DISSENTING OPINION BY ACOBA, J.

I respectfully dissent.

As indicated in the dissent in State v. Reis, --- Hawai'i ---, ---, 165 P.3d 980, 999 (2007) (Acoba, J., dissenting), I believe "the majority in this case incorrectly applies the terms 'proceedings' and 'penalty incurred' in the generic savings clause in Section 29 of Act 44, 2004 Haw. Sess. L. Act 44 [hereinafter Act 44], § 29 [hereinafter Section 29], to [erroneously] preclude the application of Section 11 of Act 44 [hereinafter, Section 11] to" Defendant-Appellee Rowena Nazareno Tactay (Tactay).

Again, I adhere to the conclusion that "[u]ltimately, the majority's [decision] is unsound because 'nothing is to be gained by imposing the more severe penalty,' Wayne LaFave, 1 Substantive Criminal Law, § 2.5 (2007) . . . , that existed before the most recent legislative policy embodied in Section 11, -- especially when our case law permits this court to confirm application of Section 11." Id. at ---, 165 P.3d at 1000. For "[i]n light of its ameliorative and remedial purpose of allowing [non-violent] drug offenders to be sentenced to probation, Section 11 should be applied to" Tactay. Id. at ---, 165 P.3d at 999.

I.

On December 20, 2004, Plaintiff-Appellant State of Hawai'i (the prosecution) filed its motion for sentencing of a

repeat offender seeking to sentence Tactay to a mandatory minimum term of imprisonment of one year and eight months pursuant to Hawai'i Revised Statutes (HRS) § 706-606.5 (Supp. 2003), based on the fact that Tactay had been convicted of unauthorized control of a propelled vehicle on February 28, 2003, and had been sentenced to the maximum term of imprisonment allowed by law for that offense.

Section 11 allows the court discretion in sentencing first-time drug offenders and provides such offenders are "eligible to be sentenced to probation." Act 44, pt II, § 11 at 214. The legislature, in enacting Section 11, intended to "clear up the confusion regarding repeat offenders" and to make it clear that "first time nonviolent drug offenders" were "eligible for diversion to treatment." Act 44, pt II, § 9 at 212-13. Thus, despite Tactay's prior conviction of unauthorized control of a propelled vehicle, she should nevertheless qualify for sentencing under Section 11. The prosecution concedes that "Act 44 afforded circuit courts discretion to sentence a repeat offender to probation pursuant to [HRS §] 706-622.5" but maintains that the act is inapplicable to the instant case because "the act contained a savings clause."

II.

For the reasons stated in the Reis dissent,

> (1) under a plain reading of Section 29, [Tactay's] sentencing "proceeding" took place after the effective date of Act 44, (2) alternatively, and assuming, arguendo, the term "proceedings" is ambiguous, the fact that prosecution of the case was initiated prior to the effective date of the

> Act does not preclude application of Section 11 under State v. Avilla, 69 Haw. 509, 750 P.2d 78 (1988), and also (3) [Tactay's] sentence may be treated as "a penalty incurred," after the effective date of the Act.

Reis, --- Hawai'i at ---, 165 P.3d at 999-1000 (Acoba, J., dissenting). I reiterate that, as the Honorable Steven Alm was correct in Reis, and the Honorable Virginia Lea Crandall was correct in State v. Cruz, No. 27242, mem. at 1 (Haw. Sept. 7, 2007) (mem.) (Acoba, J., dissenting), the Honorable Michael A. Town correctly ruled in this case as follows:

> And to me this is clearly a proceeding under [Avillal, the intent of "incur." I don't think they were that precise and it's clear to me that the legislative intent was to give discretion, be it "imposed," "incurred." I would hate someone's future to turn without -- and I don't think -- I think there is not clear direction in . . . Act 44 to do otherwise so unless and until they tell me otherwise, or an appellate court.
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> And I think under HRS 1-1, my favorite statute, in the absence of [a] clear statute or case law the [c]ourt should look at other states. Notwithstanding what -- the good work [the prosecution] did, I think that there's discretion on what "incurred" is versus "imposed."

(Emphases added.) Unfortunately, Tactay's opportunity for rehabilitation is forfeited by the Reis decision, as are the opportunities of others similarly situated like Reis and Cruz, and "[t]he consequences will invariably have an adverse effect for [them], for those around them, and for our community as a whole." Reis, --- Hawai'i at ---, 165 P.3d at 1000 (Acoba, J., dissenting). Judge Town's ruling was "legally correct and judicially appropriate[,]" id., and, thus, I would affirm the decision applying Section 11 and sentencing Tactay to probation.