DISSENTING OPINION BY ACOBA, J.

I respectfully dissent.

The stop of Petitioner/Defendant-Appellant Michael Spillner (Petitioner) on March 1, 2005 by the police, was an unconstitutional seizure under article I, section 7 of the Hawai'i Constitution[1] because the police did not have reasonable suspicion based upon specific and articulable facts that Petitioner was operating a motor vehicle without a license in violation of Hawai'i Revised Statutes (HRS) § 286-102 (1993 & Supp. 2002)[2] or without insurance in violation of HRS § 431:10C-

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[1] Article I, section 7 of the Hawai'i State Constitution states as follows:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted.

Because in this context a violation of the state constitution which affords broader rights within its jurisdiction would control on whether a violation occurred under the federal constitution or not, a violation of the former would be dispositive. State v. Maganis, 109 Hawai'i 84, 87, 123 P.3d 679, 682 (2005) (stating that "as the ultimate judicial tribunal with final, unreviewable authority to interpret and enforce the Hawai'i Constitution, we are free to give broader protection under the Hawai'i Constitution than that given by the federal constitution" (internal quotation marks and citation omitted)). United States Supreme Court opinions, however, may be cited as persuasive but not controlling authority in such instances, even though subsequently qualified or overruled by that court. See Michigan v. Long, 463 U.S. 1032, 1041 (1983) (stating that "[i]f [a] state court decision indicates clearly and expressly that it is alternatively based on a bona fide separate, adequate, and independent grounds, [the U.S. Supreme Court], of course, will not undertake to review the decision"). This dissent expressly rests on "separate, adequate, and independent [state] grounds[.]" Id.

[2] Hawai'i Revised Statutes (HRS) § 286-102 provides in relevant part:

> (a) . . . No person, except one exempted under section 286-105, one who holds an instruction permit under section

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104 (Supp. 1997).[3]

I.

In State v. Barnes, 58 Haw. 333, 568 P.2d 1207 (1977), this court applied the standard articulated in Terry v. Ohio, 392 U.S. 1 (1968), that in order "[t]o justify an investigative stop, short of arrest based on probable cause, 'the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" Barnes, 58 Haw. at 338, 568 P.2d at

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> 286-110, one who holds a provisional license under section 286-102.6, one who holds a commercial driver's license issued under section 286-239, or one who holds a commercial driver's license instruction permit issued under section 286-236, shall operate any category of motor vehicles listed in this section without first being appropriately examined and duly licensed as a qualified driver of that category of motor vehicles.
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> (b) A person operating the following category or combination of categories of motor vehicles shall be examined as provided in section 286-108 and duly licensed by the examiner of drivers:
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> . . . .
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> (3) Passenger cars of any gross vehicle weight rating, buses designed to transport fifteen or fewer occupants, and trucks and vans having a gross vehicle weight rating of fifteen thousand pounds or less . . . .

(Emphases added.)

[3] HRS § 431:10C-104 provided in relevant part:

> (a) Except as provided in section 431:10C-105, no person shall operate or use a motor vehicle upon any public street, road, or highway of this State at any time unless such motor vehicle is insured at all times under a motor vehicle insurance policy.
>
> (b) Every owner of a motor vehicle used or operated at any time upon any public street, road, or highway of this State shall obtain a motor vehicle insurance policy upon such vehicle which provides the coverage required by this article and shall maintain the motor vehicle insurance policy at all times for the entire motor vehicle registration period.

(Emphases added.)

1211 (emphases added) (quoting Terry, 392 U.S. at 21). In other words, "a police officer may stop an automobile and detain its occupants if that officer has a reasonable suspicion that the person stopped was engaged in criminal conduct." State v. Eleneki, 106 Hawai'i 177, 180, 102 P.3d 1075, 1078 (2004) (internal quotation marks, citation, and emphasis omitted).

Reasonable suspicion, in turn, requires "more than an inchoate and unparticularized suspicion or hunch." United State v. Sokolow, 490 U.S. 1, 8 (1989) (emphasis added) (internal quotation marks and citation omitted). See also State v. Heapy, 113 Hawai'i 283, 292-93, 151 P.3d 764, 773-74 (2007) (holding that "[t]he mere possibility of criminal activity does not satisfy the constitutional requirement that a stop be based on suspicion that criminal activity was afoot" (internal quotation marks and citation omitted)); State v. Goudy, 52 Haw. 497, 501, 479 P.2d 800, 803 (1971) (explaining that rules governing an investigative stop under Terry require "that such an intrusion upon personal liberty must be reasonable and be based on something more substantial than inarticulate hunches").

Furthermore, reasonable suspicion for purposes of an investigative stop is "measured by an objective standard." State v. Bolosan, 78 Hawai'i 86, 92, 890 P.2d 673, 679 (1995). See also Eleneki, 106 Hawai'i at 180, 102 P.3d at 1078 (stating that "[a] seizure or stop based on reasonable suspicion . . . is tied to some objective manifestation that the person stopped is, or is

about to be, engaged in criminal activity" (internal quotation marks and citation omitted)) (emphasis added). In short, "[t]he ultimate test" for determining whether a traffic stop is reasonably warranted is "whether from [the] facts, measured by an objective standard, a [person] of reasonable caution would be warranted in believing that criminal activity was afoot and that the action taken was appropriate." Bolosan, 78 Hawai'i at 92, 890 P.2d at 679 (emphasis added) (internal quotation marks and citation omitted).

The aforementioned standards apply expressly to investigative stops. Persons may not be subject to such a stop unless it is in accordance with such standards. As explained in Terry, the "entire rubric of police conduct" entails "necessarily swift action predicated upon the on-the-spot observations of the officer on the beat" that "as a practical matter could not be[] subjected to the warrant procedure." 392 U.S. at 20. Nonetheless,

> the notions which underlie both the warrant procedure and the requirement of probable cause remain fully relevant in this context . . . . And [thus,] in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.

Id. (footnote omitted) (emphasis added). Consequently, officers may not circumvent these strictures and detain individuals on the pretext that they are merely verifying or checking certain facts or circumstances. See Brendlin v. California, -- U.S. --, --, -- n.2, 127 S.Ct. 2400, 2404, 2405 n.2 (2007) (The state conceded

that the police officers lacked reasonable suspicion to justify stopping a vehicle that displayed a temporary operating permit and expired registration tags in an attempt "to verify that the permit matched the vehicle" where there was nothing unusual about the permit or the manner in which it was affixed and as the vehicle had an application for registration renewal associated with it, the vehicle was expected to have a temporary operating permit.).[4]

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[4] Brendlin must be compared with Rakas v. Illinois, 439 U.S. 128 (1978). In Rakas, the petitioners sought to suppress evidence of a rifle and rifle shells seized from the vehicle in which they were passengers on the grounds that the search violated their rights under the Fourth and Fourteenth Amendments to the U.S. Constitution. Id. at 130. The Rakas court rejected the petitioners' claims because they owned neither the vehicle nor the items in question that were seized from the vehicle and therefore "made no showing that they had any legitimate expectation of privacy" in the areas that were searched. Id. at 148.

In contrast, the defendant in Brendlin "did not assert that his Fourth Amendment rights were violated by the search" of the vehicle in which he was a passenger, but instead "claimed only that the traffic stop was an unlawful seizure of his person." Id. at --, 127 S.Ct. at 2404. Consequently, the defendant moved to suppress the introduction of methamphetamine production equipment seized during the police search of the vehicle. Id. The Brendlin court held that the defendant "was seized" at the time the vehicle was stopped "and it was error to deny his suppression motion on the ground that seizure occured only at the formal arrest." Id. at --, 127 S. Ct. at 2410. In effect, under Brendlin, persons in a vehicle would have standing to suppress the fruits of an illegal search if in conjunction therewith they had been illegally stopped.

Therefore, practically speaking, Rakas's rule precluding challenge by a passenger lacking property or possessory interests in a vehicle or in objects seized from the vehicle, to the introduction of the fruits of a search and seizure, does not apply if the stop was improper. The end result, in light of Brendlin, and notwithstanding Rakas, is that in such a case, a passenger may successfully suppress the introduction into evidence of items seized during a search of a vehicle not belonging to the passenger.

This end result is congruent with the automatic standing rule accorded defendants charged with possession crimes previously believed to be applicable in this jurisdiction. See State v. Tau'a, 98 Hawai'i 426, 441, 49 P.3d 1227, 1242 (2002) (Acoba, J., dissenting, joined by Ramil, J.) (stating that a defendant passenger "who is in possession of contraband has automatic standing to challenge the legality of any search and seizure by virtue of the protection afforded a person with respect to his or 'effects' under article I, section 7 of the Hawai'i Constitution"); see also Kathleen J. Curran, Search and Seizure - Hawaii's Failure to Conduct an Independent and Thorough State Constitutional Analysis of the "Automatic Standing" Rule Effectively Ignores the Hawai'i Constitution's Protection of Citizens' "Effects" from Unreasonable Searches and Seizures, 34 Rutgers L.J. 1353, 1361, 1365 (2003) (observing that

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II.

Petitioner was cited on February 15, 2005, by Officer Arthur Takamiya (Officer Takamiya or the officer) for operating a motor vehicle without a license and without insurance, and for operating a vehicle with illegal tint on its front windshield. Approximately one week later Officer Takamiya cited Petitioner's girlfriend for operating the same vehicle without insurance and for the illegal tint which still remained on the front windshield of the vehicle. Officer Takamiya again stopped Petitioner on March 1, 2005. Petitioner was operating the same vehicle involved in his February 15, 2005 citations and in the subsequent week's citation of his girlfriend. The illegal tint on the front windshield had been removed by the time of this stop. The officer again cited Petitioner for operating a motor vehicle without a license and without insurance. It is this last stop that is at issue.

Respondent/Plaintiff-Appellee State of Hawai'i (Respondent) candidly acknowledged at oral argument that officers typically issue citations under HRS § 286-102 for operating a vehicle without a license even if the operator has a valid

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the majority in Tau'a "erred in merely relying on federal precedent and in not conducting an independent state constitutional analysis as it relates to vehicle passengers charged with possessory crimes" and noting that "the dissent correctly pointed out" that the majority's opinion "'declares open season' on automobile passengers" (footnotes omitted) (quoting Tau'a, 98 Hawai'i at 444, 49 P.3d at 1245 (Acoba, J., dissenting, joined by Ramil, J.) (quoting Rakas, 439 U.S. at 157 (White, J., dissenting, joined by Brennan, J., Marshall, J., and Stevens, J.)))).

license but does not have it in his physical possession at the time of a stop.[5]

The officer forthrightly stated that on March 1, 2005, the date of the stop, he had no specific or articulable facts giving rise to a reasonable suspicion that Petitioner lacked a license or insurance. He also agreed that he "did not observe any outward signs of any traffic violations" committed by Petitioner.

> [DEFENSE]: . . . [O]n . . . March 1st, 2005, you did not observe any outward signs of any traffic violations [by Petitioner], isn't that true?
> [OFFICER TAKAMIYA]: That's true.
> [DEFENSE]: He didn't speed or weave or run a red light, any of those variety of traffic offenses?
> [OFFICER TAKAMIYA]: . . . [N]o, it was all good.

(Emphasis added.)

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[5] HRS § 286-116 (1993 & Supp. 1997) requires that a person having a valid driver's license and valid motor vehicle insurance shall keep such license in his or her possession at all times and a person having valid motor vehicle insurance shall keep such insurance identification card in his or her possession while operating the motor vehicle. However, no person charged with a violation of these requirements will be convicted if the person produces appropriate proof that the person was the holder of a license and insurance at the time of arrest. That section provides in relevant part:

> (a) Every licensee shall have a valid driver's license in the licensee's immediate possession at all times, and a valid motor vehicle or liability insurance identification card applicable to the motor vehicle operated . . . when operating a motor vehicle, and shall display the same upon demand of a police officer. Every police officer or law enforcement officer when stopping a vehicle or inspecting a vehicle for any reason shall demand that the driver or owner display the driver's or owner's driver's license and insurance identification card. No person charged with violating this section shall be convicted if the person produces in court, or proves from the proper official or other records that the person was the holder of a driver's license or a motor vehicle or liability insurance identification card and policy . . . theretofore issued to the person and valid at the time of the person's arrest.

(Emphases added.) Petitioner was not cited under this section.

Officer Takamiya further confirmed that "he had no first hand knowledge of whether [Petitioner] was actually driving without a license or that the vehicle was not insured."

> [DEFENSE]: Now from February 15th to March 1st, 2005, you don't have any first-hand knowledge whether or not he obtained a license in those two weeks, isn't that true?
> [OFFICER TAKAMIYA]: That's true.
> [DEFENSE]: You don't have any first-hand knowledge whether or not he obtained insurance . . . in those two weeks, isn't that true?
> [OFFICER TAKAMIYA]: That's true.
> . . . .
> [DEFENSE]: . . . [B]ut for all you know, [Petitioner's vehicle] could have been insured and [Petitioner could have been] licensed on March 1st, 2005, isn't that true?
> [OFFICER TAKAMIYA]: Yes.

(Emphases added.)

Indeed, Officer Takamiya testified during trial that the reason he thought Petitioner had no license was "[b]ecause [he] cited [Petitioner] one to two weeks prior" and that he therefore assumed that Petitioner did not have a driver's license or insurance on March 1, 2005. Officer Takamiya also indicated a reason he thought Petitioner's vehicle was not insured was because he "stopped [Petitioner's] girlfriend driving that same truck one week prior [to the March 1, 2005 stop] without insurance and with the same tinted front windshield."

> Direct Examination
> . . . .
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> [PROSECUTION]: Upon [recognizing Petitioner as he was driving] what were you thinking?
> [OFFICER TAKAMIYA]: That [Petitioner] was driving without a license and no insurance.
> [PROSECUTION]: And what made you think that?
> [OFFICER TAKAMIYA]: Because I cited him one to two weeks prior.
> [PROSECUTION]: For that?
> [OFFICER TAKAMIYA]: For driving without license and driving without insurance and also the illegal front tinted windshield.
> . . . .

> Cross Examination
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> . . . .
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> [Petitioner'S DEFENSE COUNSEL (DEFENSE)]: And you pulled [Petitioner] over March 1st, 2005, on the assumption that he had no driver's license and was not insured?
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> [OFFICER TAKAMIYA]: Yes.
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> . . . .
>
> [DEFENSE]: You just assumed based on your prior encounter with [Petitioner] that he wasn't insured and he had no license?
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> . . . .
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> OFFICER TAKAMIYA: . . . As far as the driver's license, that's an assumption. As far as the insurance, I stopped his girlfriend driving that same truck one week prior without insurance with the same tinted front windshield.
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> [DEFENSE]: . . . But between the time that you stopped and cited his girlfriend and when you stopped and cited him on March 1st, . . . you don't have any first-hand knowledge whether or not the vehicle was insured in that one week's time?
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> OFFICER TAKAMIYA: That's correct.

Assuming access to information regarding drivers' licenses and auto insurance was available, Officer Takamiya did not call the dispatch center and did not have any computerized check performed to determine whether any records indicated Petitioner had obtained either a license or insurance as of March 1st.[6]

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[6] Although the court admitted into evidence what appeared to be a self-authenticating document from the City and County of Honolulu's Division of Motor Vehicle, Licensing and Permits, indicating that Petitioner did not have a valid license issued to him at the time of the March 1, 2005 stop, Officer Takamiya did not testify he was aware that a valid license had not been issued to Petitioner at the time of either the February 15 or the March 1 stops. Thus, for all that is objectively in evidence, during both stops, Petitioner may have had a valid driver's license or a valid insurance policy for his vehicle although proof of such license and insurance were not in the vehicle at the time.

Of course, what is discovered subsequent to an illegal stop cannot validate the stop. If Officer Takamiya did not have a reasonable suspicion that criminal activity was afoot predicated on a "particularized and objective basis[,]" before the stop United States v. Arvizu, 534 U.S. 266, 273 (2002), see also, State v. Kim, 68 Haw. 286, 290, 711 P.2d 1291, 1294 (1985) (holding that "under article I, section 7 of the Hawai'i Constitution, a police officer must have at least a reasonable basis of specific articulable facts to believe a crime has been committed to order a driver out of a car after a traffic stop"), then the fact that his "assumption" turned out to be correct cannot retroactively create such a basis validating the stop. Heapy, 113 Hawai'i at 292, 151 P.3d at 773 (holding that "a reasonable suspicion 'must be present

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III.

Based on the foregoing facts and testimony of Officer Takamiya, his belief that Petitioner did not have a license and insurance on March 1, 2005, was not grounded in any specific or articulable facts of an objective nature. Thus, exercising "reasonable caution," Bolosan, 78 Hawai'i at 92, 890 P.2d at 679, it seems no rational inferences could be drawn objectively that Petitioner was unlicensed and uninsured on that date. Officer Takamiya conceded that he observed no traffic violations by Petitioner and did not have any knowledge at all of whether Petitioner had or had not obtained a license or insurance during the interim since he was last stopped.

Furthermore, Officer Takamiya admitted that he only assumed Petitioner did not have a license "[b]ecause [he] cited [Petitioner] one to two weeks prior" for driving without a license. Likewise, when Officer Takamiya was questioned during cross examination as to why he thought Petitioner's vehicle had no insurance, he referred to the fact that he issued a citation to Petitioner's girlfriend for operating the vehicle in question without insurance. Thus, Officer Takamiya's belief that Petitioner lacked a license and insurance on March 1, 2005, was "an inchoate and unparticularized suspicion or hunch," Sokolow,

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before a stop[,]' in order for the stop to be permissible" (quoting United States v. Cortez, 449 U.S. 411, 418 (1981) (brackets in original))). Such a rule would seriously undermine the protections afforded under article I, section 7 of the Hawai'i Constitution.

490 U.S. at 8, as even he admitted that it was "an assumption[.]" In short, Officer Takamiya's assumption did not constitute reasonable suspicion required for an investigative stop. Applying an objective standard, it cannot be said, then, that "a [person] of reasonable caution would be warranted in believing," Bolosan, 78 Hawai'i at 92, 890 P.2d at 679 (emphasis added), that Petitioner lacked a license and insurance at the time of the stop.

A police officer is not excused from complying with the standards applicable to an investigative stop merely because he may have wanted to verify or check that a driver had obtained a license and insurance. These standards apply expressly to such investigative stops and have evolved specifically to balance the interests presented in two competing arguments: (1) "that in dealing with the rapidly unfolding and often dangerous situations on city streets[,] the police are in need of an escalating set of flexible responses" and (2) "that the authority of the police must be strictly circumscribed by the law of arrest and search as it has developed to date in the traditional jurisprudence of the Fourth Amendment," Terry, 392 U.S. at 10, 11 (footnote omitted), and the Hawai'i Constitution.

Officer Takamiya's only basis for stopping Petitioner was his knowledge of Petitioner's prior citations and the citation of Petitioner's girlfriend, which as discussed infra in section IV, is insufficient to constitute reasonable suspicion.

IV.

A.

As Petitioner argues, this court held in State v. Kaleohano, 99 Hawai'i 370, 380, 56 P.3d 138, 148 (2002), that "awareness of past arrests may, when combined with other specific articulable facts indicating the probability of current criminal activity factor into a determination that reasonable suspicion, sufficient to warrant a temporary investigative stop, exists." (Emphases added.). The majority admits that this court "has 'rejected the notion that a person's prior reputation . . . , standing alone, was sufficient to establish probable cause for an arrest and has concluded that, at best, it was entitled to only minimal weight when combined with other elements.'" Majority opinion at 16 (brackets omitted) (quoting Kaleohano, 99 Hawai'i at 377, 56 P.3d at 145 (internal quotation marks and citation omitted)) (emphases added). Hence, this court's recognition that an individual's reputation for criminal activity in and of itself is an insufficient basis for probable cause suggests that it would accede to the logic of the rule such that an individual's prior history of wrongdoing would be deemed an insufficient basis for reasonable suspicion justifying a traffic stop.

Other courts expressly hold that prior violations or criminal history do not give rise to reasonable suspicion that criminal activity is afoot and therefore may not serve as the

sole basis for a stop. In that regard, Petitioner cites Robinson v. State, 388 So. 2d 286, 290 (Fla. Dist. Ct. App. 1980), where a police officer's knowledge of a suspect's prior arrest was the sole reason for stopping the defendant walking through an airport. The Florida Court of Appeals held "that an officer's knowledge of a suspect's previous arrest, standing alone, is insufficient to give rise to a reasonable suspicion that a crime may have been or is being committed in order to justify a lawful investigatory stop." Id.

Similarly, in United States v. Jerez, 108 F.3d 684, 693 (7th Cir. 1997), the U.S. Court of Appeals for the seventh circuit acknowledged that the defendant's criminal record "would not be enough by itself" to justify an investigative stop. See also United States v. Davis, 94 F.3d 1465, 1469 (10th Cir. 1996) (holding that knowledge of the defendant's criminal record alone did not justify a Terry stop as such knowledge was insufficient to create reasonable suspicion); United States v. Sandoval, 29 F.3d 537, 542 (10th Cir. 1994) (holding that "knowledge of a person's prior criminal involvement . . . is alone insufficient to give rise to the requisite reasonable suspicion" for continued detention after a traffic stop); Collier v. Commonwealth, 713 S.W.2d 827, 828 (Ky. Ct. App. 1986) (stating that "the prior record of a suspect, standing alone, will never justify a Terry stop").

The alleged "specific and articulable facts" in the instant case amount to no more than Officer Takamiya's prior knowledge of Petitioner's previous citations and the operation of the vehicle by his girlfriend without insurance, both within a span of one to two weeks before the subject stop. Following the logic of the aforementioned cases, this knowledge, standing alone, did not give rise to a reasonable suspicion that Petitioner was committing the offense of driving without a license or of driving without insurance specifically on March 1, 2005.

B.

The rationale behind the prohibition on reliance of prior criminal history as the sole basis for detention arises from a recognition that "[i]f the law were otherwise, any person with any sort of criminal record--or even worse, a person with arrests but no convictions--could be subjected to [an] investigative stop by a law enforcement officer at any time without the need for any other justification at all." Sandoval, 29 F.3d at 543. Consequently, standards governing what circumstances constitute specific and articulable facts indicative of criminal activity must be upheld in order to guard against the exercise of "standardless and unconstrained discretion," Delaware v. Prouse, 440 U.S. 648, 661 (1979), of officials in executing seizures.

Because Respondent cites no other facts aside from the Officer's knowledge of Petitioner's previous citations that could, under an objective standard, give rise to the requisite reasonable suspicion, this stop was not justified. To hold that a stop based solely on the fact of Petitioner's prior citations is proper, would eviscerate the well-settled standards pertaining to reasonable suspicion, substantially undermining the guarantee against unreasonable seizures under the Hawai'i Constitution.

V.

The majority argues that (1) an officer's knowledge of an individual's past law violations may authorize a traffic stop if the violation of which the individual is suspected is an "ongoing" violation, majority opinion at 12, (2) timeliness of information pertaining to past violations is of diminished importance in reasonable suspicion analysis involving an "ongoing" violation but nonetheless, the information surrounding Petitioner's prior violations was relatively timely, id. at 20, and (3) stopping Petitioner "was likely to advance the state's interest in highway safety." Id. at 26.

VI.

A.

As to the majority's first argument, the majority cites Deboy v. Commonwealth, 214 S.W.3d 926, 928-29 (Ky. Ct. App. 2007). But, in Deboy, the investigating officer, prior to the stop, had knowledge that the defendant's license was suspended.

Id. at 927. Understandably and in consonance with the specific and articulable facts standard, that court held that such knowledge on the part of the investigating officer qualified as a basis for reasonable suspicion justifying the investigative stop. Id. at 929.

Obviously, this case is not authority for the majority's "ongoing" violation thesis. In the instant case, Officer Takamiya only had knowledge that Petitioner had received citations for driving while unlicensed and for driving without insurance. Contrary to the majority's opinion, such violations are not analogous to a violation for a suspended license because the Petitioner could have cured these violations at virtually any time after the initial citations. Officer Takamiya even agreed during cross examination that Petitioner could have been licensed and could have been insured by March 1.

Therefore, the violations for which Petitioner was cited should not be included in the category of so called "ongoing" violations which, under the majority's view, are excepted from the rule that past violations, standing alone, do not give rise to reasonable suspicion. Indeed, the majority cites no cases which hold that where there is no evidence that a defendant's license has been suspended or revoked, standing alone, an officer's knowledge that the defendant received a citation for driving without a license or without insurance is

classified as an "ongoing" crime for which a separate reasonable suspicion standard is applicable.[7]

The crucial distinction of course between Deboy and this case is that, a defendant with a suspended license generally cannot alter his status as a person unauthorized to drive for the duration of the suspension. Thus, an officer observing a person driving, whom the officer knows has a suspended license, has the specific and articulable facts necessary for which the driver can be stopped. In that connection, the court of appeals in United States v. Laughrin, 438 F.3d 1245, 1248 (10th Cir. 2006), a case cited by the majority, noted that it might have been able to affirm the district court's determination that the officer had reasonable suspicion in stopping the defendant if the officer had testified to the length of the defendant's driving suspension as this information was necessary to evaluate whether the officer

[7] The only case that the majority cites which holds that an officer had reasonable suspicion to stop a defendant where the officer had issued a previous citation and where license suspension and revocation were not involved, is State v. Carrs, 568 So.2d 120 (Fla. Dist. Ct. App. 1990). That case, however, is distinguishable. In that case, prior to the stop in question, the police officer had knowledge that the defendant had been cited for driving with an expired license one week prior. Id. at 120. However, the Florida Court of Appeal noted that "[the citing officer], who had known [the defendant] 'all his life' and saw him 'all the time,' knew that a short time earlier [the defendant] was driving with an expired license." Id. That court concluded that "[the officer's] suspicion, based on his familiarity with [the defendant], was reasonable." Id. at 121 (emphasis added). In contrast, as noted in Section II, supra, Petitioner here was cited for driving without a license and without insurance but there is no evidence that Officer Takamiya knew that a valid license and insurance policy had not been issued to Petitioner or knew only that Petitioner did not have documented proof thereof.

Moreover, Carrs is of limited persuasive value in light of the dearth of cases reaching similar decisions and in light of the number of other cases discussed infra in Section IV.A. which expressly state that knowledge of an individual's prior criminal history is an insufficient basis for an investigative stop.

was justified in his "belief that a suspension was still in effect."

However, the officer in that case apparently did not provide such information regarding the defendant's license suspension period and that court accordingly ruled that there was no reasonable suspicion that the defendant was driving without a license. Id. Thus, Laughrin illustrates that the reason a stop based solely on an officer's knowledge of an individual's prior violation of driving with a suspended license may be proper is because during a license suspension, an individual is prohibited from driving and if the officer, knowing the term of suspension, observes the individual driving, the officer would have reasonable suspicion that the individual is committing a violation. As held in Laughrin, without knowledge of the approximate term of suspension, an officer has no reasonable basis for suspecting a driver of a violation. Likewise, in the case of a driver previously cited for driving without a license where no suspension or revocation is involved, the officer, upon reencountering the driver, is not legally cognizant of any impediment to the driver's operation of a vehicle.

The instant case is also distinguishable from cases like United States v. Sandridge, 385 F.3d 1032 (6th Cir. 2004), which is cited by the majority, where the investigating officer, prior to the stop, had knowledge that there was no record in the applicable computer system of the defendant having a valid

license. In Sandridge, the officer stopped the defendant approximately three weeks after performing a license check via computer and discovering that there was no record of the defendant having a valid license. Id. at 1033-34. There, the officer's reasonable suspicion that the defendant was driving without a license was not based on the officer's knowledge of any prior citations but, instead, on the fact that a review of license records revealed that the defendant did not have one. Id. at 1036.[8] In contrast, the officer here did not perform such a review of licensing records or insurance records.[9]

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[8] Sandridge also stated that "there are no facts in the record suggesting that [the officer] should have assumed that [the defendant's] ongoing offense [of driving without a license] had ceased between" the day that the license check was run and the day that the officer stopped the defendant. 385 F.3d at 1036. This approach turns the reasonable suspicion standard on its head because it bases a stop on a past violation only. See Section IV. supra. Nonetheless, Sandridge is distinguishable because, inter alia, arguably here there was a fact in the record suggesting that Petitioner had ceased driving without a license. As stated before, Officer Takamiya noticed that Petitioner had removed the illegal tints from his windshield for which he was also cited on February 15, 2005. Petitioner asserts "it was more reasonable to infer that [Petitioner] had also taken action to correct the other two violations, instead of assuming that [Petitioner] had not obtained his driver's license and insurance."

[9] Arguably, a lag period may exist between a driver being issued a license and such information being reflected in the record system used by police officers, although computerized systems would seemingly allow an almost instantaneous update of information. In other words, there is a relatively remote possibility that a driver may have recently obtained a license and due to a potential lag in the update of the records system, the information of such license issuance may not appear in the system at the time that a police officer performs a records check.

However, this does not mean that the police officer's suspicion that a driver does not have a license is not reasonable inasmuch as a traffic record check would present a "specific and articulable fact" giving rise to an objective basis for reasonable suspicion. "The reasonable suspicion standard does not require an officer to rule out every possible innocent excuse for the [fact] in question before stopping a vehicle for investigation." State v. Washington, 737 N.W.2d 382, 387 (N.D. 2007) (citations omitted). But it should also be noted that this proposition, cited by the majority from Arvizu, 534 U.S. at 277, does not authorize officers to assume that an individual is repeating a crime of which he was once accused, as discussed infra in Section V.B.

B.

The majority characterizes as "demonstrably flawed" Petitioner's argument that an officer's knowledge of a driver's prior violations, standing alone, can never serve as a sufficient basis for a traffic stop to determine if the driver is driving without a license or without insurance by use of a hypothetical.[10] Majority opinion at 18. But, the hypothetical is inapposite because the facts posited in that scenario i.e., a second stop during the same evening as the first stop, differ substantially from the facts of Petitioner's case. Here, a two-week period existed between the time Petitioner was first cited by the officer for driving without a license. During such period, Petitioner could have obtained a license. Hence, the

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[10] The majority challenges Petitioner's argument as follows:

> . . . . Let us posit that, late one evening, an officer effects a valid traffic stop of a vehicle after witnessing an uncontested violation of the traffic or vehicle safety codes and, incidental to that valid stop, the officer discovers that the driver is not merely without his or her license but is, in fact, unlicensed to drive in the jurisdiction. Upon encountering the same individual later the same evening, once again driving -- at a time during which the license-issuing authority has not yet reopened -- the officer would have more than reasonable suspicion to effect a second brief traffic stop of the driver to investigate whether he or she is driving without a license. Reasonable suspicion can, therefore, be established that the defendant has fixedly refused to cease prior criminal behavior, personally observed by the officer, absent other observed violations of the traffic or safety codes.
>
> Even in light of a more protracted interval, however, during which the individual could have corrected the former criminal behavior, a police officer may nevertheless have reasonable suspicion that the person has, in fact, failed to amend his or her behavior.

Majority opinion at 18 (some emphases added).

hypothetical scenario has no material bearing at all on whether Officer Takamiya had reasonable suspicion to stop Petitioner.

Moreover, that an "individual could have corrected . . . former criminal behavior," majority opinion at 18 (emphasis omitted), is part of the rationale underlying the foundation of search and seizure standards like the reasonable suspicion standard, that is intended to protect individuals against unreasonable searches and seizures and to spare them from unlimited investigatory intrusions based upon prior transgressions. Thus, while it is true that the reasonable suspicion standard does not necessitate "rul[ing] out every possible innocent excuse" for an observed event, Washington, 737 N.W.2d at 387 (citations omitted), this rule does not warrant the assumption that an individual is repeating the criminal activity of which he was once accused or convicted. To decide otherwise would be equivalent to establishing a presumption that individuals once found to have committed a violation are likely to repeatedly commit such violations in the future and is clearly at odds with "the strictures against proving guilt . . . by a predisposition based on past criminal acts[.]" Kaleohano, 99 Hawai'i at 380, 56 P.3d at 148 (quoting United States v. Feliciano, 45 F.3d 1070, 1074 (7th Cir. 1995) (internal quotation marks omitted)).

The majority relies on the proposition that "[a] determination that reasonable suspicion exists . . . need not

rule out the possibility of innocent conduct," majority opinion at 19 (quoting Arvizu, 534 U.S. at 277) (other citations omitted), in support of its argument that although Petitioner could have cured the violations, such a possibility should be disregarded for purposes of reasonable suspicion inquiry. However, Arvizu is plainly inapposite to the majority's position. In that case the federal border patrol discovered more than one hundred pounds of marijuana in defendant's minivan after stopping the defendant. Arvizu, 534 U.S. at 268.

The Arvizu court held that reasonable suspicion of criminal activity justifying the stop was present because numerous facts and circumstances were cited by the border agent that gave rise to his suspicion that defendant was engaged in illegal smuggling activity. Id. at 277. The agent stated that sensors "signal[ing] the passage of traffic that would be consistent with smuggling activities" were triggered by defendant's vehicle, suggesting that a vehicle might be trying to "circumvent" the checkpoint and the triggering "coincided with the point when agents begin . . . a shift change, which leaves the area unpatrolled." Id. at 269.

Furthermore, the border patrol agent based his decision to stop the defendant inasmuch as the defendant attempted "to pretend that [the agent] was not there" as the defendant's van was approaching the agent, children in the van "began to wave at [the agent] in an abnormal pattern . . . as if [they] were being

instructed[,]" and the knees of the children were elevated "as if their feet were propped up on some cargo on the [van] floor." Id. at 270-71. Additionally, the agent was suspicious of defendant's vehicle because it made an abrupt turn onto a road that was normally frequented by four-wheel-drive vehicles rather than vehicles like that of defendant, the agent "did not recognize the [defendant's vehicle] as part of the local traffic agents encounter on patrol," and given the location of nearby picnic areas and direction of defendant's travel, the agent "did not think it likely that [defendant's vehicle] was going to or coming from" any of those picnic areas. Id. at 271.

Arvizu explained that "each of these factors alone is susceptible of innocent explanation" but, "[t]aken together, . . . they sufficed to form a particularized and objective basis for [the agent's] stopping the vehicle, making the stop reasonable within the meaning of the Fourth Amendment." Id. at 277-78. Thus, the Arvizu court's statement that the "determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct[,]" id. at 277 (citation omitted), was made in order to emphasize that an agent may make a stop where a plethora of factors combined indicated criminal activity, notwithstanding that there may be an innocent explanation for each factor viewed in isolation.

In contrast, here, the only factors cited by Officer Takamiya for the stop were past citations of Petitioner and

Petitioner's girlfriend. The multitude of factors in Arvizu that indicated the possibility of criminal activity then afoot was not present at the time of the subject stop in the instant case. Thus, Arvizu is not supportive of the majority's position.

VII.

A.

As to the majority's second argument, the majority engages in a lengthy discussion regarding the "freshness" or "staleness" of prior violations in relation to the stop in question. It deems Sandridge and Laughlin to be "'bookends' with respect to the period of time during which an officer may have reasonable suspicion that a driver is engaged in an ongoing offense such as driving without a license[,]" implying that information less than 22 days old is generally not stale while information older than twenty-two weeks old is likely to be stale. Majority opinion at 23.

The majority's establishment of putative "bookends" for the time period during which an officer may possess "reasonable suspicion that a driver is engaged in an ongoing offense such as driving without a license[,]" id. at 23, is inconsistent with its statement that an inquiry into the existence of reasonable suspicion is of a "fact-intensive nature[,]" id. at 15. Essentially, by employing a time period between twenty-two days to twenty-two weeks as a measuring stick for reasonableness, the majority establishes a line where none is meant to exist. See

id. at 11-12 ("When discussing how reviewing courts should make reasonable-suspicion determinations, [the United States Supreme Court has] said repeatedly that they must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." (Quoting Arvizu, 534 U.S. at 273-74.)) (Citation omitted.) (Emphasis added.)

Presumably in the majority's view, any subsequent stop made less than twenty-two days after a violation is cited enjoys presumptive reasonable suspicion, any stop made after a period longer than twenty-two weeks would be presumptively invalid, and anything in between is open for debate. This rule is, in and of itself, arbitrary, inasmuch as the "bookends" are derived from courts considering the specific facts of a particular case and not a range that would be presumptively applicable. See Laughrin, 438 F.3d at 1248 (noting that "[w]hile other circuits [had] upheld traffic stops . . . based on the officer's knowledge that the motorist had no valid driver's license a week before, or twenty-two days earlier," this case was distinguishable because "[t]wenty-two days is significantly less than [twenty-two] weeks" (internal citations omitted)); Sandridge, 385 F.3d at 1036 (noting that "there [were] no facts in the record suggesting that [the detaining officer] should have assumed that [the defendant's] ongoing offense had ceased between March 5 and March 27, 2002" (emphasis added)). Manifestly, Sandridge and Laughrin

do not support the importation of a twenty-two day to twenty-two week continuum so much as they support the proposition that each case must be decided afresh, looking for guidance from cases where the totality of the circumstances, not just the elapsed time, are similar.

B.

The majority argues that timeliness of prior violation information is of limited importance in the context of ongoing violations, majority opinion at 20, and that even if timeliness is an important factor in the reasonable suspicion inquiry in this case, Officer Takamiya's one-week-old knowledge that Petitioner's vehicle lacked valid insurance and two-week-old knowledge that Petitioner was unlicensed, "give rise to reasonable suspicion to execute the March 1, 2005 traffic stop," id. at 24. In support of this argument, the majority cites cases including United States v. Pierre, 484 F.3d 75, 84 (1st Cir. 2007); Sandridge, 385 F.3d at 1034; State v. Wade, 673 So.2d 906, 907 (Fla. Dist. Ct. App. 1996); Carrs, 568 So.2d at 120-21; and State v. Decoteau, 681 N.W.2d 803, 806 (N.D. 2004), for the proposition that knowledge of prior violations approximately the same age as or older than that of Officer Takamiya's knowledge regarding Petitioner's citations was not stale and held to have given rise to reasonable suspicion justifying the stops. Majority opinion at 24-25.

All of these cases cited by the majority, with the exception of Carrs which is distinguishable and unpersuasive as discussed supra in footnote 7, dealt with license suspensions, in contrast to Petitioner's case where there was no suspension and, hence, no impediment to Petitioner's immediate acquisition of a license and insurance. Moreover, the majority's focus on the time elapsed between the two stops improperly elevates one factor above all others. Again, the majority itself asserts that, "[i]n analyzing whether reasonable suspicion supported a stop, this court considers the totality of the circumstances." Id. at 11 (citations omitted). According to the majority, the "attendant circumstances" that must be considered, along with the lapse of time between violations, include "the nature of the information, the nature and characteristics of the suspected criminal activity, and the likely endurance of the information." Id. at 21 (quoting Pierre, 484 F.3d at 83).

However, the majority focuses not on the attendant facts of the stop at issue but, rather, on whether the attendant facts justifying a previous stop have become "stale." This approach abrogates the specific and articulable facts test. The gravamen of Officer Takamiya's stop was obviously to check on whether Petitioner had obtained a license since Petitioner was last stopped. The determination of whether information based on a prior stop has or has not become so stale as to justify a subsequent, otherwise objectively suspicionless, stop truly

places the questioned stop in the "unbridled discretion" of the officer and is a practice that has long been condemned. See Prouse, 440 U.S. at 661 (condemning "spot checks" that amount to a "constitutionally cognizable" seizure made on the "unbridled discretion of law enforcement officials" (emphasis added)). It places our law on a slippery slope as such a formulation contains no governing principle and provides no guidance to police officers. An individual's constitutional right to be free from illegal seizure cannot hinge on the unguided determinations of whether facts and circumstances that once indicated criminal activity was afoot have or have not become stale at the time the officer makes the subsequent but apparently suspicionless stop.

VIII.

The majority's third argument regarding traffic safety is, with all due respect, a makeweight effort to buttress its ultimate holding. None of the relevant issues before this court requires a determination of whether the licensing requirements advance a legitimate government interests. There is no doubt that "[t]he state has a legitimate interest in ensuring the vehicles on its roadways are properly insured and operated by licensed drivers." Majority opinion at 26; cf. Heapy, 113 Hawai'i at 286, 151 P.3d at 767 (2007) (explaining that, in holding that stops based only on the fact that the driver attempted to avoid a sobriety checkpoint were illegal, this court did "not ignore the important State interest in combating drunken

driving" (citing Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990))). However, the result of the stop cannot supply the reasonable suspicion that justifies the stop in the first place. Id. at 292, 151 P.3d at 773 (holding that "a reasonable suspicion 'must be present before a stop[,]' in order for the stop to be permissible" (quoting Cortez, 449 U.S. at 418)).

Thus this argument does not warrant disregarding the bases of the reasonable suspicion standard. As noted before, the rules applicable in a reasonable suspicion inquiry already reflect a compromise between or balancing of the interests of the state in preventing criminal conduct and the interests of individuals in remaining free from unreasonable searches and seizures. Overlooking the well-established tenets of the reasonable suspicion standard impermissibly tilts the balance between these interests.

IX.

As Petitioner argues, "the fruit of the poisonous tree doctrine prohibits the use of evidence at trial which comes to light as a result of the exploitation of a previous illegal act of the police." State v. Fukusaku, 85 Hawai'i 462, 475, 946 P.2d 32, 45 (1997) (internal quotation marks and citations omitted). Inasmuch as Officer Takamiya's stop of Petitioner on March 1, 2005 was an unconstitutional seizure, Petitioner's motion to suppress evidence obtained from the warrantless seizure of

Petitioner, or his property, or both, should have been granted by the court.

Based on the foregoing, I would reverse the ICA's April 24, 2007 judgment issued pursuant to its April 13, 2007 SDO, and the January 4, 2006 judgments of the District Court of the First Circuit, Ewa Division.