai'i at 206, 29 P.3d at 925 (some emphases in original) (some emphases added) (original brackets and some internal quotation marks omitted).

Here, as in Sinagoga, the sentencing court's consideration of the "kinds of sentences [that were] available," HRS § 706-606(3), in this case "was implicit in the court's [ultimately imposed] sentence of incarceration." Sinagoga, 81 Hawai'i at 428, 918 P.2d at 235; see also State v. Lau, 73 Haw. 259, 260, 831 P.2d 523, 523 (1992) (reasonably inferring from a review of the record that the sentencing court did consider the sentencing alternatives).[3] Thus, the absence of the sentencing

[3] In Lau, the defendant asserted on appeal that "the sentencing court committed reversible error by not stating its reasons for imposing a twenty year sentence [(as opposed to the special indeterminate term of eight years)]." Id. at 260, 831 P.2d at 523. In affirming the defendant's sentence, this court stated:

> Our review of the record reveals that the sentencing court had the benefit of a [PSI] report, the arguments of counsel, which included references to both the ordinary twenty year term and the special indeterminate term of eight years, and [defendant's] personal statement. Thus, we can reasonably infer that the court did consider the sentencing alternatives[.]

(continued...)

court's explicit statement that it considered all sentencing options, including the option plainly provided in HRS § 706-606.5(5), was not fatal to the validity of Petitioner's sentence because the majority, consistent with the doctrine of *stare decisis*, applied the presumption established in Sinagoga, which, as previously stated, has been the "rule of law" in this jurisdiction since 1996, and affirmed Petitioner's sentence. However, curiously, the majority then proceeds to carve out a new "rule" that is not only contrary to the presumption it just applied, but is based entirely on *obiter dictum*, underscoring the fact that its new "rule" is entirely unnecessary and, in turn, has no application to the instant case.

B. Obitur Dictum

"Obiter dictum" is "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)." Black's Law Dictionary 1102 (8th ed. 2004) (emphasis added). The majority's affirmance of Petitioner's sentence based on the existing presumption in Sinagoga, -- that was also followed in Vellina and Tauiliili, 96 Hawai'i 195, 199-200, 29 P.3d 914, 918-19 (2001), and relied upon by the majority, see majority op. at 17, -- underscores the

[3](...continued)
Id. (emphasis added). Consequently, the Lau court affirmed the defendant's sentence.

needless exercise in promulgating a new "rule" that is, clearly, "one that is unnecessary to the decision in [**this**] case and therefore not precedential[.]" Black's Law Dictionary 1102 (emphases added).

This court has stated that, under the doctrine of *stare decisis*, "it is the duty of all inferior tribunals to adhere to the decision [of a court of last resort], without regard to their views as to its propriety, until the decision has been reversed or overruled by the court of last resort or altered by legislative enactment." Robinson v. Ariyoshi, 65 Haw. 641, 653, 658 P.2d 287, 297 (1982) (citation omitted). However, "an inferior tribunal might not be bound under the doctrine of stare decisis if the pronouncement of a superior court is actually dictum." Id. at 654, 658 P.2d at 298 (emphasis added) (citation omitted). Questioning the wisdom of "a rule that accords a statement of a superior court no precedential weight merely because the statement was not necessary to the actual adjudication of the controversy," id., the Robinson court opined:

> we think a more constructive approach would be to consider a statement of a superior court binding on inferior tribunals, even though technically dictum, where it "was passed upon by the court with as great care and deliberation as if it had been necessary to decide it, was closely connected with the question upon which the case was decided, **and** the opinion was expressed with a view to settling a question that would in all probability have to be decided before the litigation was ended."

Id. at 655, 658 P.2d at 298 (quoting Nobrega v. Nobrega, 14 Haw. 152, 155 (1952)) (emphases added).[4]

Although I concur in the Robinson court's "constructive approach" to affording precedential value to statements that are "technically dictum," especially where "the opinion was expressed with a view to settling a question that would in all probability have to be decided before the litigation was ended," Robinson, 65 Haw. at 655, 658 P.2d at 298 (citation omitted), such is not the case here where, as discussed infra, Petitioner's sentence is affirmed, leaving nothing further to "litigate."

In the case at bar and notwithstanding the fact that the sentencing court did not state its reasons for the imposed sentence, the majority concludes that neither the ICA nor the sentencing court erred based on its application of Sinagoga. Such conclusion effectively ends Petitioner's "litigation" with respect to her first point of error, and, as a result, the majority's discussion regarding Petitioner's sentence should end there; it does not.

[4] In Nobrega, this court observed that:

> Perhaps the strongest reason that can be urged in support of the course pursued [here] is that the case [before the court in Nobrega] was to go back to the [c]ircuit [c]ourt for further action and that that court would naturally want instructions upon the point in question and that, if such instructions were not given, the case would probably be brought to this court again for the settlement of the question. Under such circumstances, with a view to settling the law of the case once and for all, the court would often be justified in going further than it would under some other circumstances.

Nobrega, 14 Haw. at 153-54.

Instead, the dissent includes a lengthy discussion that is not only wholly unnecessary to the disposition of the instant case, but inappropriately sets forth a new "rule" mandating that sentencing judges state their reasons for imposing a consecutive versus concurrent sentence, which creates an untenable situation for our sentencing judges, discussed infra. Under the "constructive approach" described in Robinson, the majority's discussion setting forth its new "rule" is not being "expressed with a view to settling a question that would in all probability have to be decided before the litigation was ended." 65 Haw. 655, 658 P.2d at 298. Indeed, applying the new "rule" to Petitioner would not end the litigation inasmuch as doing so would require a remand for re-sentencing. On the other hand, by failing to overrule Sinagoga, the majority's application of the existing presumption and its conclusion that neither ICA nor the sentencing court erred ends Petitioner's "litigation" with respect to her sentencing.

Nevertheless, the majority asserts that, "despite the absence of any reversible error in the ICA's opinion, when a majority of this court determines to accept certiorari and to issue an opinion that opinion is not 'dicta' merely because it affirms the decision of the ICA." Majority op. at 43. Pointing to this court's decisions in State v. Maluia, 107 Hawai'i 20, 108 P.3d 974 (2005), and Korsak v. Hawai'i Permanente Medical Group, 94 Hawai'i 297, 12 P.3d 1238 (2000), -- cases in which the

applications for writ of certiorari were granted, judgments affirmed, but opinions rendered on issues of first impression -- the majority argues: "The dissent does not suggest that the opinions issued in the foregoing cases were merely 'dicta' because the decision of the ICA was affirmed." Majority op. at 45 (footnote, citing similar examples, omitted). The majority clearly misses the point.

My belief that the majority's opinion violates the doctrine of *stare decisis* and constitutes dicta is entirely unrelated to any issues regarding this court's power to accept or reject applications for certiorari review but, rather, is based wholly on my belief that the majority's holding here is only tangentially related to the facts presented in this opinion and has no effect on the parties currently before this court. To be clear, what makes the majority's discussion dicta is that the its entire discussion underlying the new "rule" is wholly unnecessary to the disposition of Petitioner's first point of error and that the majority resolves the alleged error not by applying the new "rule," but by the application of the existing precedent, i.e., the Sinagoga presumption. Thus, in my view, the majority's discussion is merely a thinly veiled attempt to set forth a new rule that is entirely unrelated to the issues that the parties asked this court to decide.

In an apparent attempt to establish a connection between its new "rule" and the disposition of Hussein's case, the majority argues that:

> [Hussein] has indicated that she believed a HRPP Rule 35 motion should have been filed. Inasmuch as we clarify that[,] upon remand, [Hussein] has the opportunity to file a HRPP Rule 35 motion, our holding that the sentencing court would be required to state reasons is germane to [Hussein's] probable [HRPP] Rule 35 motion and, thus, cannot be considered dicta.

Majority op. at 45.

In the instant case, however, the majority affirms Hussein's consecutive sentence, agreeing with the ICA that the sentencing court "did not abuse its discretion" in imposing such sentence. Id. at 11-12. The majority further holds that "all mitigating factors that were known at the time of sentencing [or alleged by Hussein] were presented to the sentencing court," id. at 36, and, as a result, Hussein's counsel's decision not to file a HRPP Rule 35 motion "did not fall outside the range of competence expected of criminal lawyers." Id. Thus, inasmuch as the aforementioned conclusions by the majority determine questions of law -- i.e., whether Hussein's sentence was illegally imposed and whether Hussein's counsel was ineffective -- such conclusions constitute the "law of the case." See State v. Gomes, 107 Hawai'i 253, 258, 112 P.3d 739, 744 (App. 2005) ("[A] determination of a question of law made by an appellate court in the course of an action becomes the law of the case and may not be disputed by a reopening of the question at a later

stage of the litigation."). Consequently, were Hussein to raise the same sentencing issues in a HRPP Rule 35 motion on remand, the sentencing court would be bound to follow the conclusions reached by the majority here. In other words, any post-appeal motion Hussein files that questions the validity of her consecutive sentence must be based on legal arguments that are totally different from those previously raised in the instant appeal. Accordingly, I believe, contrary to the majority's view, that it is not "probable," as the majority repeatedly contends, that Hussein will file a post-appeal Rule 35 motion.

The majority's argument that the filing of a HRPP Rule 35 motion is "probable" rests solely on the fact that Hussein argued in her application that a HRPP Rule 35 motion "should have been filed." However, based on the law of the case established by the majority opinion and the fact that it is impossible to foretell what actions, if any, Hussein will take post-appeal, the majority's arguments regarding a "probable" HRPP Rule 35 motion filed by Hussein are both legally and factually unsupported and improperly based on mere speculation.

Additionally, the majority concludes, based on Lau, that

> the rationale supporting the rules set forth in this case and in Lau are closely analogous. Also, the dissent's assertion that the "new rule . . . [is] wholly unrelated to the issue being 'clarified,'" dissenting op. at 32, is incorrect inasmuch as the "new rule" is related to the issues raised on appeal, including a HRPP Rule 35 motion, which "would in all probability have to be decided before

> the litigation was ended," Robinson, 65 Haw. at 655, 658 P.2d at 298.

Majority op. at 48 (emphasis added). Putting aside the obvious fact that the majority takes the dissent's position totally out of context, its assertion that the circumstances in Lau and the case at bar "are closely analogous" misses the mark.

Admittedly, the issue in Lau and in the instant case are nearly identical, i.e., dealing with the sentencing court's failure to state its reasons for the imposed sentence; however, the circumstances surrounding the cases are entirely distinguishable. First, Lau was decided pre-Sinagoga; thus, the Lau court was not bound by an existing precedent as are the ICA and this court here. Second, this court in Lau did not have the benefit of reviewing the information contained in the PSI report to assess whether sufficient evidence existed to support the sentencing court's imposed sentence.[5] Here, however, not only

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[5] In Lau, this court observed that "traditionally the [PSI] report is not admitted into evidence or made part of the record on appeal," 73 Haw. at 264, 831 P.2d at 526, and that "such practice complies with HRS § 806-73, which provides that . . . [PSI] reports 'are confidential and are not public records.'" Id. This court further stated that

> had the pre-sentence report been made part of the record in this case (and ordered sealed to comply with the confidentiality requirement of HRS § 806-73), our review of the report could have been helpful in determining all of the specific factors which the sentencing court had before it when it considered the sentencing alternatives.

Id. at 264-65, 831 P.2d at 526. Thus, the Lau court mandated that, henceforth, all PSI reports be made part of the record and ordered sealed in order to "facilitate appellate review." Id. Notwithstanding the fact that the issue squarely before the court was the sentencing court's failure to state its reason for the imposed sentence, the Lau court did not mandate that sentencing courts do so. Instead, this court merely "urged and strongly recommended that the sentencing court [state its reasons] and to also state

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are the appellate courts bound by Sinagoga, both courts have access to the information in the PSI report from which to assess whether "evidence to the contrary," Sinagoga, 81 Hawai'i at 428, 918 P.2d at 235, exists. Thus, the circumstances under which the Lau court issued its mandate are clearly distinguishable from the circumstances under which the majority here attempts to establish its new "rule."

Nevertheless, the majority maintains that, "[j]ust as the mandate set forth in Lau is manifestly not dicta, but a clear requirement binding on the courts, we confirm without qualification that the mandate set forth herein is not dicta, but binding precedent." Majority op. at 47 (emphasis in original). Simply declaring that the new "rule" is not dicta and, therefore, binding precedent does not make it so where such "rule" is not necessary to the disposition of the case and is not being applied to Petitioner, herself. The majority, however, points out that this court's new rule in Tachibana v. State, 79 Hawai'i 226, 900 P.2d 1293 (1995) (requiring trial judge to engage in an on-the-record colloquy with defendant to ensure waiver of right to testify), was likewise not applied retrospectively. Majority op. at 53 n.31 (citing Tachibana, 79 Hawai'i at 238, 900 P.2d at 1305). Again, the majority misses the point.

[5](...continued)
that sentencing alternatives were considered," id. at 263, 831 P.2d at 525, recognizing that "there is no requirement for the sentencing court to state its reasons for imposing sentence." Id. (emphasis added).

I recognize that appellate courts do not always apply new pronouncements retrospectively where such application would create a significant burden on the administration of justice. However, assuming for the sake of argument that the majority's new "rule" has any precedential application whatsoever given its dicta-based creation, the question of retrospective application would arise only if the presumption in Sinagoga were overruled. By not doing so, any issue regarding a defendant's consecutive sentence where the trial court failed to explicitly state its reasons would be governed by Sinagoga -- whether arising pre- or post-new "rule" -- because (1) the presumption is still good law and (2) its application would not only be consistent with the doctrine of *stare decisis*, but would require adherence. See Solem, 462 U.S. at 312 (stating that "directly controlling cases be . . . followed").

The majority also cites to State v. Huelsman, 60 Haw. 71, 91, 588 P.2d 394, 407 (1978), as support for its position that promulgation of a new rule is appropriate even where such rule is "not necessary to the disposition of the case," majority op. at 59. However, Huelsman, as discussed below, does not support the majority's position.

As indicated by the majority, the defendant in Huelsman challenged the sentencing court's imposition of an extended sentence, contending that the extended term statute -- HRS

§ 706-662 (1978)[6] -- was vague and overbroad. 60 Haw. at 80, 588 P.2d at 400. The Huelsman court agreed with the defendant that the term "warranted" was an "unduly broad term" that rendered the statute unconstitutional. Id. at 91, 588 P.2d at 406. However, the Huelsman court remedied the infirmity in the statute through judicial construction by substituting "the more limited standard 'necessary for protection of the public'" for the word "warranted." Id. The Huelsman court then went on to state that:

> The record in these cases[7] does not disclose that the sentencing judge gave any consideration to protection of the public as a reason for imposing the extended terms, as distinguished from the purely retributive purpose of enhancing the punishment inflicted on appellant for his offenses. We find it necessary, therefore, to . . . remand these cases for resentencing in light of this opinion and need not deal in detail with appellant's contentions with

[6] At the time Huelsman was decided, HRS § 706-662 stated in relevant part that:

> The court may sentence a person who has been convicted of a felony to an extended term of imprisonment if it finds one or more of the grounds specified in this section. The finding of the court shall be incorporated in the record.
>
> . . . .
>
> (4) Multiple offender. **The defendant is a multiple offender whose criminality was so extensive that a sentence of imprisonment for an extended term is warranted**. The court shall not make such a finding unless:
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> (a) The defendant is being sentenced for two or more felonies or is already under sentence of imprisonment for felony; or
>
> (b) The maximum terms of imprisonment authorized for each of the defendant's crimes, if made to run consecutively would equal or exceed in length the maximum of the extended term imposed, or would equal or exceed forty years if the extended term imposed is for a class A felony.

(Emphases added.)

[7] I note that Huelsman dealt with an appeal from four separate cases.

> respect to the extended term sentence proceedings from which these appeals are taken.
>
> The present appeal exemplifies how difficult it may be to determine from the record of an extended term sentence hearing whether the discretion of the sentencing court was exercised within the statutory guidelines. The practice followed by sentencing courts of entering conclusory findings in the language of the applicable subsection of s 662 tends to force upon this court a choice between treating the sentencing decision as essentially non-reviewable or involving itself unduly in the exercise of sentencing discretion. Accordingly, we direct that in further proceedings in these cases, and in all other cases in which appeals may hereafter be taken from extended term sentences, the sentencing court shall state on the record its reasons for determining that commitment of the defendant for an extended term is necessary for protection of the public and shall enter into the record all findings of fact which are necessary to its decision. The record in each such case shall include the presentence report and all evidence considered by the sentencing court.

Id. at 91-92, 588 P.2d at 407 (emphases added).

Thus, although the Huelsman court did set forth a new rule "mandat[ing] that sentencing courts state their reasons for imposing an enhanced sentence on the record," majority op. at 57, such rule was -- contrary to the majority's new "rule" in the instant case -- directly relevant to the disposition of the defendant's case. Indeed, in that case, the court vacated the defendant's sentence and remanded the case for resentencing in conformity with its opinion. 60 Haw. 92, 588 P.2d at 407. Accordingly, the new rule set forth by this court in Huelsman was not only relevant to the disposition of the case but it was directly applicable to the defendant. In contrast, the majority opinion here affirmed Hussein's sentence by applying the existing precedent, i.e., the Sinagoga presumption. Consequently, the

instant case, as I have repeatedly stated, should have ended with the affirmation of Hussein's sentence.[8]

In sum, because the entirety of the majority's extensive discussion, attempting to justify its new "rule," constitutes *obiter dicta*, the "rule" clearly has no precedential value. In fact, the most that can be said of the majority's new "rule" is that it is merely a restatement of the "urg[ing] and [strong] recommend[ation]" in Lau that sentencing courts state their reasons for the imposed sentence and to also state that sentencing alternatives were considered. See majority op. at 17-18 (citing Lau, 73 Haw. at 263, 831 P.2d at 525).

C. Placing Sentencing Courts At Risk

As importantly, I have grave concerns that the majority's new "rule" creates an untenable situation for our sentencing judges. In conscientiously attempting to comply with the majority's new "rule" that they state specific reasons for imposing a consecutive sentence, our sentencing judges may unwittingly divulge confidential information gleaned from PSI reports in contravention of HRS § 806-73.

It is well-settled that, "[i]n ordinary sentencing situations, the sentencing court is given a great deal of

[8] The majority attempts to bolster its reliance on Huelsman based on its prediction that Hussein will probably file a post-appeal HRPP Rule 35 motion. However, as previously discussed, the majority's prediction is legally and factually unsupported and improperly based on mere speculation. Consequently, I continue to believe that the majority's reliance on Huelsman is misplaced.

discretion to fashion an 'individualized' sentence, 'fitted to the personal characteristics of the defendant,' and 'the particular circumstances of [the] defendant's case.'" State v. Pantoja, 89 Hawai'i 492, 498, 974 P.2d 1081, 1087 (App. 1999) (citations and footnote omitted). As more aptly stated by the United States Supreme Court in Solem, "[r]eviewing courts, of course, should grant substantial deference to . . . the discretion that trial courts possess in sentencing convicted criminals." 463 U.S. at 290; see also State v. March, 94 Hawai'i 250, 254, 11 P3d 1094, 1098 (2000) (sentencing court given broad discretion in sentencing defendants); State v. Akana, 10 Haw. App. 381, 386, 876 P.2d 1331, 1334 (1994) (sentencing court is afforded wide latitude in the selection of penalties from those prescribed and in the determination of their severity (internal quotation marks and citations omitted)). Moreover, "[i]n any system which vests discretion in the sentencing authority, it is necessary that the [sentencing court] have sufficient and accurate information so that it may rationally exercise its discretion. Such information is provided in a [PSI] report[.]" Lau, 73 Haw. at 262, 831 P.2d at 525 (citations and internal quotation marks omitted).

Pursuant to HRS § 706-602(1) (1993), the PSI report must contain the following information:

> (a) An analysis of the circumstances attending the commission of the crime;
> (b) The defendant's history of delinquency or criminality, physical and mental condition, family situation and background, economic status and capacity to make restitution or to make reparation to the victim or victims of the defendant's crimes for loss or damage caused thereby, education, occupation, and personal habits;
> (c) Information made available by the victim or other source concerning the effect that the crime committed by the defendant has had upon said victim, including but not limited to, any physical or psychological harm or financial loss suffered;
> (d) Information concerning defendant's compliance or non-compliance with any order issued under section 806-11 [(regarding the disposal of firearms)]; and
> (e) Any other matters that the reporting person or agency deems relevant or the court directs to be included.

In 1985, the legislature considered "A Bill [(S.B. No. 249)] for an Act Relating to the Confidentiality of Adult Probation Records" and indicated that

> [r]ecords [(i.e., case records and PSI reports)] originated by adult probation officers pursuant to the duties and powers already established in section 806-73, Hawaii Revised Statutes, are not clearly and expressly confidential. This fact sometimes hampers adult probation officers in the performance of their duties. This bill makes explicit the documents which can be released and to whom they can be released.

Conf. Comm. Rep. No. 14, in 1985 Senate Journal, at 852; Conf. Comm. Rep. No. 24, in 1985 House Journal, at 894. Consequently, HRS § 806-73 now provides that "[a]ll adult probation records shall be confidential and shall not be deemed to be public records. As used in this section, the term 'records' includes, but is not limited to, all records made by any adult probation officer in the course of performing the probation officer's official duties." See also Lau, 73 Haw. at 264, 831 P.2d at 526 (recognizing that PSI reports are traditionally not admitted into evidence or made part of the record on appeal because such

practice complies with HRS § 806-73) (emphasis added). However, the confidentiality of PSI reports is not absolute inasmuch as the statute also provides that "[t]he records, or the content of the records," shall not be divulged except to certain individuals or entities specifically described therein. See HRS § 806-73(b)(1) through (7) (listing the defendant, defendant's counsel, and the prosecuting attorney, as well as entities or organizations involved in the custody, care, and/or treatment of the defendant) (emphases added).

In 2006, when considering further revisions to HRS § 806-73 "to add persons and entities to the list of those who are allowed access to adult probation records," Sen. Stand. Comm. Rep. No. 2250, in 2006 Senate Journal, at 1134, the Committee on Judiciary and Hawaiian Affairs noted its concerns "regarding a defendant's privacy and the ability of case management, assessment, or treatment providers to use information in a defendant's adult probation records to selectively grant certain defendants access to a treatment program." Id. To address those concerns, the Committee amended the measure (generally limiting disclosure of certain types of information) "to balance privacy and other issues," id., which amendments were eventually adopted.

As observed by the American Bar Association (ABA) in its commentary to standards related to confidentiality of PSI reports:

> The willingness of persons to respond fully and candidly to preparers of presentence reports is affected by the expectation as to the ultimate distribution of those reports. Among the sources from whom information may be sought about individual defendants are the defendants themselves, members of their families, and others who may have significant information, relevant to sentencing, about the defendants' private lives. It is in the public interest to encourage disclosures of information by the assurance that the information will not be made available generally to the public. Offenders have a right to privacy on matters not connected to the offenses of which they have been convicted. No legitimate interests are served by making the contents of presentence reports routinely a matter of public record. . . .
>
> . . . .
>
> It almost goes without saying that the presentence reports should be available to sentencing courts and to appellate courts reviewing sentences. Of course, reports should be made available in a manner that does not incorporate them into the open records of the cases.

ABA Standards for Criminal Justice: Sentencing at 186, Standard 18-5.6 (3d ed. 1994) (emphases added). Relatedly, ABA Standard 18-5.21, which addresses the contents of presentence reports, provides in relevant part: "(b) The rules should establish appropriate measures to protect the privacy of offenders or victims with regard to information, included in sentence reports, that is not otherwise a matter of public record." Id. at 216 (emphasis added). The Commentary states:

> Paragraph (b) cautions that the raw data included in the sentence reports may include information about offenders and victims and about other persons that is not a matter of public record. Individuals' privacy should be protected against unwarranted disclosures. Sentence reports should be open to persons with satisfactory reasons for access to the raw data only on conditions that take privacy concerns adequately into account.

Id. at 217-18.

The foregoing underscores my fear that sentencing judges, in conscientiously attempting to comply with the majority's new "rule", may unwittingly violate the legislative

intent and statutory mandate. Although I acknowledge that this court has previously urged and recommended that our sentencing courts state the reasons for the imposed-sentence and that sentencing alternatives were considered, see, e.g., Lau, 73 Haw. at 263, 831 P.2d at 525, I recognize the dilemma that we may have placed them in by making such a recommendation that will now be exacerbated by the majority's new "rule", i.e., compelling them to disclose confidential "raw data" gleaned from a PSI report that the legislature via the enactment of HRS § 806-73 has declared to be confidential from public disclosure. Curiously, the majority, although setting forth a mandatory "rule" that compels our sentencing courts to state its reasons for the imposed sentence, states "we do not require specific findings of fact." Majority op. at 21 n.15. Assuming that the distinction in the majority's view is that "findings of fact" need not be separately prepared in writing and filed, I see no material distinction between requiring oral findings of facts versus written findings of facts.[9] Compelling our sentencing judges to

[9] As previously stated, the Sinagoga court observed that there is no statutory requirement "that the court expressly recite its findings on the record for each of the factors set forth in HRS § 706-606." Sinagoga, 81 Hawai'i at 428, 918 P.2d at 235. In that case, however, the ICA also observed that the sentencing judge

> orally reviewed Defendant's prior criminal record, which included convictions in various jurisdictions for burglary, assault, driving under the influence, and drug and concealed weapon possession. [The sentencing judge] noted that the offenses Defendant was charged with in the present case were felonies involving violence, and that Defendant was not a young man. [The sentencing judge] then declared that Defendant would be "a danger to people, whether in Hawaii

(continued...)

state such findings on the record will increase the chances of breaching the confidentiality of the information contained in PSI reports.

Moreover, the new "rule" announced today by the majority not only trespasses upon a sentencing court's discretion, but will create confusion for our sentencing judges. The majority's holding today begs the question: "How will the new 'rule', henceforth, co-exist with the un-overruled presumption in Sinagoga?" To illustrate, assume a sentencing court fails to state its reasons for imposing a consecutive sentence on the record as required under the majority's decision in this case. The defendant then appeals the sentence, arguing that the sentencing court violated "the Hussein 'rule.'" Based upon the majority's holding today, it is unclear what the

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[9](...continued)

> [Hawai'i] or any other state where he happens to be; and that as long as he's free to do so, he's going to continue to be a danger to both people and to property."

Id. at 425, 918 P.2d at 232. If the above-quoted "reasons" would satisfy the majority's new "rule," I fail to see how such "reasoning" -- that simply parrots or repeats the language of the factor itself -- is "essential to meaningful appellate review." Majority op. at 20 (quoting Commentary to ABA Standard 18-5.19). Indeed, the "reasons" articulated in Sinagoga did not engender the "rule" that the majority now seeks to impose. To the contrary, it engendered the presumption itself.

In my view, the most critical tool that is "essential to appellate review" is the PSI report, which is now available due to the mandate in Lau that the report be sealed and made part of the record. Given the presumption in Sinagoga that the sentencing court considered the factors enumerated in HRS § 706-606, the appellate court's task is to review the PSI report, including the evidence presented and the arguments made by counsel at the sentencing hearing, and then decide whether there is sufficient support in the record for the imposed sentence, i.e., that the sentencing court did not abuse its discretion. The majority's new "rule" that compels sentencing judges state their reasons is not "essential to appellate review," it simply makes it easier.

reviewing court should do. For example, should the reviewing court apply the presumption inasmuch as the presumption is still good law? Or, would a violation of the Hussein "rule" require the reviewing court to ignore the presumption, vacate the sentence imposed, and remand the case for a new sentencing hearing? In my view, therein lies the fundamental flaw in the majority's holding -- the presumption and the new "rule" cannot co-exist without creating a dilemma for both the reviewing courts and the sentencing judges, as well as confusion for the Bar.[10]

If, for example, a sentencing judge's "reasons" for imposing a consecutive sentence is based on confidential information gleaned from the PSI report, such as the defendant's "history of delinquency," "mental condition," "family situation," "personal habits," or other such information not available from public records,[11] the new "rule" places our sentencing judges in

[10] The majority believes that my view "stems from [my] confusion between the requirement in HRS § 706-668.5 that the court consider all of the HRS § 706-606 factors before imposing a consecutive or concurrent sentence, and the requirement expressed [in the majority's opinion] that the court state its reasons for imposing a consecutive sentence." Majority op. at 55-56 (emphases in original). To the contrary, my position is grounded in my belief that requiring the sentencing court to explain the "reasons," i.e., to articulate the specific findings that support the factors upon which the sentencing court relied, would be unnecessary given (1) the presumption espoused in Sinagoga that the sentencing court "considered all the factors in HRS § 706-606 before imposing concurrent or consecutive terms of imprisonment under HRS § 706-668.5," 81 Hawai'i at 429, 918 P.2d at 236, and (2) the deference afforded to sentencing courts, id. (citing State v. Akana, 10 Haw. App. 381, 386, 876 P.2d 1331, 1334 (1994)).

[11] I note that, although information regarding a defendant's adult criminal convictions, including the conviction for which he or she is currently being sentenced, are subjects covered in the PSI report, the same information can be ascertained from the records of the underlying criminal cases, which are public records. Thus, I am not concerned about divulging information about a defendant's prior adult criminal record.

(continued...)

an untenable situation: (1) they could comply with the new "rule" by reciting their specific reasoning, including the information gleaned from the PSI report upon which they relied, and, thus, risk violating the confidentiality of the PSI report; or (2) they could ignore the majority's new mandate and not recite any specifics, thereby preserving confidentiality; or (3) they could attempt to comply with the majority's new mandate and HRS § 806-703 by providing some but not all of its reasoning, thereby honoring confidentiality. Doing the former (i.e., scenario (1) above) would place the confidentiality of PSI reports in jeopardy and violate the legislative intent; doing the latter (i.e., scenarios (2) or (3) above) could result in reversal either for failure to state reasons as mandated by the new "rule" or because, in the eyes of the reviewing court, the stated-reasons were insufficient. Not only is it unfair to place our judges in such a situation, I believe it insulting to them to

[11](...continued)

Moreover, I am not -- as the majority curiously asserts -- suggesting that: (1) the judge should be "precluded from relying upon [any] information in the PSI"; or (2) "no court, no prosecutor, and no defense attorney could reference any information in the PSI regardless of the type of sentencing proceeding." Majority op. at 74. I am merely asserting that the sentencing judge should not be forced to violate the confidentiality provisions of the PSI laws by having to set forth clearly confidential information into the public record. Indeed, I am gravely concerned that the majority believes that such action by the sentencing court would be appropriate.

Additionally, the majority mischaracterizes the dissent's position when it argues that "prior offenses or police reports" "are not pub[l]ic records despite the dissent's statement to the contrary." Id. (emphasis added). To be clear, I reiterate that I am not concerned about information regarding a defendant's adult criminal convictions inasmuch as such information, i.e., the defendant's various criminal court case files, are accessible to the public, unless they have been sealed by the court.

have the appellate courts intrude into an area where great deference has been recognized and afforded. Indeed, as the court in Sinagoga observed, "[t]he law presumes that judges will conscientiously fulfill their duty to obey the directive of HRS § 706-668.5. Sinagoga, 81 Hawai'i at 428, 918 P.2d at 235. Thus, given the appellate court's ability to review the (1) PSI report made part of the record pursuant to the Lau mandate and (2) transcripts of the sentencing hearing, coupled with the presumption in Sinagoga, the majority's new "rule" is wholly unwarranted.[12]

Accordingly, I continue to believe that the majority's new "rule" cannot co-exist with the presumption, and the majority's holding falls just short of explicitly overruling it.

[12] Indeed, the majority's discussion of State v. Chavira, No. 29082 (Haw. App. Feb. 25, 2009) (s.d.o.), clearly demonstrates how sentencing judges can unwittingly (and, undoubtedly, under the majority's new rule **will**) violate the legislative intent and statutory mandate regarding the confidentiality of the information contained in PSI reports. Presumably, in attempting to comply with the urging of the Lau court to state its reasons for the imposed sentence, the Chavira court divulged detailed information contained in the PSI report regarding the defendant's personal and family history. Because the PSI report is sealed and made part of the record, the sentencing court could have simply referred to the defendant's personal and family history in general terms, indicating that the basis of which is contained in the PSI report, and the appellate court could itself have simply reviewed the PSI report to ascertain if it contained sufficient basis to support the sentencing court's conclusions.

Additionally, the majority's discussion of State v. Heggland, 118 Hawai'i 425, 193 P.3d 341 (2008), which involved issues surrounding the defendant's prior conviction in Colorado, is inapposite because, as noted supra, information regarding a defendant's adult criminal convictions, although contained in a PSI report, can be ascertained from the public records of the underlying criminal cases. Therefore, divulging specific details regarding a defendant's prior adult criminal record does not violate the legislative intent nor the mandate of HRS § 806-73.

D. The Majority's Commentary on HRPP Rule 35

The majority states that,

> [b]ecause the ICA ruled on counsel's failure to file a Rule 35 motion prior to initiation of appellate proceedings, **one may be left with the impression that the time for filing had expired**. Indeed, subsequent to the ICA's SDO, Petitioner indicates [in her application] that "[t]he Hawai'i rule retains the [c]ourt's jurisdiction to reduce a sentence if the motion is filed prior to the notice of appeal[,] and thus, "due diligence required such a motion." **Petitioner therefore apparently believes that because counsel failed to file a HRPP Rule 35 motion, she has lost that opportunity**.

Majority op. at 37 (underscored emphases in original) (bold emphases added). I disagree.

In her application, Petitioner specifically argues:

> Contrary to the ICA's footnote 3 [(commenting on the similarities between the federal Rule 35 and Hawaii's Rule 35, except with regard to the time limitations for bringing such motion)], there is a crucial distinction between the federal and Hawaii'i Rule 35 provision. The Hawai'i rule retains the lower [c]ourt's jurisdiction to reduce a sentence if the motion is filed prior to the notice of appeal. [Petitioner] contends, due diligence required such a motion.

(Emphasis added.) Contrary to the majority's pure speculation that "one may be left with the impression that the time for filing [a Rule 35 motion] had expired[,]" and that Petitioner, "therefore[,] apparently believes that[,] because counsel failed to file a HRPP Rule 35 motion, she has lost that opportunity[,] id. (emphases added), nowhere in her application does she indicate such belief. All that can be gleaned from Petitioner's application is that she believed the mere failure to file a Rule 35 motion prior to the notice of appeal amounted to ineffective assistance of counsel.

Moreover, there is absolutely nothing in the ICA's SDO that could reasonably be interpreted as suggesting that, "because counsel failed to file a HRPP Rule 35 motion, Petitioner has lost that opportunity." Id. The ICA's entire analysis with regard to Petitioner's contention that counsel's failure to file a Rule 35 motion constituted ineffective assistance consists of the following:

> Finally, we note that in Shraiar v. United States, 736 F.2d 817 (1st Cir. 1984), a defendant claimed that counsel failed to file a motion for reduction of his sentence, pursuant to Federal Rules of Criminal Procedure 35(b).[3] 736 F.2d at 818. The court in Shraiar stated:
>
> > The rule does not suggest that a motion should be filed automatically in every case. To the contrary, the Advisory Committee's note indicates that such a motion would normally be accompanied by "evidence, information, and argument to support a reduction in sentence." No court has held that failure to file such a motion automatically constitutes ineffective assistance of counsel.
>
> Id. We reject [Petitioner]'s argument that defense counsel's failure to file an HRPP Rule 35 motion to develop additional mitigating factors rendered counsel's representation constitutionally ineffective in this case.
>
> _____
>
> [3] Fed. R. Crim. P. 35(b) is similar to a Motion for Reduced Sentence under HRPP Rule 35(b) except the federal rule provides 120 days to file the motion, whereas the Hawai'i rule provides 90 days.

SDO at 7. One need only read Rule 35 to understand -- as even the majority acknowledges -- that "the plain language of . . . Rule 35(b) . . . allows the reduction of a sentence 'within 90 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal[.]'"

Majority op. at 39. In other words, Petitioner has not "lost that opportunity," majority op. at 37; once this appeal is completed, Petitioner is free to file a Rule 35 motion.

Finally, although I recognize that this court has granted certiorari in the absence of any error in order to provide clarification, none of the cases relied upon by the majority, see id. at 40-41, promulgated a new rule on an issue wholly unrelated to the issue being "clarified," as the majority does here. The majority maintains that,

> despite "[f]inding no reversible error," and "affirm[ing the] appellant's sentence[,] this court set forth a new rule "mandat[ing] that the sentencing court make [the pre-sentence] report part of the record in all cases where a pre-sentence report has been prepared and that the report be sealed." Lau, 73 Haw. at 264, 831 P.2d at 526. . . .
> . . . As in Lau, we may impose measures related to improving the administration of justice where the facts of the case warrant.

Majority op. at 46-47. However, the majority's reliance on Lau is unavailing inasmuch as the new "rule" set forth in that case was directly related to the issue on appeal, i.e., whether the sentencing court, in imposing a twenty year term of imprisonment, considered an eight year sentencing option under the young adult defendants statute for which he was qualified. 73 Haw. at 259-60, 831 P.2d at 523-24. This court affirmed the sentence imposed, holding that its

> review of the record reveal[ed] that the sentencing court **had the benefit of a pre-sentence report**, the arguments of counsel, which included references to both the ordinary twenty year term and the special indeterminate term of eight years, and [the defendant]'s personal statement," and, thus, it could be reasonably inferred that "the sentencing court did consider the sentencing alternatives.

Id. at 260, 831 P.2d at 524 (emphasis added). Because the pre-sentence report -- which the sentencing court had the benefit of reviewing, but the appellate court did not -- was not included in the record on appeal, the Lau court instructed that, henceforth, "the sentencing court [should] make the [pre-sentence] report part of the record in cases where a pre-sentence report has been prepared and that the report be sealed." Id. at 465, 831 P.2d at 526. Thus, the new rule in Lau was directly related to the issue on appeal.

To the contrary, the issue purportedly being clarified here is related to Petitioner's purported belief that, "because counsel failed to file a HRPP Rule 35 motion, she has lost that opportunity." Majority op. at 37. As such, the majority "find[s] it necessary to clarify the ICA's opinion with respect to HRPP Rule 35." Id. Clearly, the majority's new "rule" requiring the sentencing court state its reasons for imposing a consecutive as opposed to a concurrent sentence is wholly unrelated to the issue purportedly being clarified. Thus, the majority's efforts to justify its "clarification" regarding HRPP Rule 35 by invoking an entirely baseless impression allegedly gleaned from Petitioner's application and the ICA's SDO is -- in my view -- untenable. Equally untenable is the fact that the majority, upon accepting Petitioner's application under the guise

of providing a "clarification" with respect to Rule 35, then exploits the certiorari process by promulgating a new "rule" that, as previously discussed, violates the doctrine of *stare decisis* and is based entirely on dicta.

II. CONCLUSION

Based on the foregoing, I concur in the majority's affirmance of the sentence imposed upon the Petitioner. I cannot agree, however, with the majority's new "rule," mandating the sentencing court to state specific reasons when imposing a consecutive sentence -- without overruling the long-standing presumption set forth in Sinagoga -- because it violates the doctrine of *stare decisis*. Moreover, the majority's entire discussion of its new "rule" is *obiter dicta*, i.e., not necessary to the actual adjudication of this case, has no precedential value and is, thus, not binding on our sentencing courts. The majority's attempt to bolster the viability of its new "rule" based on its prediction that Hussein will probably file a post-appeal HRPP Rule 35 motion is factually and legally unsupported and based on mere speculation. I also believe that, given the plain language of HRPP Rule 35, the ICA's disposition with regard to the HRPP Rule 35 motion does not require clarification. The majority's attempt to justify its commentary on HRPP Rule 35 under the guise of an unwarranted clarification is, in my view,

wholly inappropriate. Inasmuch as I concur in the majority's conclusions that neither the ICA nor the sentencing court erred, I would affirm the ICA's judgment on appeal via order without further comment.