CONCURRING AND DISSENTING OPINION BY ACOBA, J.

I would (1) modify the holding in State v. Domingues, 106 Hawai'i 480, 107 P.3d 409 (2005), with respect to cases charged under Hawai'i Revised Statutes (HRS) § 291-4.4 (Supp. 2000)[1] after its repeal but (2) sustain the dismissal by the Intermediate Court of Appeals (the ICA) of any charge against Respondent/Defendant-Appellant Philip Kala Kekuewa, III (Respondent or Kekuewa) in this case for the reasons set forth herein.

Petitioner/Plaintiff-Appellee State of Hawai'i (Petitioner) filed an application for writ of certiorari[2] on

---

[1] HRS § 291-4.4 entitled "Habitually driving under the influence of intoxicating liquor or drugs," stated in pertinent part:

> (a) A person commits the offense of habitually driving under the influence of intoxicating liquor or drugs if, during a ten-year period the person has been convicted three or more times for a driving under the influence offense; and
>
> (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[.]

(Emphases added.) Effective January 1, 2002, HRS § 291-4.4 was repealed by 2000 Haw. Sess. L. Act 189, § 32 at 432.

[2] Pursuant to HRS § 602-59 (Supp. 2006), a party may appeal the decision of the intermediate appellate court (the ICA) only by an application to this court for a writ of certiorari. See HRS § 602-59(a). In determining whether to accept or reject the application for writ of certiorari, this court reviews the ICA decision for:

> (1) Grave errors of law or of fact; or

(continued...)

November 6, 2006, requesting that this court review the August 23, 2006 judgment issued by the ICA pursuant to its August 10, 2006 published opinion,[3] reversing the March 22, 2005 judgment of the district court of the first circuit[4] adjudging Respondent guilty of Operating a Vehicle Under the Influence of an Intoxicant (OVUII), HRS § 291E-61 (Supp. 2003).[5] In essence the

(...continued)

(2) Obvious inconsistencies in the decision of the [ICA] with that of the supreme court, federal decisions, or its own decision,

and the magnitude of such errors or inconsistencies dictating the need for further appeal.

HRS § 602-59(b). The grant or denial of a petition for certiorari is discretionary with this court. See HRS § 602-59(a).

[3] The ICA opinion was issued by Associate Judge John S.W. Lim, and joined by Chief Judge James S. Burns and Associate Judge Craig H. Nakamura.

[4] The Honorable William A. Cardwell presided.

[5] 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;
(2) While under the influence of any drug that impairs the person's ability to operate the vehicle in a careful and prudent manner;
(3) With .08 or more grams of alcohol per two hundred ten liters of breath; or
(4) With .08 or more grams of alcohol per one hundred milliliters or cubic centimeters of blood.

(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:
(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;

(continued...)

ICA held that the oral accusation, which charged Kekuewa with OVUII "for your second offense," was insufficient under

---

[5](...continued)

(B) Ninety-day prompt suspension of license and privilege to operate a vehicle during the suspension period, or the court may impose, in lieu of the ninety-day prompt suspension of license, a minimum thirty-day prompt suspension of license with absolute prohibition from operating a vehicle and, for the remainder of the ninety-day period, a restriction on the license that allows the person to drive for limited work-related purposes and to participate in substance abuse treatment programs;

(C) Any one or more of the following:

(i) Seventy-two hours of community service work;

(ii) Not less than forty-eight hours and not more than five days of imprisonment; or

(iii) A fine of not less than $150 but not more than $1,000; and

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

(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 neurotrauma special fund;

(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;

(C) Not less than ten days but not more than thirty days imprisonment of which at least forty-eight hours shall be served consecutively; and

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

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. State v. Kekuewa, 112 Hawai'i 269, 270-71, 145 P.3d 812, 813-14 (App. 2006). The ICA therefore reversed the conviction of OVUII. Id. at 277, 145 P.3d at 820.

I.

In its application, 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) does 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 Hawai'i 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 [Respondent's] conviction rather than remanding for

resentencing under HRS § 291E-61(b)(1)"; and (3) "there was sufficient evidence to convict [Respondent]."[6]

Respondent did not file a response to Petitioner's application.

On December 14, 2006, this court accepted 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], [supra], 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.). Act 71 of the 2003 legislature created a separate statutory section, HRS § 291E-61.5 (Supp. 2004), for the felony offense of "Habitually Operating a Vehicle Under the Influence of an Intoxicant"[7] and defined the term "conviction."[8] In regard to Act 71, the legislature stated,

---

[6] Some of the matters stated herein were set forth in the concurring and dissenting opinion in State v. Ruggiero, -- Hawai'i --, --, 160 P.3d 703, 719 n.1 (2007) (Acoba, J., concurring and dissenting) ("Kekuewa should have been disposed of before the instant case. . . . 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.").

[7] I note that by separating the felony offense of "habitually driving under the influence of an intoxicant" from the misdemeanor offenses in enacting Act 71, 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.

[8] HRS § 291E-61.5 stated in relevant part:

> (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

(continued...)

> 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.

---

[8](...continued)

> (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) 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
>
> (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.

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

> 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, Petitioner filed its supplemental brief. In addressing the foregoing amendments in its supplemental brief, Petitioner argued that the amendments did not impact this case.[9] Respondent filed his supplemental brief on February 13, 2007, essentially agreeing that the amendments were not applicable.[10] Hence, both parties agree Domingues applies in this case. On March 21, 2007, this court held oral argument.

II.

First, I believe the holding in Domingues should be modified to conform it to the facts that were actually before us in that case. In order to uphold the indictment of Domingues, who had been charged under HRS § 291-4.4 after it had been repealed, the majority decided that "HRS § 291E-61 [(Supp. 2001), the new statute] which relates to operating a vehicle under the influence of an intoxicant, substantially reenacted HRS § 291-

---

[9] According to 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."

[10] In his supplemental brief, Respondent 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."

4.4[, the repealed statute.]" Domingues, 106 Hawai'i at 482, 107 P.3d at 411 (emphasis added).

In Domingues, the defendant was tried under "HRS § 291-4.4(a)(1) and/or 291-4.4(a)(2)." 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). As noted before, see supra note 1, 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[.]
>
> . . . .
>
> (c) Habitually driving under the influence of intoxicating liquor or drugs is a class C felony. . . .

(Emphases added.)

The new statute, HRS § 291E-61(a) and (b)(4), 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:
>
> . . . .
>
> (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). Thus the new statute, HRS § 291E-61, was not a substantial reenactment of HRS § 291-4.4. The question of whether HRS § 291E-61 itself was constitutionally valid was not before us. The majority response to this, however, was to judicially convert the express "sentencing" factors into elements, thus saving the constitutionality of the new statute, an issue which, again, was not an issue before us.

The majority proceeded to decide that the "sentencing" provisions in the new statute, HRS § 291E-61(b)(1)-(3),[11]

---

[11] In pertinent part, 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 . . . :
>
> . . . .
>
> (C) Any one or more of the following:
>
> . . . .

(continued...)

pertaining to 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 that "[made] the three prior conviction condition a sentencing factor" and

---

[11](...continued)

(ii) Not less than forty-eight hours and not more than five days imprisonment
(iii) A fine of not less than $150 but not more than $1000

. . . .

(2) For an offense that occurs within five years of a prior conviction[:]

. . . .

(B)

. . . .

(ii) Not less than five days but not more than fourteen days of imprisonment[.]

(C) A fine of not less than $500 but not more than $1,500;

. . . .

(3) For an offense that occurs within five years of two prior convictions[:]

(A) A fine of not less than $500 but not more than $2,500;

. . . .

(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.)

transformed such a factor into "an element of the offense." Id. (Acoba, J., dissenting, joined by Nakayama, J.).

As Petitioner correctly states, "[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[12] and 291-4.4, the majority restyled the new sentencing

---

[12] 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:
>
> (i) Seventy-two hours of community service work;
>
> (ii) Not less than forty-eight hours and not more than five days of 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 for driving under the influence of intoxicating liquor under this

(continued...)

provisions in HRS § 291E-61(b)(1)-(4) into elements to conform to an elemental status already established for the offenses in HRS §§ 291-4 and 291-4.4, the repealed statutes. Petitioner astutely observes 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

---

(...continued)

section or section 291-4.4 by:

. . . .

(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; and

(C) A fine of not less than $500 but not more than $1,500.

(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:

(A) A fine of not less than $500 but not more than $2,500;

. . . .

(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.

. . . .

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 Defendant ha[d] not been charged, can be saved in the face of a due process challenge that Defendant ha[d] not brought." Id. (emphases added).

III.

That notice must be given of the elements required to be proven is a salutary proposition. But that was of no consolation to Domingues and other such defendants similarly situated who had been charged under HRS § 291-4.4, after its repeal, but whose convictions were nevertheless upheld. Based on the language of the oral charge and of HRS § 291-4.4, there plainly 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 is charged." Id. at 487, 107 P.3d at 416 (internal quotation marks and citations omitted).

Hence, with all due respect, the majority is, at the least, inaccurate in its contention that "construing HRS §§ 291E-61(b)(1)-(4) (Supp. 2002) as extrinsic sentencing factors would have raised serious concerns . . . , given a defendant's inability to ascertain the class and grade of the offense charged (i.e., a petty misdemeanor or a class C felony) and whether the right to a jury has . . . attached." Majority opinion at 16-17.

No concerns arose in Domingues because the ability of Domingues and others similarly situated to ascertain the grade and class of the offense charged was unquestioned: The oral charge and HRS § 291-4.4 under which Domingues was charged on their faces made the three convictions/ten-year requirement an element of the offense.

Indeed, this had been previously and expressly confirmed by the legislature. As set forth in State v. Shimabukuro, 100 Hawai'i 324, 60 P.3d 274 (2002):

> 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.

Id. at 328 n.12, 60 P.3d at 278 n.12 (Acoba, J., announcing the judgment of the court) (emphasis in original and emphasis added). Conversely, treatment of the three conviction requirement as a sentencing factor under HRS § 291-4.4 had been expressly rejected by the legislature. As Shimabukuro pointed out,

> [t]he 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 that HRS § 291-4.4 be viewed as a sentencing enhancement statute.

Id. (emphasis in original). As the dissent in Domingues related, "[n]o due process violation occurred [t]here because Defendant was 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." Domingues, 106 Hawai'i 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 regarding due process, as it pertained to Domingues, was, as Petitioner aptly points out, "dicta."

Thus it is not surprising that in Domingues the "element" proposition "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.). The excursion of the Domingues majority into a constitutional evaluation of HRS § 291E-61(b)(1)-(4) was neither relevant nor appropriate to the charge brought against Domingues. There simply was no constitutional issue in Domingues.

Hence, there was no "constitutional doubt in Domingues . . . [as to whether] a defendant charged under HRS § 291E-61 (Supp. 200[1]) would not have had sufficient notice of (1) whether he or she was charged with a petty misdemeanor or a class C felony, and (2) whether he or she was entitled to a jury[,]" majority opinion at 18, as the majority contends. Because the specific language in Domingues informed the defendant he was being charged with having three convictions in ten years, a class C felony, the charge and HRS § 291-4.4 were clear, plain, and

definite. The majority ignores the fact that the so-called constitutional doubt would arise only were the defendant charged under the new HRS § 291E-61, which Domingues obviously was not. The constitutional analysis which had no application to Domingues was invoked to render HRS § 291E-61 substantially similar to HRS § 291-4.4, thus preserving Domingues's conviction, a result only achievable by reconstituting the "substantially similar" question into a constitutional question not before this court.

IV.

I believe, therefore, that 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"

(citation omitted), and overruling State v. Jumila, 87 Hawai'i 1, 950 P.2d 1201 (1998)).

The majority's inconsistent response to Petitioner's argument that prior convictions are extrinsic factors that need not be alleged in a charge is that "prior convictions[] [are] generally a fact or circumstance extrinsic to the charged offense[,]" but "prior convictions were intrinsic to, or enmeshed in, the habitual OVUII offenses[.]" Majority opinion at 23. As Judge Lim, writing for the ICA noted,

> [Respondent's] primary argument on appeal is that Domingues's designation of certain prior DUI convictions as essential elements intrinsic to a DUI offense that must be alleged in the charge and determined by the trier of fact, Domingues, 106 Hawai'i at 487-88, 107 P.3d at 416-17, cuts directly against the grain of the supreme court's Tafoya precedents and federal Apprendi jurisprudence, which exempt historical facts and prior convictions, respectively -- in other words, factors extrinsic to an offense -- from the dual requirement of allegation and determination by the trier of fact. State v. Tafoya, 91 Hawai'i 261, 271, 982 P.2d 890, 900 (1999); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

Kekuewa, 112 Hawai'i at 276 n.6, 145 P.3d at 819 n.6. (emphasis added). The majority justifies this diversion on the ground that "unique circumstances" were present in Domingues -- without describing what such "unique circumstances" were. Majority opinion at 23.

The conflict between denominating a prior conviction as an "extrinsic" factor in this court's precedents but on the other hand as an "intrinsic" factor, in this case, does not manifest "unique circumstances," but the inherent limitations of an analysis based on an extrinsic/intrinsic formula. Accordingly, this is not a ground for rejecting the erroneous application of

HRS § 291E-61 to Domingues. See Brantley, 99 Hawai'i at 465, 56 P.3d at 1254. Therefore, on the grounds stated above, 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.

V.

Second, the case decided in Domingues by the majority that was not there, is now here. As noted in the 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." 106 Hawai'i at 499, 107 P.3d at 428 (Acoba, J., dissenting, joined by Nakayama, J.) (emphasis in original). Kekuewa was charged generally under HRS § 291E-61 (the previously new statute) and convicted under HRS § 291E-61(b)(2). While I believe Petitioner is 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, is now raised by Respondent in this case.

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; ten days to thirty days, 291E-61(b)(3)(C) for a third offense. Thus, in effect, HRS § 291E-61(b)(1)-(3), as it applied at the time of the offense, referred to three separate petty misdemeanor offenses.

VI.

After the close of all evidence at trial, Kekuewa brought a "motion to dismiss based on a defective charge." Kekuewa, 112 Hawai'i at 274, 145 P.3d at 817. To reiterate, 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 "[t]he prosecutor 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, [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 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." 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).

VII.

This court has 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.

State v. Elliott, 77 Hawai'i 309, 311, 884 P.2d 372, 374 (1994) (quoting State v. Jendrusch, 58 Haw. 279, 281, 567 P.2d 1242, 1244 (1977) (citations omitted)). In Domingues, a 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 prosecution had to prove beyond a reasonable doubt that Kekuewa (1) "operate[d] or assume[d] actual physical control of the operation 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. 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.

VIII.

Plainly the reference only to "a second offense" in the charge against Kekuewa fails under HRS § 291E-61 to designate the particular petty misdemeanor offense charged and to "sufficiently allege all the essential elements of the offense[.]" State v. Sprattling, 99 Hawai'i 312, 316, 55 P.3d 276, 280 (2003) (internal quotation marks and citation omitted). Under these circumstances the failure to charge in the specific section and the operative language therein would not sufficiently apprise a layperson of the charge brought. As Judge Lim stated in his 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 oral charge failed to sufficiently allege "the essential element[]," Elliott, 77 Hawai'i at 311, 884 P.2d at 374, that 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[,]" for a conviction of HRS § 291E-61(b)(2). See Domingues, 106 Hawai'i at 487, 107 P.3d at 416.

The ICA explained 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.'" Kekuewa, 112 Hawai'i at 277, 145 P.3d at 820 (quoting Cummings, 101 Hawai'i at 143, 63 P.3d at 1113) (other citation and brackets omitted). Furthermore, as the ICA observed, "'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)). 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." Id. at 277, 145 P.3d at 820.

The majority opinion in Domingues instructed Petitioner "on how future cases under the new statute[, HRS § 291E-61(b)(1)-(4),] may be saved from motions to dismiss." 106 Hawai'i at 499, 107 P.3d at 428 (Acoba, J., dissenting, joined by Nakayama, J.) (emphasis in original). Petitioner failed to follow that advice as to the petty misdemeanor offense in HRS § 291E-61(b)(2). Consequently, the charge "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." Cummings, 101 Hawai'i at 142, 63 P.3d at 1112 (internal quotation marks and

citations omitted). The conviction, then, must be reversed and the motion to dismiss brought by Respondent, sustained.

IX.

However, contrary to the ICA's decision, the majority maintains that "the ICA should have remanded the matter for entry of judgment of conviction and resentencing as to the offense described by HRS §§ 291E-61(a) and (b)(1) (Supp. 2004)." Majority opinion at 28. Excising "for your second offense" from the oral charge, the majority proposes that the remaining language, that Kekuewa "did operate or assume actual physical control of a vehicle while under the influence of alcohol in an 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] for your second offense[,]" Kekuewa, 112 Hawai'i at 271, 145 P.3d at 814, "set forth the essential elements of the [included] offense described by HRS §§ 291E-61(a) and (b)(2) (Supp. 2004)[,]" majority opinion at 28-29.

The majority purportedly relies on Elliott but merely recites the framework of that case. In Elliott, the included third degree assault offense was said to be included in the greater defective charge of assault against a police officer. Thus, "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. Elliott, 77 Hawai'i at 313, 884 P.2d at 376.

That is not the case here. On the faces of HRS §§ 291E-61(a) and (b)(1), HRS § 291E-61(a) contains only the definition of "Operating a vehicle under the influence of an intoxicant," and does not charge an offense. Under the precedent established by Domingues, the definition of OVUII must be tied to either one of three misdemeanor and one felony offense. See Domingues, 106 Hawai'i at 487, 107 P.3d at 416 (stating that "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" (citing HRS § 702-205 (emphasis added)). The remaining language in the charge against Kekuewa is completely devoid of such a connection.

Applying Domingues, the remaining language cannot be construed to allege either a "first offense, or any 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; Ruggiero, -- Hawai'i at --, 160 P.3d at 731 (Acoba, J., concurring and dissenting). Pursuant to Domingues, there is no generic OVUII offense. See Ruggiero, -- Hawai'i at --, 160 P.3d at 731 (Acoba, J., concurring and dissenting). Hence, in this case, the offense

listed in 291E-61(b)(1) cannot be "included" in the purportedly greater offense in 291E-61(a) because subsection (a) itself merely describes OVUII conduct and does not set forth any offense at all.

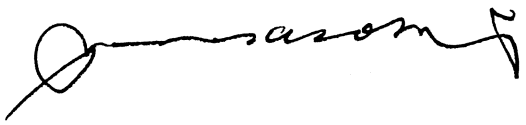
X.

Until Ruggiero, this court has never held that a charge may be sustained if an element is only "implicit" in the charge. The long-standing precedent in this jurisdiction is 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). As such, because the charge against Kekuewa did not allege an offense, it was properly dismissed in its entirety.

Ruggiero invites a sea change in the long and well established due process protection against defective charges, and at the very least places such protection on uncertain footing. With all due respect, the extension of Ruggiero to this case, sacrifices that due process principle to the result reached in this case.[13] In light of the adverse constitutional implications

[13] Also, the Ruggiero plurality's contention that "it would also have fallen within the prosecution's discretion to charge the lesser included offense of DUI as a first-time offense[,]" -- Hawai'i at --, 160 P.3d at 716 (Levinson, J., announcing the judgment of the court) (citing State v. Holbron, (continued...)

of the majority's ruling, I would adhere to the principle of due process protection, as did the ICA.



[13](...continued)
80 Hawai'i 27, 44, 904 P.2d 912, 929 (1995) ("Within constitutional limits, it is always the prosecution's prerogative to undercharge any offense for whatever reason it deems appropriate. . . ." (Emphasis in original.)); State v. Mendonca, 68 Haw. 280, 283, 711 P.2d 731, 734 (1998) (other citation omitted)), is, with all due respect, simply erroneous, since there is no dispute that the prosecution expressly sought to charge a "second conviction" offense, and was not exercising its discretion to "under charge."