DISSENTING OPINION BY MOON, C.J.,
IN WHICH NAKAYAMA, J., JOINS

I respectfully disagree with the majority's holding that the DUI charge in this case was fatally defective because it "failed to allege a critical facet of a material element of DUI, pursuant to HRS § 291-4(a)(1), which the prosecution was required to prove beyond a reasonable doubt[.]" Majority Opinion (Maj. op.) at 10 (emphasis added). In my view, the omission of the phrase "in an amount sufficient to impair the person's normal mental faculties or ability to care for oneself and guard against casualty" did not render the charge deficient. I, therefore, respectfully dissent.

This court recently reiterated that we "will interpret a charge as a whole, employing practical considerations and common sense." State v. Sprattling, 99 Hawai'i 312, 319, 55 P.3d 276, 283 (2002) (emphasis added) (citations omitted). In the present case, Cummings was charged with, inter alia, "operat[ing] or assum[ing] actual physical control of the operation of a vehicle while under the influence of intoxicating liquor," in violation of HRS § 291-4(a)(1). Unlike the majority, I believe the charge was sufficient to give Cummings notice of all the essential elements that the prosecution was required to prove beyond a reasonable doubt. Moreover, the charge, in my view, set forth "with reasonable clarity all essential elements of the crime intended to be punished[] and fully define[d] the offense

in unmistakable terms readily comprehensible to persons of common understanding[.]" See Maj. op. at 8 (citing State v. Merino, 81 Hawai'i 198, 214, 915 P.2d 672, 688 (1996)).

As the United States District Court of Appeals for the Third Circuit has noted,

> courts have recognized for over half a century that driving "under the influence" is commonly understood to mean driving in a state of intoxication that lessens a person's normal ability for clarity and control. See, e.g, Weston v. State, 65 P.2d 652, 654 (1937); State v. Graham, 222 N.W. 909, 911 (1929). This common understanding is consistent with the obvious purpose of drunk driving statutes; i.e., to prevent people from driving unsafely due to an alcohol-induced diminished capacity. Because driving "under the influence" is commonly understood, it therefore puts citizens on fair notice of proscribed conduct.

Government of Virgin Islands v. Steven, 134 F.3d 526, 528 (3rd Cir. 1998) (parallel citations omitted). As far back as 1929 -- only a couple of decades after the introduction of the Ford Model T, -- the Minnesota Supreme Court recognized that "the expression 'under the influence of intoxicating liquor' is in common, everyday use by the people" and "[w]hen used in reference to the driver of a vehicle on public highways, it appears to have a well-understood meaning." State v. Graham, 222 N.W. 909, 911 (Minn. 1929). Given the common understanding of the term today, I fail to see how omission of the "magical" phrase "in an amount sufficient to impair the person's normal mental faculties or ability to care for oneself and guard against casualty" could be viewed as omitting a "critical component" or a "critical facet,"

see Maj. op. at 10, much less an essential element of the offense charged.

Prior to 1991, HRS § 291-4(a)(1) did not include the language that the majority now considers essential to state the offense of drunk driving as defined by the statute. See 1990 Haw. Sess. Laws 188. Clearly, however, under the statute as it existed prior to its amendment, the conduct charged constituted a valid criminal offense. The question, then, is whether the inclusion of the additional language operated to alter the offense as it existed prior to the amendment. The majority obviously believes so. I do not.

As amended, and in its entirety, HRS § 291-4(a)(1) provided as follows:

> **§ 291-4 Driving under the influence of intoxicating liquor.** (a) 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[.]

Id. (emphasis added). The legislative history fails to explain why the law was amended to include a statutory definition of the term "under the influence of intoxicating liquor," and there is nothing to indicate that the legislature intended, by virtue of the amendment, to add essential elements or "critical components" that had, theretofore, been missing. Rather, the legislature, in

my view, merely intended to codify the term "under the influence" as it was commonly understood, which is supported by the plain language of the statute itself. By employing the phrase "meaning that" as a predicate to the statutory definition, it is clear that the amendment adds nothing to what previously existed, except it clarifies that the added language is synonymous with the term that immediately precedes it. In other words, the amendment merely reiterates the common understanding of what it means to be "under the influence."

The legislature's clarification was perhaps a response to this court's decision in State v. Mata, 71 Haw. 319, 789 P.2d 1122 (1990), issued shortly before the adoption of the statutory amendment. In Mata, the defendant was convicted of violating HRS § 291-4(a)(1) and, on appeal, claimed that the instructions given to the jury were erroneous.[1] Id. at 331, 780 P.2d at 1128. We

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[1] The jury was instructed that:

> A person is under the influence of intoxicating liquor . . . if he or she has consumed intoxicating liquor sufficient to affect his or her mental or physical facilities . . . or abilities in such a way as to impair, to any perceptible, appreciable, or noticeable degree, his or her ability to operate a vehicle safely. The mere fact that a person has taken a drink does not automatically place him under the ban of the statute, unless such drink has some influence upon the person lessening, in some degree, his ability to operate an automobile safely.
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> The burden is on the State to prove beyond a reasonable doubt that the defendant's consumption of alcohol impaired, to any perceptible, appreciable, or noticeable degree, the defendant's ability to operate a motor vehicle safely. The State need not prove that the defendant actually drove in an unsafe or erratic manner or that the defendant caused an accident. It must prove only a diminished capacity to operate

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agreed, noting that the trial judge "equated the statutory term 'under the influence of intoxicating liquor' with the 'slightest perceptible, appreciable or noticeable degree' of impairment and instructed that impairment included 'any interference with' or 'lessening of' 'alertness', 'any weakening or slowing up of the action of the motor nerves', or 'any interference with the coordination of the sensory or motor nerves' which may cause sluggishness." Id.

In Mata, we declined to read into HRS § 291-4(a)(1) the existing statutory definition of "under the influence of intoxicating liquor" as it was codified in Chapter 281[2] because

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[1](...continued)

> safely.
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> If the ability of the defendant to drive safely has been lessened to the slightest perceptible, appreciable, or noticeable degree by the use of intoxicating liquor, then the defendant may be deemed to be under the influence. That condition which brings a driver within the scope of driving under the influence is any interference with or lessening of alertness, any weakening or slowing up of the action of the motor nerves, or any interference with the coordination of sensory and motor nerves which may cause sluggishness where quickness of action is required or which may otherwise signal a diminished capacity to operate a vehicle safely.

Id. at 328-39, 789 P.2d 1127-28 (emphases added).

[2] Pursuant to HRS § 281-1, "'Under the influence of liquor' means that the person concerned has consumed intoxicating liquor sufficient to impair at the particular time under inquiry the person's normal mental faculties or ability to care for oneself and guard against casualty, or sufficient to substantially impair at the time under inquiry that clearness of intellect and control of oneself which the person would otherwise normally possess." Id. (emphasis added).

that chapter dealt with the sale of liquor and liquor establishments, as opposed to traffic violations, and therefore was not in pari materia. Id. at 330, 789 P.2d at 1128. Our unwillingness to adopt the magical phrase from an unrelated statutory framework, however, did not hinder us from recognizing, even in the absence of the statutory definition at issue, that the pre-1991 version of HRS § 291-4(a)(1) required the prosecution to prove more than the "slightest perceptible, appreciable or noticeable degree" of "diminution of the function of the motor nerves" in order to secure a conviction. Id. at 331, 789 P.2d at 1129.

Accordingly, based on the foregoing, I would conclude that the charge, as given, set forth with reasonable clarity all of the essential elements necessary to state an offense under HRS § 291-4(a)(1) in a way that was readily comprehensible to a person of common understanding. Moreover, it was sufficient to provide Cummings with notice of all the essential elements that the prosecution was required to prove beyond a reasonable doubt. I would, therefore, hold that the trial court had subject matter jurisdiction and would affirm Cummings's conviction of and sentence for DUI.