CONCURRING OPINION BY LEVINSON, J.
IN WHICH MOON, C.J., JOINS

I agree that Shimabukuro lacked the number of predicate convictions requisite to a conviction of habitually driving under the influence of intoxicating liquor or drugs, in violation of HRS § 291-4.4 (Supp. 1998),[1] and that the circuit court therefore erred in denying his motion to dismiss Count I of the indictment. My analysis, however, differs from Justice Acoba's.

In my view, one cannot fairly ascertain the meaning of the phrase "convicted three or more times," as it is employed in HRS § 291-4.4(a), see supra note 1, without construing the statute in pari materia with the DUI statute, HRS § 291-4 (Supp. 1998). See HRS § 1-16 (1993) ("Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called in aid to explain what is doubtful in another."). In this regard, HRS § 291-4(a) (Supp. 1998) provided in relevant part:

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[1] HRS § 291-4.4 provided in relevant part:

> (a) A person commits the offense of habitually driving under the influence of intoxicating liquor or drugs if, during a ten-year period the person has been convicted three or more times for a driving under the influence offense; and
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> (1) The person operates or assumes actual physical control of the operation of any vehicle while under the influence of intoxicating liquor, meaning that the person is under the influence of intoxicating liquor in an amount sufficient to impair the person's normal mental faculties or ability to care for oneself and guard against casualty; [or]
>
> (2) The person operates or assumes actual physical control of the operation of any vehicle with .08 or more grams of alcohol per one hundred milliliters or cubic centimeters of blood or .08 or more grams of alcohol per two hundred ten liters of breath[.]
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> . . . .
>
> (b) For the purposes of this section a driving under the influence offense means a violation of [HRS §] 291-4 . . . .
>
> (c) Habitually driving under the influence of intoxicating liquor or drugs is a class C felony.

(Emphases added.)

> A person commits the offense of driving under the influence of intoxicating liquor if:
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> (1) The person operates or assumes actual physical control of the operation of any vehicle while under the influence of intoxicating liquor, meaning that the person concerned is under the influence of intoxicating liquor in an amount sufficient to impair the person's normal mental faculties or ability to care for oneself and guard against casualty; or
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> (2) The person operates or assumes actual physical control of the operation of any vehicle with .08 or more grams of alcohol per one hundred milliliters or cubic centimeters of blood or .08 or more grams of alcohol per two hundred ten liters of breath.

A first offense "not preceded within a five-year period by a [DUI] conviction" was punishable, inter alia, by "[n]ot less than forty-eight hours and not more than five days of imprisonment" without the possibility of probation or suspension of sentence. HRS § 291-4(b)(1)(C)(ii) (Supp. 1998). A second offense, occurring "within five years of a prior [DUI] conviction," was punishable, inter alia, by "[n]ot less than forty-eight consecutive hours but not more than fourteen days of imprisonment of which at least forty-eight hours [was to] be served consecutively," also without the possibility of probation or suspension of sentence. HRS § 291-4(b)(2)(B)(ii) (Supp. 1998). And a third offense, occurring "within five years of two prior [DUI] convictions," was punishable, inter alia, by "[n]ot less than ten days but not more than thirty days imprisonment of which at least forty-eight hours [was to] be served consecutively," likewise without the possibility of probation or suspension of sentence. HRS § 291-4(b)(3)(C) (Supp. 1998). Obviously, HRS § 291-4(b) created an escalating sentencing scheme keyed to the defendant's degree of recidivism, i.e., the number of actual prior DUI offenses logged within five years of his or her current

DUI offense.[2]

Viewed in this context, it is apparent to me that HRS § 291-4.4 was a "we've-had-it-up-to-here" statute directed at driving-under-the-influence offenders who had reached the "next level," i.e., four actual DUI offenses committed within the same ten-year time period. Being a class C felony, see HRS § 291-4.4(c), supra note 1, a person convicted of habitually driving under the influence of intoxicating liquor or drugs was subject to an indeterminate maximum prison sentence of five years, see HRS § 706-660(2) (1993), with the possibility, in appropriate circumstances, of extended-term sentencing under HRS §§ 706-661 (1993) and 706-662 (Supp. 1998). In other words, what differentiated the "habitual" DUI offender under HRS § 291-4.4 from the "three time loser" under HRS § 291-4(b)(3)(C) was actual culpability for a fourth DUI offense, thereby justifying the further escalation of the penal consequence.[3] Tautologically, however, actual culpability for a fourth DUI offense presupposed actual culpability for three prior DUI offenses. Cf. People v. Barro, 93 Cal. App. 4th 62, 64 (Cal. Ct. App. 2001) (holding that the effect of a dismissal of one of the defendant's prior convictions was "to wipe the slate clean as if the defendant [had] never suffered the prior conviction in the initial instance," thereby placing the defendant in a position "'as if he had never been prosecuted for'" the prior offense and precluding

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[2] HRS § 291-7 (1993), the DUI statute that proscribed the offense of driving under the influence of drugs, is indistinguishable from HRS § 291-4 in this respect and may also be viewed in pari materia with HRS § 291-4.4.

[3] This is precisely what distinguished HRS § 291-4.4 from "status" offenses such as that described by HRS § 134-7(b) (Supp. 2001). See State v. Lobendahn, 71 Haw. 111, 113, 784 P.2d 872, 873 (1989) ("Lobendahn's status was that of a convicted felon at the time he possessed the firearm and ammunition. Such possession was unlawful and the subsequent reversal of the conviction does not then render such possession lawful.") (Emphasis added.).

its qualification as a "strike" under California's "Three Strikes" sentencing enhancement law) (citation omitted).

The foregoing interpretation is supported by the legislative history of HRS § 291-4.4. In considering the statute, the House Transportation Committee noted that the "current penalties for habitually driving under the influence of intoxicating liquor [were] not sufficient to keep impaired drivers off the road. Of the 4,000 DUI arrests that were made in 1994, 919 drivers were considered recidivists. A majority of those repeat offenders were convicted two or three times." Hse. Stand. Comm. Rep. No. 49, in 1995 House Journal, at 1046 (emphases added). Accordingly, the House Judiciary Committee explained, the act "establish[ed] a felony offense for those who are convicted of their fourth offense of driving under the influence of alcohol within a ten year period[,]" so that "repeat offenders who have not responded to previous court sanctions and treatment opportunities should receive stricter penalties." Hse. Stand. Comm. Rep. No. 844, in 1995 House Journal, at 1345 (emphases added). Likewise, the Senate Judiciary Committee noted that the statute ensured that, "if a person has been convicted three times and is charged and convicted a fourth time, the person will have committed the offense of habitually driving under the influence[.]" Sen. Stand. Comm. Rep. No. 1265, in 1995 Senate Journal, at 1301 (emphasis added). Thus, it is clear that the legislature enacted HRS § 291-4.4 to provide enhanced penalties -- specifically, as noted supra, a class C felony conviction and the consequences stemming therefrom -- "for those who are convicted of their fourth offense of driving under the influence of alcohol within a ten year period." Hse. Stand. Com. Rep. No. 49, in 1995 House Journal, at 1046 (emphasis added).

Moreover, in 1999, the legislature amended HRS § 294-4.4 and HRS § 291-4 to clarify that, for purposes of calculating the number of prior DUI convictions, there was no difference between a DUI conviction in violation of HRS § 291-4 and a "habitual" DUI conviction in violation of HRS § 291-4.4, i.e., both statutes prohibited the same conduct and were part of an integrated sentencing scheme. See 1999 Haw. Sess. L. Act 78, §§ 1 and 2, at 131-32. "'[S]ubsequent legislative history or amendments' may be examined in order to confirm our interpretation of statutory provisions." State v. Sullivan, 97 Hawai'i 259, 266, 36 P.3d 803, 810 (2001) (quoting Bowers v. Alamo Rent-A-Car, Inc., 88 Hawai'i 274, 282, 965 P.2d 1274, 1282 (1998)). Thus, although the legislature defined "habitual" DUI as a distinct offense in 1995, it is clear that the only fact that distinguished a "habitual" DUI offense from other DUI offenses was that a habitual offender had collected three or more prior DUI convictions within the same ten-year period.[4]

The record reflects that, at the time Shimabukuro entered his conditional guilty plea to the habitual DUI charge, he was not, in fact, actually culpable of three prior DUI offenses within the same ten-year period, because one of his prior DUI convictions had been vacated, thereby rendering him culpable of only two relevant prior DUI offenses.[5] That the

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[4] Indeed, when the legislature recodified Hawaii's DUI offenses in 2000, it eliminated the distinct offense of "habitual" DUI, but retained the same penalties (based on a class C felony) for "an offense that occurs within ten years of three or more prior convictions for offenses under this section . . . ." 2000 Haw. Sess. L. Act 189, § 23 at 426-27. Notably, the legislature did not indicate that it was eliminating a "status" offense, see supra note 3, when it recodified the DUI offenses.

[5] For purposes of my analysis, it makes no difference whether the vacated conviction was, in the first instance, "unconstitutionally obtained" or defective for some other reason. The inescapable fact is that, at the time he was sentenced as a "habitual" DUI offender, Shimabukuro had not "been

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conviction had not been vacated when he committed the DUI offense as to which he was charged and convicted as a habitual DUI offender in the present matter is immaterial. The fact remains that the conviction was vacated, and Shimabukuro was in fact culpable of only two prior DUI offenses within the same ten-year period as the offense giving rise to the present appeal. That being so, Shimabukuro could not be a "habitual" DUI offender within the meaning of HRS § 291-4.4.

For the foregoing reasons, I agree that the correct resolution of the present appeal is to vacate Shimabukuro's conviction under Count I of the indictment and remand the matter to the circuit court with instructions to grant the motion to dismiss, enter a judgment of conviction of the included offense of DUI, pursuant to HRS § 291-4, and sentence Shimabukuro in accordance with that statute.

(...continued)
convicted three or more times for a driving under the influence offense."