NO. 22980

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellant

vs.

SOLOMON MARTIN, Defendant-Appellee

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NOS. 97-2160 & 97-3100)

MEMORANDUM OPINION
(By: Acoba, and Duffy, JJ.; With
Moon, C.J., Levinson, and Nakayama, JJ., Concurring)

Plaintiff-Appellant State of Hawai'i (the prosecution) appeals from orders of the first circuit court[1] (the court) granting the motion of Defendant-Appellee Solomon Martin (Defendant) to strike the reference to use of firearms in the commission of a felony, Hawai'i Revised Statutes (HRS) § 134-6 (Supp. 1998) in Count IV of the complaint of Cr. No. 97-2160, and references to the mandatory term of imprisonment for use of a firearm in the commission of a felony, HRS § 706-660.1 (1993), in Count I of Cr. No. 97-2160 and Counts I and II of the indictment in Cr. No. 97-3100.

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[1] The Honorable John S.W. Lim presided over this matter.

I.

In the September 4, 1997 complaint in Cr. No. 97-2160, Defendant was charged in relevant part in Count I and Count IV as follows:

> COUNT I: On or about the 23rd day of August, 1997, in the City and County of Honolulu, State of Hawaii, SOLOMON MARTIN did intentionally engage in conduct which is a substantial step in a course of conduct intended or known to cause bodily injury to John Williams with a dangerous instrument, to wit, a semiautomatic firearm, intending or knowing that it was a dangerous instrument, thereby committing the offense of Attempted Assault in the Second Degree, in violation of Sections 705-500 and 707-711(1)(d)[2] of the Hawaii Revised Statutes, and where he had a semiautomatic firearm in his possession or threatened its use or used the semiautomatic firearm while engaged in the commission of this felony, whether the semiautomatic firearm was loaded or not, and whether operable or not, he is subject to Sentence of Imprisonment for Use of a Firearm, Semiautomatic Firearm or Automatic Firearm in a Felony, in accordance with Section 706-660.1 of the Hawaii Revised Statutes.[3]

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[2] HRS § 707-711(1)(d) (1993) states as follows:

> **Assault in the second degree.** (1) A person commits the offense of assault in the second degree if:
> . . . .
> (d) The person intentionally or knowingly causes bodily injury to another person with a dangerous instrument[.]

[3] HRS § 706-660.1 states in pertinent part as follows:

> **Sentence of imprisonment for use of a firearm, semiautomatic firearm, or automatic firearm in a felony.** (1) A person convicted of a felony, where the person had a firearm in the person's possession or threatened its use or used the firearm while engaged in the commission of the felony, whether the firearm was loaded or not, and whether operable or not, may in addition to the indeterminate term of imprisonment provided for the grade of offense be sentenced to a mandatory minimum term of imprisonment without possibility of parole or probation the length of which shall be as follows:
> . . . .
> (d) For a class C felony -- up to three years.
> The sentence of imprisonment for a felony involving the use of a firearm as provided in this subsection shall not be subject to the procedure for determining minimum term of imprisonment prescribed under section 706-669; provided further that a person who is imprisoned in a correctional institution as provided in this subsection shall become

(continued...)

. . . .

COUNT IV: On or about the 23rd day of August, 1997, in the City and County of Honolulu, State of Hawaii, SOLOMON MARTIN did knowingly carry on his person or have within his immediate control or intentionally use or threaten to use a firearm while engaged in the commission of a separate felony, whether the firearm was loaded or not, and whether operable or not, thereby committing the offense of Carrying, Using or Threatening to Use a Firearm in the Commission of a Separate Felony, in violation of Sections 134-6(a) and (e) of the Hawaii Revised Statutes,[4] and the separate felony is Attempted Assault in the Second Degree, in which the elements are that Solomon Martin did intentionally engage in conduct which is a substantial step in a course of conduct intended or known to cause substantial bodily injury to John Williams, in violation of Sections 705-500 and 707-711(1)(a)

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[3](...continued)
subject to the parole procedure as prescribed in section 706-670 only upon the expiration of the term of mandatory imprisonment fixed under paragraph . . . (d).

(Emphases added.)

[4] HRS § 134-6(a) and (e) (Supp. 1998) states as follows:

Carrying or use of firearm in the commission of a separate felony; place to keep firearms; loaded firearms; penalty. (a) It shall be unlawful for a person to knowingly carry on the person or have within the person's immediate control or intentionally use or threaten to use a firearm while engaged in the commission of a separate felony, whether the firearm was loaded or not, and whether operable or not; provided that a person shall not be prosecuted under this subsection where the separate felony is:

(1) A felony offense otherwise defined by this chapter;
(2) The felony offense of reckless endangering in the first degree under section 707-713;
(3) The felony offense of terroristic threatening in the first degree under section [707-716(1)(a)], 707-716(1)(d)]; or
(4) The felony offenses of criminal property damage in the first degree under section 708-820 and criminal property damage in the second degree under section 708-821 and the firearm is the instrument or means by which the property damage is caused.

. . . .

(e) Any person violating subsection (a) . . . shall be guilty of a class A felony. Any person violating this section by carrying or possessing a loaded firearm or by carrying or possessing a loaded or unloaded pistol or revolver without a license issued as provided in section 134-9 shall be guilty of a class B felony. Any person violating this section by carrying or possessing an unloaded firearm, other than a pistol or revolver, shall be guilty of a class C felony.

(Emphases added.)

of the Hawaii Revised Statutes.[5]

(Emphases added.)

In a December 18, 1997 indictment in Cr. No. 97-3100, Defendant was charged in relevant part in Count I and Count II as follows:

> COUNT I: On or about the 23rd day of August, 1997, in the City and County of Honolulu, State of Hawaii, SOLOMON MARTIN did intentionally fire a firearm, an instrument that falls within the scope of Section 706-660.1 of the Hawaii Revised Statutes, in a manner which recklessly placed Toni Clegg in danger of death or serious bodily injury, thereby committing the offense of Reckless Endangering in the First Degree, in violation of Section 707-713 of the Hawaii Revised Statutes.
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> COUNT II: On or about the 23rd day of August, 1997, in the City and County of Honolulu, State of Hawaii, SOLOMON MARTIN did intentionally fire a firearm, an instrument that falls within the scope of Section 706-660.1 of the Hawaii Revised Statutes, in a manner which recklessly placed Sunsiri Edwards in danger of death or serious bodily injury, thereby committing the offense of Reckless Endangering in the First Degree, in violation of Section 707-713 of the Hawaii Revised Statutes.

The cases were consolidated for trial. Trial began on July 8, 1995. During trial proceedings, Count I of the complaint was dismissed by the court. On July 9, before the jury was sworn, Defendant moved to dismiss Count IV of the complaint on the ground that in State v. Ganal, 81 Hawai‘i 358, 917 P.2d 358 (1996), this court had held that HRS § 134-6(a) does not apply when the use of a firearm is an element of the underlying offense. The prosecution, on the other hand, argued that the use of a dangerous instrument was not an element of the underlying

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[5] HRS § 707-711(1)(a) (1993) states as follows:

> **Assault in the second degree.** (1) A person commits the offense of assault in the second degree if:
> (a) The person intentionally or knowingly causes substantial bodily injury to another.

felony, attempted assault in the second degree, HRS § 707-711(1)(a), identified in Count IV. The court, however, granted the motion. It dismissed the HRS § 134-6(a) charge in Count IV on the ground that "the legislature did not intend to enhance twice for use of one dangerous firearm" and reinstated Count I.

Trial continued, and on July 10, 1998, Defendant indicated he would change his pleas on all of the remaining counts in the complaint and in the indictment.

At the change of plea hearing, Defendant orally moved to strike the reference in Count I of the complaint to the use of the firearm in the commission of a felony, HRS § 706-660.1 in Cr. No. 97-2160, and the same reference in Counts I and II of the indictment in Cr. No. 97-3100. The prosecution objected and indicated that as to all counts as to which a firearm was involved, the weapon involved was "a semiautomatic weapon."[6]

The court deemed there was an "aggravation" of the attempted assault and reckless endangering charges from misdemeanors to felonies because of "the use of the firearm."

[6] HRS § 706-660.1(3) (1993) pertains to use of a semiautomatic firearm and provides as follows:

> A person convicted of a felony, where the person had a semiautomatic firearm or automatic firearm in the person's possession or used or threatened its use while engaged in the commission of the felony, whether the semiautomatic firearm or automatic firearm was loaded or not, and whether operable or not, shall in addition to the indeterminate term of imprisonment provided for the grade of offense be sentenced to a mandatory minimum term of imprisonment without possibility of parole or probation the length of which shall be as follows:
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> . . . .
>
> (d) For a class C felony -- five years.

The court also perceived that "the State seeks under [HRS §] 706-660.1 to aggravate by way of a mandatory minimum for the same use of the firearm." The court granted the motion. Thereafter, the court accepted no-contest pleas to, among other counts, Count I of the complaint and Counts I and II of the indictment and sentenced Defendant on each count to concurrent five-year probation terms.

On October 19, 1999, the court filed a written "Order Granting Oral Motion to Dismiss Count IV in Cr. No. 97-2160 and Oral Motion Striking Mandatory Minimum Language" with findings of fact and conclusions of law (without delineation) (Order).

II.

On November 17, 1999, the prosecution appealed from the Order. On appeal, the prosecution contends the court erred, as to the complaint, in dismissing Count IV and striking the language referred to above from Count I, and as to the indictment, in striking the same language from Counts I and II. The prosecution does not challenge paragraphs 1-5, 7, and 9-16 of the Order.

III.

Count I and Count IV of the complaint in Cr. No. 97-2160 appear to involve substantially the same facts. Count I, however, charges a violation of HRS §§ 705-500 (1993) and 707-711(1)(d), attempted assault in the second degree on John

Williams, under the circumstances where "bodily injury" was caused "to another person with a dangerous instrument," in this case, a semiautomatic firearm, subjecting Defendant, as Count I alleges, to consideration under "[HRS §] 706-660.1" for a mandatory term of imprisonment. Count IV charges, again, the use of a firearm in the commission of a separate felony; this time, under HRS § 134-6(a) and (e), the separate felony being the same separate felony of assault in the second degree alleged in Count I, that is, as against John Williams, except in the HRS 707-711(1)(a) version under which "substantial bodily injury" is caused "to another person." The court found that "[t]he conduct involving the use of the firearm is the same for both Counts I and IV under Criminal number 97-2160." The prosecution does not designate this finding as error. Accordingly, it is established that Counts I and IV of the complaint are based on the same conduct.

In moving for dismissal of Count IV, Defendant argued that under Ganal, "HRS § 134-6 does not apply where the use of a firearm establishes an element of the underlying felony." Defendant reasoned that because Count IV charged "Attempted Assault in the Second Degree 'with a dangerous instrument[,]' [the firearm,] . . . [as] the underlying offense[,]" the HRS § 134-6 charge must "be dismissed."

But, in Ganal, this court was concerned with the pre-1993 amendment version of HRS § 134-6(a) and held that "the originally enacted version of HRS § 134-6(a) was never intended

to apply where the defendant's use of a firearm establishes an element of the underlying felony." 81 Hawai'i at 372, 917 P.2d at 384. However, as the prosecution points out, Defendant was charged under HRS § 134-6(a) as modified by the 1993 amendment. The 1993 amendment prohibited prosecution under HRS § 134-6 where the possession, control, threat to use, or use of a firearm was involved in certain described felonies. Attempted assault in the second degree is not one of those felonies. Accordingly, as the prosecution argues,

> the rule of *expressio unius est exclusio alterius* applies in this instance. "The specificity of the legislative enumeration in this section means that the limitations exemption is applicable only to the offenses enumerated." *State v. Liuafi*, 1 Haw. App. 625, 637, 623 P.2d 1271, 1279 (1981). "When the legislature expresses things through a list, the court assumes that what is not listed is excluded." 2A *Sutherland Statutory Construction* § 47.23, at 216-17 (5th ed. 1992). "Departure from the plain and unambiguous language of the statute cannot be justified without a clear showing that the legislature intended some other meaning would be given the language." *In re Tax Appeal of Lower Mapunapuna Tenants Ass'n*, 73 Haw. 63, 68, 828 P.2d 263, 266 (1992) (quoting *Espaniola v. Cawdrey Mars Joint Venture*, 68 Haw. 171, 179, 707 P.2d 365, 370 (1985)).

State v. Kaakimaka, 84 Hawai'i 280, 291, 933 P.2d 617, 628, reconsideration denied, 84 Hawai'i 496, 936 P.2d 191 (1997) (brackets omitted). Because the 1993 version of HRS § 134-6(a) does not list attempted assault in the second degree as an offense for which "a person shall not be prosecuted under [that] subsection," Defendant is subject to prosecution for the use of a firearm and for the felony in which the firearm was used. The court therefore erred in relying upon the holding in Ganal to dismiss Count IV. Count IV, therefore, cannot be dismissed on the authority of Ganal.

As an alternative ground for sustaining the court's dismissal, Defendant argues on appeal that Count IV was charged in violation of Hawai'i Rules of Penal Procedure (HRPP) Rule 7(f) and therefore, must be dismissed.[7] Defendant maintains that Count IV "in effect attempts to amend the underlying felony of Count I to include an additional element under 707-711(1)(a)." Defendant points out that under Count I, attempted assault in the second degree under HRS § 707-711(1)(d) requires proof of an attempt to cause bodily injury to John Williams with the use of a dangerous instrument, to wit, a semi-automatic handgun. Under Count IV, the underlying felony is alleged to be attempted assault in the second degree under HRS § 707-711(1)(a), requiring proof that Defendant attempted to cause substantial bodily injury to John Williams. Thus, assault in the second degree as defined under HRS § 707-711(1)(a) requires proof different from that required with respect to HRS § 707-711(1)(d).

Defendant did not below raise the argument that Rule 7(f) was violated. There is no express indication in the record that Count IV was amended from a prior version. Moreover, an argument not raised below need not be considered on appeal. See State v. Moses, 102 Hawai'i 449, 456, 77 P.3d 940, 947 (2003) ("As a general rule, if a party does not raise an argument at

[7] HRPP Rule 7(f) states as follows:

> **Amendment.** The court may permit a charge other than an indictment to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

trial, that argument will be deemed to have been waived on appeal[.]"); see also Hawai'i Rules of Appellate Procedure Rule 28(b)(4) ("Points not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice plain error not presented.").

It was established by the court's uncontested findings, however, that the underlying conduct for attempted assault in 707-711(1)(a) upon which the violation of HRS § 134-6(a) and (e) are premised in Count IV of Cr. No. 97-2160 is the same assaultive episode described in Count I, as an attempted assault under HRS § 707-711(1)(d). Defendant cannot lawfully be convicted of both. As stated by this court, "[the] Double Jeopardy [Clause] protects individuals against multiple punishments for the same offense." State v. Ake, 88 Hawai'i 389, 392, 967 P.2d 221, 224 (1998).

In State v. Jumila, 87 Hawai'i 1, 950 P.2d 1201 (1998), reversed on other grounds by State v. Brantley,[8] 99 Hawai'i 463, 56 P.3d 1252 (2002), both the majority and the dissent agreed that a defendant cannot be convicted of both a HRS § 134-6(a) violation and receive a sentence under HRS § 706-660.1 on the underlying 134-6(a) felony offense. The majority said that, "as explained by the dissent, a defendant may not be convicted of an HRS § 134-6(a) violation and receive a mandatory minimum term of

[8] The plurality in Brantley held that a defendant may be convicted of both carrying or use of a firearm in the commission of a separate felony, and the separate felony; but did not discuss the question of whether the double jeopardy clause barred a mandatory minimum term of imprisonment if defendant was convicted under both HRS § 134-6(a) and HRS § 706-660.1.

imprisonment on the underlying felony pursuant to HRS § 706-660.1." Id. at 6, 950 P.2d at 1206. The dissent pointed out that "a problem is presented by the issue of whether double jeopardy prohibits punishment under both HRS § 134-6(a) (carrying or use of a firearm) and HRS § 706-660.1 (mandatory minimum terms) when the application of both statutes is based on the same underlying felony[.]" Id. at 13, 950 P.2d at 1213 (Ramil, J., dissenting, joined by Nakayama, J.) Applying the test in Blockburger v. United States, 284 U.S. 299 (1932), the dissent noted that "[u]nder *Blockburger*, double jeopardy prohibits cumulative punishments unless 'each statutory provision requires proof of a fact which the other does not.'" Id. (brackets omitted) (quoting United State v. Lanzi, 933 F.2d 824 (10th Cir. 1991)).

Observing that "there is no material difference between, on the one hand, 'carrying' or 'having within one's immediate control' a firearm and, on the other hand, 'possessing' a firearm[, b]oth HRS § 134-6(a) and HRS § 706-660.1 include 'using' or 'threatening to use' a firearm[,]" id. at 14, 950 P.2d at 1214, the dissent decided that "it cannot be said that *each* statutory provision requires proof of a fact which the other does not[,]" id. (emphasis in original) (internal quotation marks omitted). It was concluded, then, that "double jeopardy principles prevent imposition of cumulative punishments under both HRS § 134-6(a) and HRS § 706-660.1 when the application of

both statutes is based on the same underlying felony." Id.

That is the case here. The appropriate remedy was to "vacate the mandatory minimum term and remand for resentencing without the mandatory minimum." Id. In accordance with the agreement of the majority and dissent in Jumila on this issue, the court's order in Cr. No. 97-2160 with respect to Count IV regarding HRS § 134-6(a) and (e) is vacated with instructions to reinstate that charge. However, the court's order striking the reference to HRS § 706-660.1 in that case is affirmed.

IV.

The court perceived a "double enhancement" in Counts I and II in Cr. No. 97-3100[9] in essentially the following syllogism set forth in the Order: (1) charging the use of a firearm elevated the reckless endangering charge from a misdemeanor to a felony (Paragraph 11); (2) the charging reference to 706-660.1 for use of firearm "seeks further to subject Defendant to

[9] According to the prosecution's proffer at the change of plea hearing on July 10, 1998, Count I in Cr. No. 97-2160 involved separate incidents from that in Counts I and II of Cr. No. 97-3100. As to Count I in Cr. No. 97-2160, the prosecution said:

> With respect to Count 1, the State would prove that - essentially, the evidence of the State would be that during a certain confrontation, Mr. Martin had this weapon at the stomach of Mr. Williams and clicked the trigger and for some reason the gun did not work.

As to Counts I and II in Cr. No. 97-3100, the prosecutor said:

> With respect to Counts 1 and 2 of 97-3100, again, with the same weapon on the same evening, the State would prove that shots were fired at a car in which Tory Cleg and Sincery Edwards were passengers or drivers and those shots were fired from that weapon by Mr. Martin.

enhanced sentencing" (Paragraph 12); (3) "the legislature while increasing the penalty for firing a firearm . . . , [in a reckless endangering charge to a felony] did not include a mandatory minimum sentence for the same conduct and firearm" (Paragraph 14); (4) "the State [further] seeks under 706-660.1 to aggravate by way of a mandatory minimum for the same use of the firearm" (Paragraph 15); and (5) "the legislature did not intend to enhance twice for one conduct" (Paragraph 19); (6) therefore "the mandatory minimum language as it relates to the use of a firearm in Count I of Cr. No. 97-2160 and Counts I and II under Cr. No. 97-3100" are stricken.[10]

With respect to Counts I and II under Cr. No. 97-3100, HRS § 707-713 in pertinent part states that reckless endangering in the first degree is as follows:

> (1) A person commits the offense of reckless endangering in the first degree if the person . . . fires a firearm in a manner which recklessly places another person in danger of death or serious bodily injury.
> (2) Reckless endangering in the first degree is a class C felony.

As the language in Counts I and II indicates, the prosecution charged the firearm was "an instrument that falls within the scope of [HRS §] 706-660.1." Defendant maintained this was a "double enhancement" stemming from (1) charging an aggravated form of reckless endangering (the use of a firearm elevating the

[10] The order in reference to these counts states in an incomplete sentence, "IT IS FURTHER ORDERED that the mandatory minimum language as it relates to the issue of a firearm in Count I of Cr. No. 97-2160 and Counts I and II under Cr. No. 97-3100." However, the transcript of July 10, 1998 hearing indicates the court intended the reference to be stricken, and the parties do not dispute this.

charge to first degree status, as opposed to second degree reckless endangering)[11] and (2) charging a HRS § 706-660.1 violation which exposed Defendant to a mandatory minimum term of imprisonment without possibility of parole or probation for the involvement of a firearm while engaged in the commission of a felony.

As indicated, reckless endangering in the first degree is a "class C felony." HRS § 707-713. Upon conviction of a class C felony, HRS § 706-660.1 provides that a defendant "may be sentenced to an indeterminate term of imprisonment." Under the indeterminate sentencing scheme, the court "shall impose the maximum length of imprisonment" prescribed by law, and the "minimum length of imprisonment shall be determined by the Hawaii paroling authority[.]" HRS § 706-660. However, the court's sentencing power is subject to the proviso, relevant here, that an indeterminate sentence is to be imposed "except as provided

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[11] HRS § 707-714 (1993) states as follows:

> **Reckless endangering in the second degree.** (1) A person commits the offense of reckless endangering in the second degree if the person engages in conduct which recklessly places another person in danger of death or serious bodily injury.
>
> (2) For the purposes of this section and in addition to other applications, a person engages in conduct which recklessly places another person ind danger of death or serious bodily injury when that person intentionally discharges a firearm in a populated area, in a residential area or within the boundaries or in the direction of any road, street or highway; provided that the provisions of this paragraph shall not apply to any person who discharges a firearm upon a target range for the purpose of the target shooting done in compliance with all laws and regulations applicable thereto.
>
> (3) Reckless endangering in the second degree is a misdemeanor.

(Emphasis added.)

for in section 706-660.1 relating to the use of firearms in certain felony offenses[.]" Id. Under the relevant portion of HRS § 706-660.1, a defendant

> may in addition to the indeterminate term of imprisonment provided for the grade of offense be sentenced to a mandatory minimum term of imprisonment without possibility of parole or probation the length of which shall be as follows:
>
> . . . .
>
> (d) For a class C felony -- up to three years.

Reckless endangering in the first degree, as contrasted to its second degree cousin, was originally "reserved for cases where the actor employs 'widely dangerous means.'" Commentary on HRS §§ 707-713 to -714. The legislature in 1978 amended the statute by adding to the circumstance of employing widely dangerous means, the firing of a firearm under the prescribed circumstances. See Supplementary Commentary on HRS § 707-713 to -714. In doing so, the legislature equated the specific act of the firing of a firearm in circumstances placing another person in danger of death or serious bodily injury with the general approbation against the employment of "widely dangerous means."

Contrary to the court's statement, there is no "double enhancement" here. Conviction under 707-713 for reckless endangering in the first degree merely reflects the apparently undisputed fact that defendant "fire[d] a firearm" under the attendant circumstances as described in the statute. The use of the firearm was an intrinsic element of the class of felony for which Defendant was charged. As expressed by HRS § 706-660, under such circumstances the court was required to consider under

HRS § 706-660.1 whether Defendant should "in addition to the indeterminate term of imprisonment" called for, "be sentenced to a mandatory minimum term of imprisonment" for the use of the firearm.

Thus, sentencing under HRS § 706-660.1, were it to take place, would not extend the maximum length of imprisonment, but only remove the extent to which the Hawai'i Paroling Authority might, in its discretion, prescribe as the minimum length of imprisonment to be served by Defendant. Because the language of Counts I and II only reflected the interrelationship between the indeterminate sentencing procedure in HRS § 706-660 which was subject to the mandatory minimum term procedure in HRS § 706-660.1, there was no reason to strike it. The court's reference to two mandatory minimums appears to be incorrect. The court, accordingly, erred in striking the language from Counts I and II.[12]

V.

[12] The court said "[w]ith respect to the charge of [a]ttempted [a]ssault in the [s]econd [d]egree and the two counts of [r]eckless [e]ndangering in the [f]irst [d]egree, if a defendant commits these offenses, he can be charged either with the unadorned Class C felony or with the Class C felony with a firearm mandatory minimum basically at the whim of the prosecution." The court contended, thus, that under State v. Modica, 58 Haw. 249, 250-51, 567 P.2d 420, 421-22 (1977) (holding that where "same act committed under the same circumstances is punishable either as a felony or as a misdemeanor, under either of two statutory provisions, and the elements of proof essential to either conviction are exactly the same[;] a conviction under the felony statute would constitute a violation of the defendant's rights"). As indicated above with respect to attempted assault in the second degree in Cr. No. 97-2160, the mandatory minimum sentence charge under HRS § 706-660.1 is stricken. With respect to the reckless endangering in the first degree charges, "the Class C felony [charge] with a firearm mandatory minimum" merely reflects the circumstance that when a firearm is employed in a HRS § 707-713 charge, the court must consider whether a part of the indeterminate imposed sentence should be made pursuant to HRS § 706-660.1.

Accordingly, the court's order dismissing Count IV of Cr. No. 97-2160 is vacated with instructions that Count IV be reinstated, but the striking of the reference to HRS § 706-660.1 in Count I of Cr. No. 97-2160 is affirmed. The court's order striking the reference to HRS § 706-660.1 in Counts I and II of Cr. No. 97-3100 is vacated and the case remanded for disposition in accordance with this opinion.

On the briefs:

Donn Fudo, Deputy Prosecuting Attorney, City and County of Honolulu, for plaintiff-appellant.

Rose Anne Fletcher, Deputy Public Defender, for defendant-appellee.

I concur in the result.