SCWC-22-0000129

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I,
Respondents/Plaintiff-Appellee,

vs.

PATRICK H. OKI,
Petitioner/Defendant-Appellant.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-22-0000129 and CAAP-21-0000278 (consolidated);
CR. NO. 1PC151000488)

DISSENTING OPINION
(By: McKenna, J., in which Eddins, J., joins)

We respectfully dissent on the issue of Oki's sentencing on the use of computer counts, as the crime of using a computer in the commission of theft was repealed before Oki's trial and sentencing. First, as pointed out by Justice Wilson in his dissent from the denial of Oki's first application for writ of certiorari, the repealed crime constituted cruel or unusual punishment under the Hawai'i Constitution. Second, as explained by Judge Wadsworth in his dissent from the ICA's decision, the

term "proceeding" in the savings clause is ambiguous in this context; as such, pursuant to State v. Avilla, 69 Haw. 509, 750 P.2d 78 (1988), and the rule of lenity, the use of computer counts should have been dismissed.

1. Oki's first application for writ of certiorari

In Oki's first application for writ of certiorari, he argued that the ICA erred in affirming the denial of the motion to dismiss the use of computer counts, because that crime had been repealed as "unduly harsh" and constituting cruel and unusual punishment in violation of the federal and state constitutions. This court denied certiorari over Justice Wilson's dissent. State v. Oki, No. SCWC-18-0000501, 2020 WL 6115119 (Haw. Oct. 16, 2020) (order rejecting app. for cert.).

Oki argued the use of computer twenty-year sentence should be set aside based on the federal and state constitutions' "cruel and unusual punishment" clauses.[1] Justice Wilson noted that after Oki committed the alleged offenses and was charged, but before Oki's trial and sentencing, the legislature repealed the crime for which Oki was charged in counts 8 and 9, the use of a computer to commit theft offense. 2020 WL 6115119, at *1 (citing 2016 Haw. Sess. Laws Act 231, § 42 at 758-59).

[1] Again, Article I, Section 7 of the Hawai'i Constitution actually prohibits the infliction of cruel "or" unusual punishment.

Justice Wilson did note that under Act 231's savings clause, the act did not affect "proceedings that were begun before its effective date." Id. (quoting 2016 Haw. Sess. Laws Act 231, § 70 at 775). He opined, however, that Oki's trial and sentencing are "proceedings" that began after the effective date of the act. 2020 WL 6115119, at *3. Justice Wilson relied on Avilla, 69 Haw. 509, 750 P.2d 78. Oki, 2020 WL 6115119, at *2-3. Avilla contained identical savings clause language. This court "defined the term 'proceeding' to include a sentencing hearing as a proceeding begun after the effective date of the amending statute." Oki, 2020 WL 6115119, at *2. Avilla rejected the position that "proceedings" must be interpreted to mean "prosecutions," and "noted that the interpretation of 'proceedings' to include sentencing comported with the remedial purpose of the [repealed] statute to provide for release on bail." Oki, 2020 WL 6115119, at *2. Justice Wilson noted that Act 231's repeal of the use of a computer subsection was also remedial; therefore, he reasoned, as in Avilla, "[i]t is consistent with this remedial purpose to interpret the sentencing and trial of . . . Oki as 'proceedings' begun after the effective date of Act 231." Oki, 2020 WL 6115119, at *3 (footnote omitted).

Hence, Justice Wilson would have remanded to the circuit court with directions to dismiss counts 8 and 9 and impose a

concurrent sentence of ten years with credit for time served. Id.

2. Oki's present certiorari proceedings

On March 19, 2021, Oki filed a motion to correct illegal sentence. Oki asserted the circuit court had the power to correct Oki's illegal sentence in counts 8 and 9 pursuant to Hawai'i Rules of Penal Procedure ("HRPP") Rule 35(a) (eff. 2003), which provides in part that the court "may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner" upon a motion filed within 90 days of the sentence's imposition.

Oki correctly asserted his sentence for counts 8 and 9 was illegal because the offense of the use of a computer in the commission of a separate theft, HRS § 708-893(1)(a), was repealed before his trial and sentencing. Citing State v. Von Geldern, 64 Haw. 210, 215, 638 P.3d 319, 323 (1981), Oki noted we construe remedial legislation liberally to accomplish the purpose of its enactment; he emphasized that section of Act 231, Section 42, was an ameliorative[2] and remedial sentencing provision. The legislature had stated it was "[r]epealing a provision that subjects a person to a separate charge and

[2] An ameliorative statute is a "legislative change which reduces the penalty for criminal behavior." Reis, 115 Hawai'i at 99-100, 165 P.3d at 1000-01 (Acoba, J., dissenting) (cleaned up).

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." 2016 Haw. Sess. Laws Act 231, § 35 at 756.

Oki acknowledged the savings clause contained in section 70 of Act 231.[3] He characterized it as a general savings clause that applies to all the sections of the act except section 54, 55, and 56 (the drug offenses). Oki thus predicted a potential counter-argument based on State v. Reis, 115 Hawai'i 79, 165 P.3d 980 (2007), which held that "'proceedings,' absent ambiguity arising from the subject matter peculiar to the legislation, means criminal prosecutions." 115 Hawai'i at 97-98, 165 P.3d at 998-99. Oki acknowledged an argument could be made that because the legislature laid out exceptions for the drug offenses, but not the use of a computer offense, it did not intend to allow the repeal of the use of a computer offense to be retroactively applied; Oki reasoned, however, that "[t]here is no case law supporting that silence or lack of language in a provision outweighs the explicit written intent of the legislature in the statute itself." Oki continued, "the legislature is presumed to

[3] Oki indicated that HRS §§ 1-3 (2009) and 1-11, which apply to amendments with no savings clause, do not apply to his case. HRS § 1-3 provides, "No law has any retrospective operation, unless otherwise expressed or obviously intended." HRS § 1-11 provides, "No suit or prosecution pending at the time of the repeal of any law, for any offense committed, or for the recovery of any penalty or forfeiture incurred under the law so repealed, shall be affected by such repeal."

know the law when enacting statutes, including this court's interpretation of statutory language"; therefore, he concluded, it is presumed that the legislature was aware of Reis and Avilla when it enacted Act 231, both of which interpreted identical savings clause language, quoting Reis, 115 Hawai'i at 97, 165 P.3d at 998. Oki posited that Reis concluded "proceedings" means criminal prosecutions absent ambiguity, whereas Avilla demonstrates that the subject matter of an act can create ambiguity where normally none exists. Oki thus argued Act 231 is more similar to Avilla than Reis because the subject matter of eliminating an offense and its penalty for a behavior that the legislator no longer viewed as criminal, as well as its punishment as "unduly harsh," created ambiguity.

Oki also quoted the Black's Law Dictionary definition of "proceeding," "an act or step that is part of a larger action," to argue that "a trial or sentencing proceeding is an 'act or step' within the larger criminal action and thus, fits within the definition of 'proceeding.'" Proceeding, Black's Law Dictionary)

Oki also relied on In re Estrada, 408 P.2d 948 (Cal. 1965), in which the California Supreme Court held that

> [w]hen the legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper . . . . It is an inevitable inference that the legislature must have intended that the new statute imposing the lighter penalty now deemed to be sufficient

> should apply to every case to which it constitutionally could apply[.]

Estrada, 408 P.2d at 951. Oki argued his case is even more compelling, for the legislature did not merely reduce the punishment for use of a computer, but eliminated the offense entirely.

Oki acknowledged that Reis said "courts in other jurisdictions have analyzed the phrase 'penalties incurred' in the context of a savings clause and have concluded that a defendant incurs the penalty at the time of the commission of the offense," citing Reis, 115 Hawai'i at 91, 165 P.3d at 992. Oki distinguished those cases, however, as guarding against ex post facto violations.

Instead, Oki analogized his case to a Utah case, State v. Tapp, 490 P.2d 334 (Utah 1971), upon which Justice Acoba's dissent in Reis had relied. See Reis, 115 Hawai'i at 92 & n.24, 165 P.3d at 993 & n.24 (rejecting the dissent's reliance on Tapp); Reis, 115 Hawai'i at 111-13, 165 P.3d at 1012-14 (Acoba, J., dissenting) (relying on Tapp to opine the court could have applied the statute in effect at the time of the defendant's sentencing). In Tapp, the Utah Supreme Court determined that no penalty is incurred until the defendant is convicted, judgment entered, and sentencing imposed. 490 P.2d at 336.

Oki concluded he should not have been tried, convicted, and sentenced under the use of a computer statute subsection that was repealed by Act 231 before his trial and sentencing. He contended the circuit court should dismiss counts 8 and 9 to correct his illegal sentence and resentence him accordingly.

The State opposed Oki's motion to correct illegal sentence. First, it erroneously contended our court's denial of certiorari rendered the ICA's judgment on appeal a "final judgment"[4] based on Hawai'i Rules of Appellate Procedure ("HRAP") Rule 40.1[5] and HRAP Rule 36(c),[6] and that, therefore, the previous rulings of the circuit court and ICA were the "law of the case." According to the State, the circuit court and ICA had already determined that Act 231 did not bar Oki's prosecution, conviction, and sentence for counts 8 and 9. The State pointed to footnote 22 in the ICA's memorandum opinion, which addressed Act 231's savings clause. The State then incorrectly framed this court's

[4] Under Hawai'i law, in contrast with federal law, there is no final judgment for res judicata purposes unless appeals have been exhausted. See E. Sav. Bank, FSB v. Esteban, 129 Hawai'i 154, 160, 296 P.3d 1062, 1068 (2013).

[5] HRAP Rule 40.1(h) (eff. 2020) provides in relevant part, "The rejection of an application for certiorari shall be final. . . ."

[6] HRAP Rule 36(c) (eff. 2016) provides in relevant part, "The intermediate court of appeals' judgment is effective as follows . . . (2) if an application for a writ of certiorari is filed, (A) upon entry of the supreme court's order dismissing or rejecting the application . . . ."

denial of certiorari as a "finding" that the ICA's memorandum opinion did not contain any alleged grave errors of law or fact.[7]

Next, the State argued that the doctrines of collateral estoppel, issue preclusion, claim preclusion, and res judicata barred Oki's illegal sentence argument.

The State further argued that, even if Oki were to take the position that he never previously argued that Act 231 barred his conviction and sentence for counts 8 and 9 (and had only argued cruel and unusual punishment), forfeiture principles still barred Oki from raising that claim. The State argued Oki had repeatedly previously conceded that Act 231 did not bar his prosecution for counts 8 and 9.

Finally, the State maintained Oki's illegal sentence argument was "patently frivolous." The State relied on HRS § 1-11, which provides, "No suit or prosecution pending at the time of the repeal of any law, for any offense committed, or for the recovery of any penalty or forfeiture incurred under the law so repealed, shall be affected by such repeal." (Emphasis added.) Next, relying on Reis, the State maintained that the word "proceeding" in Act 231 means "prosecution."[8] The State

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[7] It is axiomatic that a denial of certiorari does not signify adoption or affirmance of a lower court's decision.

[8] The State also cited an earlier opinion of this court in State v. Van den Berg, 101 Hawai'i 187, 191, 65 P.3d 134, 138 (2003), which it says (continued. . .)

distinguished Avilla, in which this court determined the term "proceedings" was ambiguous, asserting Avilla applied to "statutory amendments on a single subject matter" (bail proceedings), whereas Act 231 was comprehensive legislation, more similar to the act in Reis. Reis, 115 Hawai'i at 89-90, 165 P.3d at 990-91.

The State also relied on Reis to argue that the "penalties incurred" language in the savings clause foreclosed Oki's argument, for a "defendant incurs, at the moment [they] commit[] the offense, liability for the criminal penalty in effect at the time of the commission of the offense." Reis, 115 Hawai'i at 92-93, 165 P.3d at 994. The State posited that Oki incurred liability for the use of a computer offense when his criminal course of conduct was completed, in October and November of 2013 for counts 8 and 9, respectively; thus, he incurred those penalties long before Act 231 took effect in 2016.

In his reply, Oki additionally asserted the State's filing gave the erroneous impression that Oki's HRPP Rule 35 illegal sentence argument had already been litigated and decided by the circuit court and ICA. He pointed out that only Oki's cruel and unusual punishment claim had been addressed. Oki further argued

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(. . .continued)
interpreted an identical savings clause and reached the same conclusion as Reis. See infra note 9 for a brief summary of Van den Berg.

that forfeiture does not apply to his case because under HRPP Rule 35, an illegal sentence may be corrected at any time. Oki also noted that HRPP Rule 40(a)(3) (eff. 2006) provides that a motion to correct an illegal sentence is not waived by failure to raise it before the trial court or on appeal. Oki distinguished the forfeiture cases cited by the State as not involving illegal sentencing.

The circuit court erred in denying Oki's motion to correct illegal sentence. As Judge Wadsworth correctly pointed out, Reis only held that "'proceedings,' absent ambiguity arising from the subject matter peculiar to the legislation, means criminal prosecutions." State v. Oki, No. CAAP-22-0000129, 2023 WL 6130310, at *12 (Haw. App. Sept. 19, 2023) (mem. op.) (Wadsworth, J., concurring and dissenting) (citing Reis, 115 Hawai'i at 97-98, 165 P.3d at 998-99). Judge Wadsworth opined that the repealing legislation shared relevant similarities with that in Avilla, not Reis. Id. First, although Act 231 is broad, section 42 pertains solely to the repeal of HRS § 708-893(1)(a). Id. Second, the express legislative purpose was to eliminate an "unduly harsh" separate charge and enhanced penalty for use of a computer. Id. (citing 2016 Haw. Sess. Laws Act 231, § 35(4) at 756). That purpose, according to Judge Wadsworth, injected ambiguity into the term "proceedings" as used in the savings clause "and applied to section 42." Oki,

2023 WL 6130310, at *12. Thus, "[i]n this unique context, 'proceedings' can mean trial and sentencing proceedings begun after the Act's effective date for pre-effective date violations." Id.

Judge Wadsworth rejected the State and majority's conclusion 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." Id. He opined that "[b]ecause of the complex nature" of the sections amending those drug-related offenses, "they required specific exceptions to Act 231's savings clause." Id. He further opined that the State's position was inconsistent with the legislative purpose to eliminate an "unduly harsh" separate charge and twenty additional year "enhanced penalty" for using a computer to commit an underlying theft crime. Oki, 2023 WL 6130310, at *13 (Wadsworth, J., concurring and dissenting). He concluded Oki's trial and sentencing as to counts 8 and 9 were "proceedings" begun after the effective date of Act 231. Id.

Finally, Judge Wadsworth noted the State did not make any argument regarding the "penalties incurred" phrase in its answering brief, and indicated he would have thus deemed such argument waived. Oki, 2023 WL 6130310, at *13 n.5 (Wadsworth, J., concurring and dissenting). In any event, in his view, the

legislature's express purpose to undo an "unduly harsh" enhanced penalty for the use of a computer in commission of the underlying crime "undermines the notion that Oki incurred the liability for such a penalty in these circumstances." Id. Thus, Judge Wadsworth would have held the circuit court erred in denying Oki's motion to correct illegal sentence. Oki, 2023 WL 6130310, at *13.

3. Oki's sentence for counts 8 and 9 was illegal

Our primary goal in statutory interpretation is to ascertain and effectuate the intention of the legislature. State v. Sumera, 97 Hawai'i 430, 436, 39 P.3d 557, 563 (2002) (citations omitted). We start with the plain language of a statute to determine legislative intent. Id. This court has previously interpreted the "penalties that were incurred" and "proceedings that were begun" savings clause language in Avilla and Reis.

In 1988, in Avilla, this court considered whether a substantially similar savings clause precluded the defendant from petitioning for release on bail pursuant to a statute amended after the defendant's indictment, but before his conviction and sentencing. 69 Haw. at 509-11, 750 P.2d at 78-79. The savings clause provided, "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 defendant argued "proceedings" as applied to his case should be read as appellate proceedings; the state argued "proceedings" means prosecutions. 69 Haw. at 512, 750 P.2d at 80.

We determined the term "proceedings" was ambiguous, for it could mean prosecutions, "but within the context of the statutes regulating the release of defendants on bail, it [could] also mean bail proceedings." Id. We found no clues as to legislative intent in the context of the amending act as a whole, nor in the history of the act. 69 Haw. at 513, 750 P.2d at 80. We noted, however, that the relevant legislative committee reports revealed the amendment was prompted by a concern for defendants "whose appeals are eventually deemed meritorious"; thus, we stated we could not "conclude that the legislature meant to deny every convicted criminal whose prosecution began" before the applicable amendment "an opportunity to seek release on bail pending appeal," for to do so "would be inconsistent with the legislative purpose to prevent . . . injustice." Id.

In 2007, this court interpreted savings clause language identical to that in Avilla, but with a different outcome, over the dissent of Justice Acoba. In Reis, the circuit court sentenced the defendant as a first-time offender rather than a repeat-offender under a statute that was amended to give the

judge sentencing discretion; the act had an effective date after the defendant's conduct, charging date, and guilty plea, but before sentencing. 115 Hawai'i at 82, 165 P.3d at 983. The prosecution appealed the circuit court's sentencing as illegal, arguing the defendant should have been sentenced as a repeat offender. Reis, 115 Hawai'i at 81, 165 P.3d at 982. The majority of our court agreed. Id.

In doing so, Reis reviewed both the "proceedings that were begun" and "penalties that were incurred" savings clause language. First, the court determined the word "proceedings," as it appeared in that savings clause, "unambiguously refer[red] to the initiation of a criminal prosecution against a defendant." Reis, 115 Hawai'i at 87, 165 P.3d at 988. We noted the initiation of criminal proceedings through a formal felony prosecution, preliminary hearing, indictment, information, or arraignment "is the starting point of our whole system of adversary criminal justice." Id. (quoting State v. Luton, 83 Hawai'i 443, 449–50, 927 P.2d 844, 850–51 (1996)). We relied on Van den Berg, in which we "construed the term 'proceedings' to mean the initiation of prosecution through a charging instrument and concluded that the amendments in question were therefore not available to the defendants[.]'" Reis, 115 Hawai'i at 87-88, 165

P.3d at 988-89 (citing Van den Berg, 101 Hawai'i at 191, 65 P.3d at 138).[9]

We then attempted to distinguish our holding in Avilla, in which we interpreted "proceedings" as the initiation of bail proceedings rather than a criminal prosecution, as not based on the ameliorative nature of the statutory provision involved but, rather, the "unique subject matter of the act in question." Reis, 115 Hawai'i at 88, 165 P.3d at 989. We said Avilla involved an act pertaining solely to bail, which created an ambiguity in the term "proceedings": it could mean "bail proceedings" as much as it could mean "prosecutions." 115 Hawai'i at 89, 165 P.3d at 990 (citing Avilla, 69 Haw. at 512-13, 750 P.2d at 80-81). We further rejected the defendant's contention that Avilla stands "for the proposition that this court construes the language of the standard savings clause 'in a manner that best effectuates the underlying legislative intent

[9] Van Den Berg contained a savings clause with the same material language. 101 Hawai'i at 191, 65 P.3d at 138. Van Den Berg did not cite to Avilla. In Van Den Berg, we noted the defendants were indicted, tried, and convicted all prior to the effective date of the applicable act:

> the record indicates that Appellants' respective proceedings were "begun" before June 18, 1993: (1) Van den Berg was indicted on October 25, 1991, his trials were conducted in 1992 and 1993, and he was convicted on May 5, 1993; and (2) Karagianes was charged on July 8, 1992, his trials were held in 1992 and 1993, and he was convicted on September 15, 1993. Because the proceedings involving Appellants began prior to the effective date of Act 239, the 1993 Statute did not apply to Appellants.

Id. We did not interpret the "penalties that were incurred" language. See id.

and purpose of that particular statute,'" for we "resort to legislative history only when there is an ambiguity in the plain language of the statute." Reis, 115 Hawai'i at 90, 165 P.3d at 991 (citing State v. Valdivia, 95 Hawai'i 465, 472, 24 P.3d 661, 668 (2001)). Rather, we framed Avilla as

> stand[ing] 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.

Reis, 115 Hawai'i at 90, 165 P.3d at 991.

We also distinguished cases cited by the dissent as involving only the general savings clause codified at HRS § 1-3 (1993); we stated that "[t]he inclusion of a specific savings clause within the body of the amending statute demonstrates a clear legislative intent that the contents of the act do not apply retroactively." Reis, 115 Hawai'i at 90 & n.19, 165 P.3d at 991 & n.19 (distinguishing State v. Koch, 107 Hawai'i 215, 112 P.3d 69, (2005),[10] and Von Geldern, 64 Haw. 210, 638 P.2d 319).[11]

[10] Koch held that retroactive application of a remedial statute was not constitutionally prohibited. 107 Hawai'i at 222, 112 P.3d at 76.

[11] In Von Geldern, this court held that an ameliorative sentencing amendment applied retroactively to cases not yet final as of its effective date. 64 Haw. at 215, 638 P.2d at 323.

Reis also interpreted the meaning of the savings clause "penalties that were incurred" language. 115 Hawai'i at 91-93, 165 P.3d at 992-94. We held that a defendant "incurs" a penalty at the time of the commission of the offense. Id. We relied on the reasoning of courts in other jurisdictions which had concluded the same. Id.

We acknowledged the contrary interpretation of the Utah Supreme Court in Tapp, which concluded that a penalty is not incurred until a defendant is convicted, judgment entered, and the sentence imposed. Reis, 115 Hawai'i at 92, 165 P.3d at 993 (citing Tapp, 490 P.2d at 336). However, we rejected Tapp as (1) implicitly rejecting the proposition that a sentencing proceeding was a severable "proceeding"; (2) conflating the meaning of "incur" and "impose"; (3) citing no authority supporting the conclusion that a penalty is, by its plain meaning, "incurred" at the time of sentencing; (4) and, in application, ultimately resulting in greater inequities among defendants. Reis, 115 Hawai'i at 92 n.24, 165 P.3d at 993 n.24.

Next, we said our construction of "proceedings" and "incurred" was sound, for it "ensure[d] the consistent application of justice and avoid[ed] potential constitutional infirmity." Reis, 115 Hawai'i at 93, 165 P.3d at 994. In particular, we said our construction (1) avoided arbitrary and inconsistent outcomes in the application of ameliorative

sentencing amendments to defendants; and (2) preserved the constitutionality of the statute as a whole. Reis, 115 Hawai'i at 93, 96, 165 P.3d at 994, 997. As to arbitrary and inconsistent outcomes, we agreed with the sentiment of the District of Columbia's highest court that there is "nothing irrational in a legislative conclusion that individuals should be punished in accordance with the sanctions in effect at the time the offense was committed." Reis, 115 Hawai'i at 93, 165 P.3d at 994 (citing Holiday v. United States, 683 A.2d 61, 72 (D.C. 1996)). Additionally, reviewing cases in other jurisdictions, we said that the nationwide trend at that time was to not apply amendments retroactively, even when they are ameliorative. Reis, 115 Hawai'i at 95-96, 165 P.3d at 996-97 (citing People v. Floyd, 72 P.3d 820 (Cal. 2003); State v. Parker, 871 So.2d 317 (La. 2004); State v. Ross, 95 P.3d 1225 (Wash. 2004)).

As to preserving the statute's constitutionality, we said the savings clause applied to the whole act, and some provisions of the act provided for enhanced or new penalties; thus, interpreting the savings clause "such that any hearing conducted after the effective date could be considered a separate proceeding or that the defendant has not incurred the penalties . . . until the date sentence is imposed could expose some provisions" of the act to challenge under the ex post facto

clause of the United States Constitution. Reis, 115 Hawai'i at 96, 165 P.3d at 997 (citing U.S. Const. art. 1, § 10, cl. 1 (prohibiting states from enacting retroactive penal legislation)).

Finally, we concluded the legislature "unambiguously intended" that the amendment authorizing sentencing discretion "would not be available to defendants whose criminal prosecutions commenced" prior to its effective date. Reis, 115 Hawai'i at 97, 165 P.3d at 998. We said we presumed the legislature knows the law when enacting statutes and, hence, that the legislature was aware of our interpretation of "proceedings" in Van den Berg and the "crucial analytical role the absence of a savings clause played in Koch and Von Geldern" at the time it enacted the statute. Reis, 115 Hawai'i at 97, 165 P.3d at 998 (citing Agustin v. Dan Ostrow Constr. Co., 64 Haw. 80, 83, 636 P.2d 1348, 1351 (1981); Van den Berg, 101 Hawai'i at 191, 65 P.3d at 138).

Therefore, because the defendant had been charged before the applicable act's effective date, we held the circuit court erred by applying the amendment to her sentence. Reis, 115 Hawai'i at 98, 165 P.3d at 999. We vacated and remanded for sentencing as a repeat offender. Id.

Justice Acoba dissented. Reis, 115 Hawai'i at 98-125, 165 P.3d at 999-1026 (Acoba, J., dissenting). He disagreed with the

majority's savings clause interpretation. Reis, 115 Hawai'i at 98, 165 P.3d at 999. Justice Acoba opined that

> In light of its ameliorative and remedial purpose of allowing first-time drug offenders to be sentenced to probation, [the amendment] should be applied to Reis because (1) under a plain reading of [the savings clause], Reis's sentencing "proceeding" took place after the effective date of [the act], (2) alternatively, and assuming, arguendo, the term "proceedings" is ambiguous, the fact that the prosecution of the case was initiated prior to the effective date of the [a]ct does not preclude application of [the amendment] under [Avilla], and also (3) Reis's sentence may be treated as "a penalty incurred[]" after the effective date of the Act.

Reis, 115 Hawai'i at 98-99, 165 P.3d at 999-1000.

As to the plain language of the savings clause, Justice Acoba looked to the Black's Law Dictionary definition of "proceeding," "[a]n act or step that is part of a larger action," and reasoned that "a sentencing proceeding is obviously an 'act or step' within the larger criminal action and, thus, fits within the definition of proceeding." Reis, 115 Hawai'i at 100, 165 P.3d at 1001 (quoting Proceeding, Black's Law Dictionary).

Justice Acoba pointed out that the term "proceedings" was not defined in the applicable act. Reis, 115 Hawai'i at 101, 165 P.3d at 1002. Thus, assuming arguendo the term "proceeding" is ambiguous, Justice Acoba opined Avilla was directly on point because it addressed an ameliorative statute with an identical savings clause. Reis, 115 Hawai'i at 103, 165 P.3d at 1004. In Justice Acoba's view, the majority misstated Avilla, for that

case "said nothing about the 'unique subject matter' of bail but plainly concluded that the word 'proceedings'" was subject to multiple interpretations; moreover, Avilla did not presume that "proceedings" generally means prosecutions. Reis, 115 Hawai'i at 105-06, 165 P.3d at 1006-07 (citing Avilla, 69 Haw. at 512, 750 P.2d at 80). Justice Acoba also relied on the rule of lenity to argue that any ambiguity in the term "proceedings" must be resolved in favor of the defendant. Reis, 115 Hawai'i at 107, 165 P.3d at 1008.

Justice Acoba's dissent also highlighted the ameliorative nature of the act in question. He distinguished Van den Berg as not involving any ameliorative provisions, and opined that cases from other jurisdictions "support a liberal reading where ameliorative sentencing statutes are involved." Reis, 115 Hawai'i at 108-10, 165 P.3d at 1009-11 (citing Floyd, 72 P.3d 820; In re DeLong, 113 Cal.Rptr.2d 385 (Ct. App. 2001); People v. Behlog, 543 N.E.2d 69 (N.Y. 1989); People v. Walker, 623 N.E.2d 1 (N.Y. 1993)).

Next, looking to the "penalties that were incurred" language in the savings clause, Justice Acoba noted that some courts have found that "no penalty is incurred" until a defendant is sentenced, including the Utah Supreme Court in Tapp. Reis, 115 Hawai'i at 110-11, 165 P.3d at 1011-12. Justice Acoba distinguished the cases cited by the majority holding

otherwise as not involving abatement or ameliorative statutes or, unlike Hawai'i case law, requiring an express legislative statement of retroactivity. 115 Hawai'i at 112-13 & n.32, 165 P.3d at 1013-14 & n.32 (citing Koch, 107 Hawai'i at 222, 112 P.3d at 76 (noting legislative intent to give retroactive effect may be implied)).

Justice Acoba cast doubt on the majority's interpretation of the legislature's intent. In his view, the legislature's imputed knowledge of Von Geldern, Avilla, and Koch cut against the majority's holding. Reis, 115 Hawai'i at 116, 165 P.3d at 1017. Further, he noted that commentators have expressed skepticism that savings statutes represent sound policy or the actual intent of the legislature, particularly where the legislature lessens a penalty for a crime, so appellate courts have read seemingly broad savings statutes narrowly. 115 Hawai'i at 117, 165 P.3d at 1018 (citing 1 Substantive Criminal Law, § 2.5).

Justice Acoba opined that the savings clause was a generic, not specific, savings clause, inasmuch as it applied to the entire act, which was a multi-statute amendment containing both ameliorative and penalty-enhancing provisions. Reis, 115 Hawai'i at 116, 165 P.3d at 1017. But he rejected the majority's dispositive distinction between "specific" versus "general" savings clauses, and noted that Koch and Von Geldern, which the

majority attempted to distinguish on those grounds, do not contain any discussion of such a distinction. Reis, 115 Hawai'i at 115-16, 165 P.3d at 1016-17.

Justice Acoba maintained that there would be nothing arbitrary or unjust in applying the ameliorative provisions to the defendant, for the legislature must have intended for them to apply to all cases that it could constitutionally do so. Reis, 115 Hawai'i at 122-24, 165 P.3d at 1023-25 (citing Estrada, 408 P.2d at 951). Justice Acoba also rejected the majority's contention that his interpretation would make some provisions of the act susceptible to challenge as ex post facto measures because the savings clause "was of a general nature obviously included to prevent the ex post facto application of those penalty provisions." Reis, 115 Hawai'i at 118, 165 P.3d at 1019. In Justice Acoba's view, "under our precedent a liberal reading is required as to the ameliorative provision. On the other hand, the non-remedial provisions are subject to the basic prohibition against retroactivity stated in the savings clause." Id.

Hence, Justice Acoba concluded the savings clause was "not a bar to application of a remedial sentencing provision." Reis, 115 Hawai'i at 125, 165 P.3d at 1026.

The legislature repealed the subsection that allowed for theft in the first degree, a Class B felony, to be sentenced as

a Class A felony if a computer had been used in the theft because the repealed subsection was "too harsh." 2016 Haw. Sess. Laws Act 231, § 35 at 756. Thus, Reis is distinguishable on this basis alone; it addressed a statute that reduced penalties, not one that repealed a crime. Thus, contrary to the majority's analysis, Reis does not control here—Avilla does. Reis is distinguishable.

Avilla stated that "proceedings," as used in a savings clause, can mean either prosecutions or a part of a criminal prosecution depending on the circumstances; in Avilla's case, bail proceedings. Avilla, 69 Haw. at 512, 750 P.2d at 80. Reis distinguished itself from Avilla. It held that the subject matter of an act may render "proceedings" ambiguous. Reis, 115 Hawai'i at 88, 165 P.3d at 989. Reis observed that because the statute at issue in Avilla concerned bail proceedings, "proceedings" was ambiguous in that case. 115 Hawai'i at 89, 165 P.3d at 990. But it seemed to propose a default rule that without a subject matter-based reason for uncertainty, "proceedings" means prosecutions. 115 Hawai'i at 90, 91, 165 P.3d at 991, 992. Reis, however, stands for the "unremarkable proposition" that context matters in statutory interpretation. See 115 Hawai'i at 90, 165 P.3d at 990. It did not overrule Avilla.

Here, as in Avilla, there is a subject matter-based reason to find "proceedings" ambiguous. Just like the statute in Reis differed from the statute in Avilla, the statute here differs from the one in Reis. The statute in Reis reduced penalties. The statute here repealed an offense. Act 231 did not diminish the amount of punishment the legislature seeks to impose for theft using a computer. It eliminated separate criminal liability for a category of behavior. See former HRS § 708-893(1)(a) (providing that "A person commits the offense of use of a computer in the commission of a separate crime") and HRS § 708-893(2) ("Notwithstanding any other law to the contrary, a conviction under this section shall not merge with a conviction for the separate crime.") Even though HRS § 708-893 required underlying criminal conduct, it treated the use of a computer in a theft as a separate offense to be punished separately. With Act 231, the legislature eliminated separate criminal liability arising from the use of a computer in a theft.

This intent is more than ameliorative. The legislature did not tell defendants, "You're still guilty, but your sentence was too harsh." The legislature told defendants, "You may be guilty of ordinary theft, but you're not guilty of this offense at all." Why would the legislature want a defendant prosecuted *for a crime that no longer exists*? It would not. The legislature

repealed the crime because the sentence was unduly harsh. The majority relies on several canons of statutory interpretations - judge-made prudential rules intended to aid us in divining the legislature's intent. The majority's position is flawed as it is absurd to say the legislature would want a defendant to proceed to trial for a crime that no longer exists, and then be sentenced to a punishment it just repudiated.

Hence, in this context, "proceedings" might mean only prosecutions, or it could mean all three of the bedrock stages of criminal law: prosecution, trial, and sentencing. As the meaning of "proceedings" is ambiguous here, the rule of lenity applies.

As stated by the California Supreme Court:

> When the legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper . . . . It is an inevitable inference that the legislature must have intended that the new statute imposing the lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply[.]

In re Estrada, 408 P.2d 948, 951 (Cal. 1965).

It is difficult to understand why we would say the legislature did not intend to give a defendant the benefit of the more humane sentence.

We therefore agree with Judge Wadsworth's dissent here, Justice Acoba's dissent in Reis, and Justice Wilson's dissent from the denial of certiorari on the first appeal.

The legislature did not define "proceedings" in its savings clause. Thus, Act 231's savings clause as applied to the repeal of the use of a computer in the commission of theft offense is ambiguous, and the ICA majority's construction produced an unjust result inconsistent with section 42's remedial purpose.

The rule of lenity applies where a statute is ambiguous. State v. Borge, 152 Hawaiʻi 458, 469, 526 P.3d 435, 446 (2023) ("[I]f a statute is ambiguous, and the legislative history does not provide sufficient guidance, we follow the rule of lenity. The rule of lenity provides that where a criminal statute is ambiguous, it 'must be strictly construed against the government and in favor of the accused.'"). The "policy of lenity means that the [c]ourt will not interpret a [state] criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what [the legislature] intended." State v. Vellina, 106 Hawaiʻi 441, 444 n.5, 106 P.3d 364, 367 n.5 (2005) (cleaned up). Here Act 231 is ambiguous as to whether the amendment deleting use of a computer was intended to apply to pending cases.

Based on all these reasons, we would hold that counts 8 and 9 must be dismissed.

DATED: Honolulu, Hawaiʻi, May 20, 2024.

/s/ Sabrina S. McKenna

/s/ Todd W. Eddins