DISSENTING OPINION BY ACOBA, J.

I respectfully dissent.

I believe the Administrative Driver's License Revocation Office (ADLRO) hearing officer was wrong in sustaining the license revocation of Petitioner-Appellant Sasha A. Leon-Guerrero (Petitioner) pursuant to Hawai'i Revised Statutes (HRS) § 291E-38 when the Intoxilyzer Supervisor failed to appear for three hearings for which he was subpoenaed.[1] The sustainment violated Petitioner's due process rights and subjected Petitioner to substantial detriment.

I.

As justification for upholding the driver license revocation procedure, this court has said, "A driver's license is a constitutionally protected interest and due process must be provided before one can be deprived of his or her license." Kernan v. Tanaka, 75 Haw. 1, 21, 856 P.2d 1207, 1218 (1993) (emphasis added), cert. denied, 510 U.S. 1119 (1994) (internal citation omitted). Thus, as this court has said, "Accepting that a driver's license is a protected property interest, the issue becomes 'what process is due to protect against erroneous deprivation of that interest.'" Id. at 22, 856 P.2d at 1218 (quoting Illinois v. Batchelder, 463 U.S. 1112, 1116-17 (1983)).

[1] Additionally, in accordance with the dissent in Freitas v. Admin. Dir. of Courts, 108 Hawai'i 31, 58, 116 P.3d 673, 700 (2005) (Acoba, J. dissenting as to Part III), I would hold that the ADLRO hearings should be open to the public without the requirement that persons comply with an identification and sign in procedure before being admitted to the hearing.

"The basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner." State v. Adam, 97 Hawai'i 475, 482, 40 P.3d 877, 884 (2002) (internal quotation marks and citation omitted). In essence, "[t]he touchstone of due process is protection of the individual against arbitrary action of government." State v. Huelsman, 60 Haw. 71, 88, 588 P.2d 394, 405 (1978), overruled on other grounds by State v. Tafoya, 91 Hawai'i 261, 982 P.2d 890 (1999) (quoting Wolff v. McDonnell, 418 U.S. 539, 558 (1974)). Accordingly, we have said the Administrative Revocation Program comports with due process requirements because it "affords the arrestee an opportunity to examine all relevant witnesses, whether it be at an initial hearing or a continued hearing." Simmons v. Admin. Dir. of the Courts, 88 Hawai'i 55, 64, 961 P.2d 620, 629 (1998).

It follows that "continuance of an administrative revocation hearing is invalid if 'good cause' is not shown for the continuance." Robison v. Admin. Dir. of the Courts, 93 Hawai'i 337, 341, 3 P.3d 503, 507 (App. 2000) (citation omitted). See also Simmons, 88 Hawai'i at 63, 961 P.2d at 628 (stating that "[i]f [a] continuance is invalid, the continued hearing would not comply with the mandatory time requirements set forth in HRS § [291E-38] and would therefore be illegal and void" (internal quotation marks and citation omitted)). This holding

> relie[s] on the legislative history of [HRS § 291E-38[2]], which clearly indicated the legislature's desire for the administrative revocation "process to be expeditious, not to allow the continuance to be used to let cases drag on, to administer this law properly and quickly, to cause the use of a continuance beyond 30 days to be the unique exception, and not to tolerate any lengthy delays in the hearing process."

Robison, 93 Hawai'i at 342, 3 P.3d at 508 (emphasis omitted and emphases added) (footnote omitted) (quoting Aspinwall v. Tanaka, 9 Haw.App. 396, 404, 843 P.2d 145, 149 (1992) (citing 1990 Senate Journal, at 681-82 (statement of Senator Lehua Fernandes Salling))).

> As a general rule, "good cause" means a substantial reason; one that affords a legal excuse. There is no fixed rule for determining good cause for delay of trial which does not violate [the] accused's constitutional and statutory rights, the matter being one for judicial determination, and the question of what constitutes good cause for a delay in bringing [the] accused to trial is primarily for the discretion of the trial court.

Id. (internal quotation marks and citation omitted) (emphasis omitted and emphasis added). An abuse of discretion occurs where "a tribunal . . . clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Farmer v. Admin. Dir. of Court, 94 Hawai'i 232, 237, 11 P.3d 457, 462 (2000) (internal citation omitted).

II.

HRS § 291E-38 was amended in 2002, 2002 Haw. Sess. L. Act 113 § 6 at 315, to add the provision that "[t]he absence from the [ADLRO] hearing of a law enforcement officer or other person,

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[2] HRS § 286-259 was recodified under HRS § 291E-38.

upon whom personal service of a subpoena has been made as set forth in subsection (h), constitutes good cause for a continuance." (Emphases added.) Presently, HRS § 291E-38 states in relevant part:

> (a) If the director administratively revokes the respondent's license and privilege to operate a vehicle . . . after the administrative review, the respondent may request an administrative hearing to review the decision within six days of the date the administrative review decision is mailed. If the request for hearing is received by the director within six days of the date the decision is mailed, the hearing shall be scheduled to commence no later than:
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> (1) Twenty-five days from the date the notice of administrative revocation was issued in a case involving an alcohol related offense; or
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> (2) Thirty-nine days from the date the notice of administrative revocation was issued in a case involving a drug related offense.
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> The director may continue the hearing only as provided in subsection (k).
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> . . . .
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> (k) For good cause shown, the director may grant a continuance either of the commencement of the hearing or of a hearing that has already commenced . . . For purposes of this section, a continuance means a delay in the commencement of the hearing or an interruption of a hearing that has commenced, other than for recesses during the day or at the end of the day or week. The absence from the hearing of a law enforcement officer or other person, upon whom personal service of a subpoena has been made as set forth in subsection (h), constitutes good cause for a continuance.

(Emphases added.)

Regarding the 2002 amendment, the Report of the Joint Senate Committees on Transportation, Military Affairs, and Government Operations and Tourism and Intergovernmental Affairs states in pertinent part, that

> the absence of police officer witnesses may be due to any number of legitimate reasons which may not be known to the ADLRO hearing officer at the time of [the] hearing. Currently, the absence of a subpoenaed and served police officer at the ADLRO hearing would cause a reversal upon judicial review, merely on the basis of the officer's unexplained non-appearance at [the] time of [the] hearing. There should be a means of insuring that an otherwise

> sustainable case is not dismissed or reversed due to the excusable non-appearance or failure of an officer to notify the office prior to hearing. Hence, the good cause for the continuance to be ordered initially by the hearing officer should be the non-appearance itself. Since the hearing officer is mandated by statute to control and conduct the hearing, the discretion to determine good cause for non-appearance upon later examination or testimony should rest in the hearing officer's hands.

Sen. Stand. Comm. Rep. No. 2274, in 2002 Senate Journal, at 1147 (emphases added). The Report of the Senate Judiciary Committee similarly declared that

> [t]he absence of police officer witnesses may be due to any number of legitimate reasons which may not be known to the hearing officer at time of hearing. Currently, the absence of a subpoenaed and served police officer at the hearing would cause a reversal upon judicial review, merely on the basis of the officer's unexplained non-appearance at time of hearing. This measure remedies that deficiency in the proceedings.

Sen. Stand. Comm. Rep. No. 2766, in 2002 Senate Journal, at 1340 (emphases added).

III.

Simply because the statute declares that the police officer's absence is, in and of itself, good cause for granting a continuance, cannot ipso facto make it so. The statute, even when read in conjunction with the legislative history, lacks any rational basis for a fair procedure that is required when deprivation of a property right is concerned. Although the legislative reports acknowledge that a witness's absence "may be due to any number of legitimate reasons," the statute itself is not grounded in such reasons. By defining the very absence of a witness as good cause in of itself as sufficient for a continuance, without reference to the circumstances of the

absence, the statute effectively eliminates any semblance of reason or fairness that must underlie due process.

As observed above, this court has held that a driver's license, once bestowed, is a constitutionally protected property interest. See Kernan, 75 Haw. at 21-22, 856 P.2d at 1218 (citations omitted); see also State v. Toyomura, 80 Hawai'i 8, 21, 904 P.2d 893, 906 (1995). Thus, the government may not divest an individual of his or her driver's license unless it has complied with the safeguards established by due process requirements. Slupecki v. Admin. Dir. of the Courts, 110 Hawai'i 407, 413, 133 P.3d 1199, 1205 (2006); Gray v. Admin. Dir. of the Court, 84 Hawai'i 138, 146 n.14, 931 P.2d 580, 588 n.14 (1997).

Resort to the statute and its legislative history only begs the question of whether Petitioner's due process rights were violated by the repeated continuances granted because of the witness's absence. It is the province of the judiciary, not the legislature, to determine the parameters of constitutional protections. Thus, the question is whether the 2002 amendments to HRS § 291E-38 comport with due process requirements.

IV.

Pertinent to this case, "[p]rocedural due process guarantees a meaningful opportunity to be heard." In the Interest of Doe, 99 Hawai'i 522, 533 n.14, 57 P.3d 447, 458 (2002) (emphasis added) (citing In re Genesys Data Techs., Inc., 95 Hawai'i 33, 40, 18 P.3d 895, 902 (2001); Turner v. Haw.

Paroling Auth., 93 Hawai'i 298, 310, 1 P.3d 768, 780 (2000) (explaining that the procedural due process right is a "right not to be deprived of a liberty interest without reasonable notice and a meaningful opportunity to be heard" (citation and internal quotation marks omitted))). In authorizing a hearing officer to continue a driver's license revocation hearing based solely on the absence of a witness, the statute provides no guidelines to the hearing officer and no protection to the driver.

Essentially, the hearing officer is afforded unfettered discretion to repeatedly continue a revocation hearing, thereby foreclosing any meaningful opportunity for the driver to contest the revocation of his or her license. The potential for abuse of discretion engendered by the statute, i.e., continuing a hearing based merely on the "good cause" ground that the police officer was absent, is incompatible with the constitutional guarantee of a meaningful opportunity to be heard. As such, the revocation of Petitioner's driver's license cannot be upheld on the basis that good cause existed simply on the ground that the witness was not present.

V.

Furthermore, Petitioner was denied due process as she was not given the opportunity to examine all relevant witnesses at the hearing or the continued hearing but, instead, would only be allowed such opportunity if she agreed to incur the substantial detriment of continuing the hearing for a third time.

At the third hearing on July 26, 2004, the hearing officer apparently offered Petitioner the option of either continuing further or entertaining a motion to strike the intoxilyzer test results when the Intoxilyzer Supervisor failed to appear. The hearing officer, however, refused to rescind the revocation based on the non-appearance of the Intoxilyzer Supervisor.

Hence, the hearing officer did not comply with the primary and original legislative intent behind HRS § 291E-38 that the revocation process be "expeditious" and that lengthy delays not be tolerated in the hearing process. Robison, 93 Hawai'i at 342, 3 P.3d at 508. There is no evidence in the statute's legislative history that the legislature intended to predicate an expeditious hearing upon the relinquishment of due process protections. Hence, the hearing officer did not comply with the legislative intent to provide a speedy hearing in the revocation process but instead impermissibly left Petitioner with the choice of sacrificing her due process right to a meaningful hearing.

Under HRS § 291E-38,the hearing could in fact have continued indefinitely in order to allow the Intoxilyzer Supervisor to testify. As stated before, the hearing officer did offer Petitioner the option of striking the intoxilyzer test results if the Intoxilyzer Supervisor failed to appear at the next continued hearing. However, if the Intoxilyzer Supervisor failed to appear then, Petitioner would have been forced to agree to yet another hearing continuance if she wanted to examine the

Intoxilyzer Supervisor as a witness. Based on these facts, it appears that the hearing could have been continued indefinitely regardless of the burden on Petitioner.

VI.

That the government may have an interest in public safety that weighs in favor of continuing hearings rather than dismissing ADLRO cases due to the non-appearance of witnesses, does not constitute a justification for continuing the hearings in a manner that violates Petitioner's due process rights. The government interest in a particular procedure is one of the factors, along with "the private interest that will be affected by the official action; the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards[,]" that must be considered in determining whether a particular procedure violates due process rights. Kernan, 75 Haw. at 22-23, 856 P.2d at 1218-19 (bracketed material omitted) (quoting Matthews v. Eldridge, 424 U.S. 319, 334-35 (1976)).

However, application of the foregoing Matthews factors to the instant case as a test for determining whether Petitioner's due process rights have been violated, is inappropriate. Use of the Matthews factors may be of value in determining whether the ADLRO process, taken as a whole, comports with due process requirements. However, the Matthews factors have no import with respect to the argument that HRS § 291E-38,

as modified by the 2002 amendment, violates Petitioner's due process rights by eliminating the requirement that continuances be granted only upon a demonstration of actual good cause. Use of those factors involves a balancing of interests. But the outcome of such a balancing test cannot be a valid basis for eliminating the good cause requirement for continuances because that would entail eliminating a significant aspect of fairness that must underlie the ADLRO process.

Even if the Matthews factors applied to the central issue raised by Petitioner in this case, the ADLRO process, insofar as it is affected by HRS § 291E-38, would not pass muster under that test. The second factor, "the risk of an erroneous deprivation of such interest through the procedure used," Kernan, 75 Haw. at 22-23, 856 P.2d at 1218 (quoting Matthews, 424 U.S. at 335), would weigh against granting a third continuance in Petitioner's case. There is substantial risk that individuals like Petitioner could be erroneously deprived of their license because HRS § 291E-38 eliminates the need for a showing of a reasonable basis for good cause in continuing a hearing, thereby allowing hearings to be continued upon the mere absence of a police officer, regardless of the reason for the absence. Thus, the 2002 amendment does more than create a potential for abuse of discretion. Rather, the procedure under the amendment creates a substantial risk that a driver's property interest in a driver's

license may be erroneously deprived because of the loss of a timely hearing or the inability to examine a witness.

VII.

The instant case is distinguishable from Gaines v. Municipal, 101 Cal. App. 3d 556, 561, 161 Cal. Rptr. 704, 707 (1980), which held that a police officer's failure to appear at the defendant's trial for misdemeanor narcotics violations because the officer was out of the state on vacation, constituted good cause for continuing the case past the 45-day statutory period. In Gaines, the defendant was subjected to a single continuance. Id. In contrast, Petitioner here was subjected to three continuances due to the absence of the same witness, the Intoxilyzer Supervisor. Furthermore, Gaines did not involve a statute such as HRS § 291E-38 that expressly provided that absence of a police officer from a proceeding ipso facto constituted good cause for the continuation of proceedings and therefore, did not create the potential for the unreasonable indefinite continuation of proceedings.

The case of Farmer is also distinguishable from the instant case. There, this court held that it was neither an abuse of discretion nor a violation of the defendant's due process rights when the ADLRO hearing officer denied the defendant's request for a continuation of the hearing pending a decision of the district court on the defendant's motion to set aside a prior driving under the influence (DUI) conviction, where

a favorable decision of the district court would subject the defendant to a shorter revocation period by the ADLRO officer. 94 Hawai'i at 235, 11 P.3d at 460.

That case did not involve the statutory elimination via HRS § 291E-38 of the requirement to show good cause prior to the continuation of a hearing, as is the central issue in this case. On the contrary, Farmer was decided on the fact that the ADLRO hearing officer was not required to await the district court's decision prior to rendering the ADLRO decision. Id. at 237, 11 P.3d at 462. Furthermore, even if the defendant's motion to set aside the prior DUI conviction were granted by the district court, remedy was available outside of the ADLRO to the defendant to challenge the ADLRO lifetime license revocation on the grounds that one of the requisite prior DUI convictions had been vacated. Id. at 237, 11 P.3d at 462. Indeed, such relief was granted by this court under its inherent powers. Id. at 241, 11 P.3d at 466.

VIII.

In regard to substantial detriment, this case is similar to Robison. In Robison, the defendant requested an administrative hearing to challenge the revocation of his driver's license for driving under the influence of an intoxicating liquor. 93 Hawai'i at 339, 3 P.3d at 505. The hearing was continued three times as the arresting officer telephoned the director, stating that he was ill and could not

appear. Id. at 339-40, 3 P.3d at 505-06. The ICA held that upon the police officer's third failure to appear, "the hearing officer should have made an effort to verify whether [the officer] was really ill . . . and whether [the officer] could provide his testimony by telephone or other means." Id. at 343, 3 P.3d at 509 (emphasis added) (footnote omitted).[3] Thus, in granting the continuances without making such verification, the Director abused his discretion by failing to provide the defendant with an expeditious hearing. Id. at 342-43, 3 P.3d at 508-09.

The ICA further held that the defendant there "suffered substantial detriment" when continuances were granted without a determination that the specific facts underlying the officer's absence constituted "good cause" to support the continuances because the defendant "incur[red] the expense of serving and re-serving subpoenas for each hearing, he also had to rearrange his schedule to be present at each hearing and pay fees for his attorney to be present at each hearing as well." Id. at 343, 3 P.3d at 509.

The Robison court explained that,

> in this case, [the defendant] properly exercised his due process and statutory rights to subpoena . . . the arresting officer, to appear at the four scheduled hearings . . . . Moreover, [the defendant] appeared for each of the four administrative hearings and was ready to examine [the

[3] Robison said that "it may not have been an abuse of discretion for the hearing officer to grant one or two continuances based on telephone messages of [the testifying officer's] 'illness'" id. at 343, 3 P.3d at 509 (emphasis added) without any explanation.

> officer] each time. When [the officer] left a message prior to the fourth hearing that he would be unable to testify because he would be in the Ewa District Court, the hearing officer, upon [the defendant's] objection to any further continuances, did not determine that good cause existed for a continuance and, instead, proceeded with the fourth hearing as scheduled.

Id. at 343-44, 3 P.3d at 509-10 (internal quotation marks omitted).

Here, as in Robison, the hearing officer abused his discretion in granting yet another continuance for Petitioner's hearing and thereby depriving Petitioner of the right to an expeditious hearing. It was at least an abuse of discretion of the hearing officer as to the continuance grounded upon the third failure of the Intoxilyzer Supervisor to appear at Petitioner's hearing, without verifying the basis for the failure to appear.

Like the Robison defendant, Petitioner also suffered substantial detriment when the hearing officer sustained the revocation of her license despite the fact that the Intoxilyzer Supervisor failed to appear for three hearings. Petitioner appeared at each of the scheduled hearings, ready to examine the Intoxilyzer Supervisor each time, only to be informed at each hearing that the Supervisor was unavailable for appearance. Moreover Petitioner incurred the expense of serving and re-serving subpoenas for each hearing, and also had to rearrange her schedule to be present at each hearing.

IX.

Accordingly, for the reasons stated, I believe the 2002 amendment is unconstitutional on its face because it equates

absence with "good cause". Further and alternatively, the amendment was unconstitutionally applied because in failing to conduct an inquiry into the underlying reasons for the failure to appear, the hearing officer abused his discretion. I would vacate the September 13, 2004 judgment of the district court of the first circuit (the court) herein and remand the case to the court.