CONCURRING AND DISSENTING OPINION BY ACOBA, J.

This case is the third in a trilogy of cases, beginning with State v. Domingues, 106 Hawai'i 480, 107 P.3d 409 (2005), followed by State v. Kekuewa, 112 Hawai'i 269, 145 P.3d 812 (App.), cert. granted, 113 Hawai'i 153, 149 P.3d 805 (2006), all having their origins in the split opinions in State v. Shimabukuro, 100 Hawai'i 324, 60 P.3d 274 (2002) (plurality opinion). A review of these cases is necessary for an understanding of the historical development of the case law in this area and the ultimate result in the instant case.

For while the plurality relies on Domingues, the parties do not argue its applicability. However, inasmuch as this court may recognize plain error, State v. Nichols, 111 Hawai'i 327, 334, 141 P.3d 974, 981 (2006); Hawai'i Rules of Penal Procedure (HRPP) Rule 52(b) (2007), I agree that based on Domingues, the charge against Defendant-Appellant Adam Ruggiero (Ruggiero) was insufficient to support the conviction and sentence for Operating a Vehicle Under the Influence of an Intoxicant (OVUII), Hawai'i Revised Statutes (HRS) § 291E-61 (Supp. 2003), as a second time offender, HRS § 291E-61(b)(2). However, consistent with the result of the Intermediate Court of Appeals (ICA) in Kekuewa, 112 Hawai'i at 277, 145 P.3d at 820, in which this court granted certiorari,[1] I would hold that, as in

[1] Although this court has not issued a disposition in connection with the grant of certiorari in Kekuewa, Kekuewa should have been disposed of before the instant case. The Kekuewa certiorari application was granted

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Kekuewa, which follows from Domingues, Ruggiero cannot be held liable for any OVUII offense, contrary to the plurality's ultimate holding.

I.

In Shimabukuro, it was held that "[i]n a conviction for habitually driving under the influence of intoxicating liquor or drugs (Habitual DUI), [HRS] § 291-4.4 (Supp. 1998),[2] the

[1](...continued)
previously on December 14, 2006, and oral argument was held on March 21, 2007. The certiorari application in Kekuewa requests that Domingues, which is the controlling authority in this case, be reversed and, thus, confirmation of Domingues should precede its citation for the result in this case. Inasmuch as the majority insists that this case be issued before disposition of the Kekuewa certiorari application, under the circumstances, some of the references to Kekuewa herein are to the briefs filed by the parties on the certiorari application.

[2] In Shimabukuro it was stated that:

> HRS § 291-4.4 prohibit[ed] any person from habitually driving under the influence of liquor or drugs. In relevant part, that section provided:
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> > **Habitually driving under the influence of intoxicating liquor or drugs.** (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
> > (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;
> > (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[.]
>
> (Emphasis added.) HRS § 291-4.4 was repealed on January 1, 2002. It [was] replaced by HRS § 291E-61 (Supp. 2001).

Shimabukuro, 100 Hawai'i at 325 n.1, 60 P.3d at 275 n.1 (Acoba, J., announcing the judgment of the court).

requisite prior driving under the influence (DUI) convictions must be valid." 100 Hawai'i at 325, 60 P.3d at 275 (Acoba, J., announcing the judgment of the court). The defendant in Shimabukuro was charged on June 6, 1999 with Habitual DUI. Id. Approximately six months later, "[o]n January 3, 2000, one of [the d]efendant's three prior DUI convictions was vacated because it was 'unconstitutionally obtained.'" Id. Thereafter, but apparently prior to trial, on January 18, 2000, the defendant "filed a motion to dismiss his Habitual DUI charge, on the ground that he had less than the number of convictions necessary for charging that offense." Id. at 275, 278 n.12, 60 P.3d at 325, 328 n.12. However, the district court denied the defendant's motion, relying on State v. Lobendahn, 71 Haw. 111, 784 P.2d 872 (1989).[3] Shimabukuro, 100 Hawai'i at 275, 60 P.3d at 275. The

[3] In Shimabukuro, it was explained,

> In Lobendahn, the defendant was convicted of kidnapping and terroristic threatening. See Lobendahn, 71 Haw. at 111, 784 P.2d at 872. He appealed those convictions. While the appeal was pending and the defendant was on parole, he was arrested and charged with being a felon in possession of a firearm and ammunition in violation of HRS § 134-7 (1985). See id. at 112, 784 P.2d at 872. After the defendant's arrest, but before his trial for the felon-in-possession charge, this court set aside his kidnapping and terroristic threatening convictions and remanded his case for a new trial. See id. Upon retrial, the defendant was acquitted of the kidnapping and terroristic threatening charges. See id. Subsequently, the defendant was convicted of being a felon in possession of a firearm and ammunition under HRS § 134-7. See id.
>
> On appeal, this court affirmed the defendant's HRS § 134-7 conviction on the ground that "the legislature did not intend to encourage persons to flaunt the law while an appeal is pending." Id. at 112-13, 784 P.2d at 873. The Lobendahn court held that "[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. (citing United States v. Liles, 432

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defendant "entered into a conditional plea of guilty allowing him to challenge the court's denial of his motion to dismiss." Id. at 325-26, 60 P.3d at 275-76.

On appeal, the rule of lenity was applied and "the term 'convicted' in HRS § 291-4.4 as referring to a prior valid DUI conviction" was "strictly construe[d.]" Id. at 327, 60 P.3d at 277 (Acoba, J., announcing the judgment of the court) (emphasis added). It was noted that "[a]ccording to the legislative history of HRS § 291-4.4, the requisite prior DUI convictions were considered an element of the offense." Id. at 328 n.12, 60 P.3d at 278 n.12 (Acoba, J., announcing the judgment of the court) (citing House. Stand. Comm. Rep. No. 844, in 1995 House Journal, at 1345) (emphasis added). Hence, HRS § 291-4.4 was not intended to "be viewed as a sentencing enhancement statute." Id. (Acoba, J., announcing the judgment of the court). As set forth in Shimabukuro,

> According to the legislative history of HRS § 291-4.4, the requisite prior DUI convictions were considered an element of the offense. See House Stand. Comm. Rep. No. 844, in 1995 House Journal, at 1345 ("This bill already includes as an element of habitually driving under the influence, three convictions for DUI." (Emphasis added.)). The purpose of HRS § 291-4.4 was to "establish a felony offense for those who are convicted of habitually driving under the influence of intoxicating liquors or drugs." Id.
>
> The House Judiciary Committee also considered, but did not adopt, the Office of the Public Defender's position that "the philosophy established in the Penal Code to address the repeat offender is by way of enhanced penalties, rather than an elevation of the classification of the offense." Id. (emphasis added). Hence, the legislature did not intend

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F.2d 18, 21 (9th Cir. 1970)).

100 Hawai'i at 325 n.5, 60 P.3d at 275 n.5 (brackets in original).

> that HRS § 291-4.4 be viewed as a sentencing enhancement statute.

Id. (Acoba, J., announcing the judgment of the court) (some emphases in original and emphasis added). Thus it was concluded that the trial court "erred in denying [the d]efendant's motion to dismiss" the habitual DUI charge. Id. at 328, 60 P.3d at 278 (Acoba, J., announcing the judgment of the court).

II.

On January 1, 2002, HRS § 291-4.4 was repealed. Id. at 328 n.12, 60 P.3d at 278 n.12. In that regard, Shimabukuro recognized that in enacting HRS § 291E-61, the legislature had adopted a sentence-enhancing statute. Id. (Acoba, J., announcing the judgment of the court). It was pointed out in Shimabukuro, that based on the legislative history, the newly enacted HRS § 291E-61 (Supp. 2001), consolidated "all driving under the influence provisions into one offense and sentencing scheme[.]" Id. (Acoba, J., announcing the judgment of the court) (emphasis added).

> More specifically, the provisions [of H.B. No. 1881] consolidate impaired driving and boating offenses, under present sections 291-4 (alcohol), 291-7 (drugs), and 200-81 (boating), into one single offense (operating a vehicle under the influence of an intoxicant), with uniform penalties. This offense also includes the present class C felony habitual DUI (section 291-4.4).
>
> Your Committee finds that consolidation of the habitual offense will ensure that all DUI convictions, whether under section 291-4 or 291-4.4, count as priors for purposes of sentencing.

Senate Stand. Comm. Rep. No. 1881, in 2000 House Journal, at 1400 (emphases added).

Hence, as set forth in HRS § 291E-61, the habitual DUI provision has become part of a sentencing scheme expressly "address[ing] the repeat offender . . . by way of enhanced penalties" as the public defender had recommended in 1995.

> House. Stand. Comm. Rep. No. 844, in 1995 House Journal, at 1345. According to the legislative history of HRS § 291-4.4, that was not the case prior to the effective date of HRS § 291E-61.

Id. (Acoba, J., announcing the judgment of the court) (some emphases in original and emphasis added).

III.

With respect to a sentencing enhancement statute, in State v. Sinagoga, 81 Hawai'i 421, 435, 918 P.2d 228, 242 (App. 1996) (Acoba, J., announcing the opinion of the court except for part IV.B.4. written by Burns, C.J., with Acoba, J., dissenting), the ICA had previously held that "if a sentencing court gives consideration to the defendant's previous convictions in choosing to impose consecutive, rather than concurrent, terms of imprisonment, the court must ensure that any prior felony, misdemeanor, and petty misdemeanor conviction relied on was a counseled one." (Citing United States v. Tucker, 404 U.S. 443, 447 (1972).). As to the procedure to be implemented in determining whether a prior conviction was counseled or not, a majority of the ICA held in Part IV.B.4. of that opinion, that the defendant was required to challenge a conviction relied on by the State as an uncounseled one:

> As we have noted above, the rationale for not allowing the consideration of an uncounseled criminal conviction as a basis for the imposition or enhancement of a prison sentence is its lack of reliability. In our view, if the presentence report states that the defendant has a prior criminal conviction and the defendant does not respond to that report with a good faith challenge on the record that the reported criminal conviction was (1) uncounseled, (2) otherwise invalidly entered, or (3) not against the defendant, that prior criminal conviction is reliable for all sentencing purposes. We agree with [State v.] Triptow[, 770 P.2d 146 (Utah 1989),] that the defendant, more than anyone else, knows whether or not his or her prior criminal conviction

was uncounseled, otherwise invalid, or irrelevant.

Id. at 445, 918 P.2d at 252 (Burns, C.J., announcing the opinion of the court with respect to Part IV.B.4.) (emphasis added). On the other hand, the dissent argued that inasmuch as the State proffered the convictions for the purpose of enhancing the severity of a prison sentence, the burden of establishing their validity should rest with the State:

> The majority's faulty premise that "the defendant, more than anyone else, knows whether or not his or her prior criminal conviction was uncounseled, otherwise invalid, or irrelevant" has no support in the record. Majority opinion at 445, 918 P.2d at 252. Time and time again, the cases indicate that lay persons are typically unaware of the nature and import of court procedures. . . .
>
> . . . Under the presumptive approach adopted by the majority, a defendant's failure to raise an uncounseled conviction constitutes, in effect, a waiver of his state constitutional right to effective assistance of counsel, without provision for the required procedures for the knowing, voluntary and intelligent waiver of the right to counsel and permits the State to use such a conviction, even if uncounseled, in the sentencing process.

Id. at 437, 918 P.2d at 244 (Acoba, J., dissenting) (some emphasis in original and some added).[4]

IV.

Subsequently, the application of Sinagoga, with respect to prior convictions, was seemingly limited to convictions that

[4] See Shirley M. Cheung, State v. Sinagoga: The Collateral Use of Uncounseled Misdemeanor Convictions in Hawai'i, 19 U. Haw. L. Rev. 813, 843 (1997) (The fairness of the majority's rule on the procedural aspect of Sinagoga can be questioned and that "[t]he better rule would be to follow Judge Acoba's dissenting opinion in Sinagoga" because placing the burden "on the defendant may require him to determine whether each and every one of his convictions was counseled or not, including those convictions that may never be considered in a sentencing hearing" and "[the State] has greater and easier access to the defendant's prior criminal records, particularly when the convictions occur[ed] in other jurisdictions. [Therefore p]lacing the burden on the State makes logical sense[,]" because "[t]he State knows which prior convictions it will rely on in requesting enhanced sentencing and can more efficiently research whether the convictions were counseled or not. The State would have to conduct this research anyway, no matter where the burden is placed, so placing the burden on the State will avoid the public paying twice.").

were uncounseled. In State v. Veikoso, 102 Hawai'i 219, 220, 74 P.3d 575, 576 (2003), the defendant was charged with habitually driving under the influence of intoxicating liquor, in violation of HRS § 291-4.4 (Supp. 2000) (Habitual DUI). The defendant filed a motion to dismiss "to collaterally attack the validity of three of his underlying DUI convictions and preclude the prosecution from using them to prove the habitual DUI charge." Id. at 220-21, 74 P.3d at 576-77. The trial court "denied the motion to dismiss after determining that the continued validity of the predicate prior convictions was irrelevant to establish culpability for the habitual DUI charge." Id. at 221, 74 P.3d at 577. Thereafter, the defendant "entered a conditional guilty plea, preserving his right to appeal the trial court's denial of his motion to dismiss." Id.

On appeal, the Veikoso court "examine[d] whether a defendant has the right to collaterally attack prior convictions in the context of trial proceedings for a subsequent offense." Id. at 223, 74 P.3d at 579. Taking issue with the reference to prior convictions that were "otherwise invalidly entered" in the procedural portion of Sinagoga, 81 Hawai'i at 437-47, 918 P.2d at 244-54 (Burns, C.J., announcing the opinion of the court with respect to Part IV.B.4.), this court limited the application of Sinagoga, with respect to prior convictions, to uncounseled convictions:

> We recognize the tension between our holding and dictum in Sinagoga. In Sinagoga, the [ICA] was required to resolve the issue of whether a sentencing court could consider a

> defendant's prior uncounseled convictions in determining whether consecutive terms of imprisonment were warranted. Sinagoga, 81 Hawai'i at 435, 918 P.2d at 242. The ICA [majority on the procedural aspect] expressly held that the sentencing court could properly rely only upon prior counseled convictions, id., but proceeded to outline a procedure whereby defendants could challenge convictions appearing in a presentence report on the basis that they were "(1) uncounseled, (2) otherwise invalidly entered, and/or (3) not against the defendant[.]" Id. at 446, 918 P.2d at 253 (emphasis added). Because the "otherwise invalidly entered" language in Sinagoga may be construed as permitting collateral attacks whenever the validity of a conviction is challenged, we emphasize, in light of our holding today, that this language should be disregarded.

Veikoso, 102 Hawai'i at 226 n.8, 74 P.3d at 582 n.8 (some emphases in original and some added). However, Veikoso confirmed that a defendant could file a HRPP Rule 40 proceeding for post-conviction relief regarding the constitutional validity of prior convictions:

> Challenges to the constitutional validity of prior convictions alleged to have been obtained as the result of invalid guilty pleas must be raised either through a direct attack or pursuant to HRPP Rule 40, which encompasses all common law and statutory procedures for post-conviction relief, and not in proceedings related to a subsequent habitual DUI offense.

Id. at 226, 74 P.3d at 582; see also id. at 227, 74 P.3d at 583 (Acoba, J., concurring) (explaining that "a collateral attack on a prior conviction should not be allowed in the trial proceedings in which the prior conviction is an element to be proven" (citing but see, e.g., People v. Allen, 981 P.2d 525, 535-38 (Cal. 1999) (holding that since the California Supreme Court has required a colloquy as to a defendant's constitutional rights, the "record [from the prior proceeding] should clearly demonstrate the defendant was told of his rights and that he affirmatively waived them[,]" and because of this ease of administration, "motions to strike prior felony convictions" in a subsequent trial are

permitted))); State v. Grindling, 96 Hawai'i 402, 405, 31 P.3d 915, 918 (2001) ("As a general rule, a collateral attack may not be made upon a judgment or order rendered by a court of competent jurisdiction.").

V.

A.

In Domingues, the first case of the trilogy, the defendant was tried under "HRS § 291-4.4(a)(1) and/or 291-4.4(a)(2) [(Supp. 2000)]." 106 Hawai'i at 483, 107 P.3d at 412. The oral charge stated in relevant part,

> Kyle Evan Domingues did operate or assume actual physical control of the operation of any vehicle while under the influence of intoxicating liquor . . . and had been convicted three or more times for driving under the influence offenses during a ten-year period, and/or did operate or assume actual physical control of the operation of any vehicle while with .08 or more grams of alcohol per one hundred milliliters, . . . and had been convicted three or more times for driving under the influence offenses during a ten year period, thereby committing the offense of Habitually Driving Under the Influence of Intoxicating Liquor or Drugs, in violation of Sections 291-4.4(a)(1) and/or 291-4.4(a)(2) of the [HRS].

Id. (emphases in original) (capitalization omitted). In that connection, HRS § 291-4.4 stated in pertinent part:

> **Habitually driving under the influence of intoxicating liquor of drugs.** (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
>
> (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;
>
> (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[.]
>
> . . . .
>
> (c) Habitually driving under the influence of intoxicating liquor or drugs is a class C felony. . . .

(Emphases added.)

Thereafter, "Domingues filed a motion to dismiss the indictment in open court" on the basis that "because HRS §§ 291-4.4(a)(1) and (a)(2) had been repealed prior to the indictment date, Domingues should not be charged thereunder." Domingues, 106 Hawai'i at 483, 107 P.3d at 412. The new statute, HRS § 291E-61(a) and (b)(4) (Supp. 2001), under which Domingues was not charged but that was in effect at the time Domingues was charged, provided in pertinent part as follows:

> (a) A person commits the offense of operating a vehicle under the influence of an intoxicant if the person operates or assumes actual physical control of a vehicle:
>
> (1) While under the influence of alcohol . . . .
>
> . . . .
>
> (b) A person committing the offense of operating a vehicle under the influence of an intoxicant shall be sentenced as follows without possibility of probation or suspension of sentence:
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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):
>
> . . . .
>
> An offense under this paragraph is a class C felony.

(Emphases added.) As the dissent in Domingues indicated, the new statute, "HRS § 291E-61[,] convert[ed] what had been an element of the offense under HRS § 291-4.4, i.e., that the accused had been convicted three or more times . . . [,] into a sentencing factor[.]" Domingues, 106 Hawai'i at 496, 107 P.3d at 425 (Acoba, J., dissenting, joined by Nakayama, J.) (emphases added). See also Shimabukuro, 100 Hawai'i at 328 n.12, 60 P.3d at 278

n.12 (Acoba, J., announcing the judgment of the court) (stating that "the habitual DUI provision ha[d] become a part of a sentencing scheme expressly 'addressing the repeat offender . . . by way of enhanced penalties'" (ellipses points in original) (citation omitted)). Thus the new statute, HRS § 291E-61, was not a substantial reenactment of HRS § 291-4.4. The majority response to this in Domingues was to judicially convert the express "sentencing" factors into elements.

The majority proceeded to hold that the "sentencing" provisions in the new statute, 291E-61(b)(1)-(3),[5] pertaining to

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[5] HRS § 291E-61(b)(1)-(3) concerned petty misdemeanors as follows:

> (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:
>
> (1) For the first offense or any offense not preceded within a five-year period by a conviction for an offense under this section or section 291E-4(a):
>
> (A) A fourteen-hour minimum substance abuse rehabilitation program, including education and counseling, or other comparable program deemed appropriate by the court; and
>
> (B) Ninety-day prompt suspension of license and privilege to operate a vehicle . . . and
>
> (C) Any one or more of the following:
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> . . . .
>
> (ii) Not less than forty-eight hours and not more than five days imprisonment; or
>
> (iii) A fine of not less than $150 but not more than $1,000.
>
> . . . .
>
> (2) For an offense that occurs within five years of a prior conviction[:]
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> . . . .
>
> (B) Either one of the following:
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> . . . .
>
> (ii) Not less than five days but not more than fourteen days of imprisonment; and
>
> (C) A fine of not less than $500 but not more than $1,500;

(continued...)

petty misdemeanor offenses of varying sanctions, must be considered with HRS 291E-61(b)(4), the Class C felony offense, as establishing a "hierarchy of offenses." Domingues, 106 Hawai'i at 487, 107 P.3d at 416. As such, according to the majority, references to the number of convictions must be treated as "attendant circumstances," id. (citing HRS § 702-205 (1993)), and, thus, as elements of the offenses. The majority accomplished this by "judicially imprint[ing] on HRS § 291E-61" constitutional due process requirements. Id. at 498, 107 P.3d at 427 (Acoba, J., dissenting, joined by Nakayama, J.). This, in effect, nullified the express statutory language and the legislative history that "[made] the three prior conviction condition a sentencing factor." Id. (Acoba, J., dissenting, joined by Nakayama, J.); see also Shimabukuro, 100 Hawai'i at 328 n.12, 60 P.3d at 278 n.12 (Acoba, J., announcing the judgment of the court).

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[5](...continued)

> . . . .
> (3) For an offense that occurs within five years of two prior convictions for offenses under this section or section 291E-4(a):
> (A) A fine of not less than $500 but not more than $2,500;
> (B) Revocation of license and privilege to operate a vehicle for a period not less than one year but not more than five years; and
> (C) Not less than ten days but not more than thirty days imprisonment of which at least forty-eight hours shall be served consecutively.

(Emphases added.)

B.

As the Petitioner/Plaintiff-Appellee State of Hawai'i (the petitioner) correctly stated in its supplemental brief in Kekuewa, "[t]he ultimate issue in Domingues was whether HRS § 291E-61(b)(4) (Supp. 200[1]) (since repealed) was a 'substantial reenactment' of HRS § 291-4.4 (Supp. 200[0])." As noted above, to support its conclusion that HRS § 291E-61(b)(1)-(4) was a "substantial reenactment" of HRS § 291-4[6]

[6] HRS § 291-4 (Supp. 2000), entitled "Driving under the influence of an intoxicating liquor," stated in pertinent part:

> (a) A person commits the offense of driving under the influence of intoxicating liquor if:
>
> (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
>
> (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.
>
> (b) A person committing the offense of driving under the influence of intoxicating liquor shall be sentenced as follows without possibility of probation or suspension of sentence:
>
> (1) For the first offense, or any offense not preceded within a five-year period by a conviction for driving under the influence of intoxicating liquor under this section or section 291-4.4 by:
>
> . . . .
>
> (C) Any one or more of the following:
>
> . . . .
>
> (ii) Not less than forty-eight hours and not more than five days of imprisonment; or
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> . . . .
>
> (2) For an offense that occurs within five years of a prior conviction for driving under the influence of intoxicating liquor under this section or section 291-4.4 by:
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> . . . .

(continued...)

(...continued)

> (B) Either one of the following:
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> . . . .
>
> (ii) Not less than five days but not more than fourteen days of imprisonment of which at least forty-eight hours shall be served consecutively; and
>
> . . . .
>
> (3) For an offense that occurs within five years of two prior convictions for driving under the influence of intoxicating liquor under this section or section 291-4.4 by:
>
> . . . .
>
> (C) Not less than ten days but not more than thirty days of imprisonment of which at least forty-eight hours shall be served consecutively.
>
> (4) Any person eighteen years of age or older, who is convicted under this section and who operated or assumed actual physical control of a vehicle with a passenger, in or on the vehicle, who was younger than fifteen years of age, shall be sentenced to an additional mandatory fine of $500, and an additional mandatory term of imprisonment of forty-eight hours; provided, however, that the total term of imprisonment for a person convicted under this section shall not exceed thirty days. Notwithstanding any other law to the contrary, any conviction for driving under the influence of intoxicating liquor under this section or section 291-4.4 shall be considered a prior conviction for purposes of imposing sentence under this section.

(Emphasis added.)

As stated in Dominques,

> HRS § 291-4 . . . was amended by Act 189 and, as amended, was in effect from September 30, 2000 through December 31, 2001. See 2000 Haw. Sess. L. Act 189, Part IV, § 41 at 433. Act 189 amended HRS § 291-4 by increasing the amount of community service hours required for those convicted of more than one offense of driving under the influence within five years. See 2000 Haw. Sess. L. Act 189, Part II, § 22 at 404.
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> HRS § 291-4.4 . . . was amended by Act 189 and was in effect as amended from September 30, 2000 through December 31, 2001. See 2000 Haw. Sess. L. Act 189, Part IV, § 41 at 433. Act 189 amended HRS § 291-4.4 to include sentencing provisions, requiring, inter alia, the revocation of an offender's driver's license for a minimum of one year, a minimum imprisonment of ten days, and referral to a substance abuse counselor. See 2000 Haw. Sess. L. Act 189, Part II, § 21 at 405.
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> . . . .
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> Effective January 1, 2002, Act 189 repealed HRS

(continued...)

and 291-4.4, the majority restyled the new sentencing provisions in HRS § 291E-61(b)(1)-(4) into elements in order to transform them into their prior elemental status in HRS §§ 291-4 and 291-4.4, the repealed statutes. The petitioner astutely observed that "[t]he Domingues court [(referring to the majority)] implicitly concluded that, in order to be a 'substantial reenactment,' a subsequent statute must contain the same elements as the repealed statute[, HRS § 291-4.4]." (Citing Domingues, 106 Hawai'i at 485-86, 107 P.3d at 414-15.).

In deciding that the sentencing factors in HRS § 291E-61(b)(1)-(4) must be treated as elements to preserve the constitutionality of the new statute, in spite of its express language, "the [majority]. . . establish[ed] that the new statute, HRS § 291E-61[,] must be judicially impressed with due process requirements . . . substantiating, indeed, that the new statute [was] not a substantial re-enactment of the repealed one." Domingues, 106 Hawai'i at 498, 107 P.3d at 427 (Acoba, J., dissenting, joined by Nakayama, J.) (emphases in original). Thus, "the majority . . . decide[d] whether an indictment brought pursuant to the new statute, HRS § 291E-61, under which [the d]efendant ha[d] not been charged, can be saved in the face of a

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§ 291-4 and HRS § 291-4.4 and, simultaneously, HRS § 291E-61, entitled "Operating a Vehicle Under the Influence of an Intoxicant," became effective. See 2000 Haw. Sess. L. Act 189, Part IV, § 41 at 433.

106 Hawai'i at 484 n.5, 107 P.3d at 413 n.5.

due process challenge that [the d]efendant ha[d] not brought." Id. (emphases added).

But contrary to the Domingues majority's position, the language of the oral charge and of HRS § 291-4.4, plainly established that there was no question that Domingues was, "as a matter of basic due process, . . . put on sufficient notice of the nature and cause of the accusation with which he [was] charged." Id. at 487, 107 P.3d at 416 (internal quotation marks and citations omitted). See supra. As the dissent related, "[n]o due process violation occurred here because [the d]efendant was [separately] charged with Habitual DUI under HRS § 291-4.4. Under that statute, three prior convictions was an element of the offense of Habitual DUI, which required the prosecution to allege and prove the prior convictions." Id. at 499, 107 P.3d at 428 (Acoba, J., dissenting, joined by Nakayama, J.). Because the charges against Domingues rested on the stand-alone provision of HRS § 291-4.4, see supra, and HRS § 291-4.4 incorporated the three conviction/ten-year requirement as elements, the majority's discussion, as it pertained to Domingues, was, as the petitioner aptly pointed out, "dicta."

C.

In Domingues the "element" proposition imposed by the majority "was not argued or briefed by the parties, or decided by the [circuit] court. No factual basis exist[ed] in the record for [its] application[.]" 106 Hawai'i at 499, 107 P.3d at 428 (Acoba, J., dissenting, joined by Nakayama, J.). I believe the

foregoing matters constitute compelling justification for reversing that part of the decision pertaining to charges brought under HRS § 291-4.4 against Domingues. See State v. Garcia, 96 Hawai'i 200, 206, 29 P.3d 919, 925 (2001) (stating 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 (1991) (emphasis in original) (other citation omitted)).

Alternatively, the majority's construction of HRS § 291-4.4 and HRS § 291E-61 should be corrected on the grounds set forth above. See State v. Brantley, 99 Hawai'i 463, 465, 56 P.3d 1252, 1254 (2002) (explaining that "this court has long recognized, we not only have the right but are entrusted with a duty to examine the former decisions of this court and, when reconciliation is impossible, to discard our former errors" (citations omitted), overruling State v. Jumila, 87 Hawai'i 1, 950 P.2d 1201 (1998)). Therefore, I would reverse that portion of the Domingues decision concluding that HRS § 291-4.4 as it pertained to Domingues was substantially re-enacted, vindicating the circuit court's decision that Domingues could not be charged under a statute that had already been repealed.

VI.

As noted before, in Kekuewa, the petitioner filed an application for writ of certiorari on November 6, 2006, requesting that this court review the August 10, 2006 decision of the ICA, reversing the March 22, 2005 judgment of the district

court of the first circuit (district court) adjudging Respondent/Defendant-Appellee Philip Kala Kekuewa, III (Kekuewa) guilty of OVUII. In Kekuewa, the oral charge alleged the OVUII charge was a "second offense." 112 Hawai'i at 271, 145 P.3d at 814.

At the close of the petitioner's case in chief, the petitioner sought to move into evidence a certified court abstract of Kekuewa's traffic record and a certified court calendar reflecting a prior OVUII conviction of Kekuewa. Id. at 272-73, 145 P.3d at 815-16. The petitioner offered the abstract and calendar for the purpose of "proving the elements of a prior offense in the case-in-chief rather than at sentencing" under Domingues. Id. The district court ruled that the abstract and calendar were admissible to "introduce evidence as to the subsequent [OVUII]" over Kekuewa's objections. Id. at 273, 145 P.3d at 816. After the petitioner rested, Kekuewa moved for a judgment of acquittal, but the motion was denied. Id. After the close of all evidence at trial, Kekuewa brought a "motion to dismiss based on a defective charge." Id. at 274, 145 P.3d at 817.

Kekuewa was charged as follows:

> [Kekuewa], on or about the 15th day of April 2004, in the City and County of Honolulu, State of Hawaii, island of Oahu, you did operate or assume actual physical control of a vehicle while under the influence of alcohol in an amount sufficient to impair your normal mental faculties or the ability to care for yourself and guard against casualty thereby violating Section 291E-61 of the [HRS] for your second offense.

Id. at 271, 145 P.3d at 814 (emphasis added). Defense counsel

argued that petitioner "did not specify the attendant circumstances in the complaint [with] what he orally charged." Id. at 274, 145 P.3d at 817. Defense counsel further argued, "[B]ased on that, the [petitioner's] failure to outline the attendant circumstances in his oral charging of [Kekuewa], we ask the [c]ourt to dismiss the case based on a defective charge." Id. The district court denied the motion stating, "[M]y notes reflect that at the time of arraignment [petitioner], in fact, did charge, arraign him as a second [offender] and did include the attendant circumstances. That's my specific note that I'm looking at right now. Therefore, I will deny that motion based on that." Id. at 275, 145 P.3d at 818. Kekuewa was thereafter convicted of driving under the influence of an intoxicant, in violation of HRS § 291E-61(b)(2) (Supp. 2003).

On appeal, the ICA held in essence that the oral accusation, which charged Kekuewa with OVUII "for your second offense" was insufficient under Domingues, inasmuch as "an offense that occurs within five years of a prior conviction for an offense under this section[,]" HRS § 291E-61(b)(2), is an attendant circumstance and, thus, an essential element of the OVUII offense which must be alleged in the accusation. Kekuewa, 112 Hawai'i at 270-71, 145 P.3d at 813-14.

VII.

A.

In the Kekuewa certiorari application, the petitioner argued that "notwithstanding [Domingues], this honorable court

should clarify that prior convictions pursuant to HRS § 291E-61(b)(1)-(3) are not essential elements of the offense of OVUII" (emphasis added) inasmuch as (a) "the plain language and legislative history of HRS § 291E-61(b)(1)-(3) [do] not indicate an intent to make prior convictions an element of the offense of OVUII," (b) "the reasoning in Domingues that HRS § 291E-61(b)(1)-(3) are intrinsic and, thus, must be included in a charge pursuant to HRS § 291E-61 is a misapplication of the intrinsic/extrinsic analysis and is contrary to established Hawaii and federal case law," and (c) "because prior convictions have traditionally been considered 'sentencing factors' and because the introduction of prior conviction evidence during the guilty phase of a trial is prejudicial to a defendant, the better interpretation of HRS § 291E-61 is that (b)(1)-(3) are sentencing factors rather than an element of the offense of OVUII"; (2) "the ICA erred in reversing [Kekuewa's] conviction rather than remanding for resentencing under HRS § 291E-61(b)(1)"; and (3) "there was sufficient evidence to convict [Kekuewa]."

B.

On December 14, 2006, this court accepted the petitioner's application for writ of certiorari and ordered that the parties "file a supplemental brief addressing whether this court's interpretation of [HRS] § 291E-61(b) (Supp. 2002), in [Domingues], is applicable to the underlying prosecution commenced on October 11, 2004, given the subsequent amendments

made to HRS § 291E-61(b) effective January 1, 2004." (Citing 2003 Haw. Sess. L. Act 71, § 1 at 123-24.).

Effective January 1, 2004, Act 71 of the 2003 legislature created a separate statutory section, HRS § 291-61.5, for the felony offense of "Habitually Operating a Vehicle Under the Influence of an Intoxicant"[7] and defined the term "conviction":

> (a) A person commits the offense of habitually operating a vehicle under the influence of an intoxicant if:
>
> (1) The person is a habitual operator of a vehicle while under the influence of an intoxicant; and
>
> (2) The person operates or assumes actual physical control of a vehicle:
>
> (A) While under the influence of alcohol in an amount sufficient to impair the person's normal mental faculties or ability to care for the person and guard against casualty;
>
> (B) While under the influence of any drug that impairs the person's ability to operate the vehicle in a careful and prudent manner;
>
> (C) With .08 or more grams of alcohol per two hundred ten liters of breath; or
>
> (D) With .08 or more grams of alcohol per one hundred milliliters or cubic centimeters of blood.
>
> (b) For the purposes of this section:
>
> "Convicted three or more times for offenses of operating a vehicle under the influence" means that, at the time of the behavior for which the person is charged under this section, the person had three or more times within ten years of the instant offense:
>
> (1) A judgment on a verdict or a finding of guilty, or a plea of guilty or nolo contendere, for a violation of this section or section 291-4, 291-4.4, or 291-7 as those sections were in effect on December 31, 2001;
>
> (2) A judgment on a verdict or a finding of guilty, or a plea of guilty or nolo contendere, for an offense that is comparable to this section or section 291-4, 291-4.4, or 291-7 as those sections were in effect on December 31, 2001, or section 291E-61 or 707-702.5; or

[7] I note that, in enacting Act 71, by separating the felony offense of "habitually driving under the influence of an intoxicant" from the misdemeanor offenses, the legislature in effect reinstated the separate statutory scheme separating DUI offenses under HRS § 291-4 as petty misdemeanor offenses from the stand alone provision of habitual DUI under HRS § 291-4.4, the repealed statute, under which Domingues had been charged in the Domingues case.

(3) An adjudication of a minor for a law or probation violation that, if committed by an adult, would constitute a violation of this section or section 291-4, 291-4.4, or 291-7 as those sections were in effect on December 31, 2001, or section 291E-61 or 707-702.5;

that, at the time of the instant offense, had not been expunged by pardon, reversed, or set aside. All convictions that have been expunged by pardon, reversed, or set aside prior to the instant offense shall not be deemed prior convictions for the purposes of proving the person's status as a habitual operator of a vehicle while under the influence of an intoxicant.

A person has the status of a "habitual operator of a vehicle while under the influence of an intoxicant" if the person has been convicted three or more times within ten years of the instant offense, for offenses of operating a vehicle under the influence of an intoxicant.

(c) Habitually operating a vehicle while under the influence of an intoxicant is a class C felony.

(d) For a conviction under this section, the sentence shall be either:

(1) An indeterminate term of imprisonment of five years; or

(2) A term of probation of five years, with conditions to include:

(A) Mandatory revocation of license and privilege to operate a vehicle for a period not less than one year but not more than five years;

(B) Not less than ten days imprisonment, of which at least forty-eight hours shall be served consecutively;

(C) Referral to a certified substance abuse counselor as provided in section 291E-61(d); and

(D) A surcharge of $25 to be deposited into the neurotrauma special fund.

2003 Haw. Sess. L. Act 71, § 1 at 123-24 (emphases added).

In regard to Act 71, the legislature stated,

The purpose of this measure is to establish a status offense of habitually operating a vehicle under the influence of an intoxicant . . . .

. . . .

Your Committee finds that being punished as a status offender rather than receiving an enhanced sentence has distinct implications. Status offenders receive a specific punishment as long as the offender meets the criteria at the time the offender reoffends. The offender cannot defeat the charge by having a previous conviction reversed on a subsequent appeal. By contrast, enhanced sentences can be avoided if any prior convictions that are the basis for an enhanced sentence are overturned.

Your Committee believes it is important that the habitually impaired driver understand that he or she will be charged with a felony for any further impaired driving arrests, even if one of their prior convictions is reversed after their arrest.

Stand. Comm. Rep. No. 1268, in 2003 Senate Journal, at 1564 (emphases added).

On February 12, 2007, the petitioner filed its supplemental brief. In addressing the foregoing amendments in its supplemental brief, the petitioner argued that the amendments did not impact Kekuewa. According to the petitioner, "the plain language and legislative history of the amendments made to HRS § 291E-61(b), effective January 1, 2004, do not directly or indirectly effect this honorable court's statement in Domingues that the condition of prior convictions in HRS § 291E-61(b)(1)-(4) (Supp. 2002) 'describes attendant circumstances,' i.e., elements" and that "unless the Domingues court's statement is dicta with respect to HRS § 291E-61(b)(1)-(3), then Domingues is applicable to the instant case."

Kekuewa filed his supplemental brief on February 13, 2007, essentially agreeing that the amendments were not applicable. In his supplemental brief, Kekuewa argued that (1) "Domingues remains applicable to HRS § 291E-61 (Supp. 2003)"; (2) the Domingues "holding regarding HRS § 291E-61(b)(1) through (b)(3) does not constitute dicta"; (3) "Domingues did not misapply the intrinsic/extrinsic analysis"; and (4) "any prejudice based on the prior convictions can and should be prevented." Hence, both parties agree Domingues applied in Kekuewa.

C.

As pointed out, the case decided in Domingues by the

majority was not before the court, see Domingues, 106 Hawai'i at 498, 107 P.3d at 427 (Acoba, J., dissenting, joined by Nakayama, J.), but was present in Kekuewa. As noted in the Domingues dissent, "[t]he majority's holding . . . constitutes an advisory opinion to one side on how future cases under the new statute may be saved from motions for dismissal." Id. at 499, 107 P.3d at 428 (Acoba, J., dissenting, joined by Nakayama, J.) (emphasis in original). While I believed the petitioner was accurate in its reading of the Domingues majority opinion, "the due process challenge that Domingues [had] not brought," id. at 498, 107 P.3d at 427 (Acoba, J., dissenting, joined by Nakayama, J.), because not germane to the facts in Domingues, was germane to the facts in Kekuewa and was raised by the respondent in Kekuewa.

HRS § 291E-61(b)(1)-(3) expressly charged a petty misdemeanor for designated prior intoxicant convictions, but with differing ranges for terms of imprisonment from forty-eight hours to five days for a first offense, 291E-61(b)(1)(C)(ii); five days to fourteen days, 291E-61(b)(2)(B)(ii) for a second offense; and ten days to thirty days, 291E-61(b)(3)(C) for a third offense; and an additional forty-eight hours imprisonment for a conviction under HRS § 291E-61(b)(4). Hence, in effect, HRS § 291E-61(b)(1)-(3), as it applied at the time of the offense, referred to three separate petty misdemeanor offenses.

VIII.

As related in State v. Elliott, 77 Hawai'i 309, 884 P.2d 372 (1994), in State v. Jendrusch, 58 Haw. 279, 567 P.2d

1242 (1983), this court "held that the failure to allege an essential element of an offense made a charge 'fatally defective.'" 77 Hawai'i at 311, 884 P.2d at 374 (citing Jendrusch, 58 Haw. at 280-81, 567 P.2d at 1244 (citations omitted)) (other citations omitted). The Elliott court explained that, in Jendrusch, this court stated:

> The accusation must sufficiently allege all of the essential elements of the offense charged. This requirement obtains whether an accusation is in the nature of an oral charge, information, indictment, or complaint, and the omission of an essential element of the crime charged is a defect in substance rather than of form. A charge defective in this regard amounts to a failure to state an offense, and a conviction based upon it cannot be sustained, for that would constitute a denial of due process. This requirement may not be waived or dispensed with, and the defect is ground for reversal, even when raised for the first time on appeal.

Elliott, 77 Hawai'i at 311, 884 P.2d at 374 (quoting Jendrusch, 58 Haw. at 281, 567 P.2d at 1244 (citations omitted)) (other citation omitted).

As noted before, the Domingues majority of this court observed that the "prefatory language of HRS § 291E-61(b)(1) through 291E-61(b)(4) describes attendant circumstances that are intrinsic to and 'enmeshed' in the hierarchy of offenses that HRS § 291E-61 as a whole describes." 106 Hawai'i at 487, 107 P.3d at 416 (citing HRS § 702-205) (emphasis added). Thus, in order to convict Kekuewa of HRS § 291E-61(b)(2), the petitioner had to prove beyond a reasonable doubt that Kekuewa (1) "operate[d] or assume[d] actual physical control of a vehicle" (2) "while under the influence of alcohol in an amount sufficient to impair [his] normal mental faculties or ability to care for the person and guard against casualty[,]" see State v. Cummings, 101 Hawai'i

139, 143-44, 63 P.3d 1109, 1113-14 (2003), and (3) the offense "occur[red] within five years of a prior conviction for driving under the influence of intoxicating liquor under [HRS § 291E-61] or [HRS §] 291-4.4[,]" Domingues, 106 Hawai'i at 487, 107 P.3d at 416. The petitioner was likewise required to charge these essential elements in order to convict Kekuewa of violating HRS § 291E-61(b)(2). See Cummings, 101 Hawai'i at 143-44, 63 P.3d at 1113-14.

Thus, the oral charge alleging a violation of HRS § 291E-61 for Kekuewa's "second offense," failed to sufficiently allege an "essential element[]," Elliott, 77 Hawai'i at 311, 884 P.2d at 374, of HRS § 291E-61(b)(2), that is, that the instant offense "occur[red] within five years of a prior conviction for driving under the influence of intoxicating liquor under [HRS § 291E-61] or [HRS §] 291-4.4[,]" see Domingues, 106 Hawai'i at 487, 107 P.3d at 416. The oral charge, then, failed to apprise Kekuewa of the specific penalties he was subject to under HRS § 291E-61(b)(2).[8] Plainly, the reference only to "a second offense" in the charge against Kekuewa fail[ed] under HRS § 291E-

[8] As the ICA stated in its opinion, "[t]he five-year time period omitted from the oral charge was a critical part of the HRS § 291E-61(b)(2) attendant circumstances, one with especial resonance in this case in light of [Kekuewa's] several prior [OVUII] convictions." Kekuewa, 112 Hawai'i at 277, 145 P.3d at 820. The ICA reiterated that "[i]ts inclusion was required, and 'that requirement is not satisfied by the fact that [Kekuewa] actually knew [the essential elements of the offense charged] and was not misled by the failure to sufficiently allege all of them.'" Id. (quoting Cummings, 101 Hawai'i at 143, 63 P.3d at 1113) (other citation omitted) (some brackets in original and some added). Furthermore, the ICA observed that "'citing to a statutory reference does not cure a charge that merely states an element of the offense in generic terms.'" Id. (quoting Cummings, 101 Hawai'i at 143, 63 P.3d at 1113 (citing Elliott, 77 Hawai'i at 311, 884 P.2d at 374)).

61 to designate the particular petty misdemeanor offense charged and to "sufficiently allege all the essential elements of the offense[.]" Elliott, 77 Hawai'i at 311, 884 P.2d at 374 (citations omitted).

Under these circumstances, the failure to charge in the specific section and the operative language therein would not legally apprise a person of the charge brought. Because it failed to do so, the charge against Kekuewa "amount[ed] to a failure to state an offense, and a conviction based upon it cannot be sustained, for that would constitute a denial of due process." Cummings, 101 Hawai'i at 142, 63 P.3d at 1112 (internal quotation marks and citations omitted). The ICA was thus correct in concluding that "the oral charge in this case was defective, and that [Kekuewa's] oral motion to dismiss should have been granted." 112 Hawai'i at 277, 145 P.3d at 820.

As noted before, the majority opinion in Domingues had in effect instructed the petitioner in Kekuewa "on how future cases under the new statute[, HRS § 291E-61(b)(1)-(4) (Supp. 2001),] may be saved from motions for dismissal." 106 Hawai'i at 499, 107 P.3d at 428 (Acoba, J., dissenting, joined by Nakayama, J.) (emphasis in original). The petitioner in Kekuewa failed to follow that advice as to the petty misdemeanor offense in HRS § 291E-61(b)(2), and, so, the conviction in Kekuewa was required to be reversed and the motion to dismiss brought by Kekuewa, sustained.

IX.

Furthermore, I note that after excising "for your second offense" from the oral charge in Kekuewa, the remaining language, that Kekuewa "did operate or assume actual physical control of a vehicle while under the influence of alcohol in amount sufficient to impair [his] normal mental faculties or the ability to care for [him]self and guard against casualty thereby violating Section 291E-61 of the [HRS,]" Kekuewa, 112 Hawai'i at 271, 145 P.3d at 814, contains only the definition of "[o]perating a vehicle under the influence of an intoxicant" under HRS § 291E-61(a), and does not charge an offense.

The fact that no prior convictions would be mentioned in the language of the complaint after excision of the "second offense" language does not save the complaint under HRS § 291E-61(b)(1). Under the statutory scheme there is no generic OVUII offense. Hence the remaining language cannot be construed to allege either a "first offense" or an "offense not preceded within a five-year period by a conviction for an offense under [HRS § 291E-61] or [HRS §] 291E-4(a)," alternative elements for a conviction under HRS § 291E-61(b)(1). See Domingues, 106 Hawai'i at 487, 107 P.3d at 416.

The requirement of charging a "first offense" stems from the necessity to differentiate the particular offense being charged from the three misdemeanor versions of HRS § 291E-61. By failing to allege either alternative in 291E-61(b)(1) or any of the other versions of the 291E-61 offense, the oral charge failed

to apprise Kekuewa of the specific penalties for which he was in jeopardy under the several provisions of HRS § 291E-61(b)(1)-(4). Consequently, the remaining language cannot be construed to allege a "first offense."

Relatedly, in State v. Motta, 66 Haw. 89, 657 P.2d 1019 (1983), this court "refined the Jendrusch rule by adopting the 'liberal construction standard' for post-conviction challenges" to indictments. Elliott, 77 Hawai'i at 312, 884 P.2d at 375 (citation omitted)). Under Motta, this court "will not reverse a conviction based upon a defective indictment unless the defendant can show prejudice or that the indictment cannot within reason be construed to charge a crime." 66 Haw. at 91, 657 P.2d at 1020. However, as stated in Elliott, the Motta court "expressly noted that . . . even under [the liberal construction standard], the charge in Jendrusch would be fatally defective for failing to allege an essential element of the offense." 77 Hawai'i at 312, 884 P.2d at 375 (citing Motta, 66 Haw. at 92, 657 P.2d at 1020-21) (emphasis added). The Motta court reached that conclusion "despite the fact that the charge at issue in Jendrusch had referred to the statute defining the offense." Id. (citing Jendrusch, 58 Haw. at 280, 567 P.2d at 1243-44).

This court has stated that "an oral charge, complaint, or indictment that does not state an offense contains within it a substantive jurisdictional defect, rather than simply a defect in form, which renders any subsequent trial, judgment of conviction, or sentence a nullity." Cummings, 101 Hawai'i at 142, 63 P.3d at

1112 (citing State v. Israel, 78 Hawai'i 66, 73, 890 P.2d 303, 310 (1995) (other citations omitted)) (emphasis added). Because the oral charge in this case "failed to state a material element of [a violation of HRS § 291E-61(b)(1)] that the prosecution was required to prove, it failed to state an offense and, therefore, was fatally defective." Id. at 145, 63 P.3d at 1115. Accordingly, the "court lacked subject matter jurisdiction to preside" over the case. Id. As such, I believe the charge against Kekuewa was properly dismissed in its entirety for the additional grounds set forth above.

X.

In the instant case, on January 29, 2003, Ruggiero was convicted of OVUII, HRS § 291E-61(a)(1) (Supp. 2002). Ruggiero appealed his conviction. While his appeal was pending before this court, on March 10, 2004, Ruggiero allegedly operated or assumed actual physical control of a vehicle while under the influence of an intoxicant, in violation of HRS § 291E-61.

On March 19, 2004, this court issued a summary disposition order reversing Ruggiero's January 29, 2003 conviction. State v. Ruggiero, No. 25671, SDO (Mar. 19, 2004). It was held that the prosecution's failure to prove an essential element of the offense required reversal of Ruggiero's conviction.

On April 19, 2004, Ruggiero was charged with OVUII, in violation of "HRS § 291E-61" (Supp. 2003), for the events that took place on March 10, 2004. The complaint stated:

> That on or about the 10th day of March, 2004, . . . [Ruggiero] did operate or assume actual physical control of a vehicle while under the influence of an intoxicant meaning that he was under the influence of alcohol in an amount sufficient to impair his normal mental faculties or ability to care for himself and guard against casualty, thereby committing the offense of [OVUII] in violation of Section 291E-61 of the [HRS].

On April 29, 2004, the notice and judgment of the March 19, 2004 summary disposition order was filed.

On September 8, 2004, a bench trial was held in the district court of the second circuit (the court) as to the March 10, 2004 events. The court found Ruggiero guilty of OVUII, HRS § 291E-61(b) and (c).[9]

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[9] HRS § 291E-61 stated in pertinent part:

> (a) A person commits the offense of operating a vehicle under the influence of an intoxicant if the person operates or assumes actual physical control of a vehicle:
>
> (1) While under the influence of alcohol in an amount sufficient to impair the person's normal mental faculties or ability to care for the person and guard against casualty.
>
> . . . .
>
> (b) A person committing the offense of operating a vehicle under the influence of an intoxicant shall be sentenced as follows without possibility of probation or suspension of sentence:
>
> . . . .
>
> (2) For an offense that occurs within five years of a prior conviction for an offense under this section or section 291E-4(a) by:
>
> (A) Prompt suspension of license and privilege to operate a vehicle for a period of one year with an absolute prohibition from operating a vehicle during the suspension period;
>
> (B) Either one of the following:
>
> (i) Not less than two hundred forty hours of community service work; or
>
> (ii) Not less than five days but not more than fourteen days of imprisonment of which at least forty-eight hours shall be served consecutively;
>
> (C) A fine of not less than $500 but not more than $1,500; and
>
> (D) A surcharge of $25 to be deposited into the neutrama special fund;
>
> . . . .
>
> (c) Notwithstanding any other law to the contrary,

(continued...)

At the sentencing hearing, in response to the court's request for sentencing recommendations, Plaintiff-Appellee State of Hawai'i (the prosecution) related that according to Ruggiero's "abstract," this was his second offense as he had a "prior [OVUII] in January 2003 within the five-year period." The court held an "enhanced sentencing hearing." It admitted into evidence Ruggiero's abstract which indicated that he had been convicted of OVUII on January 29, 2003. The parties also stipulated to this court's March 19, 2004 summary disposition order, which reversed Ruggiero's January 29, 2003 conviction, and that the notice and judgment of the summary disposition order was filed on April 19, 2004. The court scheduled a further sentencing hearing and on September 30, 2004, the court sentenced Ruggiero apparently as a second time offender pursuant to HRS § 291E-61(b)(2), based on the prior January 29, 2003 conviction for OVUII.

XI.

Ruggiero argues that the court erred by sentencing him as a second-time offender pursuant to HRS § 291E-61(b)(2). Citing Sinagoga, he maintains that (1) in order to give an "enhanced sentence, the proper procedures must be followed[,]"

(...continued)

> any:
> (1) Conviction under this section or section 291E-4(a);
> . . . .
> shall be considered a prior conviction for purposes of imposing sentence under this section. Any judgment on a verdict or a finding of guilty, a plea of guilty or nolo contendere, or an adjudication in the case of a minor, that at the time of the offense has not been expunged by pardon, reversed, or set aside shall be deemed a prior conviction under this section.

and here, because "the prior conviction was reversed[,]" the prosecution failed to prove an essential element of the offense, that a prior conviction was validly entered; and (2) "we are plainly dealing here with a sentencing statute, not a 'status offense'" and as such "any argument based on 'status offense' case law is inapposite and unavailing." In response, the prosecution contends that "[t]he subsequent invalidity of a prior conviction is irrelevant[.]" But in light of Domingues and Kekuewa, the result here is foreordained on the preliminary ground that the complaint was insufficient to charge an offense.[10]

XII.

At trial, defense counsel did not challenge the insufficiency of the complaint. In that regard, "[i]f the substantial rights of the defendant have been affected adversely, the error will be deemed plain error." Nichols, 111 Hawai'i at 334, 141 P.3d at 981 (quoting State v. Sawyer, 88 Hawai'i 325, 330, 966 P.2d 637, 642 (1998) (other citation omitted)). This court "will apply the plain error standard of review to correct

[10] It should be noted that assuming arguendo that HRS § 291E-61 creates a "status offense," Ruggiero argues that "there is considerable doubt as to whether being a 'status offense' would make it constitutionally permissible to use an invalidated conviction." Ruggiero notes that in Lobendahn, this court "addressed the question of status offenses and permitted the use of a vacated conviction to establish the requisite felon status for the offense[.]" However, Ruggiero argues that "Lobendahn did not even consider the constitutional questions" and was "merely a case of statutory construction." Ruggiero points out that Lobendahn relied on Liles, which, according to Ruggiero, "likewise did not even consider the constitutional object to use of invalid convictions" and was called into question by United States v. Bagley, 837 F.2d 371, 374-75 (9th Cir. 1988). Because I believe the prosecution failed to charge an offense as a preliminary matter, this question need not be reached.

errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights." Id. (quoting Sawyer, 88 Hawai'i at 330, 966 P.2d at 642) (other citations omitted)). Thus, this court may recognize plain error regarding the insufficiency of the complaint inasmuch as it "seriously affec[ed] the fairness . . . of [the] judicial proceeding[.]" Id. (citations omitted).

XIII.

As required of the petitioner in Kekuewa, in order to convict and sentence Ruggiero of HRS § 291E-61(b)(2), the prosecution had to prove beyond a reasonable doubt that Ruggiero (1) "operate[d] or assume[d] actual physical control of a vehicle" (2) "while under the influence of alcohol in an amount sufficient to impair [his] normal mental faculties or ability to care for the person and guard against casualty[,]" see Cummings, 101 Hawai'i at 143-44, 63 P.3d at 1113-14, and (3) the offense "occur[red] within five years of a prior conviction for an offense under [HRS § 291E-61] or [HRS §] 291E-4(a)[,]" Domingues, 106 Hawai'i at 487, 107 P.3d at 416. The prosecution was likewise required to charge these essential elements in order to convict Ruggiero of violating HRS § 291E-61(b)(2). See Cummings, 101 Hawai'i at 143-44, 63 P.3d at 1113-14.

To reiterate, the complaint alleged only a violation of HRS § 291E-61. However, as in Kekuewa, the complaint failed to sufficiently allege the essential element, "occur[red] within

five years of a prior conviction for an offense under [HRS § 291E-61] or [HRS §] 291E-4(a)[,]" see Elliott, 77 Hawai'i at 311, 884 P.2d at 374, for a conviction of HRS § 291E-61(b)(2), see Domingues, 106 Hawai'i at 487, 107 P.3d at 416. Therefore, the complaint failed to apprise Ruggiero of which specific penalties and, thus, the offense he was subject to under HRS § 291E-61. The complaint, then, was defective and the court erred in convicting and sentencing Ruggiero pursuant to HRS § 291E-61(b)(2) for the same reasons decided in Kekuewa. See Elliott, 77 Hawai'i at 311, 884 P.2d at 374; see also supra.

XIV.

Furthermore, as in Kekuewa, the language of the complaint that Ruggiero "did operate or assume actual physical control of a vehicle while under the influence of an intoxicant meaning that he was under the influence of alcohol in an amount sufficient to impair his normal mental faculties or ability to care for himself and guard against casualty, thereby committing the offense of [OVUII] in violation of Section 291E-61 of the [HRS,]" contains only the definition of OVUII under HRS § 291E-61(a), and does not itself charge an offense. As a result, the absence of an allegation that the offense was a "first offense" or an "offense not preceded within a five-year period by a conviction for an offense under [HRS § 291E-61] or [HRS §] 291E-4(a)[,]" alternative elements for a conviction of HRS § 291E-61(b)(1), see Domingues, 106 Hawai'i at 487, 107 P.3d at 416, made the charge a nullity, see Cummings, 101 Hawai'i at 142, 63

P.3d at 1112. As indicated in the discussion supra, the language with which Ruggiero was charged only defines OVUII, inasmuch as the complaint failed to apprise Ruggiero of the specific version of the OVUII offense to which he was subject under HRS § 291E-61. Also, as noted before, the requirement to charge a first offense stems from the necessity to identify the version of HRS § 291E-61 being charged.

It should be noted that, in Elliott, this court reversed the defendant's conviction for assault against a police officer because of the failure to charge an essential element of the crime. 77 Hawai'i at 312-13, 884 P.2d at 375-76. However, "because all of the essential elements of assault in the third degree were alleged in the oral charge and proven at trial[,]" this court concluded that "the appropriate remedy for [the defendant's] post-conviction challenge to the defective charge [was] to remand the case for entry of judgment of conviction of assault in the third degree and for resentencing in accordance therewith." Id. at 313, 884 P.2d at 376.

Unlike Elliott, in this case, the complaint failed to allege an essential element for a conviction of HRS § 291E-61(b)(1), namely that an offense was a "first offense" or an "offense not preceded within a five-year period by a conviction for an offense under [HRS § 291E-61] or [HRS §] 291E-4(a)[.]" See Domingues, 106 Hawai'i at 487, 107 P.3d at 416. As stated before, there is no generic OVUII offense. Also, as this court has stated, "[t]o allow a mere statutory reference to cure the

omission of essential elements would completely vitiate the rule of law developed in Jendrusch, Motta, and [State v.] Yonoha, [68 Haw. 586, 723 P.2d 185 (1986)]." Elliott, 77 Hawai'i at 311, 884 P.3d at 374.

As in Kekuewa, because the complaint in this case "failed to state a material element of [a violation of HRS § 291E-61(b)(1)] that the prosecution was required to prove, it failed to state an offense and, therefore, was fatally defective." Cummings, 101 Hawai'i at 145, 63 P.3d at 1115; see also supra. Accordingly, as in Kekuewa, the "court lacked subject matter jurisdiction to preside" over the case, Cummings, 101 Hawai'i at 145, 63 P.3d at 1115, and the charge against Ruggiero must be dismissed, see Elliott, 77 Hawai'i at 311, 884 P.2d at 374.

XV.

It is observed that the plurality agrees that "[t]he complaint charging Ruggiero with a violation of HRS § 291E-61 was insufficient as a matter of law in charging a violation of HRS § 291E-61(a) and (b)(2)." Plurality opinion at 23. However, the plurality concludes that "the complaint was sufficient to support a conviction and sentence as a first-time violator of HRS § 291E-61(a) and (b)(1)" and then remands for "entry of a judgment of conviction for operating a vehicle under the influence of an intoxicant with no prior offenses, in violation of HRS § 291E-

61(a) and (b)(1), and for resentencing in accordance therewith."[11] Plurality opinion at 28.

The plurality does concede that "because the attendant circumstance of no prior convictions within five preceding years, as set forth in HRS § 291E-61(b)(1), is elemental, it should be alleged in the charge and proved at trial."[12] Plurality opinion at 26 n.19 (emphasis in original). But despite the elemental status of "a first offense," the plurality contends that "on its face, the complaint can reasonably be construed to charge the crime of [OVUII] as a first offense, in violation of HRS § 291E-61(a) and (b)(1)" as it "plainly states the elements set forth in HRS § 291E-61(a)[.]" Plurality opinion at 26 (emphases added). But this is inconsistent with the Domingues majority's conclusion that "HRS § 291E-61(b)(1) through 291E-61(b)(4) describes attendant circumstances that are intrinsic to and 'enmeshed' in the hierarchy of offenses that HRS § 291E-61 as a whole describes[,]" 106 Hawai'i at 487, 107 P.3d at 416 (citing HRS § 702-205) (emphasis added), and, thus, are elements that must be alleged, see Cummings, 101 Hawai'i at 143-44, 63 P.3d at 1113-14,

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[11] Likewise, Justice Nakayama's concurring and dissenting opinion "agree[s] with the [plurality's] ultimate decision to vacate Ruggiero's conviction and sentence under HRS §§ 291E-61(a) and (b)(2), and remand for entry of judgment and for resentencing in accordance with HRS §§ 291E-61(a) and (b)(1)." Concurring and dissenting opinion at 4.

[12] It should be noted that Justice Nakayama's concurring and dissenting opinion agrees with the plurality that HRS §§ 291E-61(a) and (b)(2)-(3) "must be construed as creating separate status offenses" but disagrees "that HRS § 291E-61(b)(1) also describes attendant circumstances." Concurring and dissenting opinion at 1.

and proved beyond a reasonable doubt by the prosecution, HRS § 701-114 (1993).

In that regard, the plurality's contention that "given the unique nature of the element -- . . . that is, the absence of any priors -- . . . the import of HRS § 291E-61[] is implicit in the charge[,]" plurality opinion at 26, contravenes the long standing principle, as stated supra, that "[t]he accusation must sufficiently allege all of the essential elements of the offense charged[,]" Elliott, 77 Hawai'i at 311, 884 P.2d at 374 (quoting Jendrusch, 58 Haw. at 281, 567 P.2d at 1244 (citations omitted)) (other citations omitted); see also Cummings, 101 Hawai'i at 143-44, 63 P.3d at 1113-14, and is contrary to Domingues. With all due respect, dispensing with an element on the purported ground that it is "unique [in] nature" or "implicit in the charge," see plurality opinion at 26, is arbitrary because supported only by the desired result.

Moreover, the plurality's assertion that Ruggiero "impliedly acknowledges that the complaint was sufficient to charge [OVUII] as a first-time offense when he concedes that he is subject to sentencing as a first time offender under HRS § 291E-61(b)(1)[,]" plurality opinion at 26-27, is a misreading of Ruggiero's position. Ruggiero argues that the prior conviction is to be considered only at the time of sentencing, and did not contend at all that based on the insufficiency of the complaint he would alternatively "be subject to sentencing under HRS § 291[E-61](b)(1) as a first-time offender." Thus it is a

misstatement to characterize Ruggiero's argument pertaining to sentencing as an "implied[] acknowledg[ment]" that the complaint was "sufficient" to charge a first offense. Plurality opinion at 26-27.

In any event, "that the accused actually knew [the essential elements of the offense charged] and was not misled by the failure to sufficiently allege all of them" does not satisfy the requirement that "the prosecution must prove beyond a reasonable doubt all of the essential elements of the offense charged, [and must also] sufficiently allege them[.]" Cummings, 101 Hawai'i at 143, 63 P.3d at 1113 (quoting Israel, 78 Hawai'i at 73, 890 P.2d at 310 (other citations omitted)) (brackets omitted). Thus, contrary to the plurality's contention, see plurality opinion at 26-27, Ruggiero's argument regarding the complaint is not pertinent to determining its sufficiency.

Finally, irrespective of whether the prosecution had the discretion to charge Ruggiero under HRS § 291E-61(b)(1), see plurality opinion at 26 (stating that "it was within the discretion of the prosecution to pursue a sufficiently articulated charge of [OVUII] as a second-time status offender, it would also have fallen within the prosecution's discretion to charge the lesser included offense of [OVUII] as a first-time offender"), the fact remains that the complaint failed to allege the essential element of "first offense" or an "offense not preceded within a five-year period by a conviction for an offense under [HRS § 291E-61] or [HRS §] 291E-4(a)," to convict Ruggiero

of violating HRS § 291E-61(b)(1). As indicated before, the necessity of pleading "a first offense" is to enable the defendant to discern which version of the offense among those set forth in HRS § 291E-61(b)(1)-(4) is being charged,[13] and, as in Kekuewa, the charge does not allege an offense by simply referring to the definition of OVUII.

[13] Contrary to Justice Nakayama's concurring and dissenting opinion, apprising a defendant of the specific penalties to which he or she is subject appears to be a "practical reason why a defendant must be informed that the offense for which he or she is charged with is his or her first offense." Concurring and dissenting opinion at 3. Furthermore, the concurring and dissenting opinion's assertion that "a defendant is uniquely aware of his or her status as a first-time offender" is irrelevant inasmuch as under the plurality's view, the prosecution has "the discretion to decide which statutory subsection to charge the accused with[.]" State v. Mendonca, 68 Haw. 280, 283, 711, P.2d 731, 734 (1985). The plurality contends that the prosecution has the discretion to charge a defendant as a first-time offender under HRS § 291E-61(b)(1), despite the presence of a "prior conviction." See id. The invalidity of the concurring and dissenting opinion's assertion in such a situation is illustrated by the fact that Ruggiero was not a "first-time offender" under HRS § 291E-61(c) insofar as he had a conviction that was not reversed as of March 10, 2004, when the events in this case transpired. See supra. Thus, Ruggiero could not be "uniquely aware of his . . . status as a first-time offender," concurring and dissenting opinion at 3, because in fact, he was not.