IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI, Respondent/Plaintiff-Appellee,

vs.

CHESTER PACQUING, Petitioner/Defendant-Appellant.

SCWC-29703

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. 29703; CR. NO. 08-1-0556)

March 22, 2013

DISSENTING OPINION BY ACOBA, J.

I would hold that the decision of the circuit court of the first circuit (the court) to dismiss a violation of Hawaiʻi Revised Statutes (HRS) § 708-839.55 (Supp. 2006), Unauthorized Possession of Confidential Personal Information (UPCPI)[1] by

[1] HRS § 708-839.55 provides in relevant part:

§ 708-839.55 Unauthorized possession of confidential personal

Petitioner/Defendant-Appellant Chester Pacquing (Petitioner) as de minimis rests within the sound discretion of the court, and the court cannot be said to have clearly abused its discretion. Therefore, I respectfully dissent.

I.

A.

The record establishes that the facts following were stipulated to by the parties as relevant to Petitioner's Motion to Dismiss for De Minimis Violation (de minimis motion) pursuant to HRS § 702-236 (1993).[2] To recount briefly, Petitioner was the

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> **information.**
> (1) A person commits the offense of unauthorized possession of confidential personal information if that person intentionally or knowingly possesses, without authorization, any confidential personal information of another in any form, including but not limited to mail, physical documents, identification cards, or information stored in digital form.

(Emphasis added.) The term "confidential personal information" is defined in HRS § 708-800 as follows:

> "Confidential personal information" means information in which an individual has a significant privacy interest, including but not limited to a driver's license number, a social security number, an identifying number of a depository account, a bank account number, a password or other information that is used for accessing information, or any other name, number, or code that is used, alone or in conjunction with other information, to confirm the identity of a person.

HRS § 708-800 (emphasis added).

[2] HRS § 702-236 provides in pertinent part:

> **§ 702-236 De minimis infractions.**
> (1) The court may dismiss a prosecution if, having regard to the nature of the conduct alleged and the nature of the attendant circumstances, it finds that the defendant's conduct:
> (a) Was within a customary license or tolerance,

subject of traffic stops conducted by Honolulu Police Department (HPD) Officers Barry Danielson (Officer Danielson) and Darrin Lum (Officer Lum) on two separate occasions, March 23, 2008, and April 7, 2008. During the first stop, Petitioner verbally identified himself as "Michael John Jose," and provided Officer Lum with a date of birth and address.

Officer Lum then issued Petitioner two criminal citations. After Petitioner left the area, Officer Lum realized that he had not provided Petitioner with a copy of one of the citations, and left the copy at the address Petitioner provided. Upon receiving the citation, the actual Michael John Jose (Complainant) informed the police that the citation was in error.

On April 7, 2008, during the second stop, Petitioner presented a copy of the citation he had received on March 23, 2008 as identification. Complainant arrived at the scene and identified Petitioner by name, indicating that Petitioner was his

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> which was not expressly refused by the person whose interest was infringed and which is not inconsistent with the purpose of the law defining the offense; or
>
> (b) Did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or
>
> (c) Presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense.

(Emphases added.)

former neighbor. Petitioner confirmed Complainant's statement. Petitioner stated that he "was scared because [he] had some warrants and did not want to get arrested," and that he "used to live by [Complainant]." Petitioner and Complainant once were neighbors, and Petitioner "came to know" the information he provided to Officer Lum "through the course of their relationship."

B.

On April 11, 2008, the district court of the first circuit held a preliminary hearing herein. The transcript of the preliminary hearing was never made a part of the record in the proceedings below. At the hearing, Officer Lum testified, in part, that during the first stop on March 23, 2008, after he had contacted dispatch, he "wrote [] up" citations in Complainant's name, and included in both citations Complainant's address, date of birth, driver's license number, and the last four digits of Complainant's social security number. Officer Lum related that during the second stop on April 17, 2008, Petitioner handed him the citation he had issued to Petitioner on March 23, 2008.

C.

On April 14, 2008, Respondent charged Petitioner by complaint (Complaint) with UPCPI. On September 2, 2008, Petitioner filed a Motion for Bill of Particulars (motion for particulars) or in the alternative, a Motion to Dismiss (motion

to dismiss). The motion for particulars sought a bill answering whether the date of the alleged offense was the first stop on March 23, 2008, or the second stop on April 7, 2008.

In the Memorandum in Support of the motion to dismiss, Petitioner maintained that, at the time of the first stop, Respondent could prove only that Petitioner possessed Complainant's information "in his head," and, moreover, the information he recited was not confidential because it was acquired during the course of his relationship with Complainant as his neighbor. With respect to the second stop, Petitioner argued that the information on the citation was given to him by Officer Lum.

In response to Petitioner's request for particulars, Respondent asserted that its theory was that Petitioner "possessed Complainant's confidential personal information in memory and/or on the traffic citation issued by Officer Lum [during the first stop] to and including the [second stop]." (Emphasis added.) As to the motion to dismiss, Respondent argued Petitioner's conduct fell within the scope of HRS § 708-839.55 because confidential personal information includes "'any . . . name, number, or code that is used . . . to confirm the identity of a person.'" (Quoting HRS § 708-800.) In denying the motion for particulars, or in the alternative, the motion to dismiss, the court concluded "Complainant's name, date of birth and street

address constitute[d] 'confidential personal information'" because they were "used 'in conjunction with other information to confirm the identity of another person[,]'" i.e., Complainant. (Quoting HRS § 708-800.)

D.

On October 6, 2008, Petitioner filed his de mimimis motion. In his supporting memorandum, Petitioner maintained that application of the nine factors set forth in State v. Park, 55 Haw. 610, 617, 525 P.2d 586, 591 (1974) supported dismissal. In Park, this court stated that the following factors (hereinafter, "Park factors") should be considered, including:

> (1) the background, experience and character of the defendant; (2) knowledge on the part of the defendant of the consequences of the act; (3) the circumstances surrounding the offense; (4) the harm or evil caused or threatened by the offense; (5) the probable impact of the offense on the community; (6) the seriousness of the punishment; (7) the mitigating circumstances; (8) possible improper motives of the complainant or prosecutor; (9) any other data which may reveal the nature and degree of the culpability in the offense committed by each defendant.

Petitioner maintained that the resulting harm or evil in this case and probable impact on the community was minimal, because the police immediately believed Complainant, and that even if the police had not believed Complainant, the resulting consequence would be "somewhat minimal" in that it would have resulted in Complainant receiving citations. Additionally, Petitioner asserted that his conduct constituted a violation of

the offense of Unsworn Falsification to Authorities, HRS § 710-1063(1)(b) (UFTA), instead of UPCPI.[3]

In opposition, Respondent argued, inter alia, that Petitioner possessed Complainant's name, address, and birth date "in an effort to use Complainant's identity for his own personal benefit," and that "[Petitioner's] conduct caused 'the harm or evil sought to be prevented'" in that Complainant "would have suffered the repercussions of two unjustified traffic citations" had Petitioner not been caught.

E.

At a hearing on October 30, 2008, the court addressed both the motion to dismiss and the de minimis motion. The parties reiterated the arguments raised in their memoranda.

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[3] HRS § 710-1063 provides as follows:

§ 710-1063 Unsworn falsification to authorities.

(1) A person commits the offense of unsworn falsification to authorities if, with an intent to mislead a public servant in the performance of the public servant's duty, the person:

(a) Makes any written statement, which the person does not believe to be true, in an application for any pecuniary or other benefit or in a record or report required by law to be submitted to any governmental agency;

(b) Submits or invites reliance on any writing which the person knows to be falsely made, completed, or altered; or

(c) Submits or invites reliance on any sample, specimen, map, boundary-mark, or other object the person knows to be false.

(2) Unsworn falsification to authorities is a misdemeanor.

II.

On February 10, 2009, the court denied the motion to dismiss.

On February 11, 2009, the court issued a De Minimis Dismissal Order (Order). The court's findings of fact (findings) largely repeated the facts set forth by the parties' memoranda. The court found, inter alia, that "[Complainant] is [Petitioner's] neighbor." Finding 17. The court entered the following relevant conclusions of law (conclusions):

> 2. The decision to dismiss a prosecution based upon it being a de minimis infraction is one made by the court. The Hawaii Supreme Court has adopted a "totality of circumstances" test for determining whether an offense is to be treated as a de minimis infraction [Park, 55 Haw. at 610, 525 P.2d at 586.]
> . . .
> 4. In consideration of the first two [] factors [set forth in Park] assuming [Petitioner] knew the requirements of the law, and therefore knew he should not have given another person's information as his own, the logical conclusion would be that he was committing some form of identity theft or violating a duty to not mislead a police officer.
> 5. With all due regard to the discretion of the Prosecuting Attorney's Office, the proper charge in this case exists pursuant to HRS § 710-1063, Unsworn Falsification to Authorities, which reads as follows:
> (1) A person commits the offense of unsworn falsification to authorities if, with an intent to mislead a public servant in the performance of the public servant's duty, the person:
> (b) Submits or invites reliance on any writing which the person knows to be falsely made, completed, or altered.
> 6. HRS § 710-1063 is a consequence that a person in [Petitioner's] position could reasonable expect to incur.
> 7. The circumstances surrounding the offense charged, the resulting harm or evil in this case, and the probable impact upon the community, are minimal. The police immediately believed [Complainant] when he informed them that he did not own a black Acura and he did not get pulled over on March 23, 2008. [Complainant] did not have to appear in traffic court and did not incur

> any traffic violations as a result of [Petitioner's] conduct. This minimal result does not warrant a felony charge for Defendant, or worse, a felony conviction.
> 8. The punishment in this case, a felony conviction for [Petitioner], and a potential five-year term of incarceration, is too serious and too harsh. [Petitioner's] actions did not rise to the level of a felony offense. Again, Defendant's conduct may constitute a misdemeanor pursuant to HRS § 710-1063(1)(b).
> 9. [Petitioner], being only 24 years old, is a mitigating circumstance in his favor. The non-violent nature of this offense, and [Petitioner's] history of nonviolence, are also mitigating factors.
> 10. The [c]ourt is also concerned that [Petitioner] has been over-charged and his misdemeanor conduct was pigeon-holed into a felony statute.
> 11. [Petitioner's] conduct caused harm only to a minimal extent, and [was] certainly not serious enough to warrant a felony conviction.
> 12. [Petitioner's] conduct also does not fall within that which was envisioned [sic] by the legislature in forbidding the charged offense.
> 13. [Petitioner's] conduct was meant to be prohibited by HRS § 710-1063(1)(b), Unsworn Falsification to Authorities.
> 14. The harshness of a conviction is a factor when determining whether a charge should be dismissed under HRS § 702-236. State v. Vance, 61 Haw. 291, 602 P.2d 933 (1979). In the instant case, a conviction for [Petitioner] could result in an indeterminate five-year term of imprisonment.
> 15. [Petitioner's] conduct constitutes a de minimis infraction within the meaning of HRS § 702-236.

(Emphases added). The court granted Petitioner's de minimis motion. Additionally, the court dismissed the complaint "without prejudice as to the State charging [Petitioner] under a different section of the Hawaiʻi Revised Statutes." The court stated that "the State may re-charge [Petitioner] under HRS § 710-1063(1)(b) within 90 days of the filing of this order." (Emphasis added.)

III.

A.

Respondent filed its notice of appeal on March 12, 2009.

At a subsequent hearing before the court on June 17, 2009, Petitioner and Respondent affirmed that, at the time Petitioner's de minimis motion was decided, the parties had stipulated to the facts set forth in their memoranda regarding Petitioner's motion to dismiss and Petitioner's de minimis motion. Defense counsel indicated that he wanted to make a record that no testimony was given at the prior hearing on Petitioner's motion to dismiss and de minimis motion because Petitioner and Respondent "agreed to the facts[.]" Respondent concurred that its understanding was that, at the time of the first hearing on Petitioner's de minimis motion, "both sides already stipulated to the facts that were in the [parties'] respective memorandum [sic]," and that "there [were] no material differences in the recollection of facts." Respondent added that both parties were "in agreement that those facts should be made part of the record[.]" (Emphasis added.)

On July 20, 2009, Respondent filed its Opening Brief with the ICA. In it, Respondent noted that the facts presented by Respondent and adopted by the court in the order denying Petitioner's motion to dismiss were "more complete and less ambiguous than those in the Order Granting [Petitioner's de minimis motion]," but Respondent did not challenge any of the court's findings. Respondent challenged only certain conclusions

of the court.[4] Petitioner filed his Answering Brief on November 13, 2009.

On May 26, 2010, over a year after filing its notice of appeal, and months after the briefs had already been filed, Respondent filed a Motion to Supplement Record on Appeal with Transcript (motion to supplement), pursuant to Hawaiʻi Rules of Appellate Procedure (HRAP) Rule 10(e)(2)(C).[5] The attached declaration declared in relevant part that "there [was] an additional transcript, that of the preliminary hearing proceeding dated April 11, 2008 . . . that had not been included in the Record on Appeal" and that "this transcript would allow [the ICA] to conduct a more complete review of this case[.]"

The ICA granted the motion on May 27, 2010. On June 10, 2010, Petitioner filed a Motion to Reconsider the ICA's Order granting Respondent's motion to supplement. Therein, Petitioner argued that it was "not appropriate" for the ICA to consider the preliminary hearing transcript, because neither party submitted

[4] Specifically, in its Opening Brief, Respondent argued that the court erred in concluding (1) "UCPCI was not the 'proper charge'" (challenging conclusions 4, 5, 6, 13); (2) "the impact on the community and Complainant was 'minimal'" (challenging conclusions 7 and 11); (3) "the punishment for UCPCI was 'too harsh'" (challenging conclusions 8, 10, 12, 14); (4) Petitioner's "youth and history of violence [were] mitigating circumstances" (challenging conclusion 9); and (5) the infraction was de minimis (challenging conclusion 15).

[5] HRAP Rule 10(e)(2)(C) provides in part that "[i]f anything material to any party is omitted from the record by error or accident or is misstated therein, corrections or modifications may be" made "by direction of the appellate court before which the case is pending, on proper suggestion or its own initiative."

nor offered to submit it into evidence at the hearings below and, thus, the transcript of the preliminary hearing "was not received in evidence." On June 21, 2010, the ICA denied Petitioner's motion for reconsideration as untimely.

B.

On January 25, 2012, the ICA issued a memorandum opinion ruling in Respondent's favor. The ICA stated that "'it is the defendant's burden to place all of the relevant attendant circumstances before the trial court, and to establish why dismissal of the charge as a de minimis infraction is warranted in light of those circumstances.'" State v. Pacquing, No. 29703, 2012 WL 247992, at *4 (App. Jan. 25, 2012) (quoting State v. Rapozo, 123 Hawaiʻi 329, 331, 235 P.3d 325, 327 (2010)).

In the ICA's view, Officer Lum's statement that he included Complainant's driver's license number and last four digits of Complainant's social security number in the citation issued to Petitioner were circumstances pertaining to the charged offense that were not presented to the court. Id. According to the ICA, had the court had this evidence before it, such evidence might have affected its analysis. Id. The ICA consequently vacated the court's Order.

IV.

In his Application, Petitioner questions whether the ICA gravely erred in concluding that the court was not presented

with all the relevant circumstances. Petitioner argues that (1) the ICA's reliance on Rapozo was misplaced; (2) even if the court had been presented with the testimony that the ICA deemed relevant, the court's ultimate conclusion would not have been different; and (3) the court properly applied the Park factors.

V.

Preliminarily, it must be noted that while Respondent argued in its Opening Brief that it intended to prove at trial that the citations included Complainant's driver's license number, it did not mention the inclusion of a portion of Complainant's social security number. Inasmuch as the ICA proceeded to decide the appeal on matters that were not of record, three concerns arise.

First, Respondent moved to supplement the record under HRAP Rule 10(e)(2)(C) and HRAP Rule 27, which prescribe the contents of motions. Even if Petitioner's motion for reconsideration was untimely, HRAP Rule 10(e)(2)(C) only permits supplementation of the record "on proper suggestion" if "anything material to any party is omitted from the record by error or accident or is misstated therein." (Emphasis added). However, in its affidavit, Respondent did not indicate that the transcript was omitted "by error or accident or is misstated." Rather, Respondent stated that the "transcript would allow [the ICA] to conduct a more complete review of this case." This explanation

does not suggest that something was omitted by error or accident or was misstated.

Instead, it indicates that Respondent sought to add matters that were neither before the court nor before the ICA. But supplementing the record on appeal with evidence not presented to the trial court is improper under HRAP Rule 10(e). See Fireman's Fund Ins. Co. v. AIG Hawaiʻi Ins. Co., Inc., 109 Hawaiʻi 343, 126 P.3d 386 (concluding that none of the provisions of HRAP Rule 10(e) would allow a party to supplement the record with evidence that appeal had become moot where opposing party argued that it was improper to supplement the record with evidence not presented to the trial court). Respectfully, the ICA should not have considered the evidence in the preliminary hearing transcript in deciding the appeal inasmuch as it was not presented to the court.

Additionally, Respondent may be judicially estopped[6] from arguing that there were other facts relevant to Petitioner's de minimis motion because it had stipulated to the facts.[7] Only

[6] See, e.g. State v. Adler, 108 Hawaiʻi 169, 175, 118 P.3d 652, 658 (2005) (holding that defendant was judicially estopped from arguing on appeal that his commercial promotion of marijuana conviction was barred by licensed doctor's prescription of cannabis under California law, where defendant conceded in trial court that marijuana was a drug that could not be lawfully prescribed).

[7] The majority argues that, Respondent was not estopped because Respondent stipulated that there were "no material differences in the recollection of the facts set forth in the respective memoranda," and not that the stipulated facts were "all of the relevant facts bearing upon the defendant's conduct and the nature of the attendant circumstances regarding

on appeal to the ICA did Respondent indicate that, while the citations had not been admitted into evidence, it intended "to prove at trial that [Petitioner] was in possession of Complainant's Hawaiʻi driver's license number, which was entered on [Petitioner's] March 23, 2008 citations by Officer Lum[.]" In his Answering Brief, Petitioner noted that there was no evidence introduced to indicate Complainant's driver's license number was included on the citations issued to Petitioner. No reference was made in Respondent's Opening Brief to the inclusion of the last four digits of Complainant's social security number on the citation. As noted by the ICA, "the parties did not introduce the citations issued to [Petitioner] in Complainant's name or present evidence that Complainant's driver's licence number or the last four digits of Complainant's social security number appeared on the citations[,]" and instead, both parties argued in their motions "that Complainant's name, birth date, and street address constituted Complainant's confidential personal

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the commission of the offense." Majority opinion at 35, 35 n.22.

However, as discussed in greater detail infra, the parties told the court that they did not take any testimony regarding the de minimis motion because, as Petitioner explained, they "agreed to the facts." Respondent confirmed that there were "no material differences in the recollection of the facts." By acknowledging that the parties "agreed to the facts," and not proposing additional facts, Respondent confirmed that it agreed that the "relevant facts" were set forth in the parties' memoranda.

Moreover, as explained infra, the fact that Respondent agreed that all of the relevant facts were before the court is also confirmed by Respondent's positions before the court. Respondent did not argue -- at any stage -- that there were additional facts that the court should have considered as relevant. Presumably, had Respondent believed that additional facts were relevant, it would have said so.

information that Pacquing possessed without authorization." Pacquing, 2012 WL 247992, at *3 (emphasis added).

Third, although testified to at the preliminary hearing, none of the filings by Respondent or the stipulated facts support or mention the fact that the driver's license number or the social security number was, in fact, the charged confidential personal information possessed by Petitioner. In any event, assuming, arguendo, that Complainant's driver's license and social security number were included in the citations, as indicated by the ICA, Respondent may have waived that theory by failing to argue it to the court. Where the State fails to raise a particular theory in support of a motion, or as in this case, in its stipulation before the court, the State may not raise the new theory on appeal.[8]

VI.

With respect to Petitioner's first argument, this case may be distinguished from Rapozo as cited by the ICA. In Rapozo, the defendant was charged with Ownership or Possession Prohibited of Any Firearm or Ammunition By a Person Convicted of Certain Crimes, because she possessed a single bullet in her brasserie.

[8] See, e.g., State v. Rodrigues, 67 Haw. 496, 498, 692 P.2d 1156, 1158 (1985) (noting that "[n]othing in the record even hints that the State was also relying on a finding of exigent circumstances to justify the warrantless search and seizure, or on a "good faith" exception theory[,]" and having "propounded only the theory of consent to the search in question[,]" "the issues of exigency and a 'good faith' exception to have been waived").

Rapozo, 123 Hawaiʻi at 331, 235 P.3d at 327. The bullet was discovered following the defendant's arrest for driving under the influence of an intoxicating substance. Id. at 332, 235 P.3d at 328. The defendant argued that she was "going to have [the bullet] made into a charm for a bracelet," and that therefore, the possession of a single bullet "did not actually cause or threaten the harm sought to be prevented or did so only to the extent too trivial to warrant the condemnation of conviction." Id.; see also Rapozo, 123 Hawaiʻi at 354, 235 P.3d at 350 n.7 (Acoba, J., dissenting) (noting that various internet authorities stated that "bullet jewelry has become the latest rage"). The defendant did not testify at the hearing but presented a declaration by her attorney stating that the defendant's "explanation for having the bullet in her possession was that she was going to have it made into a charm for a bracelet." Rapozo, 123 Hawaiʻi at 332, 235 P.3d at 328 (majority opinion). The State did not present any evidence in that case, nor did it object to the presentation of evidence by declaration. Rapozo, 123 Hawaiʻi at 332-33, 236 P.3d at 328-29.

Subsequent to the hearing, the circuit court granted the de minimis motion. Id. at 333, 235 P.3d at 329. A majority of this court affirmed the ICA's vacation of the circuit court's order. Id. at 349, 235 P.3d at 345. According to the Rapozo majority, "[t]he only evidence offered by [the defendant] in

support of her motion was the declaration of her counsel, which omitted many of the relevant attendant circumstances." Id. at 331, 235 P.3d at 327.

Unlike Rapozo, both parties stipulated to the facts in this case. Indeed, the parties agreed that the alleged confidential personal information was Complainant's name, birth date, and address, and that the alleged unlawful conduct was the possession thereof. Consequently, unlike in Rapozo, the court did have all of the facts relating to the specific "conduct alleged[,]" HRS § 702-236, by Respondent. See Rapozo 123 Hawaiʻi at 331, 235 P.3d at 327.

VII.

As to his second argument, Petitioner maintains that contrary to the ICA's decision, the testimony from the preliminary hearing would not have affected the court's de minimis conclusion. Indeed, respectfully, the ICA was wrong to suggest that evidence that the citation included Complainant's driver's license number and the last four digits of Respondent's social security number "may have affected the [court's] analysis." Pacquing, 2012 WL 247992, at *5.

In its Memorandum opposing Petitioner's motion for particulars, Respondent asserted that Petitioner "possessed Complainant's confidential personal information in memory and/or

on the traffic citation issued by Officer Lum [during the first stop] to and including the [second stop]." Therefore, that the citation included Complainant's "confidential personal information," i.e. Complainant's name, address, and birth date, was already a fact before the court.

Here, the court found that Petitioner had identified himself to Officer Lum using Complainant's name, address, and birth date, findings 2 and 3; that Officer Lum filled out the citation and Petitioner signed the citation after Officer Lum confirmed there was a valid driver's license number matching Complainant's name, address, and birth date. Based on those facts, the court concluded Petitioner had been in possession of confidential personal information under HRS § 708-839.55. The fact, then, that additional information may have been included in the citation, i.e., Complainant's driver's license number and the last four digits of his social security number, would not have changed the court's analysis. Although the statute specifically mentions a driver's license number and social security number as types of confidential personal information, the court had accorded Complainant's name, address, and birth date the same effect.

Moreover, Petitioner did not provide the license number or social security number to the police. Such information was

obtained by the police officer from police sources and given to Petitioner in the form of the citation. Petitioner neither solicited nor willingly obtained Complainant's driver's license number or social security number. Consequently, the preliminary hearing testimony concerning Complainant's driver's license number or social security number would not have altered the court's analysis or ruling, inasmuch as it treated the citations as already containing confidential material under HRS § 708-839.55. See HRS § 708-800 (defining "confidential personal information").

VIII.

As to his third argument, Petitioner contends that the court properly applied the Park factors set forth supra. In its findings and conclusions, the court applied all nine Park factors and decided that each factor supported a de minimis dismissal.

A.

Regarding factor (1), the court concluded that, assuming Petitioner knew the requirements of the law, he would not believe he was committing a violation of HRS § 708-839.55. Conclusion 4. Regarding factor (2), although Petitioner "knew he should not have given another person's information as his own[,]" the penalty for a violation of UFTA, HRS § 710-1063, "is a consequence that a person in [Petitioner's] position could

reasonably expect to incur" as a result of his conduct; not a "potential five-year term of incarceration." Conclusion 4, 8.

Regarding factors (3),(4), and (5), the court concluded that, based on "[t]he circumstances surrounding the offense charged, the resulting harm or evil in this case, and the probable impact upon the community, [were] minimal." Conclusion 7. According to the court, the harm was minimal because "[t]he police immediately believed [Complainant] when he informed them that . . . he did not get pulled over on March 23, 2008." The court considered that Complainant could have been forced to "appear in traffic court" or may have "incur[red] [] traffic violations."

Regarding factor (6), the court noted that HRS § 708-839.55 carries with it "a felony conviction" and "a potential five-year term of incarceration[,]" which the court deemed as "too serious and too harsh" a punishment for Petitioner's actions. Conclusion 8. Such a consideration was proper under the circumstances of this case. See Vance, 61 Haw. at 291, 602 P2d at 933 (stating that "where a literal application of [a statute] would compel an unduly harsh conviction[,]" HRS § 702-236 "may be applicable to mitigate this result").

Regarding factor (7), the court deemed Petitioner's age of 24, lack of a personal history of violence, and the non-

violent nature of the offense as mitigating factors. Conclusion 9.

Regarding factor (8), the court expressed concern that Petitioner had been "over-charged and his misdemeanor conduct [] pigeon-holed into a felony statute."[9] Conclusion 10.

Regarding factor (9), the court considered the fact that HRS § 708-839.55 is a non-violent offense and that Petitioner's conduct was more appropriately a misdemeanor, UFTA, rather than a felony.[10] In light of Respondent's concession that Petitioner's conduct also fell within the misdemeanor offense of

[9] Specifically, the court noted that "with all due regard to the discretion of the prosecuting attorney's office, the proper charge in this case exists pursuant to HRS § 710-1063, [UFTA]." Conclusion 5.

[10] The majority argues that UFTA "is not directed at harms to individuals such as Complainant." Majority opinion at 26 n.13. Instead, the majority states that "the clear objective of the statute is to ensure that 'information which the government relies upon is not falsified.'" Id. (quoting Commentary to HRS § 710-1063). However, the Commentary to HRS § 710-1063 also states that "[f]alse testimony and other misleading information to officials can convert governmental power into an instrument of injustice rather than justice, with unfortunate consequences not only for the individual whose life, freedom or property may be affected, but also for the community's general sense of security and confidence in the state." Commentary to HRS § 710-1063 (citation omitted) (emphasis added). In other words, the statute also attempts to "ensure" that, inter alia, individuals do not suffer "unfortunate consequences." Thus, as an individual whose "life, freedom, or property" may have been affected by Petitioner's misleading statement, Complainant is also a party the statute intended to protect.

Moreover, both Respondent and the court believed that the charge of HRS § 710-1063 would effectuate punishment for Petitioner's actions. On appeal, Respondent "agree[d] that it was logical for [Petitioner] to believe he was committing [UFTA]" and UFTA "would have been a proper charge." (Emphases added.) Similarly, the court stated in conclusion 5 that "the proper charge in this case" was [UFTA], and dismissed the charge without prejudice to allow Respondent to re-file charges of UFTA. Thus, contrary to the majority's position, both the parties and the court agreed that UFTA would have been a proper charge.

UFTA, the court did not abuse its discretion in considering this a factor.

Also, in connection with factor (9), the court considered the fact that Petitioner's conduct was not the type of conduct "envisioned [sic] by the legislature" in enacting the statute. Conclusion 12. This particular proposition is discussed infra.

B.

The majority does not directly address the court's analysis of the Park factors. Following precedent, the court correctly applied the Park factors, and thus the court's conclusion that Petitioner's conduct was de minimis was well within its discretion to make. "'The authority to dismiss a prosecution under § 702-236 [thus] rests in the sound discretion of the trial court[ ]'" and the court's decision to dismiss a prosecution thereunder will be reversed "'only if the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to a substantial detriment of a party litigant.'" State v. Hironaka, 99 Hawaiʻi 198, 53 P.3d 806 (2002) (quoting State v. Ornellas, 79 Hawaiʻi 418, 420, 903 P.2d 723, 725 (App. 1995)) (emphasis added).

The majority's decision to de-emphasize[11] the Park test is inconsistent with its reliance on Park for the proposition that the court must be aware of "all of the relevant facts bearing upon the defendant's conduct and the nature of the attendant circumstances," before ruling on a de minimis motion. See majority opinion at 28 (citing Park, 55 Haw. at 616, 525 P.2d at 591). The majority's analysis also contrasts with the majority opinion in Rapozo, which expressly listed all nine Park factors for consideration and then stated that "[b]ecause the district court in Park failed to take those factors into account in dismissing the charges as de minimis, we reversed its dismissal of the charges." Rapozo, 123 Hawaiʻi at 344, 235 P.3d at 340. Here, indeed, the court did take all nine factors into account before dismissing the charge as de minimis.

IX.

Instead of addressing the Park factors, the majority argues first, that the court abused its discretion because "[Petitioner's] conduct caused or threatened the harm or evil sought to be prevented by the statute," majority opinion at 19, and second, because "[Petitioner] did not establish that his

[11] The majority argues that it does not "'de-emphasize' the factors set forth in Park," but instead that it is unnecessary to consider each Park factor because it "consider[s] the [Park factors] in light of the requirements set forth in the de minimis statute." Majority opinion at 19 n.9. In this case, however, the court thoroughly examined all nine Park factors. By not addressing the court's analysis, the majority fails to accord the court the deference required by the abuse of discretion standard.

conduct was too trivial to warrant the condemnation of conviction." Majority opinion at 28.

X.

In support of its first argument, the majority contends that (1) the harm or evil sought to be prevented by HRS § 708-839.55 is "a broader range of conduct than 'identity theft-related crimes,'" majority opinion at 20, (2) the legislature rejected the recommendation of the Anti-Phishing Task Force's (Task Force) to include the offense of UPCPI within the statute prohibiting Identity Theft in the Third Degree, id. at 23-24, (3) the legislature did not "predicate the offense of UPCPI upon an intent to commit identity theft," id. at 25, (4) the legislature "intended to penalize [Petitioner's] conduct with a felony conviction," id., and (5) unlike in Viernes, where the methamphetamine possessed by the defendant could not be used, here there is nothing "to suggest that [Petitioner's] possession of Complainant's confidential personal information could not lead to identity theft or other crimes." Id. at 26-27.

A.

1.

Contrary to the majority's first contention that HRS § 708-839.55 "was intended to deter a broader range of conduct," majority opinion at 20, the legislative history demonstrates that the only "harm or evil" sought to be prevented by HRS § 708-

839.55 was the "rise in identity theft related crimes." S. Stand. Comm. Rep. No. 2508, in 2006 Senate Journal, at 1249.

A task force established to "develop state policy on how best to prevent further occurrences of phishing[12] and other forms of electronic commerce-based crimes in the state," 2005 Haw. Sess. Laws Act 65, at 14, recognized that "phishing is a relatively small part of the identity theft problem." Anti-Phishing Task Force Report at 4. Rather, "much more work and resources [were] needed to protect Hawaiʻi's people from identity theft and other electronic commerce-based crimes." Id. at 5 (emphasis added).

The Task Force believed the "[t]heft of confidential personal information typically precedes the actual identity theft." Id. at 3 (emphasis added).[13] Thus, to "curb the rise in identity theft related crimes," the Task Force recommended amending HRS § 708-839.8 "to include a crime for possession or transfer of 'confidential personal information.'" Id. at 22.

[12] Phishing is an attempt to deceive "internet users into divulging confidential information . . . under false pretenses." Anti-Phishing Task Force Report at 1.

[13] The majority cites language in the Task Force report which indicates that some of the perpetrators of identity theft "are close friends and family members." Majority opinion at 21 (citing Anti-Phishing Task Force Report at 4). The identity of the perpetrators of identity theft is irrelevant to determining whether or not the harm or evil sought to be prevented by the legislature was identity theft or a broader range of conduct. In any event, in this case, there is no evidence that Petitioner was a close friend or family member of Complainant.

Addressing the Task Force's specific recommendation to make the unauthorized possession of confidential personal information a felony, the Senate Committees on Commerce, Consumer Protection and Housing, and Media, Arts, Science and Technology believed that this action would "help deter identity theft crimes." Id. at 1249 (emphasis added).

Contrary, then, to the majority's contention that HRS § § 708-839.55 was intended to affect a range of conduct broader than identity theft, the only harm mentioned by the Task Force and the Senate Committees was "the increasing problem of identity theft." Anti-Phishing Task Force Report at 6, see also S. Stand. Comm. Rep. No. 2508, in 2006 Senate Journal, at 1248. This is confirmed by the Commentary to HRS § 708-839.55. See Commentary to HRS § 708-839.55 (stating that "[t]he legislature found" that "mak[ing] intentionally or knowingly possessing the confidential information of another without authorization a class C felony would help to deter identity theft crimes") (emphasis added).

2.

Hence, the majority's arguments that the legislature sought to deter crimes other than "identity theft" are incorrect. The majority argues that in enacting HRS § 708-839.55, the legislature was concerned with the "immediate purposes" of the statute. Majority opinion at 24. But the "immediate purposes" are nothing more than restatements of the legislature's intent to

prohibit the unauthorized possession of confidential information. The first purpose cited by the majority is "increasing criminal penalties for conduct that would otherwise constitute a misdemeanor." Because the "conduct" cited by the majority is the unauthorized possession of confidential personal information, this purpose simply means that the legislature sought to increase the penalties for the possession of such information. Similarly, the second purpose cited by the majority, "filling a loophole," amounts to proscribing conduct (possession) that was not previously prohibited.

Further, when examined in the legislative context, the harm identified by the majority is actually identity theft, rather than a "broader" harm. The Senate Committees found that it was difficult to "curb the rise in identity theft related crimes when identity thieves in possession of personal information . . . cannot be prosecuted for crimes other than petty misdemeanor thefts." S. Stand. Comm. Rep. No. 2508, in 2006 Senate Journal, at 1249 (emphases added). As noted, the Committees believed that making the possession of confidential personal information of another a class C felony, i.e., increasing the penalties for conduct that had previously constituted a misdemeanor, "will help deter identity theft crimes." Id. (Emphasis added.) Therefore, the "immediate

purposes" posited by the majority reinforce the conclusion that the harm addressed was identity theft.

B.

The majority's second contention is that it "appears that the legislature understood UPCPI to be distinct from identity theft, because it does not involve a 'monetary loss to the victim.'" Majority opinion at 24. Respectfully, the majority overstates the inferences that can be drawn from the legislature's decision to separate the UCPCI offense in HRS § 708-839.55 from the offense of identity theft in the third degree, HRS § 708-839.8. The legislature found that the two offenses were "distinct" from one another, but that did not mean that the offenses were intended to address different harms. Instead, although HRS § 708-839.55 and HRS § 708-839.8 prohibit different conduct, they are aimed at the same harm. The Task Force's recommendation of employing two separate measures was to "curb the rise in identity theft crimes" by increasing the penalties for identity theft itself and criminalizing the possession of confidential personal information without authorization. Anti-Phishing Task Force Report at 22. The legislature similarly believed that both increasing the penalties for identity theft by making "identity theft an enumerated offense within the repeat offender statute" and "amending the law to make intentionally or knowingly possessing the confidential

personal information of another without authorization a class C felony" would "help to deter identity theft crimes." S. Stand. Comm. Rep. No. 2508, in 2006 Senate Journal, at 1249 (emphasis added).

These objectives are manifested in the ultimate placement of HRS § 708-839.55, prohibiting the unauthorized possession of confidential personal information, in Chapter 708, Part IV of the HRS, entitled "theft and related offenses." (Emphasis added.) The legislature thus believed HRS § 708-839.55 was "related" to theft, as was HRS § 709-839.8, third degree identity theft. Additionally, HRS § 708.839-55 directly precedes the offenses of identity theft of different degrees in the HRS, which are located at HRS §§ 708-839.6 - 708.839.8. Logically, this ordering indicates that all of the statutes are related to identity theft.

C.

The majority's third contention is that in some other jurisdictions, the offense of unauthorized possession of confidential personal information "require[s] that the defendant intended to use the information to defraud another or commit a crime." Majority opinion at 24-25.[14] However, the legislative

[14] This language was drawn from a section of the Task Force's report which "review[ed] other jurisdictions' [identity theft] laws" to "distinguish [them] from our laws in the State of Hawaiʻi." Anti-Phishing Task Force Report at 10.

history indicates that it was unnecessary to add such language to establish that the purpose of the statute was to prevent identity theft.

The mens rea requirement in HRS § 708-839.55 is that the defendant "intentionally and knowingly" possessed the information without authorization, i.e., that he or she intended to possess the information. Both the Task Force and the Legislature recognized that the unauthorized possession of confidential personal information was a precursor to identity theft. See Anti-Phishing Task Force Report at 3. Consequently, there was no need to tie HRS § 708-839.55 to fraud, because the mens rea requirement enumerated by the statute was sufficient to accomplish the stated legislative purpose -- "curbing the rise of identity theft related crimes." S. Stand. Comm. Rep. No. 2508, in 2006 Senate Journal, at 1249.

D.

The majority's fourth contention rejects Petitioner's argument that a felony conviction is "too harsh." Majority opinion at 26-27. This seems beside the point. HRS § 702-236(1)(b) explicitly permits the court to dismiss the charge against Petitioner if his conduct did not "cause or threaten the harm or evil sought to be prevented by the law defining the offense." HRS § 702-236(1)(b). That harm or evil was identity theft. See discussion supra. Accordingly, under the

circumstances, the court had the discretion to determine Petitioner's conduct was a de minimis violation.

E.

1.

The majority's fifth contention, that Petitioner's possession of confidential information could lead to identity theft, was never raised by Respondent, and in any event is inapplicable to the instant case.

Respondent did not raise this theory advanced by the majority, i.e., that simply by possessing Complainant's so called confidential personal information, Petitioner threatened the harm of identity theft. Hence, that argument was waived by Respondent.[15] See State v. Kikuta, 125 Hawaiʻi 78, 89, 253 P.3d 639, 650 (2011) (holding that the State's theory that the defendant's use of force was not justified because it was not reasonably related to the welfare of the minor was waived inasmuch as the State did not make that argument at trial).

Nevertheless, the majority asserts that, unlike in Viernes, where the "amount of methamphetamine possessed by the defendant was too small to be sold or used," in this case there is nothing "to suggest that [Petitioner's] possession of

[15] The majority maintains that "[Respondent] argued that [Petitioner's] conduct caused the harm or evil sought to be prevented by HRS § 708-839.55," and Viernes is "directly applicable on this point." Majority opinion at 27 n.14. Respectfully, the proposition cited by the majority is common to any case addressing the de minimis statute.

Complainant's confidential personal information could not lead to identity theft or other crimes." Majority opinion at 27. However, in Viernes, the item possessed, methamphetamine, could only be used for illicit purposes. The information possessed in the present case, on the other hand, could be possessed for innocent purposes.

Petitioner's motion to dismiss stated that "[Complainant] happens to be [Petitioner's] neighbor," and "through the course of their relationship, [Petitioner] came to know [Complainant's] name, date of birth, and address." The parties stipulated to "the facts that were in the respective memorand[a]." The statement that Complainant was Petitioner's neighbor was in Petitioner's memorandum in support of his motion to dismiss, and therefore was encompassed by the parties' stipulation. Because of their relationship as neighbors, Petitioner's possession of such information could be possessed for an unobjectionable purpose. The statement that Petitioner learned of Complainant's "confidential information" "through the course of their relationship" explains both how and why Petitioner came to possess Complainant's confidential information.[16] Because information such as a neighbor's name,

[16] This answers the majority's assertion that Petitioner's intent to avoid arrest was "the only 'purpose' evident in the record" that explained Petitioners' possession of Complainant's confidential information. Majority opinion at 33 n.20.

address, and birth date is conceivably acquired naturally in the course of being a neighbor, the "purpose" behind Petitioner's acquisition of Complainant's confidential information inheres in Petitioner's relationship with his neighbor. In other words, Petitioner's "purpose" arose out of the ordinary circumstance of knowing to whom he lived next to.[17] Such information, once acquired, is usually retained.

Petitioners' statement to Officer Lum that he "was scared because he had some warrants and did not want to get arrested," explains why he used Complainant's confidential personal information. Respectfully, under the majority's theory, having to explain "why" Petitioner possessed such information, rests on the proposition that Petitioner could have obtained his neighbor's name, address, and date of birth in anticipation that some day he would be stopped for a traffic infraction and would

[17] The majority contends that "[t]he fact that Complainant is [Petitioner's] neighbor does not, by itself, explain how [Petitioner] came to possess [Complainant's confidential] information." Majority opinion at 32-33. The majority also characterizes the conclusion that Petitioner's purpose arose out of the ordinary circumstance of knowing whom he lived next to as "speculative." Majority opinion at 33 n.19.

Respectfully, not only is the conclusion that Petitioner acquired Complainant's information over the course of their relationship a natural inference, but this fact was set forth in Petitioner's motion to dismiss and never challenged by Respondent throughout the entirety of the litigation. Indeed, Respondent's motions reiterate that Petitioner and Complainant were neighbors. The court's findings also recognized that Petitioner and Complainant were neighbors. Finding 17. Additionally, Respondent confirmed that "there were no material differences in the [parties'] recollection of the facts." As discussed supra, Respondent's position demonstrates that it acknowledged that Petitioner acquired Complainant's confidential information over the course of their relationship. Thus, the record clearly indicates that Petitioner acquired Complainant's confidential information through the course of Petitioner and Complainant's relationship as neighbors.

need such information to avoid arrest. Such a proposition is implausible. Manifestly, simply possessing this kind of information did not "cause or threaten to cause" the harm of identity theft.

2.

Although the majority maintains that Petitioner could have used Complainant's personal information for identity theft, majority opinion at 27, there is nothing in the record to support this assertion. It may be reasonably assumed that the parties, including the prosecution, knew more about the innermost facts of the case than this court. Both parties stipulated to the facts and Respondent has never suggested that Petitioner used or intended to use Complainant's personal information for identity theft.[18] Even after Respondent moved to supplement the record, the record is bereft of any references to identity theft. In other words, the majority's hypothesis that Petitioner "could have" used the information to commit identity theft is pure speculation, and there is nothing in the record suggesting that Petitioner intended to commit theft.

[18] Although Petitioner used Complainant's personal information, as discussed supra, identity theft requires the use of another's personal information with the intent to commit the offense of theft. See, e.g., HRS § 708-839.7 (providing that "[a] person commits the offense of identity theft in the second degree if that person makes or causes to be made . . . a transmission of any personal information of another . . . with the intent to commit the offense of theft in the second degree from any person or entity") (emphases added). Here, nothing in the record suggests that Petitioner intended to commit a theft offense.

XI.

The majority's second argument is that the court erred in deciding that Petitioner's conduct was "too trivial to warrant the condemnation of conviction." HRS § 702-236(1)(b). The majority contends the court failed to consider (1) the harm threatened by Petitioner's conduct, majority opinion at 30, (2) the attendant circumstances surrounding Petitioner's possession of Complainant's personal information, majority opinion at 31, and (3) any "benign" explanation for Petitioner's possession of Complainant's personal information, majority opinion at 33.

A.

First, the court obviously did address the harm "threatened" by the offense.

1.

In conclusion 3, listing the Park factors, the court stated that one of the factors to be considered when dismissing a charge as de minimis was "the resulting harm or evil, if any, caused or threatened by the infractions." (Emphasis added.) In conclusion 7, the court stated that "[t]he resulting harm or evil in this case, and the probable impact upon the community, are minimal." (Emphases added.) By referring to "the resulting harm or evil," in conclusion 7, the court was reiterating its earlier conclusion 3, which linked the "resulting harm" to the harm "caused or threatened" by the infractions. In conclusion 7 the

court affirmed that the "probable" impact on the community was minimal. Thus, the court indicated that although Petitioner may have "threatened" harm, it was not likely that the harm would be realized, i.e., the harm threatened was minimal.

2.

The majority asserts that the court should have made a more detailed assessment of the harm threatened by the offense because "harm to the Complainant was only avoided by a fortuitous turn of events."[19] However, in dismissing an offense as de minimis, the court must consider the attendant circumstances "regarding the commission of the offense," Park, 55 Haw. at 617, 525 P.2d at 591 (emphasis added), and not a string of hypotheticals. Here, the court addressed what actually happened -- Complainant informed the police that the citation was erroneous, and suffered no further harm. It would have been impossible for the court, as it is for an appellate court, to forecast reasonably what might have happened had the "fortuitous" events not occurred.

The majority assumes that Complainant would have been subject to additional traffic citations or a bench warrant if Officer Lum had not neglected to give Petitioner a copy of one

[19] According to the majority, these events were (1) Officer Lum forgot to give Petitioner a copy of one citation, (2) Complainant advised the police he was not involved in the traffic stop, and (3) Petitioner was arrested before any further citations could be issued. Majority opinion at 30.

citation and then delivered the citation to Complainant. In fact, many other intervening events could have prevented Complainant from incurring citations or being served with a bench warrant. Respectfully, it is not possible reasonably for the majority -- as it would not have been possible reasonably for the court -- to predict the likelihood of other injuries to Complainant had the actual events not occurred. Had it engaged in such an exercise, the court's conclusions would necessarily be arbitrary and capricious.

The circumstances that the majority claims the court failed to consider are circumstances that never existed, and were not argued by any of the parties.[20] Again, after Respondent supplemented the record on appeal, no evidence addressed the probability of Complainant suffering additional harm from Petitioner's conduct. Furthermore, before the ICA, Respondent did not challenge conclusion 7 on the basis that Complainant could have suffered injury had Officer Lum failed to provide Petitioner with a copy of one citation. Instead, Respondent argued that conclusion 7 was incorrect because the harm actually

[20] The majority states Respondent argued in its memorandum opposing Petitioner's de minimis motion, that "[h]ad [Petitioner] not been caught, Complainant would have suffered the repercussions of two unjustified traffic citations." Majority opinion at 31 n.17 (emphasis added). The majority then argues that this demonstrates that the hypothetical circumstances discussed supra were raised by Respondent. Id. The majority, however, argues that Petitioner "could have continued to receive additional citations in Complainant's name." Id. at 31. At no point did Respondent raise the possibility that Complainant would receive additional citations. As stated, the arguments made by the majority go beyond those raised by Respondent.

suffered by Complainant was not minimal.[21] Thus, Respondent also apparently recognized the court could not be faulted for not engaging in calculating hypothetical events.

B.

Second, the court did consider the attendant circumstances surrounding the confidential information.

1.

The majority's second contention, that "both [Petitioner] and [the court] failed to adequately address the circumstances surrounding the offense," majority opinion at 31, is drawn from Park, which stated that "all of the relevant facts bearing upon the defendant's conduct and the nature of the attendant circumstances regarding the commission of the offense should be shown to the judge." Park, 55 Haw. at 616; see also majority opinion at 28 (quoting Park).

However, as discussed supra, the court's conclusions addressed all nine Park factors. The majority's analysis only addresses one of the nine factors set forth by Park -- whether the defendant "threatened" the harm sought to be prevented by the statute. Respectfully, again, it is incongruous to rely on Park

[21] In its introductory "Statement of the Points of Error," in its Opening Brief, Respondent did cite a statement in its memorandum opposing Petitioner's de minimis motion that "[h]ad [Petitioner] not been caught, Complainant would have suffered the repercussions of two unjustified traffic citations." However, Respondent only cited this statement to demonstrate that the "issue [of harm to the community] was brought to the attention of the court." Respondent did not repeat this statement in its "Arguments" section.

for the requirement that the court must consider "all of the relevant facts," but then to ignore Park's guidance as to what those relevant facts are.

The majority criticizes the court for failing to consider "the circumstances surrounding [Petitioner's] unauthorized possession of Complainant's confidential information." Majority opinion at 31. To the contrary, the court did consider facts actually placed in the record that explained "the circumstances surrounding [Petitioner's] unauthorized possession of Complainant's confidential personal information."

Petitioner's motion to dismiss explained that "[Petitioner] happens to be [Complainant's] neighbor," and that he "came to know [Complainant's] name, date of birth, and address" through "the course of their relationship." Similarly, Respondent's opposition to Petitioner's motion to dismiss stated that "Complainant related that [Petitioner] used to be his neighbor." As discussed supra, these facts were reiterated in and encompassed by the parties' stipulation. Furthermore, the court's findings, stating that "Complainant is [Petitioner's] neighbor," finding 17, also recognized Petitioner's relationship to Complainant. Neither party challenged the court's finding of fact on this issue. Thus, finding 17 is binding on this court. Bremer v. Weeks, 104 Hawaiʻi 43, 63, 85 P.3d 150, 171 (2004)

("Findings of fact that are not challenged on appeal are binding on the appellate court.") (internal citations and punctuation omitted). Hence, the memoranda of both parties and finding 17[22] all state that Petitioner and Complainant were neighbors.

The finding that Petitioner and Complainant were neighbors addresses "the circumstances surrounding Petitioner's unauthorized possession of Complainant's confidential information." Majority opinion at 31. As stated before, because Petitioner and Complainant were neighbors, Complainant's name and address would be information naturally acquired over the course of their relationship. The majority concludes that because he did not address the aforementioned circumstances, "[Petitioner] did not meet [his] burden." Majority opinion at 35. However, as

[22] The majority "disagrees with the dissent's assertion that this finding is based on evidence submitted by Petitioner." Majority opinion at 32 n.18. The majority contends that "in asserting that [Petitioner] put these facts before the court, the dissent relies on argument contained in [Petitioner's motion to dismiss], rather than on the declaration of counsel and argument submitted in relation to [Petitioner's] de minimis motion." Id.

To the contrary, the fact that Petitioner and Complainant were neighbors was cited in both Petitioner's motion to dismiss and Respondent's opposition to that motion. The parties argued both the motion to dismiss and de minimis motion at the same hearing. No other facts were presented regarding the de minimis motion because the parties stipulated to "the facts in the respective memoranda."

Furthermore, in its findings of fact regarding both the Order denying Petitioner's motion to dismiss, and the Order granting the de minimis motion, the court stated that Petitioner and Complainant were neighbors. To reiterate, Respondent endorsed the court's findings regarding the motion to dismiss before the ICA, stating that the findings of fact in the Order granting the de minimis motion were "more complete" than those in the Order granting the de minimis motion. Thus, Respondent did not challenge the finding that the parties were neighbors; rather, Respondent acknowledged that the finding was correct. In sum, the court, Petitioner, and Respondent all agreed and acknowledged that the evidence showed Petitioner and Complainant were neighbors.

noted, the record reflects that these circumstances were in fact addressed in the record. It must be noted that Respondent did not argue before either the court or the ICA that Petitioner's relationship with Complainant or the circumstances surrounding Petitioner's unauthorized possession of Complainant's confidential information were circumstances the court had failed to take into consideration. Respondent was well aware of Petitioner's relationship with Complainant and to its credit never disputed the court's finding that Petitioner and Complainant were neighbors or argued that Petitioner's relationship with Complainant was not considered.

2.

Respondent must make a "strong showing" to establish an abuse of discretion. State v. Hinton, 120 Hawaiʻi 265, 273, 204 P.3d 484, 492 (2009); see also State v. Wong, 97 Hawaiʻi 512, 517, 40 P.3d 914, 919 (2002) (same); State v. Kupihea, 80 Hawaiʻi 307, 312, 909 P.2d 1122, 1127 (1996) (same); State v. Estencion, 63 Haw. 264, 267, 625 P.2d 1040, 1043 (1981) (same). "The term 'strong' means, inter alia, 'having particular quality in great degree,' 'compelling' and 'well established.'" Rapozo, 123 Hawaiʻi at 368, 235 P.3d at 364 (Acoba, J. dissenting) (quoting Websters Third New International Dictionary 2265 (1966)). The majority does not address the arguments raised by Respondent on appeal, or argue that Respondent's contentions constitute a

"strong showing." Thus, the majority apparently places no burden on the prosecution in de minimis proceedings. Ordinarily, under the adversary system, the opposing party bears the burden of demonstrating that evidence provided is erroneous, inadequate, or incomplete. See State v. Miller, 122 Hawai i 92, 117, 223 P.3d 157, 182 n.24 (2010) ("[T]he usual, and appropriate method for raising errors in the adversarial system is to depend on counsel."). Respectfully, the majority does not hold to this standard in its analysis of this case.

Instead, the majority "faults the court for failing to consider all of the questions which it finds should have been addressed," even though "none of these questions were ever raised at the hearing or otherwise, much less by Respondent." Rapozo, 123 Hawaiʻi at 362, 235 P.3d at 358 (Acoba, J., dissenting). Respectfully, the majority poses questions "which are not grounded in any matter of record even hinting of relevance or materiality." Id. at 363, 235 P.3d at 359. The burden of making a strong showing to establish an abuse of discretion would "seemingly require [the majority] to point to something beyond speculation and unsupported theories." Id. at 364, 235 P.3d at 368. The majority's arguments do not "strongly" show an abuse of discretion on the court's part. By taking this approach to overturning the court, the majority "invades the province of the

court and disregards the standard of review in de minimis cases." Id.

C.

Third, the majority's contention that, "unlike in Rapozo, Petitioner did not offer a benign explanation for his conduct," majority opinion at 33, is irrelevant. "Benign" would connote "a mild type of character that does not threaten health or life," or is "harmless." Merriam Webster's Collegiate Dictionary 106 (10th ed. 1993). It is unclear why the majority requires Petitioner to come forth with a "benign" explanation for his conduct. Nothing in the statute, case law, or in Rapozo requires Petitioner to state a benign explanation for his conduct -- the Rapozo majority only noted that although the defendant set forth a "benign" explanation for her conduct, that explanation was not credible. See Rapozo, 123 Hawaiʻi at 341-42, 235 P.3d at 345-46. Given that in Rapozo, a "benign" explanation still resulted in the vacation of the circuit court's order, it is unclear what explanation would be sufficient to satisfy the majority. See id. at 354, 235 P.3d at 350 n.7 (Acoba, J., dissenting).

The majority also cites Park, which did refer to "indicators to show" that an offense "was in fact an innocent, technical infraction, not actually causing or threatening any harm or evil sought to be prevented by [the statute], or that the

harm or evil caused or threatened was so trivial as to warrant the condemnation of conviction." Park, 55 Haw. at 617-618, 525 P.3d at 592 (emphasis added). Park set forth this requirement in the disjunctive, indicating that the defendant was required to show either that the violation was an innocent, technical infraction, or that the harm or evil caused or threatened was "trivial." Therefore, Petitioner was not required to show that his violation was an "innocent, technical infraction" or that his conduct was benign.

XII.

It must also be noted that the majority's suggestion that the court should have considered attendant circumstances not raised by either party is questionable because the parties stipulated to "the facts in the respective memorand[a]," and agreed that "there are no material differences in the recollection of the facts." The majority maintains that the parties' stipulation is invalid because it occurred after the State filed its notice of appeal, and therefore the court did not have jurisdiction to accept the stipulation. Majority opinion at 34. This elevates form over fact. When asking the court to agree to the stipulation, Respondent stated that "both sides already stipulated to the facts that were in the respective [memoranda]," and agreed to a further stipulation "just to supplant that." (Emphasis added.)

Despite the parties' agreement as to the facts set forth in their memoranda, the majority maintains that because Respondent only stipulated that "there are no material differences in the [parties'] recollection of the facts," the stipulation does not demonstrate that "all of the relevant facts" were before the court. But, the parties' stipulation confirmed that they had previously "agree[d] to the facts" before the appeal was taken. Further confirmation of the parties' agreement was provided by their respective positions on appeal. The majority seemingly disregards the positions taken by the parties at every stage of the proceedings. Following the stipulation, Respondent did not argue at any point that there were additional relevant facts that the court did not consider[23] or that some of the facts before the court were irrelevant.

The burden the majority places on Petitioner is insurmountable -- no defendant can predict the "infinite number" of "questions [that] could be posed" by an appellate court but that were not posed in the trial court. Rapozo, 123 Hawaiʻi at 362, 235 P.3d at 358 (Acoba, J. dissenting). Respectfully, the majority's indifference towards the parties positions and the court's evaluation of the relevant facts cannot be justified

[23] The only possible exception was Respondent's statement that it "intends to prove at trial Defendant in possession of [Complainant's] Hawaiʻi drivers license number." The majority, however, does not argue that this was a relevant fact not considered by the court. See Majority opinion at 17 n.8.

under the abuse of discretion standard that limits this court's review.

XIII.

Finally, the majority's focus on the statutory language, HRS § 702-236(1)(c) also provides an independent basis for affirming the court's dismissal of the unauthorized possession of confidential information charge as de minimis.[24] The court may dismiss a prosecution as de minimis if "it finds that the defendant's conduct . . . presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense." HRS § 702-236(1)(c) (emphasis added).[25] The court addressed this prong of the de minimis statute through conclusion 12, which stated that "[Petitioner's] conduct also does not fall within that which was

[24] These considerations also are appropriately considered as a part of the ninth Park factor, which addresses "any other data which may reveal the nature and degree of the culpability in the offense committed by each defendant." 55 Haw. at 617, 525 P.2d at 591.

[25] The majority argues that it is not necessary to address HRS 702-236(1)(c) because "Petitioner's application does not contain any arguments which specifically address this prong of the statute." Majority opinion at 28 n.15. This is incorrect. In his Application, Petitioner at two points argued that "[e]ssentially, [Petitioner] committed the offense of [UFTA]." By arguing that his actions constituted a violation of the offense of UFTA, Petitioner indicated that his actions were not those envisaged by the legislature in enacting the offense of UPCPI.

Moreover, it is necessary to address this matter because the court did decide this issue. It concluded that "[Petitioner's] conduct does not fall within that which was envisioned by the legislature in forbidding the charged offense," conclusion 12, and that "[Petitioner's] conduct was meant to be prohibited by HRS § 710-1063(1)(b), [UFTA]." Conclusion 13. The court also dismissed the charge without prejudice so that Petitioner could be re-charged with UFTA.

[envisaged] by the legislature in forbidding the charged offense." The court further noted that, instead "Defendant's conduct was meant to be prohibited by HRS § 710-1063(1)(b), Unsworn Falsification to Authorities." Conclusion 13.

First, HRS § 708-839.55 prohibits the possession of the "confidential personal information of another in any form, including but not limited to mail, physical documents, identification cards, or information stored in digital form." All of the specific examples in the statute relate to the possession of information that is in some sense recorded, either in writing or digitally. Under the canon of ejusdem generis, therefore, the general term "in any form" encompasses information that was recorded. See State v. Kalani, 108 Hawaiʻi, 279, 284, 118 P.3d 1222, 1227 (2005) ("Under the maxim of ejusdem generis, where general words follow specific words in a statute, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.") (internal quotation marks omitted).

At the time of his first traffic stop, Petitioner "possessed" Complainant's confidential information in his memory. Petitioner had not recorded that information in any form. Inasmuch as on its face HRS § 709-839.55 indicates that the legislature envisaged prohibiting the unauthorized possession of such information in some recorded form, it was reasonable for the

court to conclude that "possession" of Complainant's information in Petitioner's memory did not appear to be the conduct "envisaged by the legislature" in conclusion 12.[26] This conclusion is consistent with the court's obligation to strictly construe criminal statutes. See State v. Aiwohi, 109 Hawaiʻi 115, 129, 118 P.3d at 1210, 1224 (2005) (stating that "[t]his court has declared that a criminal statute must be strictly construed and that it cannot be extended beyond the plain meaning of the terms found therein.") (internal quotation marks and brackets omitted).

Second, Petitioner arguably did not possess personal information of Complainant that was confidential, as required by HRS § 708-389.55. Complainant's name and address would not be a "secret" to Petitioner. As noted, Petitioner indicated he learned of Complainant's birth date during the course of his and Complainant's relationship as neighbors. The fact that Petitioner "exceeded customary license" by using Petitioner's information in a manner not authorized by Complainant would not transform Complainant's non-confidential information into confidential information. Petitioner's use might have been

[26] The majority contends that because HRS § 708-839.55 contains the general phrase "in any form," Petitioner's possession of Complainant's confidential personal information in his memory falls within the statutory definition of possession. Majority opinion at 20 n.10. However, as discussed supra, the canon of ejusdem generis limits the general phrase "in any form" to possession in a recorded form.

unauthorized but that would not establish that the information he used was confidential.

Finally, the plain language of HRS § 708-839.55 prevents the intentional or knowing possession of confidential personal information "without authorization." Following the first traffic stop, Petitioner did possess a traffic citation containing Complainant's confidential personal information. However, Petitioner did not intentionally obtain or solicit the citation. Instead, Petitioner had no choice but to accept the citation from Officer Lum. There is no evidence that Petitioner knew that Officer Lum would include Complainant's confidential personal information in the citation. Because Petitioner was compelled to accept the citation, Complainant's "authorization" was irrelevant. Under such circumstances, it cannot be said reasonably that Petitioner's possession of the citation was unauthorized.

With respect to the charge of UCPCI under HRS § 708-839.55, Petitioner "possessed" information only "in his memory," possessed his neighbor's name, address, and birth date under circumstances that would not make that information confidential, and subsequently possessed that information in the form of a citation which he had no choice but to accept. Consequently, under the circumstances, the court did not "clearly" abuse its discretion, Hironaka, 99 Hawaiʻi at 205, 53 P.3d at 812, by also

concluding that "[Petitioner's] conduct [] does not fall within that which was [envisaged] by the legislature in forbidding the charged offense." Conclusion 12.

XIV.

Based on the foregoing, I respectfully dissent.

/s/ Simeon R. Acoba, Jr.