NO. CAAP-22-0000129
(Consolidated with NO. CAAP-21-0000278)

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee,
v.
PATRICK H. OKI, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 1PC151000488)

MEMORANDUM OPINION
(By: Ginoza, Chief Judge and Leonard, J.; and Wadsworth, J., concurring and dissenting)

In these consolidated appeals, Defendant-Appellant Patrick H. Oki (**Oki**) appeals from the following judgment and orders entered in the Circuit Court of the First Circuit (**Circuit Court**): (1) "Second Amended Judgment of Conviction and Sentence," filed on the February 10, 2021 (**Second Amended Judgment**); (2) "Amended Free-Standing Order of Restitution," filed on February 11, 2021 (**Amended Restitution Order**); and (3) "Findings of Fact, Conclusions of Law, and Order Denying [Oki's] Motion to Correct Illegal Sentence (**FOFs/COLs/Order**)," filed March 8, 2022.[1]

[1] The Honorable Catherine H. Remigio entered the Second Amended Judgment, the Amended Restitution Order, and the FOFs/COLs/Order. On September 19, 2022, this court entered an order consolidating the appeals in CAAP-21-0000278 and CAAP-22-0000129 under case number CAAP-22-0000129.

I. Background

Following a jury-waived trial, Oki was convicted of three counts of Theft in the First Degree, in violation of Hawaii Revised Statutes (**HRS**) §§ 708-830.5(1)(a) and -830(2) (**Counts 1-3**); one count of Theft in the Second Degree, in violation of HRS §§ 708-831(1)(b) and -830(2) (**Count 4**); three counts of Money Laundering, in violation of HRS § 708A-3(1)(a)(ii)(A) (**Counts 5-7**); two counts of Use of a Computer in the Commission of a Separate Crime, in violation of HRS § 708-893(1)(a) (**Counts 8 and 9**); and four counts of Forgery in the Second Degree, in violation of HRS § 708-852 (**Counts 1-13**). The Circuit Court sentenced Oki to indeterminate terms of imprisonment of ten years each for Counts 1-3, five years for Count 4, ten years each for Counts 5-7, twenty years each for Counts 8-9, and five years each for Counts 10-13, with all terms to be served concurrently with credit for time served. Oki was also ordered to pay $440,158.54 in restitution.

This is the second round of appeals in this case. Previously, both Oki and the State filed appeals, and on June 5, 2020, this court affirmed Oki's conviction and sentence, except with respect to the Circuit Court's order of restitution. See State v. Oki (Oki I), No. CAAP-18-0000501, 2020 WL 3027401, at *25 (Haw. App. June 5, 2020) (mem. op.). Regarding restitution, we began by noting that "neither party expressly challenges the $440,158.54 total amount of restitution ordered by the circuit court. The parties instead dispute the manner in which the restitution should be collected/distributed." Id. at *22. We concluded that "[PKF Pacific Hawaii, LLP (**PKF**)] was the sole victim and therefore the sole entity entitled to restitution[,]" noted that PKF had changed its name to Spire Hawaii, LLP (**Spire**), and remanded the case to the Circuit Court "to order restitution

directly to Spire, the entity formerly known as PKF."[2] Id. at *5 n.2, *24-25.

On remand, on December 14, 2020, Oki filed a Motion for Restitution Hearing and Study. At a February 10, 2021 hearing, the Circuit Court denied the motion. The court subsequently entered the Second Amended Judgment and the Amended Restitution Order, ordering Oki to pay $440,158.54 in restitution to Spire, and a March 22, 2021 Order Denying [Oki's] Motion for Restitution Hearing and Study.

On March 19, 2021, Oki filed a Motion to Correct Illegal Sentence. Oki argued that his sentences on Counts 8 and 9 were illegal because HRS § 708-893(1)(a) – the statute setting forth the offense on those Counts – was repealed prior to his trial and sentencing.[3] At an April 27, 2021 hearing, the Circuit Court took the matter under advisement. On March 8, 2022, the court entered the FOFs/COLs/Order, denying the motion.

On appeal, Oki contends that the Circuit Court erred in (1) "[d]enying [Oki's] Motion for Restitution Hearing and Study and in [o]rdering [r]estitution [to Spire];" (2) failing to comply with HRS § 706-646 by "fail[ing] to consider Oki's financial ability to make restitution for the purpose of establishing the time and manner of payment;" (3) "holding that Oki's illegal sentence claim [as to Counts 8 and 9] was barred as previously litigated or waived;" and (4) "denying Oki's Motion to

[2] On October 16, 2020, the Hawaiʻi Supreme Court entered its "Order Rejecting [Oki's] Application for Writ of Certiorari."

[3] Before repeal, HRS § 708-893 (2014) stated, in relevant part:

> **Use of a computer in the commission of a separate crime.** (1) A person commits the offense of use of a computer in the commission of a separate crime if the person:
>
> > (a) Intentionally uses a computer to obtain control over the property of the victim to commit theft in the first or second degree[.]

Correct Illegal Sentence [as to Counts 8 and 9]." (Formatting altered.)[4]

For the reasons explained below, we affirm.

II. Discussion

A. Restitution

In his first point of error, Oki contends that "[t]he Circuit Court erred in ordering restitution to Spire without a restitution hearing and restitution study because the record lacked evidence of 'reasonable and verified losses suffered by the victim[.]'" (Quoting HRS § 706-646(2) (Supp. 2019).[5])

At the February 10, 2021 hearing, the Circuit Court explained its decision to deny Oki's Motion for Restitution Hearing and Study, as follows:

> The court notes that the discussion that was . . . reflected in the ICA's opinion did indicate that there was no challenge to the total amount of restitution, but the challenge was to the manner in which restitution should be collected or distributed.
>
> Also it noted that all the parties agreed that PKF now exists . . . as Spire and that they went into some other discussion about how Spire is now considered the new entity.
>
> It concluded therefore after determining that the partners although identified as victims that that only exists because of their relationship with PKF, but that the actual victim and the sole victim was PKF, and therefore they determined that although there might be some civil proceeding, . . . it would come back to this court for the purpose of ordering restitution directly to Spire, the entity formerly known as PKF.
>
> I understand the argument that [Oki is] making saying that well now everything is changed. However, I believe

[4] The first two issues are raised in CAAP-21-0000278. The last two issues are raised in CAAP-22-0000129.

[5] HRS § 706-646(2) states, in relevant part:

> The court shall order the defendant to make restitution for reasonable and verified losses suffered by the victim or victims as a result of the defendant's offense when requested by the victim. The court shall order restitution to be paid to the crime victim compensation commission if the victim has been given an award for compensation under chapter 351. If the court orders payment of a fine in addition to restitution or a compensation fee, or both, the payment of restitution and compensation fee shall be made pursuant to section 706-651.

> that [the Deputy Prosecuting Attorney] is correct, there is a very specific order by the ICA that says, and that's why I started it with this quote, this matter is remanded to the circuit court to order restitution directly to Spire, the entity formerly known as PKF. It doesn't tell me that I need to make other hearings to determine if restitution should be different based on the finding that the four partners were not the direct victim. The court is constrained to do any differently.

The Hawaiʻi Supreme Court has described the duty of the trial court on remand, as follows:

> On remand, a trial court must closely adhere to the true intent and meaning of the appellate court's mandate. See State v. Lincoln, 72 Haw. 480, 485, 825 P.2d 64, 68 (1992) (quoting 5 Am. Jur. 2d Appeal and Error § 991 (1962 & Supp. 1991) (footnote omitted)) . . . .
>
> The "true intent and meaning" of a reviewing court's mandate is not to be found in a solitary word or decontextualized phrase, but rather in the opinion, as a whole, read in conjunction with the judgment and interpreted in light of the case's procedural history and context.

In re Hawaiʻi Elec. Light Co., 149 Hawaiʻi 239, 241, 487 P.3d 708, 710 (2021) (some citations omitted); see Lincoln, 72 Haw. at 485, 825 P.2d at 68 ("It is the duty of the trial court, on remand, to comply strictly with the mandate of the appellate court according to its true intent and meaning, as determined by the directions given by the reviewing court." (citation omitted)).

The memorandum opinion in Oki I explicitly recognized that neither party had challenged the total amount of restitution ordered by the circuit court, but instead had disputed the manner in which the restitution should be distributed.[6] 2020 WL 3027401, at *22. Based on this premise, this court determined that "PKF itself was clearly a 'direct victim' of Oki's crimes, for purposes of HRS § 706-646. No party disputes that the entity formerly known as PKF . . . now exists as Spire[;] . . . [and]

[6] On July 5, 2018, the Circuit Court entered the Findings of Fact, Conclusions of Law, and Order Granting State's Motion for Restitution (**Order Granting Restitution**). In Findings of Fact (**FOF**) 19, the court found that "total restitution of $440,158.54 has been proven beyond a reasonable doubt in the amounts specified below[.]" It does not appear that Oki specifically challenged FOF 19 in his first appeal. It is well-settled that unchallenged findings of fact are binding on the parties and this court. See State v. Rodrigues, 145 Hawaiʻi 487, 494, 454 P.3d 428, 435 (2019).

[i]t follows, therefore, that Spire, standing in the shoes of PKF, is the direct victim of Oki's crimes in this matter." Id. at *24. In Oki I, this court also determined that under partnership law principles, the other individual PKF partners (i.e., other than Oki) "[could not] be found to be owners of the PKF funds that Oki stole." Id. This court concluded:

> To the extent that the other partners were identified by the circuit court as "victims," they were identified as such solely in their capacities as partners of PKF. Any claim they have therefore only arises from their relationship to PKF, which exists as a separate entity. PKF was the sole victim and therefore the sole entity entitled to restitution. Any dispute, however, as to the proper allocation of the restitution funds amongst Chew, Takeno, Nakashima, and Nomura, in their capacities as PKF's partners at the time of the crimes, would best be resolved in a civil proceeding.

Id. at 25 (citations omitted).

In this context, Oki I stated:

> [T]he Amended Judgment of Conviction and Sentence [**(Amended Judgment**)], entered on May 24, 2018, in the Circuit Court of the First Circuit, is affirmed in part and vacated in part. We also vacate the Free-Standing Order of Restitution. We vacate the circuit court's order of restitution "into a designated account and thereafter subject to future claims by the defunct entity, PKF Pacific Hawaii, LLP, its former partners, as well as, any other entity including Spire, LLP and Grant Thornton, LLP, able to establish a legally recognized and enforceable claim by way of a civil judgment, civil order or settlement agreement," and remand this matter to the circuit court to order restitution directly to Spire, the entity formerly known as PKF. The Amended Judgment is affirmed in all other respects.

Id. (emphases added).

On remand, the Circuit Court closely adhered to "the true intent and meaning" of this court's mandate. In re Hawaiʻi Elec., 149 Hawaiʻi at 241, 487 P.3d at, 710. By affirming the Amended Judgment "in all other respects," Oki I affirmed the total amount of restitution stated in the Amended Judgment, i.e., $440,158.54.[7] The mandate upon remand from Oki I was for the

[7] The memorandum opinion in Oki I also described the restitution hearing held by the Circuit Court on May 22 and 24, 2018, and the evidence considered by the court in ordering restitution. 2020 WL 3027401, at *8-9. The evidence included, *inter alia*, a victim impact statement and request for restitution by Spire, as well as a statement by a Spire representative at the (continued...)

Circuit Court to order restitution directly to Spire. It did that. The court did not err in ordering restitution to Spire without another restitution hearing and a restitution study.

In his second point of error, Oki contends that the Circuit Court erred when, "[i]n contradiction of HRS § 706-646(3), . . . [it] "failed to consider Oki's financial ability to make restitution for the purpose of establishing the time and manner of payment."[8]

In the May 24, 2018 Amended Judgment and Free-Standing Order of Restitution, the Circuit Court ordered that "[r]estitution shall be paid as provided by HRS § 353-22.6 while [Oki] is incarcerated and thereafter at the rate of at least $30.00 [per] month." Oki did not challenge this provision of the Amended Judgment and Free-Standing Order of Restitution in his first appeal and, subsequently, on remand, the Circuit Court left this provision unchanged in the Second Amended Judgment and Amended Restitution Order.

Oki failed to raise this issue in his first appeal, and he does not state where in the record he raised it on remand; the issue is therefore waived. See HRAP Rule 28(b)(4); State v. Moses, 102 Hawaiʻi 449, 456, 77 P.3d 940, 947 (2003) ("As a

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[7](...continued)
restitution hearing. Id. The restitution amount of $440,158.54 was the sum of PKF's financial losses that the Circuit Court determined were attributable to Oki's offenses. Id. at *7, *9. As noted in Oki I, although the total losses attributable to Oki's offenses was $440,178.54, the Circuit Court appears to have made a typographical error in awarding $440,158.54 in restitution. 2020 WL 3027401, at *9 n.16.

[8] HRS § 706-646(3) (Supp. 2017) states, in relevant part:

> In ordering restitution, the court shall not consider the defendant's financial ability to make restitution in determining the amount of restitution to order. The court, however, shall consider the defendant's financial ability to make restitution for the purpose of establishing the time and manner of payment. The court shall specify the time and manner in which restitution is to be paid. While the defendant is in the custody of the department of public safety, restitution shall be collected pursuant to chapter 353 and any court-ordered payment schedule shall be suspended. Restitution shall be a dollar amount that is sufficient to reimburse any victim fully for losses . . . .

general rule, if a party does not raise an argument at trial, that argument will be deemed to have been waived on appeal . . . ."); State v. Hoglund, 71 Haw. 147, 150, 785 P.2d 1311, 1313 (1990) ("Generally, the failure to properly raise an issue at the trial level precludes a party from raising that issue on appeal.") (citation omitted).

B. Illegal Sentence

Oki contends that the Circuit Court erred by holding that his illegal sentence claim as to Counts 8 and 9 was barred as previously litigated or waived, and by denying his Motion to Correct Illegal Sentence as to Counts 8 and 9 on the merits. Both arguments involve the question whether Act 231 of the 2016 legislative session applies to Counts 8 and 9. See 2016 Haw. Sess. Laws Act 231 (**Act 231**)

The Circuit Court ruled that Oki's illegal sentence claim as to Counts 8 and 9, which was raised in his March 19, 2021 Motion to Correct Illegal Sentence, was barred by a number of legal doctrines, including "the law of the case,"[9] collateral estoppel, res judicata, waiver, and forfeiture. Act 231 repealed HRS § 708-893(1)(a), which sets out the offense charged in Counts 8 and 9. Oki contends his sentence on Counts 8 and 9 was illegal because his trial and sentencing were "proceedings" that began after the effective date of Act 231, and thus Act 231 applies to him. This issue was not litigated prior to Oki I and was not decided by this court in Oki I. Moreover, under HRPP Rule 35(a), "[t]he court may correct an illegal sentence at any time[.]" Cf. HRPP Rule 40(a)(3) (providing that an illegal sentence claim is not subject to waiver); see also Flubacher v. State, 142 Hawaiʻi 109, 114 n.7, 414 P.3d 161, 166 n.7 (2018) (noting that pursuant to HRPP Rule 35, the court may correct an illegal sentence at any

[9] The Circuit Court concluded that the "law of the case" was established by its prior ruling that Act 231 did not bar Oki's prosecution, conviction and sentence on Counts 8 and 9, and this court's decision in Oki I affirming that ruling. See Conclusions of Law (**COLs**) 1, 4-6. Relatedly, the Circuit Court concluded that Oki's illegal sentence claim was previously litigated and decided. COLs 7-8.

time). Therefore, the Circuit Court erred in concluding that Oki's illegal sentence claim as to Counts 8 and 9 was barred.

We thus address the merits of Oki's illegal sentence claim. Act 231, which consists of seventy-one sections, amends "various chapters of the Hawaii penal code, and related statutes outside the penal code, pursuant to the recommendations of the penal code review committee[,]" which had been appointed pursuant to House Concurrent Resolution no. 155, S.D. 1 (2015). See Act 231, §1. As a part of Act 231, the legislature repealed HRS § 708-893(1)(a), effective as of July 1, 2016. Id. §§ 42, 72 at 758-59, 776. In this regard, Act 231 provides:

> SECTION 35. . . . .
>
> . . . .
>
> The purpose of this part is to improve property crime enforcement by making more repeat offenders of crimes prohibited by this chapter subject to punishment for a class C felony when they commit another subject offense. This Act also balances the need to target professional theft and other property rights offenders with the need to update the State's felony theft threshold. More specifically, this part amends chapter 708, [HRS], regarding offenses against property rights by:
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> . . . .
>
> (4) Repealing a provision that subjects a person to a separate charge and enhanced penalty for using a computer to commit an underlying theft crime because it seems unduly harsh, given the prevalence of "smart phones" and other computing devices.
>
> . . . .
>
> SECTION 42. Section 708-893, [HRS], is amended by amending subsection (1) to read as follows:
>
> "(1) A person commits the offense of use of a computer in the commission of a separate crime if the person[~~:~~
>
> ~~(a) Intentionally uses a computer to obtain control over the property of the victim to commit theft in the first or second degree; or~~
>
> ~~(b) Knowingly~~] knowingly uses a computer to identify, select, solicit, persuade, coerce, entice, induce, procure, pursue, surveil, contact, harass, annoy, or alarm the victim or intended victim of the following offenses:
>
> ~~[(i)]~~ (a) Section 707-726, relating to custodial

interference in the first degree;
~~[(ii)]~~ (b) Section 707-727, relating to custodial interference in the second degree;
~~[(iii)]~~ (c) Section 707-731, relating to sexual assault in the second degree;
~~[(iv)]~~ (d) Section 707-732, relating to sexual assault in the third degree;
~~[(v)]~~ (e) Section 707-733, relating to sexual assault in the fourth degree;
~~[(vi)]~~ (f) Section 707-751, relating to promoting child abuse in the second degree;
~~[(vii)]~~ (g) Section 711-1106, relating to harassment;
~~[(viii)]~~ (h) Section 711-1106.5, relating to harassment by stalking; or
~~[(ix)]~~ (i) Section 712-1215, relating to promoting pornography for minors."

Id. §§ 35, 42, 72 at 755-56, 758-59, 776.

Act 231, Section 70 provided a savings clause, as follows:

> SECTION 70. This Act does not affect rights and duties that matured, **penalties that were incurred**, and **proceedings that were begun** before its effective date; provided that sections 54, 55, and 56 [addressing certain drug-related offenses] shall apply to offenses committed before the effective date of this Act:
>
> (1) But not yet charged as of its effective date;
>
> (2) Originally charged as a violation of section 712-1240.7 or 712-1240.8, [HRS], where the defendant:
>
> (a) Has not yet been placed in jeopardy or convicted on a plea or verdict; and
>
> (b) Waives any claim of denial of speedy trial rights for the period elapsing between the date of filing of the original charge and the date of filing of the new charge under this Act;
>
> (3) Originally charged as a violation of section 712-1240.7 or 712-1240.8, [HRS], for which the defendant has been convicted on a plea or verdict, but not yet sentenced, in which case the defendant shall be sentenced pursuant to this Act; and
>
> (4) Originally charged as a violation of section 712-1240.7 or 712-1240.8, [HRS], for which the defendant has been convicted on a plea or verdict and sentenced but for which no final judgment on appeal has been entered, in which case the appellate court shall either:
>
> (a) Remand the case for sentencing pursuant to this Act if the judgment is affirmed on appeal or if the sentence is vacated; or

> (b) Remand the case for further proceedings pursuant to this Act if the judgment is reversed and remanded for further proceedings.

Id. § 70 at 775-76 (emphases and some bracketed material added).

Based on Act 231, Oki contends that his sentence on Counts 8 and 9 was illegal and the Circuit Court thus erred in denying his Motion to Correct Illegal Sentence.[10] As noted, Oki specifically argues that because his trial and sentencing were separate "proceedings" that began *after* the effective date of Act 231, the repeal of HRS § 708-893(1)(a) applied to those proceedings.

The State, on the other hand, argues that because Oki committed the Count 8 and 9 offenses in 2013 and was indicted on these counts in April 2015, before Act 231's effective date of July 1, 2016, the "proceedings" against him "were begun *before* [Act 231's] effective date[.]" Thus, the State contends, based on the plain language of the savings clause in Act 231 Section 70, the Act did not apply to Counts 8 and 9 in this case.

Given the argument of the parties, whether Act 231 applies to Counts 8 and 9 depends on the meaning of the term "proceedings" in the Act 231 Section 70 savings clause. Our "foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself." State v. Nichol, 140 Hawaiʻi 482, 486, 403 P.3d 259, 263 (2017) (citations and internal quotation marks omitted).

Oki relies on State v. Avilla, 69 Haw. 509, 750 P.2d 78 (1988), as supporting his interpretation of the term "proceedings." In Avilla, the Hawaiʻi Supreme Court held that amendments to HRS § 804-4 (1985) in Act 139 of 1987 – allowing a defendant who has been convicted and sentenced to imprisonment to seek release on bail pending an appeal – were available to a

[10] Relatedly, Oki contends that "the Circuit Court erred in FOFs 9-10, 19-20, 22, 23-25, 27 and 32, and COLs 1, 4-14, 16-21, 23-27, 29-37 and 40-44."

defendant who was indicted prior to the effective date of the amendments, but whose motion to continue bail pending appeal was heard and denied after that date. Id. at 511, 513, 750 P.2d at 79, 81; see State v. Reis, 115 Hawaiʻi 79, 88-89, 165 P.3d 980, 989-90 (2007) (construing Avilla). Act 139 contained a savings clause that included language identical to that in Act 231's savings clause: "This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date." 69 Haw. at 511, 750 P.2d at 79. The Avilla court noted that "proceedings," as used in the savings clause, "can mean prosecutions; but within the context of the statutes regulating the release of defendants on bail, it also can mean bail proceedings." Id. at 512, 750 P.2d at 80 (emphasis added). Having found ambiguity in the term "proceedings," the court examined the legislature's intent as to how the term should be read. Id. Based on relevant legislative committee reports, the court discerned that the amendment of HRS § 804-4 "was prompted by a concern for those criminal defendants whose appeals are eventually deemed meritorious." Id. at 513, 750 P.2d at 80. The court ultimately concluded that the term "proceedings," as used in Act 139's savings clause, "refers, *inter alia*, to bail proceedings and the trial court thus erred when it ruled that the Act did not apply to prosecutions begun before its effective date . . . ." Id.

The State, in turn, relies on the supreme court's decision in Reis, decided nine years after Avilla, as supporting the State's interpretation of the term "proceedings" in the Act 231 Section 70 savings clause. Reis, 115 Hawaiʻi 79, 165 P.3d 980. As in Avilla, the court in Reis construed a savings clause that included language identical to that in Act 231. The issue in Reis was whether the trial court had properly applied Act 44 of the 2004 legislative session – amending HRS § 706-622.5 to allow probation for first-time nonviolent drug offenders – to a defendant who had committed the offense, been charged and pleaded guilty, but who had not yet been sentenced, before Act 44 took

effect. Id. at 82, 165 P.3d at 983. The State appealed and argued that under the savings clause, Act 44 did not apply in that case. Construing the Act 44's savings clause, the court ruled that: (1) "the term 'proceedings,' as employed in Act 44, section 29, unambiguously means the initiation of a criminal prosecution against a defendant through a charging instrument and subsumes within its scope hearings and other procedural events that arise as a direct result of the initial charging instrument[,]" id. at 98, 165 P.3d at 999 (emphases added); and (2) "a defendant *incurs*, at the moment he or she commits the offense, liability for the criminal penalty in effect at the time of the commission of the offense." Id. at 93, 165 P.3d at 994. The court therefore concluded that the provisions of Act 44 did not apply to a defendant whose prosecution had commenced prior to the Act's effective date, regardless of the date of the defendant's subsequent conviction or sentence. Id. at 98, 165 P.3d at 999.

The Reis court distinguished Avilla, explaining that "[i]t is not the ameliorative nature of a statutory provision that has prompted us in the past to construe the term 'proceedings' as meaning something other than the initiation of a criminal prosecution but, rather, the unique subject matter of the act in question." Id. at 88, 165 P.3d at 989 (emphasis omitted). The Reis court elaborated that its holding in Avilla was because:

> the subject matter of Act 139—which pertained solely to bail, its availability, and related conditions—injected ambiguity into the term "proceedings." [Avilla, 69 Haw.] at 512-13, 750 P.2d at 80. We noted that, while proceedings normally would mean "prosecutions," in the context of a statute concerned solely with *bail*, "proceedings" could also be interpreted as *bail* proceedings. Id. at 512, 750 P.2d at 80. It was that ambiguity, and that ambiguity alone, that led us to the relevant committee reports in order to determine that the legislature's concerns in enacting the measure could be addressed by allowing Avilla to benefit from the amendments. Id. at 513, 750 P.2d at 80-81.

Reis, 115 Hawaiʻi at 89, 165 P.3d at 990 (footnote omitted). The court thus concluded that "'proceedings,' absent ambiguity

arising from the subject matter peculiar to the legislation, means **criminal prosecutions of which sentencing hearings are an inseparable component**[.]" Id. at 97-98, 165 P.3d at 998-99 (emphases added).

The Hawaiʻi Supreme Court's holding in Reis, decided in 2007, is directly on point. The savings clause in Act 231 Section 70 mirrors that at issue in Reis. See 115 Hawaiʻi at 84-85, 165 P.3d at 985-86. We must presume that the legislature is aware of existing precedent when enacting statutes and therefore knew that a defendant against whom a criminal prosecution had been initiated under HRS § 708-893(1)(a) could not benefit from the repeal of that statute in Act 231. See Reis, 115 Hawaiʻi at 97, 165 P.3d at 998 ("[W]e must presume that the legislature knows the law when enacting statutes[.]") (citing Agustin v. Dan Ostrow Constr. Co., 64 Haw. 80, 83, 636 P.2d 1348, 1351 (1981)). As a result, we conclude the legislature intended that defendants against whom criminal prosecutions had already begun at the time Act 231 was enacted into law would be prosecuted under the prior version of the law.

The State further argues that construing "proceedings" to mean trial and sentencing as discrete proceedings, as Oki contends, would render superfluous the provisions of section 70 that provide exceptions to the savings clause for certain drug-related offenses. See Act 231, § 70 at 775-76. We agree. The legislature expressly provided in Act 231 Section 70 for exceptions to the savings clause for section 54 (amending §712-1241(1)), section 55 (amending §712-1242(1)), and section 56 (repealing §712-1240.8) including, *inter alia*, for certain offenses committed before the Act's effective date that had been charged and were pending at specified points within the criminal process. Specifically, Section 70 provides an exception to the savings clause for offenses originally charged under HRS § 712-1240.7 or § 712-1240.8 where the defendant: has not yet been placed in jeopardy or convicted and waives speedy trial rights; has been convicted but not yet sentenced; has been convicted and

sentenced, but no final judgment on appeal has been entered. See Act 231, § 70(2), (3) and (4) at 775-76. If the legislature had intended "proceedings" in Section 70 to mean separate parts of the criminal process such as the "trial" and "sentencing," as Oki contends, there would have been no reason for the legislature to provide the type of explicit detail in the exceptions to the savings clause set out in Section 70, subsections (2) through (4).

Further, and a separate reason that the repeal of HRS § 708-893(1)(a) in Act 231 does not apply here, Reis expressly held under an identical savings clause that "a defendant incurs, at the moment he or she commits the offense, liability for the criminal penalty in effect at the time of the commission of the offense." 115 Hawaiʻi at 93, 165 P.3d at 994. In other words, Oki incurred liability for the criminal penalty in effect at the time he committed the offenses in 2013, and at that time Use of a Computer in the Commission of a Separate Crime in violation of HRS § 708-893(1)(a) was in effect.

In sum, Avilla is distinguishable from this case. As the supreme court explained in Reis:

> Avilla, therefore, does not stand, as Reis contends, for the proposition that this court construes the language of the standard savings clause "in a manner that best effectuates the underlying legislative intent and purpose of that particular statute." We resort to legislative history only when there is an ambiguity in the plain language of the statute. Rather, Avilla stands for the unremarkable proposition that, if a statutory amendment on a single subject addresses proceedings other than criminal prosecutions — and the numerous hearings subsumed within criminal prosecutions, including hearings on evidentiary matters, motions for reconsideration, and **sentencing** — so as to give rise to an ambiguity, the defendant may benefit from the amendment if doing so would comport with the intent of the legislature as reflected in the amendment's underlying legislative history.

115 Hawaiʻi at 90, 165 P.3d at 991 (emphasis added and citation omitted).

Here, the statutory amendment eliminated an offense — it did not involve a subject such as bail proceedings that was not part and parcel of a criminal prosecution. Thus, there was no ambiguity, and no reason to deviate from the general rule that

"proceedings" in a savings clause means "prosecutions." Applying the commonly-accepted meaning of "proceedings," Oki's prosecution began before Act 231 was enacted. Id. at 89-90, 165 P.3d at 990-91.

Therefore, despite the Legislature's remedial purpose in repealing HRS § 708-893(1)(a), we must apply the plain meaning of "proceedings" and give effect to the intent of the Legislature. See Young v. United States, 943 F.3d 460, 464 (D.C. Cir. 2019) ("The purpose of a statute, even if remedial, cannot overcome the plain meaning of the statute's text.").

Oki's reliance on In re Estrada, 408 P.2d 948 (Cal. 1965) and State v. Tapp, 490 P.2d 334 (Utah 1971) is equally misplaced. Estrada is inapplicable here. That case involved a general savings statute that is unlike the savings clause in this case. 408 P.2d at 952 n.2. Moreover, Estrada reflected a presumption about legislative intent when an ameliorative amendment contains no express savings clause. The presumption in Estrada "does not govern when the statute at issue includes a 'saving clause' providing that the amendment should be applied only prospectively." People v. Conley, 373 P.3d 435, 439 (Cal. 2016). In Tapp, the Utah Supreme Court held that a defendant could benefit from a lesser penalty provided by a statutory amendment that became effective before the defendant's trial and sentence. 490 P.2d at 336. The Utah court's analysis, however, conflicts with prevailing Hawaiʻi law under Reis. In Tapp, the court briefly addressed a portion of a savings clause that provided "[t]he repeal of a statute does not . . . affect . . . any penalty incurred . . . under or by virtue of the statute repealed." Id. at 336. The court in Tapp concluded that "[i]nasmuch as no penalty is incurred until the defendant is convicted, judgment entered and sentence imposed, that statute does not affect the propriety of doing so in accordance with the law as it exists at that time." Id. The ruling in Tapp conflicts with the Hawaiʻi Supreme Court's holding in Reis that "a defendant *incurs*, at the moment he or she commits the offense,

liability for the criminal penalty in effect at the time of the commission of the offense." 115 Hawaiʻi at 93, 165 P.3d at 994. Indeed, in Reis, the Hawaiʻi Supreme Court expressly rejected the ruling in Tapp. 115 Hawaiʻi at 92, 92 n.24, 165 P.3d at 993, 993 n.24. Thus, neither Estrada nor Tapp supports Oki's arguments in this case.

We conclude the Circuit Court did not err in denying Oki's Motion to Correct Illegal Sentence as to Counts 8 and 9.

III. Conclusion

For the reasons discussed above, we affirm the Second Amended Judgment, filed on February 10, 2021, and the Amended Free-Standing Order of Restitution, filed on February 11, 2021, by the Circuit Court of the First Circuit. With regard to the "Findings of Fact, Conclusions of Law, and Order Denying [Oki's] Motion to Correct Illegal Sentence," filed on March 8, 2022, we vacate it to the extent the Circuit Court determined that Oki's illegal sentence claim was barred by law of the case, collateral estoppel, res judicata, waiver or forfeiture; but we affirm it to the extent the Circuit Court determined that Oki's sentence is not illegal.

DATED: Honolulu, Hawaiʻi, September 19, 2023.

On the briefs:

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/s/ Lisa M. Ginoza
Chief Judge

/s/ Katherine G. Leonard
Associate Judge

CONCURRING AND DISSENTING OPINION BY WADSWORTH, J.

I concur with the majority's conclusion and related analysis that: (1) the Circuit Court of the First Circuit (**Circuit Court**) did not err in ordering restitution to Spire Hawaii, LLP (**Spire**) without another restitution hearing and a restitution study; (2) Defendant-Appellant Patrick H. Oki (**Oki**) waived his argument that the Circuit Court "failed to consider [his] financial ability to make restitution for the purpose of establishing the time and manner of payment"; and (3) the Circuit Court erred in concluding that Oki's illegal sentence claim as to Counts 8 and 9 was barred.

However, as to the merits of Oki's illegal sentence claim, I respectfully dissent from the majority's conclusion that the Circuit Court did not err in denying Oki's Motion to Correct Illegal Sentence as to Counts 8 and 9.

Oki was sentenced to twenty years of incarceration on Counts 8 and 9 for using a computer to commit theft in the first degree, in violation of former Hawaii Revised Statutes (**HRS**) § 708-893(1)(a).[1] The next highest sentence he received was ten years of incarceration on other counts, including on Counts 1, 2, and 3 for committing theft in the first degree, in violation of HRS §§ 708-830.5(1)(1) and -830(2). In other words, Oki's prison sentence was effectively doubled from ten to twenty years for using a computer to commit theft. This sentence was imposed at an October 17, 2017 hearing that occurred a full 15 months after the legislature repealed HRS § 708-893(1)(a),[2] which served as

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[1] Before repeal, HRS § 708-893 (2014) provided, in relevant part:

> (1) A person commits the offense of use of a computer in the commission of a separate crime if the person:
>
> (a) Intentionally uses a computer to obtain control over the property of the victim to commit theft in the first or second degree[.]

[2] During the 2016 legislative session, the legislature repealed HRS § 708-893(1)(a), effective July 1, 2016. See 2016 Haw. Sess. Laws Act 231 (**Act 231**), §§ 42, 72 at 758-59, 776. Specifically, Act 231, section 42, stated, in relevant part:

> SECTION 42. Section 708-893, Hawaii Revised Statutes, is amended by amending subsection (1) to read as follows:
>
> "(1) A person commits the offense of use of a

(continued...)

the statutory basis for Oki's convictions and sentencing on Counts 8 and 9.[3] Moreover, in repealing HRS § 708-893(1)(a) and abolishing the crime of using a computer to commit theft, the legislature expressly stated its purpose as follows: "[to] repeal[] a provision that subjects a person to a separate charge and enhanced penalty for using a computer to commit an underlying theft crime because it seems unduly harsh, given the prevalence of 'smart phones' and other computing devices." Act 231, § 35(4) at 756 (emphases added).

As the majority observes, the legislation that repealed HRS § 708-893(1)(a) – Act 231 – also amended various chapters of the Hawaiʻi Penal Code and related statutes outside the Penal Code. With respect to all of these various amendments, Act 231, section 70, provided a common savings clause:

> SECTION 70. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date; provided that sections 54, 55, and 56 [addressing certain drug-related offenses] shall apply to offenses committed before the effective date of this Act:
>
> (1) But not yet charged as of its effective date;
>
> (2) Originally charged as a violation of section 712-1240.7 or 712-1240.8, [HRS], where the defendant:
>
> (a) Has not yet been placed in jeopardy or convicted on a plea or verdict; and
>
> (b) Waives any claim of denial of speedy trial rights for the period elapsing between the date of filing of the original charge and the date of filing of the new charge under this Act;
>
> (3) Originally charged as a violation of section

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[2](...continued)
computer in the commission of a separate crime if the person[~~:~~

~~(a) Intentionally uses a computer to obtain control over the property of the victim to commit theft in the first or second degree; or~~

. . . ."

Id. § 42, at 758 (alterations in original).

[3] Oki's February 2017 jury-waived trial occurred seven months after the July 1, 2016 effective date of Act 231.

> 712-1240.7 or 712-1240.8, [HRS], for which the defendant has been convicted on a plea or verdict, but not yet sentenced, in which case the defendant shall be sentenced pursuant to this Act; and
>
> (4) Originally charged as a violation of section 712-1240.7 or 712-1240.8, [HRS], for which the defendant has been convicted on a plea or verdict and sentenced but for which no final judgment on appeal has been entered, in which case the appellate court shall either:
>
> (a) Remand the case for sentencing pursuant to this Act if the judgment is affirmed on appeal or if the sentence is vacated; or
>
> (b) Remand the case for further proceedings pursuant to this Act if the judgment is reversed and remanded for further proceedings.

Id. § 70 at 775-76 (emphases added).

Under this savings clause, generally speaking, "proceedings" that were begun before Act 231's effective date are not affected by Act 231 and the various revisions it made to the Penal Code and related statutes. Oki contends, however, that his trial and sentencing were "proceedings" that were begun after, not before, the July 1, 2016 effective date of Act 231, and thus the repeal of HRS § 708-893(1)(a) applied to those proceedings.

As the majority's analysis reveals, the Hawaiʻi Supreme Court has interpreted the term "proceedings" in two particularly relevant cases — State v. Avilla, 69 Haw. 509, 750 P.2d 78 (1988), and State v. Reis, 115 Hawaiʻi 79, 165 P.3d 980 (2007). Both cases involved amending legislation containing language identical to that in Act 231's savings clause: "This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date." Avilla, 69 Haw. at 511, 750 P.2d at 79 (quoting 1987 Haw. Sess. Laws Act 139 (**Act 139**), § 10 at 316); Reis, 115 Hawaiʻi at 84, 165 P.3d at 985 (quoting 2004 Haw. Sess. Laws Act 44 (**Act 44**), § 29 at 227). I generally agree with the majority's description of the holdings in Avilla and Reis, but I respectfully disagree with the conclusion that Reis is directly

on point and Avilla is distinguishable from this case.

In Avilla, the amending legislation allowed defendants who had been convicted and sentenced to imprisonment to seek release on bail pending appeal. The supreme court observed that "proceedings," as used in the savings clause of the amending legislation, Act 139, "can mean prosecutions; but within the context of the statutes regulating the release of defendants on bail, it also can mean bail proceedings." 69 Haw. at 512, 750 P.2d at 80. Given this ambiguity, the court examined the legislature's intent as to the meaning of the term "proceedings," and determined that the amending legislation "was prompted by a concern for those criminal defendants whose appeals are eventually deemed meritorious." Id. at 512-13, 750 P.2d at 80. The court reasoned:

> In light of this regard for the plight of persons whose convictions may well be set aside on appeal, we cannot conclude the legislature meant to deny every convicted criminal whose prosecution began before the amendment of HRS § 804-4 became effective an opportunity to seek release on bail pending appeal. An acceptance of the State's position would be inconsistent with the legislative purpose to prevent the injustice of a criminal defendant, particularly one whose release would pose no danger to others, being imprisoned while there is pending a substantial question of law or fact that casts doubt on the validity of his conviction.

Id. at 513, 750 P.2d at 80. The court therefore concluded that the term "proceedings," as used in Act 139's savings clause, "refers, *inter alia*, to bail proceedings and the trial court thus erred when it ruled the Act did not apply to prosecutions begun before its effective date . . . ." Id. at 513, 750 P.2d at 80-81.

In Reis, on the other hand, the court ruled that the term "proceedings," as used in different amending legislation, Act 44, "unambiguously means the initiation of a criminal prosecution against a defendant through a charging instrument and subsumes within its scope hearings and other procedural events that arise as a direct result of the initial charging instrument." 115 Hawaiʻi at 98, 165 P.3d at 999. Importantly,

Reis distinguished Avilla as involving amending legislation whose unique subject matter "injected ambiguity into the term 'proceedings.'" Id. at 89, 165 P.3d at 990 (citing Avilla, 69 Haw. at 512-13, 750 P.2d at 80). The Reis court thus concluded that "'proceedings,' absent ambiguity arising from the subject matter peculiar to the legislation, means criminal prosecutions of which sentencing hearings are an inseparable component[.]" Id. at 97-98, 165 P.3d at 998-99 (footnote omitted and emphasis added).

The pertinent provisions of Act 231, which repealed HRS § 708-893(1)(a), and thereby abolished the offense of using a computer to commit theft, share relevant similarities with the amending legislation in Avilla. Although Act 231 amends a variety of penal code provisions and related outside statutes, the specific subject matter of section 42 pertains solely to the repeal of HRS § 708-893(1)(a). Moreover, section 35(4) sets forth the specific purpose of this targeted change – "repealing a provision that subjects a person to a separate charge and enhanced penalty for using a computer to commit an underlying theft crime because it seems unduly harsh, given the prevalence of 'smart phones' and other computing devices." Act 231, § 35(4) at 756 (emphases added). This explicit legislative purpose to eliminate an "unduly harsh" punishment for using a computer in this manner injects ambiguity into the term "proceedings," as used in section 70 (the savings clause) and applied to section 42. In this unique context, "proceedings" can mean trial and sentencing proceedings begun after the Act's effective date for pre-effective-date violations of HRS § 708-893(1)(a). See Avilla, 69 Haw. at 512, 750 P.2d at 80; Reis, 115 Hawaiʻi at 88-89, 165 P.3d at 989-90.

The State argues, and the majority concludes, that construing "proceedings" to mean trial and sentencing proceedings would render superfluous the provisions of section 70 that provide exceptions to the savings clause for certain drug-related offenses. See Act 231, § 70 at 775-76 (providing that Act 231

"sections 54, 55, and 56 shall apply to offenses committed before the effective date of this Act[,]" as further specified). Again, I respectfully disagree. Sections 54 through 56 serve a different purpose than Section 42. Section 56 repealed HRS § 712-1240.8 (methamphetamine trafficking in the second degree), and sections 54 and 55 amended HRS § 712-1241(1) (promoting a dangerous drug in the first degree) and HRS § 712-1242(1) (promoting a dangerous drug in the second degree), respectively, in order to expand their application to, among other things, methamphetamine distribution.[4] See State v. Bovee, 139 Hawaiʻi 530, 543, 394 P.3d 760, 773 (2017). Because of the complex nature of these revisions, they required specific exceptions to Act 231's savings clause. Construing "proceedings" to mean trial and sentencing proceedings for purposes of Section 42 does not render superfluous Act 231's savings clause exceptions for sections 54, 55, and 56.

In light of the legislature's remedial purpose in enacting section 42 and abolishing the offense of using a computer to commit theft, I conclude that the term "proceedings," as used in section 70 and applied to section 42, refers to trial and sentencing proceedings begun after the Act's effective date for pre-effective date violations of HRS § 708-893(1)(a). See

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[4] Act 231 states in relevant part:

> SECTION 49. The purpose of this part is to amend chapter 712, Hawaii Revised Statutes, regarding offenses against public health and morals, to:
>
> . . . .
>
> (3) Limit the offense of methamphetamine trafficking to instances of manufacturing the drug or distributing it to minors, which merit mandatory prison terms, so that common methamphetamine offenses involving distribution or possession of small amounts may be prosecuted as promotion of dangerous drugs, which gives the sentencing court the discretion to impose probation and drug treatment when appropriate to manage these offenders.

Act 231, § 49 at 761-62.

Avilla, 69 Haw. at 513, 750 P.2d at 80. Acceptance of the State's contrary position is inconsistent with the legislative purpose to eliminate an "unduly harsh" separate charge and enhanced penalty for using a computer to commit an underlying theft crime. Accordingly, I conclude that Oki's trial and sentencing as to Counts 8 and 9 were "proceedings" begun after the effective date of Act 231, and the Circuit Court erred in denying Oki's Motion to Correct Illegal Sentence as to Counts 8 and 9.[5]

For these reasons, I would vacate the Circuit Court's February 10, 2021 Second Amended Judgment of Conviction and Sentence as to Counts 8 and 9, and affirm the Second Amended Judgment in all other respects. I would also vacate the Circuit Court's March 8, 2022 Findings of Fact, Conclusions of Law, and Order Denying [Oki's] Motion to Correct Illegal Sentence, and remand the case to the Circuit Court with instructions to dismiss Counts 8 and 9 and enter an amended judgment that reinstates the convictions and sentences on the non-dismissed counts and reflects the dismissal of Counts 8 and 9.

/s/ Clyde J. Wadsworth
Associate Judge

[5] The majority also determines that under Reis, Oki incurred liability for the criminal penalty in effect at the time he committed the Count 8 and 9 offenses in 2013. The State does not make this argument in its answering brief, and I would deem the argument waived. In any event, the legislature's express purpose to undo an "unduly harsh" "enhanced penalty" for using a computer to commit an underlying theft crime undermines the notion that Oki incurred the liability for such a penalty in these circumstances.