CONCURRING AND DISSENTING OPINION BY ACOBA, J.,
IN WHICH DUFFY, J., JOINS

In my view (1) the offense of Failure to Disperse, Hawai i Revised Statutes (HRS) § 711-1102 (1993 & Supp. 2007) [hereinafter, the disperse statute], presents alternative statutory means for conviction, (2) each alternative means must be supported by substantial evidence for conviction, (3) the instant case also involves multiple acts, (4) when multiple acts are offered in support of a single count each must be supported by substantial evidence, and (5) Respondent/Plaintiff-Appellee State of Hawai i (Respondent) did not adduce substantial evidence as to all of the multiple acts involved in the single count of Failure to Disperse. I disagree with the majority s conclusion that the instant case should be remanded for a new trial on the act supported by substantial evidence. I believe this court s precedent compels the conclusion that, in cases such as this one, reversal is required. In this case, remand raises double jeopardy concerns inasmuch as Petitioner/Defendant-Appellant Jason Keliikoaikaika Kalaola (Petitioner) will be retried for conduct of which the jury may have rejected criminal liability.

Petitioner was charged in a complaint filed on July 19, 2007, with Failure to Disperse.[1] He was convicted as charged

[1] HRS § 711-1102 states as follows:

Failure to disperse. (1) When six or more persons are participating in a course of disorderly conduct likely

(continued...)

after a jury trial. On appeal, the Intermediate Court of Appeals (ICA) (1) vacated and remanded the case for a new trial on the basis of instructional error and (2) determined that there was sufficient evidence to convict. Petitioner seeks review of the ICA s judgment filed on June 26, 2009, pursuant to its May 29, 2009 Summary Disposition Order (SDO)[2] affirming the April 18, 2008 judgment of conviction filed by the Circuit Court of the First Circuit (the court).[3] He challenges the ICA s decision that there was sufficient evidence to convict.

I.

The following essential matters, some verbatim, are from the record and the submissions of the parties.

A.

Respondent presented several witnesses at trial. The rendition of events following is set forth in the Application. Honolulu Police Department (HPD) Officer Keani Alapa (Officer

[1](...continued)

> to cause substantial harm or serious inconvenience, annoyance, or alarm, a law enforcement officer may order the participants and others in the immediate vicinity to disperse.
>
> (2) A person commits the offense of failure to disperse if the person knowingly fails to comply with an order made pursuant to subsection (1).
>
> (3) Failure to disperse is a misdemeanor.

(Emphases added.)

[2] The SDO was filed by Presiding Judge Daniel R. Foley and Associate Judges Craig H. Nakamura and Alexa D.M. Fujise.

[3] The Honorable Reynaldo D. Graulty presided.

Alapa)[4] testified that on May 18, 2007, there were maybe 50 to 75 people fighting on the second floor of the Aloha Tower Marketplace (ATM) where he saw Petitioner challenging people to fight. He next saw Petitioner on the first floor acting the same way, and he arrested Petitioner.

On the second floor, Officer Alapa observed about fifty to seventy-five fights occurring. He and Officer Ryan Kaio (Officer Kaio) shouted orders to the general group to disperse no less than ten times. Officer Alapa observed Petitioner challenging people to fight and taking an aggressive stance. On the first floor of ATM, Officer Alapa saw Petitioner again engaging in the same aggressive behavior, challenging people to fight and causing a disturbance.

Officer Kaio related that he was with Officer Alapa on the second floor of ATM for approximately five minutes, where he saw many people fighting, but not Petitioner. He testified to repeatedly telling the crowd to leave the area.

Sgt. Albert Lee (Sgt. Lee) recounted that when he arrived at the front of ATM on the first floor, there were about 15-20 officers on the scene. When Sgt. Lee arrived he saw small fights, [t]here were three or four fights going on[,] and

[4] The transcript refers to the officer as Officer Alapa, whereas the index to the transcript refers to him as Officer Olapa. Both of the parties used the surname Alapa in their briefs. Therefore, for the sake of consistency, this opinion also refers to him as Officer Alapa.

people watching who had nothing to do with the fight[.] He noticed a large number of people coming down from the second floor, many of whom were yelling at each other and fighting. Sgt. Lee observed three or four fights happening on the first floor with a lot of people standing around in that area.

Sgt. Lee testified he noticed Petitioner streaming out of the second floor, yelling, swearing, and challenging people to fight. The sergeant saw Petitioner coming from the second floor and repeatedly told Petitioner to leave. When Sgt. Lee told him to leave, Petitioner responded that he was waiting for the valet to get his car. He recounted that Petitioner was being restrained by friends and that he never saw Petitioner approach the valet. Sgt. Lee left that area and returned to find Petitioner still there.

When Sgt. Lee returned to the front area, he saw Petitioner near a person who was being arrested, and heard Petitioner say, [Y]ou cannot arrest him. It was at that time that Sgt. Lee ordered Petitioner arrested for failure to disperse.

Sgt. Brian Taniguchi (Sgt. Taniguchi) testified he was near the front entrance area, did not see any fights, and saw Sgt. Lee and Officer Alapa attempting to have Petitioner leave. Sgt. Taniguchi pepper-sprayed Petitioner in the course of arresting him.

B.

For the defense, Rocky Contado (Contado) testified that he drove with Petitioner to ATM, that he left his van with a valet, and that when the fighting started Petitioner was with him inside of an establishment called Bikinis Cantina. He testified that the police never entered Bikinis Cantina, and that, as he and Petitioner were leaving, he gave the valet ticket to Petitioner because he had to return to Bikinis Cantina.

However, about ten minutes later, Contado saw Petitioner on the ground in handcuffs. Contado maintained that

> prior to returning to Bikinis Cantina, Contado was with [Petitioner] the entire night and Contado did not see [Petitioner] fighting, no one tried to fight with [Petitioner], and the police officers were not interacting with [Petitioner].

Kainoa Jardine (Jardine), a music promoter, testified that he had two groups playing music at Bikinis Cantina. He related that Petitioner accompanied him to load equipment into Contado s van after the fighting broke out, and Petitioner went to look for a valet to retrieve their car.

Jardine related that he saw a police officer approach [Petitioner] while Petitioner was waiting for the valet. Jardine noticed that the police officer appeared mad, getting so close to [Petitioner] that the police officer almost bumped him, but Jardine could not hear what the police officer was saying. According to Jardine, Petitioner was not angry or yelling, nor

had he challenged people to fight when the police arrested Petitioner. Jardine saw another police officer come up from behind Petitioner and take him down to the ground, handcuffing him and spraying him with mace.

Petitioner testified in his own defense. He stated that he rode with Contado to ATM in Contado s van. He did not yell, call people out, or fight. According to Petitioner, he was inside the bar during the fighting and the police did not say anything to him. He further maintained that, while he was looking for a valet on the first floor, he did not observe any fighting there. Petitioner asserted that after taking music equipment downstairs, he tried to locate the valet to retrieve his car.

According to Petitioner, he heard officers telling everyone to leave, Officer Benjamin Ohai (Officer Ohai) told him to hold up and to leave the area, and he told Officer Ohai and Sgt. Lee he was attempting to find a valet. Then Sgt. Lee became angry with him, Officer Alapa bumped him and called him a punk, and forced Petitioner to the ground.

C.

The Complaint in this case contained only one charge as follows:

> On or about the 19th day of May, 2007, in the City and County of Honolulu, State of Hawaii, [Petitioner], as one (1) of six (6) or more persons participating in a course of disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance, or alarm, or as a person in the immediate vicinity, failed to obey a law enforcement

> officer's order to disperse, in violation of Section 711-1102(1) of the [HRS].

(Emphases added.)

In pertinent part the court instructed the jury as to the elements of the disperse statute in Instruction No. 14 as follows:

> There are three material elements to the offense of failure to disperse[,] each of which [Respondent] must prove beyond a reasonable doubt.
>
> These three elements are:
>
> One, that on or about the 19th day of May 2007[,] in the City and County of Honolulu, State of Hawaiʻi[, Petitioner] was one of six or more persons participating in a course of disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance or alarm or he was a person in the immediate vicinity.
>
> Two, [Petitioner] failed to comply with a law enforcement officer's order to disperse.
>
> And three, [Petitioner] did so knowingly.

(Emphases added.)

In that connection, the relevant parts of Respondent's closing arguments to the jury follow. Respondent first argued that Petitioner was one of six or more persons engaged in disorderly conduct.

> Instruction No. 14, it lays out three essential elements that [Respondent] must prove in finding [Petitioner] guilty of failure to disperse.
>
> First, that on or about the 19th day of May 2007[,] in the City and County of Honolulu, State of Hawaii, [Petitioner] was one of six or more persons participating in a course of disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance or alarm or he was a person in the immediate vicinity.
>
> And two, [Petitioner] failed to comply with a law enforcement officer's order to disperse.
>
> . . . .
>
> Number one, the first thing that we have to prove is that [Petitioner] was one of six or more people participating in a course of disorderly conduct likely to cause substantial harm, serious inconvenience, annoyance or alarm or he was a person in the immediate vicinity.
>
> So if we take a look at that and we take a look at the incidents in this case, first, at around 12:25 a.m. on May 19th, 2007[,] Officers Alapa and Kaio were called to the [ATM] on a report of a large fight.

> Officer Kaio estimates between 30 or 40 people were fighting
>
> Officer Alapa estimates 50 to 75 people were fighting.
>
> Either one, obviously they didn t get an exact count, but there were certainly more than six people involved in this.
>
> When they arrived, they arrived on the east part of [ATM].
>
> They come into the marketplace. They hear loud noises. They hear yelling.

Respondent then described the second floor incident.

> They go upstairs and then they see people fighting.
>
> Officer Alapa testifies that most of the fighting was going on over here, but it actually spread all over the second floor of [ATM].
>
> Officer Kaio testified likewise.
>
> At that point, those were the only two officers on the scene.
>
> . . . .
>
> In the meantime, Officer Alapa, among the many people that were fighting, Officer Alapa notices [Petitioner]. He was there yelling, challenging people to a fight, using profanity.
>
> At that point, Officer Alapa tells [Petitioner] and some of the other people to move on, to leave, to disperse.
>
> He didn t ask them to do that. He told them to do that as a way to break up the fight.
>
> [Petitioner] did not adhere to the order to disperse.
>
> Officer Alapa said that he ordered [Petitioner] to disperse around ten times while he was on the second floor, and [Petitioner] did not comply with that.

(Emphases added.)

Respondent subsequently described the first floor incident.

> Sergeant Lee sees [Petitioner] on the first floor. He comes down. He -- [Petitioner] goes towards the front area on the first floor of [ATM] near the parking lot near the valet. They basically exit [ATM].
>
> Sergeant Lee observes [Petitioner]. He observes [Petitioner] getting agitated. He observes him yell. He observes him challenging people to fight.
>
> He also observes that other people were holding back [Petitioner].
>
> Sergeant Lee said -- told [Petitioner] to leave, as well.
>
> He didn t ask him to do that. He told them to do that.
>
> Again, [Petitioner] failed to do so.
>
> In the meantime, there were other fights going around. There was a fight going around in the parking lot there, as well.
>
> . . . .
>
> Sergeant Lee made an arrest.

> He comes back up. He sees [Petitioner] (inaudible) he told [Petitioner] to leave, to go to the valet.
>
> [Petitioner] has failed to do so.
>
> Sergeant Lee (inaudible) to arrest [Petitioner] at that point.
>
> [Petitioner] -- he told [Petitioner] to leave again. [Petitioner] does not leave.
>
> So Sergeant Lee testifies that [Petitioner] was starting to get aggressive towards more people.
>
> At that time, that s when Sergeant Lee made the order to arrest [Petitioner] for failure to disperse.
>
> Ladies and gentlemen, that in relation to the elements of the offense is, number one, [Petitioner] was there.
>
> In fact, he was one of six or more people engaging in the course of disorderly conduct.

(Emphases added.)

Respondent argued that orders to disperse were given on the second and first floors.

> Number two, the second element, Officer Alapa on the second floor of [ATM] ordered [Petitioner] to leave and to disperse approximately ten times. [Petitioner] failed to do so.
>
> Downstairs, Sergeant Lee ordered [Petitioner] to disperse around ten times over two different spans of times. [Petitioner] failed to do so.
>
> . . . .
>
> Now, ladies and gentlemen, another instruction which is also important that you must follow is Instruction No. 17, which shows that the law allows the introduction of evidence for the purpose of showing there was more than one act upon which proof of an element of an offense may be based.
>
> . . . .
>
> Basically, ladies and gentlemen, what that means is, number one, the incident on the second floor and, number two, the incident on the first floor.
>
> The incident on the second floor is when [Petitioner] was engaging in -- was calling people out and Officer Alapa told [Petitioner] to disperse and [Petitioner] did not do so.
>
> . . . .
>
> The second incident, this is the incident with Sergeant Lee downstairs.

(Emphases added.)

Respondent argued both the second and first floor incidents were separate violations of HRS § 711-1102.

> Ladies and gentlemen, both did happen in this case, [Petitioner] failed to comply with Officer Alapa s orders to disperse on the second floor and he failed to comply with Sergeant Lee s orders to disperse on the first floor.

> Ladies and gentlemen of the jury, ultimately, the evidence that s been presented to this case ultimately comes down to the issue of credibility, who to believe.
> Do you believe the officers?
> Or do you believe [Petitioner s] witnesses?

(Emphases added.) The court did give a specific unanimity instruction[5] pertaining to multiple acts. Instruction No. 17 stated:

> The law allows the introduction of evidence for the purpose of showing that there is more than one act upon which proof of an element of an offense may be based. In order for the prosecution to prove an element, all twelve jurors must unanimously agree that the same act has been proved beyond a reasonable doubt.

(Emphasis added.)

D.

On appeal to the ICA, Petitioner argued that 1) the court failed to properly instruct the jury regarding the material elements for the charged offense; and 2) Respondent failed to adduce sufficient evidence to establish each alternative means of committing the offense that was presented to the jury. State v. Kalaola, No. 29163, 2009 WL 1507291, at *1 (App. May 29, 2009) (SDO).

With respect to the first argument, the ICA considered the commentary on HRS § 711-1102 which stated that the offense of Failure to Disperse is an aggravated form of disorderly

[5] A general unanimity instruction is one that instructs the jury that it must be unanimous as to the general verdict of guilty or not guilty on a particular count. See State v. Apao, 95 Hawai i 440, 442, 24 P.3d 32, 34 (2001) (reciting the general unanimity instruction that the trial court gave, which stated that, [a]t the close of trial, the jurors were instructed, generally, that they must be unanimous as to the verdict). In contrast, a specific unanimity instruction is defined as an instruction that advises the jury that all twelve of its members must agree that the same underlying criminal act has been proved beyond a reasonable doubt. State v. Arceo, 84 Hawai i 1, 33, 928 P.2d 843, 875 (1996) (emphasis added).

conduct. According to the ICA, the statutory definition of disorderly conduct should have been included in the jury instructions and, thus, it vacated the judgment of the court and remanded the case for a new trial. Kalaola, 2009 WL 1507291, at *2.

With respect to the second argument, Petitioner contended that there was not sufficient evidence to establish each alternative means of committing the offense that was presented to the jury. Id. at *1. The ICA stated that

> [t]he failure to disperse offense may be proved by alternative means, namely, that [Petitioner] knowingly was either one of six or more persons participating in a course of disorderly conduct or in the immediate vicinity thereof, when [Petitioner] knowingly failed to comply with a law enforcement officer s order to disperse.

Id. at *2 (emphasis added). The ICA summarily concluded that there was sufficient evidence to prove that [Petitioner] engaged in conduct constituting the charged offense. Id. at *3.

II.

Petitioner lists the following question in his Application: Whether the ICA gravely erred in holding that there was sufficient evidence to establish each alternative means of failure to disperse. Respondent did not file a memorandum in opposition to Petitioner s Application to this court[6].

[6] Also, Respondent did not file an application for certiorari from the ICA judgment remanding to the court to instruct the jury on the definition of disorderly conduct.

III.

A.

Petitioner argues that his case involves statutory alternative means of committing the offense. According to Petitioner, [i]n an alternative means case, where it is impossible to tell which alternative theory the jury s verdict is based upon, due process requires that each of the alternative means presented to the jury be supported by legally sufficient evidence. (Citing State v. Jones, 96 Hawai i 161, 181, 29 P.3d 351, 371 (2001); State v. Gager, 45 Haw. 478, 493, 370 P.2d 739, 747 (1962).) Petitioner asserts that [b]ecause it is possible that the jurors based their decision on a theory which was not supported by legally sufficient evidence, [Petitioner s] rights to due process and a unanimous verdict were violated and the conviction must be set aside. (Citing Jones, 96 Hawai i at 181, 29 P.3d at 371; Gager, 45 Haw. at 493, 370 P.2d at 747.)

The definition of an alternative means case is as follows:

> In an alternative means case, where a single offense may be committed in more than one way, there must be jury unanimity as to guilt for the single crime charged. Unanimity is not required, however, as to the means by which the crime was committed so long as substantial evidence supports each alternative means. In reviewing an alternative means case, the court must determine whether a rational trier of fact could have found each means of committing the crime proved beyond a reasonable doubt.

State v. Rabago, 103 Hawai i 236, 251-52, 81 P.3d 1151, 1166-67 (2003) (quoting Jones, 96 Hawai i at 170, 29 P.3d at 360)

(emphases added). As to the sufficiency of evidence in an alternative means case, this court has said:

> In other words, in an alternative means case where it is impossible to tell which alternative the jury s verdict is based upon, does due process require that each of the alternative means presented to the jury be supported by legally sufficient evidence?
>
> . . . .
>
> . . . [B]ased on our analysis of [the d]efendant s rights to a unanimous verdict and to due process under article I of the Hawai i Constitution, we hold that unanimity is not required where alternative means of establishing an element of an offense are submitted to the jury, provided that there is no reasonable possibility that the jury s verdict was based on an alternative unsupported by sufficient evidence.

Jones, 96 Hawai i at 178, 181, 29 P.3d at 368, 371 (emphasis in original and emphasis added).

B.

In considering Petitioner s argument, it must first be determined whether the statute does set forth statutory alternative means of committing the offense of failure to disperse. See State v. Klinge, 92 Hawai i 577, 585, 994 P.2d 509, 517 (2000) (determining first whether a defendant s constitutional right to a unanimous verdict was violated because statutes setting forth alternate mental states were separate offenses or whether the two mental states were simply alternative means). If the statute does, it must be decided whether both alternatives are supported by substantial evidence. Jones, 96 Hawai i at 181, 29 P.3d at 371 (holding that unanimity is not required where alternative means of establishing an element of an offense are submitted to the jury provided that there is no reasonable possibility that the jury s verdict was

based on an alternative unsupported by sufficient evidence (first emphasis in original)) (second emphasis added).

The test for ascertaining whether a statute sets forth alternative means or separate crimes is whether the level of verdict specificity required by the [jury] instructions was rational and fair, considering history and practice, and the degree of blameworthiness and culpability. Klinge, 92 Hawai i at 587, 994 P.2d at 519 (internal quotation marks and citation omitted). In Klinge, the question was whether two possible mental states that satisfied the mental state required for terroristic threatening [gave] rise to independent elements defining separates crimes[.] Id.at 589, 994 P.2d at 521. Klinge first looked to the history and wide practice as guides to fundamental values. Id.at 587, 994 P.2d at 519. However, nothing in the language of the statute or Hawai i case law indicated that the two mental states should be treated as separate crimes.

Second, this court considered whether the two mental states reasonably reflect notions of equivalent blameworthiness and culpability. Id. at 588, 994 P.2d at 520 (citation omitted). In its analysis of this prong, Klinge noted that there was no practical difference in culpability between the two mental states. Id. Where two means do not reasonably reflect notions of equivalent blameworthiness or culpability, election of the specific means or a unanimity instruction may be required.

Id. at 577 n.6, 994 P.2d at 520 n.6. However, Klinge concluded that [t]he level of culpability between the two alternatives is not morally disparate in any significant sense. Id. Thus, under the two-pronged test, the mental states did not result in separate crimes.

In Jones, the defendant was charged with multiple counts of Sexual Assault in the Second Degree and Sexual Assault in the Fourth Degree. 96 Hawai i at 163, 29 P.3d at 353. The jury was instructed as to two different mental states, absence of consent and ineffective consent. Id. at 165, 29 P.3d at 355. This court considered whether the alternative theories of guilt presented to the jury regarding the lack of legal consent--(1) the absence of consent or (2) ineffective consent . . .--define separate crimes or may be treated as alternative means of establishing an element of a single offense. Id. at 174, 29 P.3d at 364. Applying the Klinge test, Jones concluded that

> alternative theories of absence of consent and ineffective consent do not represent separate crimes; rather, they are alternative means of proving the attendant circumstance element of a single crime. Id.

Referring to Klinge, Jones first looked to the

> language and history of the relevant statutory provisions[.]

Id. It noted that the commentary to the parallel Model Penal Code § 2.11 [made] clear that the consent provisions deal generally with the concept of consent and must be analyzed in the

context of the particular offenses to which they apply. Id. at 174-75, 29 P.3d at 364-65 (citing Model Penal Code and Commentaries (Official Draft and Revised Comments 1985) [hereinafter, MPC] § 2.11, cmt. 1 at 394. As such, absence of consent and ineffective consent did not define discrete or separate offenses. Id.at 175, 29 P.3d at 365.

Jones also examined cases from Hawai i and other jurisdictions indicating that absence of consent and ineffective consent reflect equivalent notions of blameworthiness. Id. Based on these factors, Jones concluded that the two mental states set forth alternative means.

C.

The plain language of HRS § 711-1102, see supra note 1, makes it applicable to those participating in disorderly conduct and those in the immediate vicinity of disorderly conduct. Thus, the instant case presents the same issue of whether statutory alternatives are alternative means requiring a unanimity instruction or instead create separate crimes requiring individual proof. Klinge, 92 Hawai i at 586, 994 P.2d at 518. This court must consider several factors, including, but not limited to, the language and legislative history of relevant statutes, the history and practice in Hawai i and other jurisdictions, and whether the alternatives reflect equivalent notions of blameworthiness and culpability. Jones, 96 Hawai i at 173-74, 29 P.3d at 363-64 (citation omitted). However, the

history and practice of other jurisdictions is unhelpful. The language of various statutes criminalizing refusal to disperse or failure to disperse varies greatly, making comparisons difficult. Furthermore, no cases addressing whether such statutes set forth alternative means or separate offenses were found.

The legislative history of HRS § 711-1102 does not make reference to anything indicating an intent to treat the statute as setting forth separate crimes as opposed to alternative means of committing the same offense. The commentary to HRS § 711-1102 briefly mentions that the statute provides a procedure under which police officers may order both those participating in a course of disorderly conduct as well as those in the immediate vicinity to disperse. Reference to the fact that police officers give similar order[s] to both groups provides some support for the proposition that alternative means are described in HRS § 711-1102. HRS § 711-1102 cmt. (1993).

The legislative history indicates that enactment of HRS § 711-1102 was part of a complete reorganization of the criminal law of the State of Hawaii and is a derivative of the [MPC.] Conf. Comm. Rep. No. 1, in 1972 House Journal, at 1035. An examination of the parallel MPC section does provide some insight into the statute. HRS § 711-1102 is almost identical to MPC § 250.1, which states in relevant part:

> (2) Failure of Disorderly Persons to Disperse upon Official Order. Where [three] or more persons are participating in a course of disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance or alarm, a peace officer or other public servant engaged in

> executing or enforcing the law may order the participants and others in the immediate vicinity to disperse. A person who refuses or knowingly fails to obey such an order commits a misdemeanor.

(Emphases added.) The explanatory notes of MPC § 250 indicate that its general purpose is to provide a rational grading of penalties [for riot, disorderly conduct and related offenses] and especially to limit the discretion of the minor judiciary to impose substantial imprisonment for petty infractions[.]

A cursory glance at the statute may raise questions as to why those in the immediate vicinity should be punished to the same degree as those who are causing the substantial harm or serious inconvenience. However, the MPC commentary to § 250.1 addresses these concerns, stating in relevant part as follows:

> [Failure of Disorderly Persons to Disperse extends] liability to anyone who refuses or knowingly fails to depart from the immediate vicinity as ordered, even if he was not personally a participant in the disorderly conduct there occurring. Liability on these terms is largely a response to practical necessity. Law enforcement officers who confront a public disturbance threatening substantial harm or serious inconvenience need the authority to require that the crowd disperse and to demand compliance from everyone there present. . . . This does not mean that mere presence should suffice for criminal liability, but it does support imposition of penal sanctions for refusal or knowing failure to move on. This much inconvenience can be reasonably demanded of any citizen to avoid escalation of the disorder and possible violence.

MPC at 232 (emphases added).

The commentary plainly states that the treatment afforded these two seemingly distinct groups is a practical necessity inasmuch as those in the immediate vicinity who fail to disperse may seriously impede officers attempts to prevent disturbances that threaten substantial harm. It is manifest that refusal to leave the scene of a disturbance increases the risk

that the disturbance will escalate. Thus, the commentary compels the conclusion that equal notions of blameworthiness apply to the two distinct groups liable under MPC § 250.1 and HRS § 711-1102 and that the statute should be construed as setting forth alternative means.

HRS § 711-1102 sets forth distinct alternative means. As the court s jury instructions state, a person commits the offense of failure to disperse when he or she (1)(a) is one of six or more persons participating in a course of disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance, or alarm, or (1)(b) is in the immediate vicinity of one of six or more persons participating in a course of disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance, or alarm, and (2) knowingly fails to comply with a law enforcement officers s order to disperse. To sustain the conviction with regard to statutory alternative means, the prosecution must have adduced substantial evidence with regard to the statutory alternative means set forth in sections (1)(a) and (1)(b).[7]

IV.

Two issues not discussed in Klinge were raised in Jones. The first was whether jury unanimity is required when the jury is presented with alternative means of establishing an

[7] As discussed further infra, the statutory alternatives presented in Jones related to two different means by which the prosecution could negative the defense of consent to several of the charges of sexual assault. 96 Hawai i at 166-67, 29 P.3d at 356-57.

element other than mental state; and [the second,] whether due process requires sufficient evidence of each alternative means to uphold a verdict where it is impossible to tell which alternative the jury relied upon. Jones, 96 Hawai i at 174, 29 P.3d at 364. In Jones, this court held that [a] defendant's rights are clearly prejudiced where the jury is instructed that it may find him guilty based upon a theory of guilt that is not supported by sufficient evidence as a matter of law. Id. at 181, 29 P.3d at 371.

To reiterate, Jones stated that unanimity is not required where alternative means of establishing an element of an offense are submitted to the jury, provided that there is no reasonable possibility that the jury's verdict was based on an alternative unsupported by sufficient evidence. Id. (emphasis in original). Thus, for example, when a jury is presented with two alternative means, one of which is supported by substantial evidence and the other is not, a defendant s rights to a unanimous verdict and to due process under article I of the Hawai i Constitution are violated. Id.

V.

A.

Petitioner indirectly argues that his case is also a multiple-acts case. A multiple-acts cases is one in which

> several acts are alleged [in one count] and any one of them could constitute the crime charged[.] Id. at 170, 29 P.3d at

360. They are distinct acts that could be charged as separate counts. Id. In such cases, [this court] requires that either the State elect the particular criminal act upon which it will rely for conviction, or the trial court instruct the jury that all of them must agree that the same underlying criminal act has been proved beyond a reasonable doubt. Id. (citations omitted) (emphasis added).

In remanding the case for a new trial and ordering the court to give a specific unanimity instruction, Arceo stated,

> Because our disposition of the present appeal is grounded in trial error and the evidence adduced at trial was clearly sufficient to support [defendant s] convictions, double jeopardy concerns are not implicated by a new trial.

Arceo, 84 Hawai i at 33 n.40, 928 P.2d at 875 n.40 (emphasis added). In other words, remand, and not reversal, was appropriate because there was substantial evidence to sustain a conviction on each of the multiple acts underlying each count. Otherwise, remand as to all of the acts could not have resulted. Thus, the record must contain substantial evidence for each of the multiple acts offered in support of a single count. Id. Consequently, [t]he test on appeal is not whether guilt is established beyond a reasonable doubt [as to an act], but whether there was substantial evidence to support the conclusion of the trier of fact. State v. Richie, 88 Hawai i 19, 33, 960 P.2d 1227, 1241 (1998) (internal quotation marks and citations omitted).

Substantial evidence . . . is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion. Id. (internal quotation marks and citations omitted).

B.

However, a unanimity instruction is not required where a charged offense is based on a single incident of culpable conduct. See State v. Valentine, 93 Hawai i 199, 208-09, 998 P.2d 479, 488-89 (2000) (holding that a unanimity instruction was not required where evidence showed only a single episode between the defendant and a police officer, during which the two allegedly engaged in a continuous struggle for possession and control of [a] firearm). Similarly, no specific unanimity instruction is necessary where the defendant is charged with a continuing offense, based on facts and circumstances that constitute a continuing course of conduct. Rabago, 103 Hawai i at 250, 81 P.3d at 1165 (internal quotation marks and citations omitted).

Respondent concedes that in presenting the issue at trial, the prosecution separated the incident into conduct on the second floor and conduct on the first floor, arguing that

[Petitioner] was actively engaged in disorderly conduct in two (both) instances and that he failed to follow the officer s orders to leave subsequent to each incident. In spite of this, Respondent argued on appeal that the situation is analogous to a

physical attack in that the charge would not be parsed into separate components for each blow delivered. In other words, according to Respondent, [Petitioner] was engaged in a single violation of the statute through a continuing course of conduct comprising failure to disperse in its totality[.]

However, the prosecution may not argue on appeal a different theory than was argued before the court. See State v. Sunderland, 115 Hawai i 396, 399-400, 168 P.3d 526, 529-30 (2007) (concluding that Petitioner made an argument at trial that

> differ[ed] from the argument [he sought] to assert on appeal and, therefore, the court would not address it (citing HRS § 641-2 (Supp. 2004) (The appellate court . . . need not consider a point that was not presented in the trial court in an appropriate manner.))); State v. Rodrigues, 67 Haw. 496, 498, 692 P.2d 1156, 1158 (1985) (holding that, on appeal, when seeking a reversal on a motion to suppress, the State was precluded from raising the issue of a good faith exception to the exclusionary rule because [i]t is a generally accepted rule that issues not raised at the trial level will not be considered on appeal) (citations omitted). Moreover, [t]he doctrine of judicial estoppel

> prevents parties from playing fast and loose with the court or blowing hot and cold during the course of litigation. State v. Fields, 115 Hawai i 503, 534, 168 P.3d 955, 986 (2007) (quoting Roxas v. Marcos, 89 Hawai i 191, 124, 969 P.2d 1209, 1242 (1998) (citations and some internal quotation marks omitted)).

Therefore, the single continuing offense theory need not be considered.

Nevertheless, an examination of the argument on the merits reveals that Respondent s single continuous offense theory is incorrect. Respondent relies on State v. Temple, 65 Haw. 261, 267 n.6, 650 P.2d 1358, 1362 n.6 (1982), for the continuing offense proposition as follows:

> A continuing offense is 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 . . . not terminated by a single act or fact, but subsisting for a definite period and intended to cover or apply to successive similar obligations or occurrences.

(Quoting 22 C.J.S. Criminal Law § 1, at 6 (1961). (Emphasis in original.)) Citing to the case notes[8] to HRS § 711-1102 (Supp. 2007) referred to above, Respondent asserts that because the police were still in the process of having people disperse and that fights had broken out on the first floor as people left the second floor, the need to prevent the harms listed in the disperse statute had not come to an end.

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[8] In the answering brief, Respondent mistakenly asserts that the above citation is to the commentary to HRS 711-1102. The citation, however, is to the statute case notes. Case notes are not recognized authority on statutory interpretation.

The commentary on HRS 711-1102 actually states:

> This section provides a procedure under which a peace officer can order a group of six or more persons participating in a course of disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance, or alarm to disperse. A similar order may be made to others in the immediate vicinity. Failure to obey such an order is a misdemeanor. The offense is thus an aggravated form of disorderly conduct which does not reach the point of riot or unlawful assembly.
>
> Previous Hawaii law contained a somewhat similar section allowing an order to disperse after force of violence has been used disturbing the public peace.

But Respondent s citation to Templeis inapposite. Temple involved the arrest and conviction of the defendant for the alleged theft of a firearm. Temple, 65 Haw. at 266, 650 P.2d at 1361. The defendant argued that the three-year statute of limitations had passed. Id. The statute in that case, HRS § 708-830(8), stated that the person committed the offense if he

> intentionally receives, retainsor disposes of the property of another, knowing that it is stolen[.] Id. at 266 n.4, 650 P.2d at 1361 n.4 (quoting HRS § 708-830(8)) (emphasis added).

Temple concluded that the statute s use of the term retain meant that the crime was a continuing offense that tolled the statute of limitations. Id. at 265, 650 P.2d at 1361. Thus, the defendant s conduct of retaining the weapon for the more than three years prior to his indictment constituted an ongoing offense under the plain meaning of the statute.

In contrast, the disperse statute does not contain similar language. HRS § 711-1102 simply grants police officers the power to arrest those who have knowingly failed to disperse after having been ordered to do so. The plain language of the statute indicates that a violation occurs by a single instance of failing to comply with a police officer s order to disperse. However, as the answering brief concedes, in presenting the issue at trial, Respondent separated the case into two parts, number one, the incident on the second floor and, number two, the incident on the first floor[,] and argued Petitioner was guilty

of both. Thus, Petitioner s case is manifestly also a multiple acts case.

VI.

Based on the foregoing, it must be determined whether the multiple acts, both the act on the first floor of ATM and the act on the second floor, provided substantial evidence to sustain Petitioner s conviction for all of the elements of HRS § 711-1102, including both of the statutory alternative means. To reiterate, the two statutory alternative means are that (1) Petitioner was one of six or more people participating in a course of disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance, or alarm, or (2) Petitioner was in the immediate vicinity of six or more people participating in a course of disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance, or alarm. Additionally, there must be substantial evidence that Petitioner knowingly failed to comply with the police officer s order to disperse.

A.

As to the incident on the second floor, there is not substantial evidence to support Petitioner s conviction. Testimony of the officers who responded to the fights on the second floor of ATM stated that Petitioner was seen upstairs in the same general central area where there were an estimated 50 to 70 people fighting. Petitioner himself testified that the whole floor was packed and there were about 200 people there.

When Officer Alapa saw Petitioner he was challenging people to fight. Thus, there is evidence in the record that six or more persons were participating in a course of disorderly conduct and that Petitioner was either participating in the conduct or a person in the immediate vicinity[.] HRS § 711-1102.

Second, Respondent must show that Petitioner knew of the order to disperse. Officer Alapa s testimony did not indicate that he addressed Petitioner directly or was in any way able to capture his attention. However, Officer Alapa addressed the general group of which Petitioner was a part, asking them to leave, although he did not address Petitioner personally. Officer Alapa stated that Petitioner did not leave at that time[.] According to Officer Alapa, it took about twenty minutes before they got a lot of people to leave the second floor and (inaudible) proceed downstairs. But there is no evidence that Officer Alapa had Petitioner in view for the entire twenty minutes or that Petitioner was on the second floor for twenty minutes. Indeed, Officer Kaio asserted that he and Officer Alapa were on the second floor for only about five minutes. Thus, Respondent was unable to establish how much time had passed before Petitioner left the second floor. Both Officers Alapa and Kaio testified that they had to deal with a number of different situations on the second floor.

However, it was clearly established that Petitioner was seen on the first floor by Officer Alapa when the officer went

downstairs. Viewing the evidence in the light most favorable to the prosecution, the evidence could support the inference that Petitioner did hear the order to leave inasmuch as he left for the first floor. Hence, the statute s requirement that Petitioner know about the order was satisfied.

The final issue in regard to Petitioner s upstairs conduct is whether or not he complied with the order to leave. While a defendant s state of mind can rarely be proved by direct evidence, the mind of an alleged offender may be read from his or her acts or conduct and the inferences fairly drawn from all of the circumstances. State v. Pudiquet, 82 Hawai i 419, 425, 922 P.2d 1032, 1038 (1996) (holding that it could be fairly inferred from defendant s threatening statements that he intended to influence the testimony of a witness (citing State v. Leung, 79 Hawai i 538, 544, 904 P.2d 552, 558 (1995))).

Petitioner s presence downstairs a short time after the order was given is evidence of Petitioner s compliance with the order to disperse. Conviction requires that Petitioner knowingly failed to comply with the officers orders to leave. There is no substantial evidence that Petitioner knowingly failed to comply with the order to disperse; rather, the evidence appears to be to the contrary.

Furthermore, the statute is silent as to the time frame within which Petitioner was required to disperse. HRS 711-1102 only requires that he knowingly fail to comply with the order

to leave the immediate area. The willful act of disobeying an order to leave cannot be inferred by Petitioner s conduct because he was seen downstairs a short time later. Thus, Respondent did not adduce [s]ubstantial evidence as to every material element of the offense charged[.] Richie, 88 Hawai i at 33, 960 P.2d at 1241 (internal quotation marks and citation omitted). Consequently, there was no substantial evidence establishing that Petitioner did not comply with the order to disperse from the second floor, and, thus, the evidence was insufficient to sustain Petitioner s conviction for his actions on the second floor.

B.

As to the incident on the first floor, it appears there was substantial evidence to support Petitioner s conviction. The testimony of Officers Alapa, Kaio, and Sgt. Lee indicates that they saw Petitioner on the first floor of the ATM complex. Officer Alapa s testimony was silent as to the number of people on the first floor, but Sgt. Lee estimated that there were about fifty people streaming out [from upstairs] and that they were all still yelling and fighting.

Sgt. Lee first saw Petitioner streaming out in [the] area. He observed Petitioner yelling, swearing, and challenging people to fight. His friends were physically restraining him. Sgt. Lee testified that there were three or four fights going on[.] Obviously, a fight would include at least two people. Hence, there was sufficient evidence to

support the inference that there were at least six people engaged in disorderly conduct on the first floor. The record thus establishes that Petitioner was either part of a group of six or more persons or, arguably, in the immediate vicinity of six or more persons who were participating in a course of disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance, or alarm[.] HRS § 711-1102.

Sgt. Lee approached Petitioner and told him to leave the area. According to Sgt. Lee s testimony, Petitioner refused to do so and Sgt. Lee had to tell Petitioner to leave at least ten more times. Petitioner s refusal to leave, as testified to by Sgt. Lee, constitutes substantial evidence that Petitioner knowingly fail[ed] to comply with an order to disperse. HRS § 711-1102. [T]he testimony of a single witness, if found by the trier of fact to have been credible, will suffice [to establish substantial evidence]. In re Doe, 95 Hawai i 183, 196, 20 P.3d 616, 629 (2001) (citing State v. Eastman, 81 Hawai i 131, 141, 913 P.2d 57, 67 (1996)) (other citations omitted). See also id. at 197, 20 P.3d at 630 (holding that the record contained substantial evidence to support the family court s determination that Mother [was] not willing and able to provide a safe environment for the child). Thus, there was substantial evidence to support Petitioner s conviction for his actions on the first floor.

C.

In sum, there was not substantial evidence that Petitioner failed to disperse on the second floor, however, there was substantial evidence that Petitioner failed to disperse on the first floor. Respondent argued to the jury that Petitioner violated the disperse statute on both floors. If the jury accepted Respondent s theory as to both incidents, it was wrong, because there was not substantial evidence to support conviction for the second floor events. If the jury decided to base its conviction on only one of the floors, it is impossible to determine whether the jury relied on the second floor incident for which there was insufficient evidence, or on the first floor incident.

Arceo stated that an accused in a criminal case can only be convicted upon proof by the prosecution of every material element of the crime charged beyond a reasonable doubt, . . . [and this] constitutional precept also implicates the defendant's right to due process of law[.] Arceo, 84 Hawai i at 30, 928 P.2d at 872 (internal quotation marks and citations omitted). Thus, the Arceo requirement that an instruction that advises the jury that all twelve of its members must agree that the same underlying criminal act has been proved beyond a reasonable doubt is grounded in the same due process protection in article I, sections 5 and 14 of the Hawai i Constitution. Id. at 33, 928 P.2d at 875. Arceo also indicated that because the

evidence adduced at trial was clearly sufficient to support [the defendant s] convictions, double jeopardy concerns are not implicated by a new trial. Id. at 33 n.40, 928 P.2d at 875 n.40 (citing State v. Wallace, 80 Hawai i 382, 413-14, 910 P.2d 695, 726-27 (1996)). Hence, the Arceo requirement that there be substantial evidence as to each specific act underlying a count, implicates the right against double jeopardy in article I, section 10 of the Hawai i Constitution in cases involving issues of sufficiency of the evidence.[9]

VII.

A.

At oral argument the issue was raised as to whether remanding for a new trial on the alternative means and multiple acts supported by substantial evidence would violate the double jeopardy clause. Although this issue was not raised by Petitioner in either the briefs or Application, this court has

the power to suasponte notice plain errors or defects affecting substantial rights[.] State v. Hernandez, 61 Haw. 475, 482, 605 P.2d 75, 79 (1980). Moreover, we have previously held that a defendant's right to be free from double jeopardy is just such a

[9] Article I, section 10 of the Hawai i Constitution states in pertinent part as follows:

> 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 held as provided by law, except in cases arising in the armed forces when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy . . . .

substantial right as to be noticeable by the court. State v. Miyazaki, 64 Haw. 611, 616, 645 P.2d 1340, 1344 (1982) (citing State v. Martin, 62 Haw. 364, 373, 616 P.2d 193, 199 (1980)).

B.

In addressing whether double jeopardy precludes retrial, this court has distinguished between trial error and evidentiary insufficiency.

> [R]eversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished.

State v. Hamala, 73 Haw. 289, 293, 834 P.2d 275, 277 (1992) (quoting Burks v. United States, 437 U.S. 1, 15 (1978)) (emphases added), rev d on other grounds byState v. Rogan, 91 Hawai i 405, 423 n.10, 984 P.2d 1231, 1249 n.10 (1999).

In Jones, this court stated that remanding the defendant s case for a new trial on the statutory alternative supported by substantial evidence would not violate the double jeopardy clause, but acknowledged the distinction between a remand for trial error and reversal for insufficient evidence.

> We note that our disposition in this case does not implicate the double jeopardy clause of article I, section 10 of the Hawai i Constitution. The double jeopardy clause bars retrial of a defendant once a reviewing court has found the evidence at trial to be legally insufficient to support a conviction. However, retrial is not barred when the reviewing court reverses a case due to trial error, such as erroneous jury instructions. Although our holding in this

> case is based, in part, on our conclusion that the jury instruction regarding ineffective consent raised the possibility that the verdict was based on an alternative means of establishing guilt not supported by legally sufficient evidence, it is undisputed that there was legally sufficient evidence of the other alternative of establishing guilt and, thus, the error in this case is trial error. Accordingly, the double jeopardy clause does not bar retrial on the means of establishing guilt for which there was sufficient evidence presented at trial.

96 Hawai i at 184 n.30, 29 P.3d at 374 n.30 (internal citations omitted) (emphases added).

The defendant in Jones was convicted of five counts of sexual assault including (1) one count of sexual assault in the second degree, HRS § 707-731(1)(a) (1993); (2) one count of attempted sexual assault in the second degree, HRS §§ 705-500 (1993) and 707-731(1)(a); (3) one count of sexual assault in the fourth degree, HRS § 707-733(1)(b) (1993); and (4) two counts of sexual assault in the fourth degree, HRS § 707-733(1)(a) (1993). Id. at 163, 29 P.3d at 353. The defendant had argued at trial that the [c]omplainant had consented to his sexual advances. The prosecution, on the other hand, argued that the evidence showed [the c]omplainant's lack of consent and also focused on [the c]omplainant's youth, arguing that [the d]efendant was a con artist who took advantage of a young girl. Id.at 164, 29 P.3d at 354. The circuit court instructed the jury as to two alternative means by which the prosecutor could overcome the defendant s defense of consent. The first way--the prosecution's primary theory--was to prove that [the c]omplainant did not consent at all, i.e., the absence of consent. The second way was to prove that, even if [the c]omplainant

consented, such consent was ineffective. Id. at 168, 29 P.3d at 358 (citing HRS § 702-235 (1993)). In Jones, the ineffective consent statute, HRS § 702-235,

> provide[d] that consent is not a defense if:
> (1) It is given by a person who is legally incompetent to authorize the conduct alleged [Ground 1]; or
> (2) It is given by a person who by reason of youth, mental disease, disorder, or defect, or intoxication is manifestly unable or known by the defendant to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct alleged [Ground 2]; or
> (3) It is given by a person whose improvident consent is sought to be prevented by the law defining the offense [Ground 3]; or
> (4) It is induced by force, duress or deception [Ground 4].

Id. at 168, 29 P.3d at 358 (emphases added). In Jones, [t]he prosecution concede[d] that the trial court's instruction as to ineffective consent was erroneously given because there was insufficient evidence to support such an instruction. Id. at 167, 29 P.3d at 357. However, the prosecution further acknowledged that the record reflect[ed] that there was some evidence and argument to the jury supporting some of the grounds of ineffective consent. Id. Specifically, [t]he prosecution, in its opening brief, argued that, although subsections (1) and (3) of the ineffective consent statute were inapplicable because there was no evidence adduced in support thereof, there was evidence adduced in support of both subsections (2) and (4) [of the ineffective consent statute]. Id. at 178 n.20, 29 P.3d at 368 n.20. The prosecution had argued in part that, due to the complainant s youth and the defendant s deception, the defendant was able to engage in sexual acts with the complainant, thereby

implicating the ineffective consent statute, HRS § 702-235. Thus, Jones said that trial error occurred based, in part, on [the] conclusion that the jury instruction regarding ineffective consent raised the possibility that the verdict was based on an alternative means of establishing guilt not supported by legally sufficient evidence[.] Id.at 184 n.30, 29 P.3d at 374 n.30 (emphasis added).

As a result, Jones was faced with the issue of whether the ineffective consent instruction constituted reversible error where it is possible that the jury found [the d]efendant guilty based upon one of the grounds of ineffective consent, despite the prosecution's failure to meet its burden of proof as to that ground. Id. at 178, 29 P.3d at 368. Stated another way, the issue was whether, in an alternative means case where it is impossible to tell which alternative the jury's verdict is based upon, does due process require that each of the alternative means presented to the jury be supported by legally sufficient evidence? Id.

Jones concluded that [a] defendant's rights are clearly prejudiced where the jury is instructed that it may find him guilty based upon a theory of guilt that is not supported by sufficient evidence as a matter of law. Id. at 181, 29 P.3d at 371. However, as noted previously, reversal was not required in Jones because it was trial error to instruct the jury as to the alternative means of ineffective consent, but retrial is not

barred when the reviewing court reverses a case due to trial error, such as erroneous jury instructions. Id. (emphasis added). Thus, the fact that [t]he double jeopardy clause bars retrial of a defendant once a reviewing court has found the evidence at trial to be legally insufficient to support a conviction[,] id, was not applicable in Jones inasmuch as the fundamental issue in that case was characterized by this court as trial error in the form of erroneous jury instructions. Id. In contrast, the issue in the instant case is clearly the sufficiency of the evidence.

C.

The ICA s determination that the evidence was sufficient to sustain Petitioner s conviction, Kalaola, 2009 WL 1507291, at *3, was wrong. As discussed supra, the conduct on the second floor was not supported by substantial evidence. Because only one count was charged, it is impossible to determine which of the multiple acts the jury relied upon in convicting Petitioner.

The difference between trial error and insufficiency of the evidence serves to distinguish the instant case from others in which this court has remanded for a new trial. In Arceo, the defendant was charged with, and convicted of, two counts of sexual assault. 84 Hawai i at 3, 928 P.2d at 845. At trial, the prosecution offered evidence of multiple instances of sexual assault in support of the defendant s conviction without electing

which specific acts the jury should rely upon for each count. Id. at 6, 928 P.2d at 848. As noted before, Arceo held that "[the defendant's] constitutional right to a unanimous verdict" demands that either the prosecution elect the specific act on which the charge is based or the court give a specific unanimity instruction. Id. at 2-3, 928 P.2d at 844-45. Because neither had occurred, this court remanded for a new trial on those counts. Id. at 33, 928 P.2d at 875.

In discussing the specific incidents of sexual penetration and sexual contact that the minor witness testified to, Arceo plainly identified each distinct act that could have been charged as a separate count, stating that the minor witness testified

> that, during the time period charged in the indictment, [the defendant] subjected him to five separate and distinct acts of sexual penetration--twice by inserting his finger into the [minor witness's] anus (on each occasion, in the shower located in the shelter), once by inserting his penis into the [minor witness's] anus (while the [minor witness] was sleeping on the bed provided by the shelter), and twice by performing fellatio upon the [minor witness] (also while the [minor witness] was in the bed)--and two separate and distinct acts of sexual contact--once by placing his penis on the [minor witness's] penis (while the [minor witness] was in the bed) and once by placing his penis on the [minor witness's] back (also while the [minor witness] was in the bed)[.]

Id. at 23, 928 P.2d at 865 (footnote omitted) (emphases added).

Arceo further explained that "the prosecution stipulated that the indictment returned against [the defendant] in this case covered 'all alleged sexual assaults of the [minor witness] by [the defendant] during the specified period while they were living on Maui.'" Id. at 24, 928 P.2d at 866 (emphasis

added). Thus, the two separate and distinct acts of sexual contact to which the [minor witness] testified at trial were directly subsumed within Count One of the indictment, and the five separate and distinct acts of sexual penetration to which he testified at trial were directly subsumed within Count Two. Id. at 24, 928 P.2d at 866 (emphases added). The discussion in Arceo continued by setting forth each of the elements of the offense and noted which acts related to which elements. With regard to the three material elements of sexual assault in the first degree, Arceo set them forth as being

> (1) that [the defendant subjected the [minor witness] to sexual penetration (i.e., the prohibited conduct, to wit, anal intercourse, fellatio, or the intrusion of [the defendant s] finger into the [minor witness s] anal opening); (2) that [the defendant] was aware that he was doing so (i.e., the requisite knowing state of mind with respect to the actor's conduct); and (3) that the [minor witness] was less than fourteen years old at the time of the sexual penetration (i.e., the attendant circumstance of the [minor witness's] age).

Id. at 14, 928 P.2d at 856 (footnote and internal citations omitted). Arceo also set forth the four material elements of sexual assault in the third degree as

> (1) that [the defendant] subjected the [minor witness s] to sexual contact (i.e., the prohibited conduct, to wit, the touching of the [minor witness s] back with [the defendant s] penis or the touching of the [minor witness s] penis with [the defendant s] penis); (2) that [the defendant] was aware that he was doing so (i.e., the requisite knowing state of mind with respect to the actor's conduct); (3) that [the defendant] was aware that the [minor witness] was not married to him (i.e., the requisite knowing state of mind with respect to the attendant circumstance implicit in sexual contact,); and (4) that the [minor witness] was less than fourteen years old at the time of the sexual contact (i.e., the attendant circumstance of the [minor witness s] age).

Id. at 15, 928 P.2d at 857 (citations omitted).

Arceo observed that remand was based on trial error and [on the fact that] the evidence adduced at trial was clearly sufficient to support [defendant s] convictions[.] Id. at 33 n.40, 928 P.2d at 875 n.40 (citing Wallace, 80 Hawai i at 413-14, 910 P.2d at 726-27) (emphasis added). This detailed account in Arceo of each individual act as it related to the elements of the two charged offenses leaves no question that there was substantial evidence upon which to base a conviction as to each underlying act. Arceo would not have discussed each act without indicating that an act lacked substantial evidence, inasmuch as Arceo remanded the case for retrial after detailing the acts related to the subject counts.

Thus, Arceo stated that, [b]ecause our disposition of the present appeal is grounded in trial error and the evidence adduced at trial was clearly sufficient to support [the defendant s] convictions, double jeopardy concerns are not implicated by a new trial. Id. at 33 n.40, 928 P.2d at 875 n.40 (emphasis added). This statement plainly signifies that Arceo had concluded that each underlying act of a count was sufficient to support a conviction. Id. at 33 n.40, 928 P.2d at 875 n.40. The conclusion in Arceo that the prohibition against double jeopardy was not violated because (1) the remand was due to trial error and (2) there was sufficient evidence to sustain the convictions on each of the multiple acts of a count means that remand is not permitted when one of the multiple acts is not

supported by substantial evidence. See discussion supra. In Arceo, the court s failure to give the unanimity instruction was trial error, resulting in remand, and not a lack of substantial evidence requiring reversal. See also State v. Kassebeer, 118 Hawai i 493, 511, 193 P.3d 409, 427 (2008) (remanding for a new trial after the circuit court plainly erred by not sua sponte giving the jury a specific unanimity instruction when the prosecution did not elect the specific act upon which the conviction was based); State v. Auld, 114 Hawai i 135, 142, 157 P.3d 574, 581 (App. 2007) (remanding for a new trial because the circuit court erred in not giving the jury a specific unanimity instruction as to the victim of the act when there were multiple victims of an act).

Furthermore, Arceo allows the prosecution an opportunity to present evidence of multiple acts to the jury under separate counts or elect the specific act to be relied upon for the charged offense. Arceo, 84 Hawai i at 27 n.30, 928 P.2d at 869 n.30 (stating that the prosecution remains free to charge multiple counts of separate and distinct acts or to elect the particular act on which it is relying at the close of its case-in-chief). This court has stated that the purpose of an Arceo unanimity instruction is to eliminate any ambiguity that might infect the jury's deliberations respecting the particular conduct in which the defendant is accused of engaging and that allegedly constitutes the charged offense. Kassebeer, 118

Hawai i at 508, 193 P.3d at 424 (citing Valentine, 93 Hawai i at 208, 998 P.2d at 488) (emphasis added). In the instant case, there remains an ambiguity regarding the particular incident for which Petitioner was convicted. The purpose behind an Arceo instruction would be defeated if conviction follows when some of the acts underlying a count are not supported by substantial evidence and there is no way to ascertain whether the jury relied on those acts in convicting a defendant.

State v. Mundon, 121 Hawai i 339, 355, 219 P.3d 1126, 1142 (2009), involved multiple acts and double jeopardy. In that case, this court reversed the defendant s conviction for Terroristic Threatening in the First Degree (TT1). Id. The defendant was charged with two separate counts of TT1. The jury convicted the defendant of one count and acquitted him of the other, but had not been instructed that it must be unanimous as to the specific act constituting the basis for the conviction. Id. The fact that the jury was not required to agree unanimously as to which count was the basis for conviction and which count was the basis for acquittal created a genuine possibility that different jurors concluded that [the defendant] committed different acts[.] Id.at 354, 219 P.3d at 1141. Thus, Mundon determined that an Arceo instruction was required because [t]he language of the indictment as to each count was identical and, thus, neither count specified which act related to which offense. Id.

The failure to give a unanimity instruction in Mundon would have amounted to trial error requiring remand. However, remand in that case would have raised double jeopardy concerns because the jury was never informed which act committed by Mundon coincided with [which] counts[.] Id. (emphasis in original). The inability to ascertain which act corresponded to the appropriate count meant it was possible that if the case were remanded, the defendant could be retried for a count of TT1 for which he had been, in fact, acquitted by the jury. This would have violated his right not to be prosecuted for the same offense twice. Id. at 355, 219 P.3d at 1142 (citing State v. Higa, 79 Hawai i 1, 5, 897 P.2d 928, 932 (1995)).

As discussed previously, similar concerns are present in the instant case. It is impossible to know for which multiple acts the jury convicted Petitioner. The presence of substantial evidence as to one of the two acts does not sufficiently guarantee that Petitioner would not be subjected to the risks double jeopardy was intended to avoid. If this court were to remand for a new trial, it is possible that Petitioner could be retried for conduct the jury had rejected as a basis for legal liability in the first trial. The prosecution could have resolved these ambiguities by electing a particular act or by alleging particular acts in separate counts. Accordingly, in my view, the conviction must be reversed.

VIII.

The majority concludes that there was not substantial evidence to support Petitioner s conviction for Petitioner s actions upstairs at ATM. However, the majority would have this case remanded for a new trial on the act that occurred downstairs. The majority argues that 1) this opinion s reading of Arceo is incorrect, majority opinion at 37-40 2) Jones is controlling and requires this court to remand for a new trial, id. at 32 3) principles of double jeopardy are extended beyond what is set forth in Hawai i and federal case law, id. at 16-32, and 4) the disposition requested by Petitioner at the ICA should be taken in the instant case, id. at 15. But contrary to the majority s position, Jones does not control the outcome of this case. As Jones itself indicated, the analysis pertaining to multiple acts was not germane to resolving the issues of alternative means. Jones stated:

> Because the prosecution correctly charged [the d]efendant with separate counts of sexual assault with respect to each distinct culpable act or incident, the danger present in Arceo--that the jury did not agree upon which independent incident constituted the charged offense--was not presented by the consent instruction in this case.

Jones, 96 Hawai i at 172, 29 P.3d at 362. Thus, I respectfully disagree with the majority.

A.

The majority s first argument is that, in Arceo,

> [t]here is no indication that this court concluded, based on [the minor witness s] equivocal testimony, that there was

substantial evidence to support each of the multiple acts. Majority opinion at 40 (citing Arceo, 84 Hawai i at 10, 928 P.2d at 852). According to the majority the evidence in Arceo was sufficient to support the defendant s convicti$n, but not that each underlying multiple act contained substantial evidence. Id. (quoting Arceo, 84 Hawai i at 33 n.40, 928 P.2d at 875 n.40) (emphasis in original).

However, in Arceo, as indicated supra, the prosecution adduced substantial evidence of multiple acts underlying each count to support the defendant s conviction. The discussion in Arceo of the minor witness s testimony related largely to 1) the defendant s argument that the prosecution should be limited to presenting evidence of a single incident for each count and testimony of other bad acts should be excluded, and 2) the prosecution s counter-argument that the defendant s sexual assaults constituted a continuing offense requiring the admission of all the instances of sexual assault. Arceo, 84 Hawai i at 5-9, 928 P.2d at 847-51. The prosecution argued that the acts should be regarded as continuing offenses because [m]inors can rarely be expected to recall the specific date, time, and details of repeated sexual offense[s]. Id.at 6, 928 P.2d at 848. To that end, this court stated, Does the victim's failure to specify precise date, time, place or circumstance render generic testimony insufficient? Clearly not. As many of the cases make clear, the particular details surrounding a child molestation

charge are not elements of the offense and are unnecessary to sustain a conviction. Id. at 13, 928 P.2d at 855 (quoting People v. Jones, 792 P.2d 643, 655-56 (Cal. 1990)) (emphases added).[10] In examining the record, Arceo noted that, during the trial, the minor witness purported to recall seven separate, distinct, and specific sexual assaults, perpetrated by [the defendant], that occurred either in the shower or the bedroom of the shelter during the period of time when he and [the defendant] sojourned there. Id. at 24 n.25, 928 P.2d at 866 n.25 (emphasis added).[11] Accordingly, in Arceo, this court determined that

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[10] It should be noted that the law regarding testimony on dates, times, and places is a separate area of law and does not relate to the sufficiency of the evidence. The majority portrays the minor witness s testimony as equivocal, majority opinion at 40, because he was unable to recall whether distinct culpable acts had even occurred on more than one occasion[,] id. at 40 n.13 (citing Arceo, 84 Hawai i at 8-10, 928 P.2d at 850-52). However, based on the defendant s conviction, it is obvious that the jury accepted the testimony of the minor witness. In any event, this does not in any way detract from the conclusion that there was substantial evidence to support the defendant s conviction for each of the seven individual acts.

[11] The majority s statment that, inArceo, the prosecutor s stipulation as to the counts including all acts was to avoid double jeopardy concerns in that case has no bearing on whether substantial evidence supported each act. Majority opinion at 40 n.12 (citing Arceo, 84 Hawai i at 6, 928 P.2d at 848). This statement in Arceo concerning seven acts is quoted to highlight the fact that the multiple acts alleged to support the defendant s conviction were subsumed in a single count, but that each act was clearly identified in that case. However, in attempting to inject doubt into the sufficiency of the evidence, the majority refers to the complaining witness s grand jury testimony where he recounted nine distinct instances of sexual assault, id. (citing Arceo, 84 Hawai i at 5, 928 P.2d at 847), and then refers to the transcript on the defendant s motion in limine where the defendant s counsel asserted that the complaining witness had testified on two different occasions that there were 12 separate instances of sexual assault[,] id. (citing Arceo, 84 Hawai i at 7, 928 P.2d at 849). Despite this effort by the majority, it is undisputed that, from the complaining witness s testimonyat trial, this court identified sevenseparate, distinct, and specific sexual assaults, perpetrated by [the defendant.] Arceo, 84 Hawai i at 24 n.25, 928 P.2d at 866 n.25 (emphasis added). The grand jury testimony and the motion in limine were not relevant to this court s determination that there was substantial evidence as to those underlying acts. Regardless of how the majority chooses to characterize the complaining witness, it cannot refute the plain language of this court s decision inArceo.

(continued...)

substantial evidence supported each act. Arceo noted that the prosecution was willing to amend the indictment to charge the defendant with separate charges relating to the separate acts. Id. at 27 n.31, 928 P.2d at 869 n.31. Ultimately, Arceo rejected the prosecution s argument with regard to continuing offenses, although it did point out that the prosecution could present multiple acts in support of a single count. Id. at 27, 928 P.2d at 869.

Hence, the majority s reference to the specific numerous acts alleged by the minor witness in Arceo as equivocal[,] majority opinion at 40, is incorrect. Contrary to the majority s assertion, nothing in Arceo indicates that the acts alleged by the minor witness were not supported by substantial evidence. It would appear self-evident that this court s statement in Arceothat the evidence was clearly sufficient to support the convictions, Arceo, 84 Hawaii at 33, 928 P.2d at 875 (emphasis added), could only have meant that this

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(...continued)

With all due respect, the majority further confuses the matter by asserting that this court s discussion [oArceo] identified only five types of conduct rather than seven individual acts. Majority opinion at 40 n.12. As stated before, the minor witness asserted that the defendant

> (1) twice inserted his finger into the Minor's butt while the Minor was taking a shower; (2) inserted his penis into the Minor's butt while the Minor was sleeping on the bed provided by the shelter; (3) twice performed fellatio upon the Minor; (4) placed his penis on the Minor's penis while the Minor was on the bed; and (5) placed his penis on the Minor's back while the Minor was either on the bed or the floor of the bedroom.

Arceo, 84 Hawai i at 4-5, 928 P.2d at 846-47 (emphases added). Manifestly the five types of conduct the majority refers to consisted of seven distinct acts. Such language directly contradicts the majority.

court had determined that each of the underlying acts it had discussed as supporting the convictions rested on substantial evidence, in light of the fact that the case was remanded. It would be unreasonable to conclude that this court remanded for a new trial based on acts that were not supported by substantial evidence in light of the discussion in Arceo.

This court has repeatedly explained that on appeal, the standard of review is not whether the evidence would satisfy a trier of fact beyond a reasonable doubt, but rather, whether the record contains substantial evidence. See State v. Hicks, 113 Hawai i 60, 70, 148 P.3d 493, 503 (2000) (citation omitted). Accordingly, as long as substantial evidence existed--as confirmed by this court s statement that the evidence was clearly sufficient, Arceo, 84 Hawai i at 33 n.40, 928 P.2d at 875 n.40,--the convictions would be upheld. The premise in Arceo, then, is that the underlying acts were supported by substantial evidence. In concluding that the evidence in Arceo was sufficient to sustain the defendant s conviction, this court necessarily relied on the underlying acts supporting the charges.

B.

The majority s second argument is that Jones should control the outcome of this case because, after determining that there was insufficient evidence to support the defendant s conviction for one of two alternative means relating to the element of consent, Jones remanded for a new trial on the other

alternative means. Majority opinion at 31. The majority reads Jones to mean that the double jeopardy clause was not implicated because there was sufficient evidence to support a conviction as to one alternative, despite there being insufficient evidence to support a conviction on the other. Id. at 37 (quoting Jones, 96 Hawai i at 184 n.30, 29 P.3d at 374 n.30). Of course, as noted before, Jones itself indicated it was not relevant to a multiple act analysis as exemplified in Arceo.

To reiterate, in Jones, this court determined that it was trial error for the court to have submitted the instruction regarding ineffective consent to the jury. 96 Hawai i at 184 n.30, 29 P.3d at 374 n.30. According to Jones, then, because the basis for reversal was trial error and not insufficiency of the evidence, double jeopardy was not implicated in the remand of the case. Id. The majority s argument over-generalizes the holding in Jones. Any case involving trial error that results in remand must necessarily contain substantial evidence to avoid implicating the double jeopardy clause. In contrast to Jones, reversal in the instant case hinges on the prosecution s failure to adduce sufficient evidence, and not on the court s failure to properly instruct the jury.[12] Jones is not a case where a

[12] In the instant case there was no trial error related to the sufficiency of the evidence to support each act underlying the count of failure to disperse. See discussion infra. As the majority s quotation of Burks explains, trial error indicates that the judicial process was defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. Majority opinion at 29 (quoting Burks, 437 U.S. at 15) (emphasis added). As already explained, none of the errors found by the ICA relate to the prosecution s

(continued...)

defendant is tried, and on appeal it is determined that the prosecution failed to adduce substantial evidence for the multiple acts underlying a count, as in Arceo. This distinction between trial error and insufficiency of the evidence in such a context is crucial, inasmuch as it explains why this court remanded in Jones but should reverse in the instant case.[13]

In explaining the various justifications for the prohibitions against double jeopardy, the majority quotes this court s statement in State v. Quitog, 85 Hawai i 128, 938 P.2d 559 (1997), that multiple trials subject a criminal defendant to embarrassment, expense and ordeal and compel[] him to live in a continuing state of anxiety and insecurity, as well as enhanc[e] the possibility that even though innocent he may be found guilty. Majority opinion at 16 (quoting Quitog, 85 Hawai i at 140, 938 P.2d at 571). The presence of sufficient evidence as to one of the two acts does not sufficiently guarantee that Petitioner would not be subjected to the risks that double jeopardy was intended to avoid. As already discussed supra, because 1) this court is unable to determine whether the jury s

(...continued)
failure to adduce sufficient evidence to sustain a conviction as to the underlying multiple acts.

[13] Referring to Jones, the majority maintains that this opinion does not explain why requiring a nexus between trial error and insufficiency of the evidence is necessary[.] Majority opinion at 35 n.10. However, this opinion does not say that a nexus is required. As noted supra, Jones itself ordered remand because this court characterized the fundamental reason for remanding as trial error due to a defective jury instruction. The question here is whether there was substantial evidence to support the multiple acts charged in one count.

decision rested on the act unsupported by substantial evidence and whether it would have acquitted of the other act, 2) retrial may place defendant at the risk of being tried again for an act for which he may, in effect, have been acquitted, and 3) the prosecution was in a position to avoid the predicament by charging in separate counts or by electing the specific act, the protections of double jeopardy must be extended to Petitioner. These factors were not present in Jones.

Additionally, the majority asserts that remand in Jones raises the same concern that the jury may have acquitted the defendant in Jones of the alternative means for which there was sufficient evidence. Majority opinion at 36 n.11. However, as explained before, there is an additional reason why reversal is appropriate. As noted in Jones, the prosecution correctly charged [the d]efendant with separate counts of sexual assault with respect to each distinct culpable act or incident. Jones, 96 Hawai i at 170, 29 P.3d at 360 (emphases added). Accordingly, the jury s decision as to each act was readily discernible. Jones stated:

> With respect to whether the statutory alternatives in this case may be treated as alternative means, it is not significant that the jury may have reached different conclusions regarding whether [the c]omplainant did not consent or any apparent consent was ineffective, i.e., meaningless, because such differences do not reflect disagreement as to the specific incident charged.

Id. at 176, 29 P.3d at 366. In other words, if the jury chose to convict or acquit, no question would arise as to its decision with respect to each act. Therefore, there was a basis in Jones

by which to confirm the jury s verdict as to the act underlying each count. By charging each act as a separate count, the prosecution provided the basis for this court to ascertain the jury s decision as to each act. The guilty verdict premised on the underlying act in each count left no question as to what the jury in Jones decided as to each act.

Hence, in Jones, remand was appropriate because there was no risk that the defendant would be retried for acts for which the defendant might have been acquitted by the jury. There, the jury s verdict manifested that it found the defendant was guilty of the separately charged acts of sexual assault. In other words, there was no question as to the commission of the underlying acts, and thus, remand did not present any risks to the double jeopardy rights of the defendant in Jones.[14]

But in Petitioner s case, there is no way to know how the jury decided as to each of the multiple acts presented to it under the one count charged. If this court remands the instant case for a new trial on the act supported by substantial evidence, there is a genuine possibility that the jury may have

[14] The majority states that Jones remanded the alternative means with respect to lack of consent for retrial despite the fact that there was a genuine possibility that the jury may have acquitted the defendant based on the remaining alternative means. Majority opinion at 36 n.11. From this the majority infers that this court should also remand the remaining act in this case. However, as already explained, Jones was expressly a trial error case, and thus, double jeopardy concerns were not implicated. Jones, 96 Hawai i at 184 n.30, 29 P.3d at 374 n.30 (stating that retrial is not barred when the reviewing court reverses a case due to trial error, such as erroneous jury instructions). In the instant case, the double jeopardy concerns arise inasmuch as Petitioner could be retried for an act for which the jury might have acquitted him.

acquitted Petitioner of the act that would be remanded pursuant to the majority s approach.[15]

Also, the majority attempts to relate the facts in Petitioner s case to trial error in Jones, stating that it is undisputed that trial error occurred in the instant case, insofar as the [court] failed to properly instruct the jury concerning (1) the statutory definition of disorderly conduct and (2) the applicability of the knowingly state of mind to each element of the offense of failure to disperse. Majority opinion 42 (citing Kalaola, 2009 WL 1507291, at *2). The majority fails to explain how this establishes any relevant connection between Jones and the instant case.[16]

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[15] The majority avers that the instant case cannot be distinguished from Jones, because in Jones, there was no basis by which to confirm the jury s verdict as to each alternative means[,] but this court nevertheless remanded the defendant s case for retrial on the alternative means that was supported by sufficient evidence[,] majority opinion at 36 n.11 (citing Jones, 96 Hawai i at 184, 29 Hawai i P.3d at 374). However, the majority s analogy is incorrect.

It cannot be disputed that there was no doubt in Jones as to the jury s verdict regarding the underlying act supporting conviction. Rather, the doubt in that case stemmed from uncertainty as to whether the jury convicted on the basis of the erroneous instruction or the instruction supported by substantial evidence. In State v. Nichols, 111 Hawai i 327, 335, 141 P.3d 974, 982 (2006), this court stated that it is ultimately the trial court that is responsible for ensuring that the jury is properly instructed. (Citation omitted.) Again, then, remand in Jones was the result of an incorrect instruction with regard to ineffective consent, 96 Hawai i at 183-84, 29 Hawai i P.3d at 373-74, rather than on the basis of sufficiency of evidence as in the instant case. Thus, Jones is inapposite.

[16] The majority asserts that this opinion discount[s] the presence of trial error in this case by apparently contending that the disposition in Jones is proper only where insufficiency of the evidence occurs as a direct result of trial error[.] Majority opinion at 35 n.10. However, as already explained, the presence of the trial error found by the ICA in this case is irrelevant because it bears no relation to the outcome. Neither the majority s decision to remand, nor this opinion s conclusion that Petitioner s conviction should be reversed, is compelled by the presence of trial error. In other words, if there were no trial error issue in this case, both the majority and this opinion would reach their respective conclusions with regard to the sufficiency of the evidence issue.

The basis for reversal here is not trial error, but rather, the double jeopardy concerns discussed supra. The conclusion that one of the underlying acts was not supported by substantial evidence did not result from any trial error by the court, and is in no way related to the conclusion that trial error occurred because the jury was not properly instructed as to the statutory definition of disorderly conduct or the knowingly state of mind. Here, the trial error recognized by the ICA has no connection to double jeopardy concerns or substantial evidence.[17] For these reasons Jones is inapposite and not controlling.

C.

The majority s third argument is that this opinion extends double jeopardy protections beyond what is set forth in Hawai i and federal case law. At the outset it should be noted that all of the cases cited by the majority are inapposite inasmuch as they do not address the situation where one of the underlying acts in a multiple acts case is not supported by substantial evidence. The majority s assertion that the extension of double jeopardy protections to Petitioner is without support in [Hawai i] case law, majority opinion at 26 n.9, is wrong inasmuch as the outcome in the instant case is

[17] Additionally, the majority maintains that the instant case does not hinge on insufficiency of the evidence to any greater extent than Jones. Majority opinion at 36 n.10. With all due respect, this statement demonstrates that, again, the majority disregards the distinction between the failure of the circuit court in Jones to correctly instruct the jury and the failure of the prosecution in the instant case to adduce substantial evidence for the multiple acts underlying Petitioner s conviction.

dictated by this court s decision in Arceo and this court s case law. On the other hand, the cases cited by the majority concern issues of trial error (but insufficiency of the evidence is involved in this case); acquittals based on a single act unsupported by substantial evidence (but the instant case involves multiple acts, one of which was supported by substantial evidence and one that was not); convictions for lesser included offenses (but there are no lesser included offenses in this case); and federal precedent (but federal precedents set forth minimum protections, and do not control the state constitution).[18]

Relying on State v. Feliciano, 62 Haw. 637, 618 P.2d 306 (1980), for the proposition that a defendant may not be retried for any offense of which he has been acquitted, whether expressly or impliedly, id. at 18 (quoting Feliciano, 62 Haw. at 644, 618 P.2d at 311), the majority argues that an express determination by either the court or the jury is required before retrial is barred. It should be noted that this court s decision in Feliciano followed the holding of Green v. United States, 355 U.S. 184 (1957). Green held that, when a defendant is convicted

[18] This court has stated on numerous occasions that we are not precluded from interpreting our state constitution to afford greater protection than that required by federal constitutional interpretations and have not hesitated to do so where warranted by logic and due regard for the purposes of those protections. Hawaii Fin. Dev. Corp. v. Castle, 79 Hawai i 64, 85, 898 P.2d 576, 597 (1995) (citation omitted); see also Wallace, 80 Hawai i at 397 n.14, 910 P.2d at 710 n.14 (citation omitted); State v. Hoey, 77 Hawai i 17, 36, 881 P.2d 504, 523 (1994) (citation omitted); State v. Kam, 69 Haw. 483, 491, 748 P.2d 372, 377 (1988) (citation omitted); Hawaii Hous. Auth. v. Lyman, 68 Haw. 55, 69, 704 P.2d 888, 896 (1985) (citing State v. Kaluna, 55 Haw. 361, 369, 520 P.2d 51, 58 (1974)); State v. Texeira, 50 Haw. 138, 142 n. 2, 433 P.2d 593, 597 n. 2 (1967).

of a lesser included offense and the case is subsequently vacated and remanded for trial error, the defendant may only be retried for the lesser included offense of which he or she was convicted. Id. at 187-88. Green stated:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id. (emphasis added). See also Ball v. United States, 163 U.S. 662, 669 (1896) (stating that [t]he prohibition is not against being twice punished, but against being twice put in jeopardy).

The majority quotes this same language to support its argument that double jeopardy protections should only be extended where there has been an acquittal in some form. Majority opinion at 16.[19] However, this language is equally applicable to Petitioner s case, in that, by remanding for a new trial he may be twice put in jeopardy where the prosecution failed to adduce sufficient evidence at the first trial. Indeed, remanding for trial when the prosecution did not adduce sufficient evidence to support a conviction for all the multiple acts would only serve

[19] Thus, the majority contends that, so long as there was sufficient evidence to support a conviction, double jeopardy bars retrial only when there was an acquittal, express or implied. Majority opinion at 35 n.10. According to the majority, confirmation as to the basis for the jury s verdict is not required where there is substantial evidence to support a conviction. Id. at 36 n.11.

However, double jeopardy concerns raised by uncertainty as to the jury s decision on the remaining act in this case should bar remand. Moreover, the prosecution was in a position to avoid such concerns by charging each count separately or electing the specific act upon which the conviction is based.

to enhanc[e] the possibility of a conviction inasmuch as this court is unable to ascertain whether the jury rejected liability for the act supported by substantial evidence. Id. (quoting Quitog, 85 Hawai i at 140, 938 P.2d at 571).

The majority mentions the Supreme Court s decision in Burks, majority opinion at 29, which held that [t]he [d]ouble [j]eopardy [c]lause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. 437 U.S. at 11. However, this opinion is not inconsistent with Burks or any of the other federal cases cited by the majority. In Burks, the petitioner had been convicted of bank robbery. Id. at 3. The petitioner appealed his conviction to the sixth circuit, which determined that there was insufficient evidence to sustain the conviction, but vacated and remanded for a new trial. Id. at 3-4. After concluding that the double jeopardy clause bars retrial after a determination that the evidence was insufficient to sustain a conviction, id. at 11, the Court reversed the petitioner s conviction inasmuch as there was not sufficient evidence adduced at trial, id. at 18.

The result for which this opinion advocates does nothing to undermine the protections that either Burks or Hawai i law have thus far afforded defendants. But rather, greater protection is afforded to Petitioner under Hawai i law than that

required by federal law. See, e.g., Mundon, 121 Hawai i at 365, 219 P.3d at 1152 ([W]e are free to give broader protection under the Hawai i Constitution than that given by the federal constitution.) (Brackets and citation omitted.); State v. Viglielmo, 105 Hawai i 197, 211, 95 P.3d 952, 966 (2004) (noting that Hawaii's double jeopardy clause provides defendants broader protection than [its] federal counterpart) (citation omitted); State v. Rogan, 91 Hawai i 405, 423, 984 P.2d 1231, 1249 (1999) (Given the inadequacy of the [federal double jeopardy standard], we take this opportunity, as the ultimate judicial tribunal with final unreviewable authority to interpret and enforce the Hawai i Constitution, to give broader protection under the Hawaii Constitution than that given by the federal constitution. (Quoting Hoey, 77 Hawai i at 36, 881 P.2d at 523).); Quitog, 85 Hawai i at 130 n.3, 938 P.2d at 561 n.3 (stating that, because the Hawai i Constitution affords greater rights, we need not--and do not--address the question whether the double jeopardy clause of the fifth amendment to the United States Constitution would dictate the same result and express no opinion in that regard); State v. Lessary, 75 Haw. 446, 457-59, 865 P.2d 150, 155-56 (1994) (concluding that interpretation given to double jeopardy clause of fifth amendment by United States Supreme Court does not adequately protect individuals subject for the same offense [from being] twice put in jeopardy, therefore requiring

additional protection under Hawai i Constitution (quoting Haw. Const. art. I, § 10)). Thus, Burks is inapposite.[20]

The majority cites State v. Bannister, 60 Haw. 658, 594 P.2d 133 (1979), to urge that, because there was substantial evidence to convict Petitioner of failure to disperse based on his acts on the first floor, the prosecution did not fail to make its case. Majority opinion at 28 (citing Bannister, 60 Haw. at 660, 594 P.2d at 135). Bannister involved the prosecution of defendant for theft of property exceeding two hundred dollars. Id. at 661, 594 P.2d at 134. At trial, the prosecution offered the hearsay testimony of the defendant s manager, who asserted that the value of the property stolen was more than two hundred dollars, but submitted no invoice as to the actual value of the goods stolen. Id. at 660, 594 P.2d at 135. This court concluded that the hearsay evidence was insufficient, and that the failure to adduce sufficient evidence as to the amount stolen meant that the defendant could not be convicted of the offense. Id. Additionally, the court concluded that double jeopardy barred the defendant from being retried for the same offense. Id.

[20] The majority agrees that federal precedent does not prevent this court from extending broader double jeopardy protections in the instant case. Majority opinion at 17 n.7. However, the majority implies that, because this court has cited with approval the principles derived from each of the federal cases relied upon herein[,] id., this court is restricted to those principles in the instant case. It does not follow that having approved of those principles, they should now serve to restrict the protections afforded under the Hawai i Constitution. Those double jeopardy cases and principles were cited with approval because they set forth the minimum double jeopardy protections under federal law, and did not, as the majority implies, circumscribe the application of this state constitution s double jeopardy clause. As the aforementioned cases demonstrate, this court has confirmed double jeopardy protections beyond those set forth by the Supreme Court.

Although Bannister does involve sufficiency of the evidence for a single act, it does not in any way address the issue of insufficiency of evidence where multiple acts are present as in the instant case. Furthermore, the majority s citation to Bannister highlights a failure to recognize that in multiple acts cases, the presence of sufficient evidence as to the remaining acts is not enough to address the uncertainty that arises when it is unclear what the jury decided as to the other act. In other words, despite there being sufficient evidence as to one of the multiple acts, there is no way of knowing what the jury decided as to those acts. The prosecution s failure to prove its case with regard to all of the underlying acts, and the attendant concern that Petitioner may be retried for an act for which the jury may have decided he was not guilty, is what distinguishes this case from Bannister and the other cases cited by the majority.

For that same reason, the majority s citation to United States v. Tateo, 377 U.S. 463 (1964), is unpersuasive. The majority cites Tateo for the proposition that [i]t would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error[.] Majority opinion at 17-18 (citing Tateo, 377 U.S. at 466). However, it cannot be said that any benefit society may derive from retrying Petitioner would outweigh the loss of double jeopardy protections. As the

majority notes, double jeopardy imposes no limitations whatever upon the power to retry a defendant who has succeeded in getting his first conviction set aside[,] for reasons other than insufficiency of the evidence[.] Id. at 18 (quoting State v. Jess, 117 Hawai i 381, 439 n.28, 184 P.3d 133, 191 n.28 (2008) (citations and internal quotation marks omitted)) (emphasis added). Inasmuch as the instant case hinges on sufficiency of the evidence, retrial should be barred.

The majority also argues that, in contrast to Mundon, Petitioner in the instant case was never acquitted by a jury for either of the two alleged acts of failure to disperse. Id. at 28. Thus, according to the majority, Petitioner is not in jeopardy of being retried for an act of which he had been acquitted. As explained supra, the defendant in Mundon was charged, inter alia, with two counts of TT1, but was ultimately convicted of only one count. 121 Hawai i at 355, 219 P.3d at 1126. This court determined that the defendant was entitled to, but did not receive, a unanimity instruction as to the two TT1 counts. Id.

However, Mundon could not be vacated and remanded for a retrial as to the count of which he was convicted because [t]he language of the indictment as to each count was identical. Id. at 354, 219 P.3d at 1141 (emphasis added). Because neither count specified which act related to which offense, there was no way to know which act formed a basis for conviction and which for

acquittal. Id. at 355, 219 P.3d at 1126. Remand for a new trial on those counts would present the possibility that the defendant would be retried for the act or acts of which he had been acquitted. Id. The majority ignores the similar double jeopardy concerns, Arceo, 84 Hawaii at 33 n.40, 928 P.2d at 875 n.40, present in the instant case inasmuch as Petitioner faces the risk of being retried for acts of which the jury may have decided he was not guilty.

As noted before, the majority argues that because

> there was no express jury verdict of acquittal[,] majority opinion at 19, the harm is too speculat[ive] to implicate the protections of the double jeopardy clause[,] id.at 25 n.9.

However, remand is inadequate in light of the risks Petitioner faces on retrial. See Arceo, 84 Hawai i at 33 n.40, 928 P.2d at 875 n.40. As explained supra, it is incorrect to characterize the double jeopardy risks to Petitioner as merely speculative if his case were to be remanded. There is a legitimate concern that he could be retried for an act for which the jury had found him not guilty, and such concerns underlie the double jeopardy protections this court has afforded defendants.

Furthermore, the cases cited by the majority are inapposite. Quitoq dealt with issues entirely unrelated to those in the instant appeal, stating that

> the outcome of the present appeal turns neither on the legal sufficiency of the evidence to support [the defendant s] attempted second degree murder

conviction nor on the presence of trial error, as that term was contemplated in Burks and Wallace[.] Quitog, 85 Hawai i at 140 n.21, 938 P.2d at 571 n.21 (emphases added). Similarly, Feliciano involved different questions. In Feliciano, the defendant was charged with attempted murder, but the jury convicted him of the lesser included offense of Reckless Endangering in the Second Degree. 62 Haw. at 640, 618 P.2d at 309. During the jury s deliberations, the circuit court gave the jury a supplemental instruction which rendered the initial instruction unclear[.] Id. at 642, 618 P.2d at 310. This court reversed due to the circuit court s trial error in improperly instructing the jury and remanded for a new trial on only the lesser included offense. Id. at 644, 618 P.2d at 311. Manifestly, the instant case does not implicate either the trial error or the double jeopardy concerns relating to lesser included offenses present in Feliciano, inasmuch as there are no lesser included offenses in this case. Nor is the instant case controlled by Whiting v. State, 88 Hawai i 356, 966 P.2d 1082 (1998),[21] or State v. Loa, 83 Hawai i 335, 926 P.2d 1258 (1996),[22]

[21] In Whiting, the defendant was charged with murder in the second degree, but the jury convicted him of the lesser included offense of manslaughter due to extreme mental or emotional disturbance (EMED manslaughter). 88 Hawai i at 358, 966 P.2d at 1084. On appeal, his conviction was reversed due to trial error. Id. The difficulty in that case was that EMED manslaughter could not be charged as its own separate offense because it was a combination of offenses. Id. The ICA held that the defendant could be retried for murder, but if found guilty of second degree murder, he could only be sentenced to EMED manslaughter. Id. This court reversed, concluding that, regardless of whether the defendant could only be convicted of EMED manslaughter, he could not be retried for second degree murder. Id. at 361, 966 P.2d at 1087. Because he had been acquitted of that charge and convicted of the lesser included offense, the second trial for that (continued...)

inasmuch as both those cases also involved the double jeopardy bar to retrial after a conviction for a lesser included offense.

The majority concedes that the cases it cites regarding implied acquittals are inapposite. However, the majority concludes that these cases support[] the inference that the doctrine of implied acquittals does not extend to the circumstances of the instant case. Majority opinion at 25 n.9. In other words, the majority maintains that, because the factual scenarios in Feliciano, Whiting, and Loa do not encompass those in the instant case, it must be inferred that the implied acquittal doctrine is also inapplicable.[23] This reasoning disregards the fact that what should dictate the outcome in this case is not the similarity with other implied acquittal cases,

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(...continued)
offense would violate double jeopardy. Id. Manifestly, nothing in the facts of Whiting is analogous to the instant case.

[22] In Loa, the trial court instructed the jury that it could convict the defendant of attempted first degree murder or a lesser included offense of attempted reckless manslaughter. 83 Hawai i at 357, 926 P.2d at 1280. The jury returned a conviction for attempted reckless manslaughter, however, this court concluded that no such offense existed. Id. Because the jury did not convict of the greater charged offense, double jeopardy barred the defendant s prosecution for that crime, despite there being no lesser included offense with which to retry the defendant. Id. at 361, 926 P.2d 1284. Again, this court s decision inLoa does not support the majority s arguments inasmuch as that decision involved unrelated issues and demonstrate only that this court had adopted an expansive view with regard to double jeopardy protections.

[23] The majority maintains that this court has repeatedly recognized that, as long as there was sufficient evidence presented to support the conviction of the defendant for the charged offense, the double jeopardy clause bars a retrial only when there was in fact an acquittal, whether express or implied. Majority opinion at 3. However, in all of the cases that the majority cites to support this proposition, the conclusion the jury had reached as to the guilt or innocence of the defendant for each underlying act and charged offense was clear. As was explained, Petitioner s case provides none of these assurances and leaves this court uncertain as to whether he will be retried for an act of which the jury may have acquitted him.

but rather, as the discussion of Arceo makes clear, the double jeopardy concerns relating to the presence of insufficient evidence in the context of multiple acts. The majority s argument that this opinion extends the doctrine of implied acquittal, majority opinion at 26, is wrong, inasmuch no reliance is placed upon either the implied acquittal doctrine or cases, and they are discussed only in response to the majority s assertions.

The majority also cites to the decision of the ICA in State v. Pesentheiner, 95 Hawai i 290, 291, 22 P.3d 86, 87 (App.), cert. denied 96 Hawai i 71, 26 P.3d 29 (2001), to support its contention that an express finding by the jury is necessary before double jeopardy is implicated. Majority opinion at 23. In Pesentheiner, the defendant was convicted at a bench trial of Harassment, pursuant to HRS § 711-1106(1)(a) (Supp. 2000), after he allegedly swung his arms in the direction of a police officer and knocked the hat off of a police officer s head. 95 Hawaii at 292, 22 P.3d at 88. HRS § 711-1106(1)(a) required proof that the defendant had the intent to harass, annoy, or alarm any other person[.] Although the trial court concluded that the defendant was reckless in waving his arms around the police officer, it nevertheless found the defendant guilty despite recklessness being insufficient to prove the mental state required. Id. at 301, 22 P.3d at 97. As the ICA stated, nothing less than the intent to harass, annoy, or alarm specified in the harassment

statute could suffice in this case. Id. at 300, 22 P.3d at 96. The defendant argued that his conviction should be reversed inasmuch as the court s finding was insufficient to convict.

However, the ICA remanded for a new trial, stating that

> [t]he court's erroneous assumption that recklessness was sufficient for conviction rendered it unnecessary, under that assumption, to go further in considering the evidence than a finding that [the defendant] recklessly waved his arms[,] and that if the court applied the correct mensrea standard in its consideration of the evidence, it would have been further required to assess the weight and credibility of [the police officer s] description of the actus reus. Id. at 301, 22 P.3d at 97.

In other words, the ICA concluded that the court had not gone on to consider all of the evidence because it erroneously believed that recklessness was sufficient to convict, and that a correct understanding of the mens rea element would have resulted in the trial court further examining the evidence. Id.

However, Pesentheiner does not add any weight to the majority s contention that express findings should be made before double jeopardy bars retrial inasmuch as Pesentheiner did not purport to resolve the issues specific to the instant case. The fact that the trial court failed to make an adequate finding with regard to the defendant s mental state presents a completely different situation. In Pesentheiner, the ICA was able look to the record to determine exactly on what basis the trial court

rested its decision to convict. The ICA concluded that the trial court s findings, although not sufficient to convict, were not inconsistent with guilt. Id. In contrast, the record in the instant case does not provide any indication as to what the jury decided with regard to the remaining act. It may have found him guilty of the act or it may have concluded he was not guilty. In other words, there is no assurance, in contrast to Pesentheiner, that retrial would not place Petitioner in jeopardy of being tried for an act for which the finder of fact determined he was not guilty.

Another plain distinction between Pesentheiner and the instant case is the ICA s correct determination that the error in Pesentheiner was trial error, as [opposed to] evidentiary insufficiency and, thus, did not constitute a decision to the effect that the government has failed to prove its case. Id. (citation omitted) (emphasis added). In concluding that the defendant could be convicted of the offense of harassment based on the conclusion that the defendant was reckless, the trial court committed an error analogous to improperly instructing the jury, except that it essentially improperly instructed itself. Consequently, the ICA s decision in Pesentheinerhas no relevance to the conclusion in this opinion.

The majority also quotes Professor Lafave to the effect that, while assessing the impact of a trial error always presents uncertainties, whether the result is a conviction or

acquittal, only in the latter situation is there concrete evidence, in the form of a not guilty verdict, that the jury may have resolved factual issues in favor of the defendant s innocence. Majority opinion at 24 (quoting Wayne R. LaFave, et al., Criminal Procedure § 25.3(b) at 631-32 (3d ed. 2007)) (emphasis added and emphasis omitted). Again, the majority relies on a situation in which the issue is one of trial error, whereas the instant case is one in which the prosecution failed to adduce sufficient evidence.

D.

The majority maintains that because there was neither an express acquittal nor a conviction on a lesser included offense, there cannot be certainty that the jury did, in effect, acquit Petitioner of any acts. Majority opinion at 25. But there is uncertainty as to which of the acts the jury based its conviction. There is no disagreement that one of the acts offered as a basis for conviction was unsupported by substantial evidence. The jury could have convicted Petitioner of the act lacking substantial evidence. The jury could have convicted Petitioner of the act supported by substantial evidence. However, it is also entirely possible that the jury had in effect found Petitioner not guilty on the acts supported by substantial evidence. What the majority cannot guarantee is that, on remand, Petitioner will not be retried for an act for which the jury had already decided he should be treated as not guilty. The

majority s assertion that double jeopardy protection is unwarranted, majority opinion at 25 n.9, disregards this substantial risk.

IX.

A.

Finally, the majority notes that on appeal to the ICA Petitioner requested that his case be remanded for a new trial on the acts supported by substantial evidence as opposed to the reversal granted by this court. Majority opinion at 14-15. However, inasmuch as the double jeopardy issue was noticeable as plain error, it would be unreasonable to limit the resolution of this case to the relief requested where the issue involves substantial rights.

The Supreme Court s decision in Burksemployed a similar rationale. The petitioner in Burks was charged with bank robbery, and his main defense at trial was that he was insane and was substantially incapable of conforming his conduct to the requirements of the law. 437 U.S. at 2-3. After the jury convicted the petitioner, he moved for a new trial on the basis that there was insufficient evidence to support his conviction. Id. at 3. The district court denied the motion, but the court of appeals for the sixth circuit reverse[d] and remand[ed] the case to the district court where the defendant [would have been] entitled to a directed verdict of acquittal unless the government present[ed] sufficient additional evidence to carry its burden on

the issue of defendant's sanity. Id. at 4 (citation omitted). According to the Supreme Court, [t]he [c]ourt of [a]ppeals assumed it had the power to order this balancing remedy by virtue of the fact that [the petitioner] had explicitly requested a new trial. Id. at 5 (emphasis added).

Burks ultimately rejected the sixth circuit s conclusion, holding that [t]he [d]ouble [j]eopardy clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. Id. at 11 (emphasis added). Importantly, Burks also concluded that it makes no difference that a defendant has sought a new trial as one of his remedies, or even as the sole remedy. It cannot be meaningfully said that a person waives his right to a judgment of acquittal by moving for a new trial. Id. at 17 (emphasis added). On the issue of whether a defendant can waive his or her double jeopardy rights, such reasoning is supportive.

As discussed supra, double jeopardy is exactly the type of substantial right noticeable as plain error. See Miyazaki, 64 Haw. at 616, 645 P.2d at 1344 (stating that this court has previously held that a defendant's right to be free from double jeopardy is just such a substantial right as to be noticeable by the court (citing Martin, 62 Haw. at 373, 616 P.2d at 199)). Furthermore, although not raised in the briefs, the question of whether remanding Petitioner s case would violate double jeopardy

was raised at oral argument. The issue discussed in oral argument is precisely the one treated here; that is, whether remanding for a new trial on the alternative means and multiple acts supported by substantial evidence would implicate double jeopardy concerns. Thus, any notion of the majority that discussion of double jeopardy should be barred is wrong.

B.

The majority s conceptual concerns are unwarranted because the prosecution is in a position, and has been since before Arceo was decided, to avoid this problem by either 1) presenting each act as a separate charge or 2) electing the specific act upon which it is seeking a conviction. See Arceo, 84 Hawai i at 27 n.30, 928 P.2d at 869 n.30 (stating that the prosecution remains free to charge multiple counts of separate and distinct acts or to elect the particular act on which it is relying at the close of its case-in-chief). The majority quotes Arceo, stating that

> requiring either a unanimity instruction or an election is not intended to . . . encourage the bringing of multiple charges when, in the prosecutor's judgment, they are not warranted. The criteria used to determine that only a single charge should be brought[] may indicate that the election of one particular act for conviction is impractical.

Majority opinion at 40 n.14 (quoting Arceo, 84 Hawai i at 31, 928 P.2d at 873). However, nothing in this opinion is inconsistent with Arceo. As Arceo explained, the decision whether to charge a defendant with multiple counts, to charge a single count supported by multiple acts, or to elect a specific act is still

within the prosecution s discretion, 84 Hawai i at 31, 928 P.2d at 873, subject to this court s review. It is still entirely up to the prosecutor to determine whether charging multiple counts of separate acts or electing a single act would be impractical. Thus, the majority s concerns are unfounded.

X.

For the foregoing reasons, I would reverse the ICA s June 26, 2009 judgment and the court s April 18, 2008 judgment, and remand to the court to enter a judgment of acquittal.