DISSENTING OPINION BY NAKAYAMA, J.,
WITH WHOM RAMIL, J., JOINS

In this case, Shimabukuro's fourth offense, I dissent from Justice Acoba's opinion to emphasize the fact that HRS § 291-4.4 is not a recidivist statute, inasmuch as it is a separate offense. As a separate offense, HRS § 291-4.4 requires that two elements be proven to convict a person of habitual DUI: (1) the person must have at least three prior convictions for DUI within a ten-year period; and (2) the person must operate or assume physical control of a vehicle while (a) under the influence of intoxicating liquor in an amount sufficient to impair the person, (b) having a blood alcohol content or breath content of .08 grams or more, or (c) under the influence of any drug that impairs the person's ability to operate the vehicle. HRS § 291-4.4. Unlike Justice Acoba suggests, the first element of HRS § 291-4.4 does not require three convictions in perpetuity. The term "conviction," as it is more commonly or technically used, means a guilty verdict or judgment upon a guilty verdict. Under this definition, Shimabukuro had three prior DUI "convictions." Thus, I would affirm Shimabukuro's HRS § 291-4.4 conviction.

Two approaches have been suggested to deal with habitual offenders. Garrett v. United States, 471 U.S. 773, 783-84 (citing 116 Cong. Rec. 33302, 33630 (1970) (statement of Rep. Poff)). The first is the creation of a separate offense, requiring that all elements of the offense be met and establishing a separate penalty for those who meet all of the elements of the offense. Id. The second is the imposition of enhanced sentences based on the increasing number of convictions for a basic underlying offense. Id. A recidivist statute is based on the second approach. Id. Unlike a separate offense, a

recidivist statute does not set forth elements to be met but deals only with enhanced sentencing for repeat offenders. See State v. Olivera, 57 Haw. 339, 346, 555 P.2d 1199, 1203 (1976) ("In Hawaii, recidivism affects the penalty imposed upon a convicted offender through the procedures provided by Penal Code s 662, under which an extended term of imprisonment may be imposed for a felony where the offender is a persistent offender . . . .").

In Garrett v. United States, 471 U.S. 773, 779-86 (1985), the United States Supreme Court held that 21 U.S.C. § 848(a)(1) was not a recidivist statute. This statute provided in relevant part that:

> Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2) . . . .

Id. at 779 n. 1 (citation omitted). The Court noted that this was not the language of a recidivist statute because it set out a separate offense "rather than a multiplier of the penalty established for some other offense." Id. at 781.

In State v. Olivera, 57 Haw. 339, 346, 555 P.2d 1199, 1203-04 (1976), this court held that HRS § 134-7(b) was not a recidivist statute. At that time, HRS § 134-7(b) provided that:

> No person who has been convicted in this State or elsewhere, of having committed a felony, or of the illegal use, possession, or sale of any drug, shall own, or have in his possession, or under his control any firearm or ammunition therefor.

Id. (citing HRS § 134-7(b)). This court noted that the prior conviction was an element of the offense and that "this [wa]s not a case of increasing the penalty for a crime because of a prior

conviction." Olivera, 57 Haw. at 346, 555 P.2d at 1203-04.

Later, in State v. Lobendahn, 71 Haw. 111, 112-13, 784 P.2d 872, 872-73 (1989), this court had the opportunity to re-examine an amended HRS § 134-7(b). Pursuant to the amendment, HRS § 134-7(b) read in relevant part that:

> No person who is under indictment or who has waived indictment for, or has been convicted in this state or elsewhere of having committed a felony, or any crime of violence, or of the illegal sale of any drug, shall own or have in the person's possession or under the person's control any firearm or ammunition thereof.

Id. (citing HRS § 134-7(b) (1985)). This court in Lobendahn did not overrule or discuss its previous decision in Olivera. See Lobendahn, 71 Haw. at 111-13, 784 P.2d at 872-73. This court did, however, affirm the defendant's conviction under HRS § 134-7(b), notwithstanding the vacation of the defendant's conviction upon which the HRS § 134-7(b) charge was based. Id. at 112, 784 P.2d at 872. In doing so, this court held that

> a convicted person "may not resort to self help by first obtaining and possessing the firearm and ammunition, and thereafter try to assert the invalidity of the prior conviction as a defense to a prosecution under § 134-7." [The defendant'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.

Id. at 113, 784 P.2d at 873 (citations omitted).

Similar to both versions of HRS § 134-7(b) in Lobendahn and Olivera, the requirement of three prior DUI convictions in HRS § 291-4.4 is an element of the offense. HRS § 291-4.4 does not impose an enhanced sentence or "multiplier" effect based on another offense. Thus, HRS § 291-4.4 is not a recidivist statute.

While Justice Levinson is correct in that the legislature clearly intended to curb the problem of repeat DUI

offenders, the reading of HRS § 291-4.4 in pari materia with HRS § 291-4 does not necessarily suggest that the legislature intended to create a recidivist statute. The legislature made it clear that it intended to set forth a separate offense for those who meet the elements of HRS § 291-4.4. In almost every committee report, the legislature states that it enacted HRS § 291-4.4 to "establish a felony offense." Conf. Comm Rep. No. 22, in 1995 House Journal, at 962; Hse. Stand. Comm. Rep. No. 49, in 1995 House Journal, at 1046; Hse. Stand. Comm. Rep. No. 844, in 1995 House Journal, at 1345. Nowhere in the committee reports does the legislature state that it enacted HRS § 291-4.4 to enhance penalties for an already existing felony offense. In fact, the legislature noted that the public defender testified in opposition to this bill because it did not impose an enhanced penalty for the repeat offender. Id. Furthermore, the legislature later amended HRS § 291-4.4, and the amended version includes, in its plain language, a "multiplier" effect or enhanced sentencing, more appropriately resembling a recidivist statute.[1] See HRS § 291E-61 (Supp. 2001).

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[1] HRS § 291E-61 provides in relevant part that:

> (b) A person committing the offense of operating a vehicle under the influence of an intoxicant shall be sentenced as follows without the possibility of probation or suspension of sentence:
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> (1) For the first offense, or any offense preceded within a five-year period by a conviction for an offense under this section or section 291E-4(a):
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> . . . .
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> (2) For an offense that occurs within five years of a prior conviction for an offense under this section or section 291E-4(a):
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> . . . .
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> (3) For an offense that occurs within five years of two prior convictions for offenses under this section or section 291E-4(a):
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> . . . .
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> (4) For an offense that occurs within ten years of three or more prior convictions for offenses under this section, section 707-702.5, or section 291E-4(a):

As HRS § 291-4.4 is not a recidivist statute, three prior DUI convictions were not required in perpetuity. Pursuant to the plain language of HRS § 291-4.4, the presence of three prior DUI convictions was only required at the time Shimabukuro operated or assumed actual physical control of the operation of a vehicle while under the influence of intoxicating liquor. Unlike Justice Acoba suggests, Shimabukuro had three prior DUI "convictions" and thus met the first element of HRS § 291-4.4.[2]

Justice Acoba argues that Shimabukuro did not have three prior DUI "convictions," inasmuch as under the rule of lenity, a "conviction" should be defined as a prior valid DUI conviction because the statute is ambiguous.[3] This suggested definition of "conviction," however, is a departure from the more commonly or technically used definition of the term "conviction."

This court has stated that "[t]he meaning of the term 'convicted' varies according to the context in which it appears and the purpose to which it relates." State v. Akana, 68 Haw. 164, 166, 706 P.2d 1300, 1303 (1985) (citation omitted); see also State v. Riveira, 92 Hawai'i 546, 552, 993 P.2d 580, 586 (App. 1999) (citation omitted) (defining the term "conviction" as one

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[2] Justice Levinson does not define the term "conviction" and bases his conclusion on the alleged recidivist nature of HRS § 291-4.4. As discussed, however, HRS § 291-4.4 is not a recidivist statute and thus the definition of "conviction" is relevant to whether Shimabukuro satisfied the first element of HRS § 291-4.4.

[3] Justice Acoba suggests several definitions for the term "conviction," including a verdict of guilty, a plea of guilty, a judgment or sentence of guilt, and a judgment that has not been expunged by pardon, reversed, set aside, or otherwise rendered nugatory. Justice Acoba then states that "we strictly construe the term 'convicted' in HRS § 291-4.4 as referring to a prior valid DUI conviction." It is thus somewhat unclear exactly how Justice Acoba is using the term "prior valid DUI conviction."

that is "often employed but rarely precisely defined."). This court has also stated that

> [t]he word "conviction" is more commonly used and understood to mean a verdict of guilty or a plea of guilty. The more technical definition includes the judgment or sentence rendered pursuant to an ascertainment of guilt. Use of the term "conviction" in a statute presents a question of legislative intent.

Akana, 68 Haw. at 166-67, 706 P.2d at 1303 (citations omitted). Generally, it is presumed that the legislature uses terms in their ordinary or commonly used meanings absent clear legislative intent indicating otherwise. See Akina v. Kai, 22 Haw. 520, 520 (Terr. 1915) ("[W]e deem it our duty to construe the law as we find it, giving to the language used its usual and ordinary meaning . . . .").

This court has defined "conviction," in its more common or technical sense, either as a guilty verdict or a judgment entered upon the guilty verdict. Akana, 68 Haw. at 167, 706 P.2d at 1303 (holding that "convicted," for the purpose of revocation of probation, meant "the ascertainment of guilt by guilty plea, or by verdict" and not a "judgment of conviction."); State v. Rodrigues, 68 Haw. 124, 132, 706 P.2d 1293, 1299 (1985) (holding that "conviction," for purposes of sentencing repeat offenders pursuant to HRS § 706-606.5(1)(b), meant "a judgment entered upon the finding" of guilt by a jury or court.); accord Riveira, 92 Hawai‘i at 552-55, 993 P.2d at 586-89 (rejecting the defendant's argument that the definition of "conviction" did not include a "juvenile adjudication" in the context of sentencing a repeat offender for driving violations). This court has departed from the more commonly used definition of "conviction" in two

contexts: (1) where a court ruling applies retroactively to similarly situated defendants; and (2) where the plain language of the statute provides such definition. See State v. Garcia, 96 Hawai‘i 200, 214, 29 P.3d 919, 933 (2001); State v. Hanaoka, 97 Hawai‘i 17, 20, 32 P.3d 663, 666 (2001); State v. Malufau, 80 Hawai‘i 126, 138, 906 P.2d 612, 624 (1995).

In the instant case, we are not dealing with the retroactive application of a court ruling to similarly situated defendants or a situation where the plain language of the statute provides a definition of the term "conviction." Nor are we dealing with a situation where there is clear legislative intent that: (1) the term "conviction" be defined as a prior valid DUI conviction; or (2) a departure from the more commonly used definition of "conviction" was intended. We are dealing with a situation where (1) the more commonly used definition of "conviction," as this court has employed in the past, is a guilty verdict or judgment entered upon a guilty verdict, (2) the legislature enacted HRS § 291-4.4 for the purpose of "[d]eter[ing] people from continuing to drive under the influence of alcohol" and "[r]educ[ing] the risk of traffic fatalities that are alcohol related by removing extremely dangerous drivers from the road," Hse. Stand. Comm. Rep. No. 49, in 1995 House Journal, at 1046, and (3) employing the commonly used definition of "conviction" achieves the legislature's purpose in enacting HRS § 291.4.4.

Justice Acoba does not state how he is using the definition "prior valid DUI conviction," how the use of that definition effects the legislature's intent, or why a departure from the more commonly used definition of "conviction" is

consistent with the legislative purpose behind HRS § 291.4.4. Justice Acoba's definition permits a repeat DUI offender to collaterally attack all prior DUI convictions in the face of an indictment under HRS § 291-4.4, or, as in this case, to withdraw a plea of no contest two years after pleading, for the purpose of escaping the scope of HRS § 291-4.4. This makes a mockery out of the separate habitual DUI offense that the legislature created and is something surely the legislature did not intend. As such, for purposes of HRS § 291-4.4, I would hold that the term "conviction" be defined in its more common or technical sense, as a guilty verdict or judgment entered upon a guilty verdict.

Utilizing this definition of "conviction," Shimabukuro had three prior DUI convictions at the time of the HRS § 291-4.4 offense. It is important to note that it was not until two years later, after being indicted with habitual DUI, that Shimabukuro filed a motion to withdraw his earlier plea of no contest to the April 4, 1997 DUI conviction and that the court granted his motion and set aside the sentence.[4] This type of collateral attack on convictions renders HRS § 291-4.4 meaningless, inasmuch as a defendant could collaterally attack a conviction at any time after an indictment under HRS § 291-4.4 for the purpose of escaping the scope of the statute. I am confident that the

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[4] The record on appeal does not provide information regarding the vacation of Shimabukuro's prior DUI conviction. This court, however, can take judicial notice of adjudicative facts, sua sponte, including the district court records in case number 096495945, pursuant to Hawai'i Rules of Evidence (HRE) Rule 201. See Akana, 68 Haw. at 165-66, 706 P.2d at 1302. The records in case number 096495945 indicate that Shimabukuro pled no contest to DUI on April 4, 1997, and two years later, after being indicted with habitual DUI, filed a motion to withdraw his plea of no contest. Thus, Justice Acoba's discussion regarding Hawai'i Rules of Penal Procedure (HRPP) Rule 40(a)(1) is not particularly relevant to the type of collateral attack used by Shimabukuro in this case.

legislature did not intend to allow a drunk driver to escape penalties for repeated offenses in this manner.

As HRS § 291-4.4 is not a recidivist statute and Shimabukuro had three prior DUI convictions when he, for the fourth time, operated or assumed actual physical control of the operation of a vehicle while under the influence of intoxicating liquor, his conviction should stand. Shimabukuro's multiple convictions for DUI indicate that he is the type of repeat offender that the legislature intended to include within the scope of HRS § 291-4.4. For the foregoing reasons, I dissent.