CONCURRING AND DISSENTING OPINION BY NAKAYAMA, J.

While I agree with the majority that the circuit court may empanel a jury for consideration of the necessity finding, and that the constitutional prohibition against ex post facto measures is not violated by Act 1, I write separately to point out that the issue of whether certain allegations must be pled in the indictment was not raised by the parties to this case. Indeed, the defendant does not allege that a lack of certain allegations in the complaint deprived him of his constitutional right to due process. I therefore would decline to address this issue.

Nonetheless, assuming that this issue had been raised by the parties, I respectfully disagree with the majority's conclusion that "a charging instrument, be it an indictment, complaint, or information, must include all 'allegations, which if proved, would result in the application of a statute enhancing the penalty of the crime committed.'" Majority opinion at 30 (quoting State v. Apao, 59 Haw. 625, 636, 586 P.2d 250, 258 (1978)). In my view, Cunningham v. California, 549 U.S. ___, 127 S. Ct. 856 (2007), Apprendi v. New Jersey, 530 U.S. 466 (2000), and this court's jurisprudence do not require that aggravating factors, as set forth in HRS §§ 706-661 and 706-662, need to be pled in a charging instrument to satisfy due process concerns.

I. DISCUSSION

A. Almendarez-Torres and Its Clarification In Jones, Apprendi, and Cunningham.

1. Almendarez-Torres

In Almendarez-Torres v. United States, 523 U.S. 224, 227 (1998), an indictment was returned by the federal grand jury

that charged the defendant "with having been 'found in the United States after being deported' without the 'permission and consent of the Attorney General' in 'violation of Section 1326.'" (Ellipses omitted.) The defendant pled guilty to the charge and admitted, inter alia, "that the earlier deportation had taken place pursuant to three earlier convictions for aggravated felonies." Id. (quotation marks and citation omitted). At the sentencing hearing, the defendant asserted that because the indictment failed to mention his prior convictions, the indictment did not set forth all elements of a crime. Id. Consequently, he alleged that he could not be sentenced to more than two years of imprisonment. Id. The two year imprisonment term was the maximum authorized by federal statute for an offender without a prior conviction. Id. The trial court rejected the defendant's argument and instead imposed a sentence of eighty-five months imprisonment, which was affirmed on appeal to the Fifth Circuit.[1] Id.

On appeal to the Supreme Court, the Court said that "[a]n indictment must set forth each element of the crime that it charges." Id. at 228. However, the Court pointed out that an indictment "need not set forth factors relevant only to the sentencing of an offender found guilty of the charged crime."

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[1] I note that on appeal to the Fifth Circuit Court of Appeals, the court affirmed the trial court's decision because 8 U.S.C. § 1326(b)(2) "is a penalty provision that simply permits a sentencing judge to impose a higher sentence when the unlawfully returning alien also has a record of prior convictions." Almendarez-Torres, 523 U.S. at 227. However, the Supreme Court noted a split among the circuits inasmuch as seven other circuits likewise held accordingly with the Fifth Circuit, while the Ninth Circuit held that subsection (b)(2) constituted a separate crime. Id. at 227-28.

Id. "Within limits," the Supreme Court said, "the question of which factors are which is normally a matter for Congress." Id. Accordingly, the Court framed the issue as whether Congress intended "the factor that the statute mentions, the prior aggravated felony conviction, to help define a separate crime? Or did it intend the presence of an earlier conviction as a sentencing factor, a factor that a sentencing court might use to increase punishment?" Id.

Emphasizing in that particular case that the "relevant statutory subject matter is recidivism[,]" id. at 230, the Supreme Court observed that "the sentencing factor at issue here-recidivism-is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence." Id. at 243.

> Consistent with this tradition, the Court said long ago that a State need not allege a defendant's prior conviction in the indictment or information that alleges the elements of an underlying crime, even though the conviction was "necessary to bring the case within the statute." Graham v. West Virginia, 224 U.S. 616, 624, 32 S. Ct. 583, 585-86, 56 L. Ed. 917 (1912). That conclusion followed, the Court said, from "the distinct nature of the issue," and the fact that recidivism "does not relate to the commission of the offense, but goes to the punishment only, and therefore may be subsequently decided." Id. at 629, 32 S. Ct. at 588 (emphasis added).

Almendarez-Torres, 523 U.S. at 243-44 (emphases in original) (ellipsis omitted); see Graham, 224 U.S. at 628 ("An indictment is confined to the question whether an offense has been committed. Here the question was simply whether the party had been convicted of an offense."). "[T]o hold that the Constitution requires that recidivism be deemed an 'element' of petitioner's offense would mark an abrupt departure from a

longstanding tradition of treating recidivism as 'going to the punishment only.'" Id. at 244 (quoting Graham, 224 U.S. at 629). Accordingly, the Supreme Court affirmed the Fifth Circuit's judgement when it rejected the defendant's "constitutional claim that his recidivism must be treated as an element of his offense." Id. at 247-48. Almendarez-Torres has not since been overruled by the Supreme Court, but its holding has been clarified.

2. The Supreme Court's clarification of Almendarez-Torres in Jones, Apprendi, and Cunningham.

One year later, in Jones v. United States, 526 U.S. 227, 248 (1999), the Court clarified its holding in Almendarez-Torres, as follows: "[Almendarez-Torres], decided last Term, stands for the proposition that not every fact expanding a penalty range must be stated in a felony indictment, the precise holding being that recidivism increasing the maximum penalty need not be so charged." In this regard, Almendarez-Torres "stressed the history of treating recidivism as a sentencing factor, and noted that, with perhaps one exception, Congress had never clearly made prior conviction an offense element where the offense conduct, in the absence of recidivism, was independently unlawful." Id. at 235.

The Court then distinguished Jones from Almendarez-Torres by observing that (1) Jones was "concerned with the Sixth Amendment right to jury trial and not alone the rights to indictment and notice as claimed by" the defendant in Almendarez-Torres, and (2) Almendarez-Torres "rested in substantial part on the tradition of regarding recidivism as a sentencing factor, not

as an element to be set out in the indictment." Jones, 526 U.S. at 248-49; see id. at 232 ("Because of features arguably distinguishing this case from [Almendarez-Torres], we granted certiorari, . . . and now reverse.").

> One basis for that possible constitutional distinctiveness is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense, and certainly unlike the factor before us in this case, a prior conviction must itself have been established through procedures satisfying fair notice, reasonable doubt, and jury trial guarantees.

Id. at 249.

A little over a year after Jones was decided, the Court in Apprendi expressly declined to address the issue of whether the indictment in that case was sufficient pursuant to its decision in Almendarez-Torres, inasmuch as the Fifth Amendment right to "presentment or indictment of a Grand Jury" was not implicated by the issues raised by the parties in Apprendi. See Apprendi, 530 U.S. at 477 n.3;[2] but see id. at 489 n.15 ("The indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted."). In

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[2] Specifically, the Court said that

> Apprendi has not here asserted a constitutional claim based on the omission of any reference to sentence enhancement or racial bias in the indictment. He relies entirely on the fact that the "due process of law" that the Fourteenth Amendment requires the States to provide to persons accused of crime encompasses the right to a trial by jury, . . . and the right to have every element of the offense proven beyond a reasonable doubt[.] That Amendment has not, however, been construed to include the Fifth Amendment right to "presentment or indictment of a Grand Jury" that was implicated in our recent decision in [Almendarez-Torres]. We thus do not address the indictment question separately today.

Apprendi, 530 U.S. at 477 n.3.

Cunningham, the Supreme Court referred to its Almendarez-Torres decision in passing when it recited its holding in Apprendi. See Cunningham, 549 U.S. at ___, 127 S. Ct. at 864. Similar to Apprendi, however, Cunningham likewise implicated the federal constitution's "jury-trial guarantee," 549 U.S. at ___, 127 S. Ct. at 860, and not the Fifth Amendment's "presentment or indictment of a Grand Jury." See Apprendi, 530 U.S. at 477 n.3.

3. Federal case law applying Almendarez-Torres post-Apprendi

In United States v. Higgs, 353 F.3d 281, 296 (4th Cir. 2003), cert. denied, 543 U.S. 999 (2004), the federal court noted that the purpose of the Indictment Clause of the Fifth Amendment to the federal constitution "is to ensure that a defendant's jeopardy is limited 'to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.'" (Quoting Stirone v. United States, 361 U.S. 212, 218 (1960).) Moreover,

> [i]n conjunction with the notice requirement of the Sixth Amendment,[3] the Indictment Clause provides two additional protections: the right of a defendant to be notified of the charges against him through a recitation of the elements, and the right to a description of the charges that is sufficiently detailed to allow the defendant to argue that future proceedings are precluded by a previous acquittal or conviction. See Russell v. United States, 369 U.S. 749, 763-64 (1962); see also Hamling v. United States, 418 U.S. 87, 117 (1974) ("[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense"); United State v. Carrington, 301 F.3d 204, 209-10 (4th Cir. 2002) (same).

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[3] As quoted in Higgs, "[t]he Sixth Amendment provides that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation." 353 F.3d at 296 n.4 (quoting U.S. Const. amend. VI).

Id. (alterations added and in original).

In Higgs, the defendant contended "that his capital convictions and death sentences must be vacated because the indictment failed to charge [him] specifically with . . . the aggravating factors required under" federal statute. Id. at 295. The prosecution alleged that, among other aggravating factors, his prior convictions need not be alleged in the indictment. Id. at 301-02. Based on Almendarez-Torres, the Fourth Circuit agreed with the prosecution and held that "[t]he Fifth Amendment Indictment Clause does not require an indictment to allege prior convictions that expose a defendant to an enhanced penalty." Id. at 304.

Other federal courts have held similarly. See, e.g., United States v. Mercedes, 287 F.3d 47, 58 (2d Cir. 2002) (holding that pursuant to Almendarez-Torres, "the district court committed no error by enhancing [the defendant's] sentence based on an uncharged prior conviction"); United States v. Thomas, 242 F.3d 1028, 1035 (11th Cir. 2001) ("[W]e are bound to follow Almendarez-Torres unless and until the Supreme Court itself overrules that decision."); compare United States v. Rodriguez-Gonzalez, 358 F.3d 1156, 1158-60 (9th Cir. 2004) (holding that because the existence of a prior conviction under a federal statute "substantively transforms a second conviction under the statute from a misdemeanor to a felony[,]" the statute "changes the nature of the crime," and therefore "Almendarez-Torres does not apply").

B. This Court's Jurisprudence Does Not Foreclose Inclusion Of the Almendarez-Torres Exception.

As explained by the majority, in Apao, this court said that "the better rule is to include in the indictment the allegations, which if proved, would result in application of a statute enhancing the penalty for the crime committed." 59 Haw. at 635, 586 P.2d at 258 (footnote omitted). This conclusion was premised on this court's observation that "[t]he common law required that 'every wrongful act which was to be taken into account in determining the punishment must be alleged in the indictment[,]' and it was necessary to allege particular facts in the indictment which created an aggravation of the crime charged." Id. (citation and parentheses omitted).

However, Apao was decided in 1978, twenty years before Almendarez-Torres was decided. Since Apao was decided, in State v. Schroeder, 76 Hawai'i 517, 527, 880 P.2d 192, 202 (1994), this court recognized that the "particular fact-finding process" at trial by the trier of fact "is wholly independent of the allegation of any foundational 'aggravating circumstances' in the indictment or complaint containing the charges against the defendant." Accord Apprendi, 530 U.S. at 477 n.3. In light of this distinction, the United States Supreme Court has not held that recidivism is either an "element" or a separate "crime" that must be pled in the charging instrument. Compare Jones, 526 U.S. at 248-49 (observing that the holding in Almendarez-Torres "cannot, then, be read to resolve the due process and Sixth Amendment questions implicated" in Jones, inasmuch as Almendarez-Torres "rested in substantial part on the tradition of regarding

recidivism as a sentencing factor, not as an element to be set out in the indictment"), with Apao, 59 Haw. at 634-35 ("We acknowledge that due process requires that an indictment contain all the essential elements of the offense charged, and 'the omission of an essential element of the crime charged is a defect in substance rather than of form.'" (Citations and parenthesis omitted.)).

Accordingly, in light of the foregoing discussion, I would hold that a prior conviction does not need to be pled in a charging instrument, inasmuch as "a prior conviction must itself have been established through procedures satisfying fair notice, reasonable doubt, and jury trial guarantees." Jones, 526 U.S. at 249; see Almendarez-Torres, 523 U.S. at 228. I would also hold that because the plain language of HRS §§ 706-661 and 706-662 indicates that Hawaii's legislature intended to "set forth factors relevant only to the sentencing of an offender found guilty of the charged crime[,]" Almendarez-Torres, 523 U.S. at 228, and the statutory language does not appear to transform "the nature of the crime," Rodriguez-Gonzalez, 358 F.3d at 1160, the aggravating factors enumerated therein need not be pled in a charging instrument.

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