CONCURRING OPINION BY ACOBA, J.

I concur in the result reached by the majority but on the grounds that (1) as applied to this case, an ordinary reading of the words in Hawai'i Revised Statutes (HRS) § 707-702(1)(a) (1993) indicates that the culpable conduct must be aimed at a living person and fails to evince any legislative intent to impose criminal liability on a pregnant woman whose self abusive conduct results in the death of a baby born alive, (2) assuming, arguendo, any doubt exists as to the construction of HRS § 707-702(1)(a), under our penal code the statute must be given a strict reading in favor of Defendant-Appellant Tayshea Aiwohi (Defendant), and (3) in any event, to construe the statute otherwise would render it vague and ambiguous, in violation of the due process clause, article I, section 5, of the Hawai'i Constitution as to a pregnant woman, because she could not know at the time of her conduct whether her acts would ultimately be illegal. In so concurring, I respectfully disagree with the majority that the pivotal point is whether the term "person" as used in HRS § 707-702(1)(a) is an attendant circumstance of the crime of reckless manslaughter rather than part of the result of conduct element, that being "the death of another person," and I also respond to Justice Levinson's concurrence.

I.

A.

Giving the words "their most known and usual signification" and "attending . . . to their general or popular use or meaning," HRS § 1-14 (1993), the language of HRS § 707-702 prohibits reckless conduct against a human being who at the time is alive, and does not express any design to include a pregnant woman whose self-abusive conduct affects her fetus. For at the time of offending acts there is simply no person (i.e. one who has been born and is alive) in existence as to whom the conduct can be said to have been directed.

HRS § 707-702(1)(a) provides that "[a] person commits the offense of manslaughter if: (a) [h]e recklessly causes the death of another person[.]" In this statute, the culpable state of mind of recklessly must relate to the result of the defendant's conduct. In that regard, "person" as used in HRS § 707-702(1)(a) is defined as "a human being who has been born and is alive." HRS § 707-700 (1993). Reading the definition of person in the "usual" way according to "general or popular use," see HRS § 1-14, "causing" the death of a "human being who has been born and is alive" (emphasis added) indicates that the culpable conduct must be aimed at one already born. See Cueller v. State, 957 S.W.2d 134, 142 (Tex. Ct. App. 1997) (Rodriguez, J., dissenting) ("'Another' is ultimately defined in the penal code as 'a human being who *has been* born and *is* alive[]" and,

thus, "the legislature intended that any conduct proscribed by the penal code must occur against a victim who 'has been born and is alive' at the time the conduct occurs." (Emphases in original.)); Collins v. State, 890 S.W.2d 893 (Tex. Ct. App. 1994). Thus, "[i]f the legislature had intended criminal consequences for conduct occurring before the birth of the fetus, it could have easily [indicated] so." Cueller, 957 S.W.2d at 142. See Collins, 890 S.W.2d at 897 (stating that "the Penal Code does not proscribe any conduct with respect to a fetus"). The legislature plainly did not do so.

B.

Thus, given a usual reading, the term "person" in the reckless manslaughter statute, HRS § 707-702, is not an attendant circumstance. With all due respect, to conclude that it is strains the language of the statute and poses potential confusion in the future regarding the parsing of statutory "elements," under HRS § 702-205 (1993). Not all elements may be necessarily contained in the definition of an offense, State v. Aganon, 97 Hawai'i 299, 303, 36 P.3d 1269, 1273 (2001), and an attendant circumstance has been defined more in terms of what it is not than what it is. As the majority indicates, in State v. Moser, 107 Hawai'i 159, 172, 111 P.3d 54, 67 (App. 2005), the Intermediate Court of Appeals stated that "[a]ny circumstances defined in an offense that are neither conduct nor the results of conduct would, by default, constitute attendant circumstances elements of the offense." Majority opinion at 31.

All parts of the definition of reckless manslaughter under HRS § 707-702(1)(a) are accounted for in a state of mind, a conduct element, and a result of conduct element. This court has already said in an analogous situation with respect to the similarly worded offense of second degree murder, that

> a person commits the offense of murder in the second degree when the "person intentionally or knowingly causes the death of another person." Any voluntary act . . . or omission may satisfy the conduct element of the offense. The death of another person, as the intentional or knowing result of the conduct, constitutes the result element of the offense.

Aganon, 97 Hawai'i at 303, 36 P.3d at 1273 (emphases added). In this respect, there is no principled difference between second degree murder and reckless manslaughter, inasmuch as the identical words "the death of another person" are employed in both statutes and the same definition of the term person in HRS § 707-700 applies in both statutes. The term person, then, should not be excised from the result of conduct element and denominated as a separate attendant circumstance as the majority proposes.

Collins is instructive. In that case, the defendant was charged with reckless injury to a child. Under Texas law, the proof of an offense is similar to ours, consisting of "(1) the forbidden conduct, (2) the required culpability, (3) any required result, and (4) the negation of any exception to the offense."[1] 890 S.W.2d at 898. In that case the Texas court said

[1] Similarly, HRS § 702-205 states as follows:

> **Elements of an offense.** The elements of an offense are such (1) conduct, (2) attendant circumstances, and (continued...)

> [w]hile injury to a child is a "result of conduct[,]" . . . this does not mean that the actor is prosecuted for the result of the conduct, rather than the conduct itself. . . . [T]his means that the conduct must be done with the required culpability to effect the result the Legislature has specified, so that the culpable mental state relates to the result of the defendant's conduct, and not to the nature of the conduct. The fact remains that the actor is prosecuted for her conduct.

Id. (emphases added). Likewise, under HRS § 707-702(1)(a) the accused is prosecuted for conduct which brings about the prohibited result. Hence, as the Collins court indicated with respect to a similar reference to injury to a child and, as this court has said in Aganon, the phrase "death of another person" "constitutes the result element." Aganon, 97 Hawai'i at 303, 36 P.3d at 1273. This is precedent binding on us and there is no compelling justification in this case for deviating from it. See State v. Garcia, 96 Hawai'i 200, 206, 29 P.3d 919, 926 (2001) ("While 'there is no necessity or sound legal reason to perpetuate an error under the doctrine of stare decisis' . . . we agree with the proposition expressed by the United States Supreme Court that a court should 'not depart from the doctrine of stare decisis without some compelling justification.'" (Quoting Hilton v. South Carolina Pub. Ry. Comm'n, 502 U.S. 197, 202, 112 S.Ct. 560, 116 L.E.2d 560 (1991).)).

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[1](...continued)

(3) results of conduct, as:
  (1) Are specified by the definition of the offense, and
  (b) Negative a defense (other than a defense based on the statute of limitations, lack of venue, or lack of jurisdiction).

HRS § 702-204 (1993) states in relevant part that "a person is not guilty of an offense unless the person acted intentionally, knowingly, recklessly, or negligently, as the law specifies, with respect to each element of the offense."

C.

Thus I must also respectfully disagree with Justice Levinson's concurring opinion that such a reading of Aganon is "misguided." Justice Levinson's concurring opinion, slip op. at 1. This court in Aganon expressly said (1) that "[t]he death of another person . . . constitutes the result element of the offense[,]" 97 Hawai'i at 303, 36 P.3d at 1273 (emphasis added), (2) that the circuit court's error in Aganon would permit the jury to infer "the requisite state of mind with respect to her conduct . . . , but not with respect to the death that resulted[,]" id. (emphasis added), and (3) that therefore, "on remand" "the elements of 'conduct' and 'result' should be separately listed[,]" id., by the circuit court. The foregoing establishes that the death of another person is the result element.

As the other concurring opinion notes, "no party [in Aganon] disputed that Karie [(the victim)] was a 'person[.]'" Justice Levinson's concurring opinion, slip op. at 4. What was self evident in Aganon is also undeniable in the instant case. For, inasmuch as HRS chapter 707 relates to "offenses against the person," there can be no reasonable doubt that the entity acted upon and to which the result was proscribed in Aganon and in this case is a person and not, for example, "a cat," as was posited during oral argument. Hence, Aganon makes no reference to any attendant circumstance element at all.

Placing the reference to the victim "Karie" in context, belies the other concurrence's reading of Aganon. In that case, this court indicated that "[a]ny voluntary act (e.g., physical abuse) . . . may satisfy the conduct element" as opposed to the "result of the conduct[.]" 97 Hawai'i at 303, 36 P.3d at 1273 (emphasis added). Explaining the circuit court's error, it was said, "The jury, for example, could have found [erroneously] that Aganon possessed the requisite state of mind with respect to her conduct (physical abuse of Karie), but not with respect to the death that resulted." Id. (emphasis added). Thus this court did not place Karie into the conduct element, as the other concurrence contends, but expressly determined that Karie, a person, was a component of the result element. On the other hand, abuse was identified as an act that could constitute the conduct element. Hence Karie was not referred to "for purposes of 'personhood' analysis," Justice Levinson's concurring opinion, slip op. at 5, but only to indicate upon whom abuse was inflicted under the alleged facts.

To detach the term person from the result element on the ground of "a curious cognitive dissonance" in Aganon, concurring opinion at 4, is at best an untenable judicial revision of that case. It implies, without judicially admitting so, that Aganon was wrongly decided as to this issue and, thus, that on remand the jury in Aganon was erroneously instructed. With all due respect, a straightforward application of the law does not countenance such an approach.

II.

Assuming, arguendo, any dispute as to opposing interpretations of HRS § 707-702(1)(a), our penal code requires that we are to strictly construe the statute. See Supplemental Commentary on HRS § 701-104 (1993) (Conference Committee Report on the Code rejecting a provision that "[t]he rule that a penal statue is to be strictly construed does not apply to this Code" and indicating that "'[i]t is the intent of the Committee that definitions of crimes are to be strictly construed'"). For the reasons stated supra, a strict construction of the statute would preclude the interpretation that HRS § 707-702(1)(a) applies when a woman's prenatal conduct causes injury to a fetus later born alive. Compare Supplemental Commentary on HRS § 701-704, supra, with Cueller, 957 S.W.2d at 137 (ruling that "[p]rovisions in the Penal Code are not to be strictly construed" in determining that "a victim attains the status of an individual after the alleged misconduct").

The application of the strict construction rule comports with the decisions of other jurisdictions which, as Plaintiff-Appellee State of Hawai'i (the prosecution) candidly conceded in oral argument, have all declined to impose criminal liability on a pregnant woman for prenatal conduct that resulted in the death of a baby born alive. See e.g., State v. Ashley, 701 So. 2d 338, 339 (Fla. 1997) (answering the certified question, "May an expectant mother be criminally charged with the death of her born alive child resulting from [a] self-inflicted

[gun-shot wound to the abdomen] during the third trimester of pregnancy," in the negative); Reinesto v. Superior Court of the State of Arizona in and for the County of Navajo, 894 P.2d 733, 734 (Ariz. Ct. App. 1995) (holding that the state could not "prosecute for child abuse a woman who uses heroin during pregnancy and thereafter gives birth to a heroin-addicted child"); State v. Deborah J.Z., 596 N.W.2d 490, 496 (Wis. Ct. App. 1999) (concluding that a pregnant woman who consumed alcohol during her pregnancy could not be charged with attempted first-degree intentional homicide and first-degree reckless injury); Collins, 890 S.W.2d at 898 (determining that the "[a]ppellant could not be prosecuted under our current laws [for reckless injury to a child] for ingesting cocaine while pregnant even if it caused the fetus to suffer pain or impairment").[2]

III.

The interpretation of HRS § 707-702(1)(a) as imposing liability when conduct injures a live human being satisfies due process and, thus, is to be preferred. See State v. Gaylord, 78 Hawai'i 127, 138, 890 P.2d 1167, 1178 (1995) (stating that, "where possible, we will read a penal statue in such a manner as

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[2] Whitner v. State, 492 S.E.2d 777 (S.C. 1997), cited by the prosecution as a case affirming the conviction of a mother for her prenatal conduct that harmed her subsequently born child, is distinguishable from the instant case. In Whitner, the mother pled guilty to criminal child neglect under Section 20-7-50 of the South Carolina Code Annotated. Id. at 778. See majority opinion at 18-19 n.5 for full text. In that case, the Supreme Court of South Carolina held that the word "child" in Section 20-7-50 included viable fetuses. Id. That court noted that "South Carolina law has long recognized that viable fetuses are persons holding certain legal rights and privileges." Id. at 779 (emphasis added). Unlike in South Carolina, neither HRS § 707-702(1)(a) on its face, nor the applicable definition of "person" in HRS § 707-700, indicates a viable fetus is to be treated as a person.

to preserve its constitutionality") (internal citations omitted)). Our due process clause, article I, section 5 of the Hawai'i Constitution, states in relevant part that "[n]o person shall be deprived of life, liberty or property without due process of law[.]" Inhering in the clause is the premise that "[a] penal statute is vague if a person of ordinary intelligence cannot obtain an adequate description of the prohibited conduct or how to avoid committing illegal acts." State v. Kam, 69 Haw. 483, 487, 748 P.2d 372, 375 (1988).

The contrary reading such as that proposed by the prosecution would render HRS § 707-702(1)(a) vague and ambiguous as to a pregnant woman. Reading HRS § 707-702(1)(a) to the effect that prenatal conduct injuries to a fetus will result in criminal liability if the baby is subsequently born alive renders the statute uncertain in its application. For the question of whether criminal liability will attach would not be evident at the time of the conduct, but be entirely contingent upon the baby subsequently being born alive. Hence, were the prosecution's view of the statute imposed, a pregnant woman could not determine whether at the time of her conduct her acts were prohibited under the statute or whether such acts would eventually be deemed illegal. Thus, under the prosecution's interpretation of the statute, a pregnant woman "cannot obtain an adequate designation of the prohibited conduct" or determine "how to avoid committing illegal acts[,]" Kam, 69 Haw. at 487, 748 P.2d at 375, as defined in HRS § 707-702(1)(a).

The statutory mandate that the "usual" and "popular" reading be employed in interpreting a statute, see HRS § 1-14, is plainly intended to attribute to a statute a construction that would be readily understood by a layperson. Thus, reading the statute as applying to conduct that is directed at a person born alive not only meets statutory construction tenets, but also complies with the due process mandate that the statute be understood "by a person of ordinary intelligence." Kam, 69 Haw. at 487, 748 P.2d at 375.

IV.

Therefore, I concur in the reversal of the August 25, 2004 order of the court but for the foregoing reasons.[3]

[3] Because we are not confronted with the situation in which a third person is charged with the death of a baby born alive because he or she caused injury to the fetus, I would not reach that situation. See majority opinion at 34 n.15.