***** FOR PUBLICATION *****

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, Plaintiff-Appellant

vs.

KYLE EVAN DOMINGUES, Defendant-Appellee

NO. 25208

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 02-1-0564)

FEBRUARY 22, 2005

MOON, C.J., AND LEVINSON AND DUFFY, JJ.; AND ACOBA, J.,
DISSENTING WITH WHOM NAKAYAMA, J. JOINS

Per Curiam. The plaintiff-appellant State of Hawai'i [hereinafter, "the prosecution"] appeals from the order of the circuit court of the first circuit, the Honorable Sandra A. Simms presiding, entered on June 21, 2002, dismissing without prejudice the indictment against the defendant-appellee Kyle Evan Domingues.

On appeal, the prosecution contends: (1) that the circuit court erred in dismissing the indictment against Domingues, inasmuch as the prosecution properly charged Domingues under the statute that was in effect on the date Domingues allegedly committed the offense, (2) that Hawai'i Revised Statutes (HRS) §§ 291E-61(a) and 291E-61(b)(4) (Supp. 2001)[1]

[1] HRS § 291E-61 provided in relevant part:

(a) A person commits the offense of operating a vehicle
(continued...)

[1](...continued)

under the influence of an intoxicant if the person operates or assumes actual physical control of a vehicle:

(1) While under the influence of alcohol in an amount sufficient to impair the person's normal mental faculties or ability to care for the person and guard against casualty;

(2) While under the influence of any drug that impairs the person's ability to operate the vehicle in a careful and prudent manner;

(3) With .08 or more grams of alcohol per one hundred ten liters of breath; or

(4) With .08 or more grams of alcohol per one hundred milliliters or cubic centimeters of blood.

(b) A person committing the offense of operating a vehicle under the influence of an intoxicant shall be sentenced as follows without possibility of probation or suspension of sentence:

(1) For the first offense, or any offense not preceded within a five-year period by a conviction for an offense under this section or section 291E-4(a):

(A) A fourteen-hour minimum substance abuse rehabilitation program, including education and counseling, or other comparable program deemed appropriate by the court; and

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

(C) Any one of the following:

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

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

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

(2) For an offense that occurs within five years of a prior conviction for an offense under this saction or section 291E-4(a):

(A) Prompt suspension of license and privilege to operate a vehicle for a period of one year with an absolute prohibition from operating a vehicle during the suspension period;

(B) Either one of the following:

(i) Not less than two hundred forty hours of community service work; or

(continued...)

[1](...continued)

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

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

(3) For an offense that occurs within five years of two prior convictions for offenses under this section or section 291E-4(a):

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

(B) Revocation of license and privilege to operate a vehicle for a period not less than one year but not more than five years; and

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

(4) For an offense that occurs within ten years of three or more prior convictions for offenses under this section, section 707-702.5, or section 291E-4(a):

(A) Mandatory revocation of license and privilege to operate a vehicle for a period not less than one year but not more than five years;

(B) Not less than ten days imprisonment, of which at least forty-eight hours shall be served consecutively; and

(C) Referral to a substance abuse counselor as provided in subsection (d).

An offense under this paragraph is a class C felony.

. . . .

(d) Whenever a court sentences a person pursuant to subsection (b), it also shall require that the offender be referred to the driver's education program for an assessment, by a certified substance abuse counselor, or the offender's substance abuse or dependence and the need for appropriate treatment. The counselor shall submit a report with recommendations to the court. The court shall require the offender to obtain appropriate treatment if the counselor's assessment establishes the offender's substance abuse or dependence. All costs for assessment and treatment shall be borne by the offender.

(Emphases added). Effective January 1, 2004, the legislature amended HRS § 291E-61 by deleting the felony offense previously described in subsection (b)(4). See 2003 Haw. Sess. L. Act 71, § 3 at 125-26. Nevertheless, Act 71 also recodified HRS § 291E-61(b)(4) as a "separate offense" under HRS § 291E-61.5, entitled "[h]abitually operating a vehicle under the influence of an intoxicant." See 2003 Haw. Sess. L. Act 71, § 1 at 123-24. The significance

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"substantially reenacted" HRS §§ 291-4.4(a)(1) and 291-4.4(a)(2) (Supp. 2000),[2] (3) that citation to the repealed statute was

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[1](...continued)
of this amendment was to separate the felony offense from the apparent assortment of petty misdemeanor offenses codified in HRS §§ 291E-61(b)(1) through 291E-61(b)(3). See Hse. Conf. Com. Rep. No. 18, in 2003 House Journal, at 1706-07; Sen. Conf. Com. Rep. No. 18, in 2003 Senate Journal, at 953-54.

[2] HRS § 291-4.4 provided in relevant part:

> (a) A person commits the offense of habitually driving under the influence of intoxicating liquor or drugs if, during a ten-year period the person has been convicted three or more times for a driving under the influence offense; and
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> (1) The person operates or assumes actual physical control of the operation of any vehicle while under the influence of intoxicating liquor, meaning that the person is under the influence of intoxicating liquor in an amount sufficient to impair the person's normal mental faculties or ability to care for oneself and guard against casualty;
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> (2) The person operates or assumes actual physical control of the operation of any vehicle with .08 or more grams of alcohol per one hundred milliliters or cubic centimeters of blood or .08 or more grams of alcohol per two hundred ten liters of breath; or
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> (3) A person operates or assumes actual physical control of the operation of any vehicle while under the influence of any drug which impairs such person's ability to operate the vehicle in a careful and prudent manner. The term "drug" used in this section shall mean any controlled substance as defined and enumerated on schedules I through IV of chapter 329.
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> . . . .
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> (c) Habitually driving under the influence of intoxicating liquor or drugs is a class C felony. In addition to any other penalty imposed, a person convicted under this section shall be sentenced to:
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> (1) Revocation of driver's license for not less than one year; and
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> (2) Not less than ten days imprisonment of which at least forty-eight hours shall be served consecutively.
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> (d) Whenever a court sentences a person pursuant to subsection (c), it also shall require that the offender be referred to a substance abuse counselor

(continued...)

consistent with the ex post facto rule, and (4) that assuming arguendo HRS § 291-4.4 was incorrectly cited in the indictment, such a mistake was a "formal defect that did not prejudice or mislead [Domingues] to his prejudice."

We hold that, as to the description of the offense, HRS § 291E-61, which relates to operating a vehicle under the influence of an intoxicant, substantially reenacted HRS § 291-4.4, which pertained to the offense of habitually driving under the influence of intoxicating liquor or drugs. Accordingly, we vacate the circuit court's June 21, 2002 order dismissing without prejudice the indictment against Domingues and remand the present matter to the circuit court for further proceedings.

I. BACKGROUND

On March 21, 2002, an Oʻahu grand jury returned an indictment against Domingues charging him with the following offenses: (1) habitually driving under the influence of intoxicating liquor (Count I), in violation of HRS § 291-4.4, see supra note 2; (2) driving without lights (Count II), in violation of HRS § 291-25(a) (1993); and (3) driving while license suspended or revoked (Count III), in violation of HRS § 286-132

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[2](...continued)

> who has been certified . . . for an assessment of the offender's alcohol abuse or dependence and the need for appropriate treatment. The counselor shall submit a report with recommendations to the court. The court shall require the offender to obtain appropriate treatment if the counselor's assessment establishes the offender's alcohol abuse or dependence.
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> All costs for assessment or treatment or both shall be borne by the offender.

(Emphases added).

(Supp. 2001).[3] Specifically, Count I alleged that:

> On or about the 9th day of August 2001, in the City and County of Honolulu, State of Hawaii, KYLE EVAN DOMINGUES did operate or assume actual physical control of the operation of any vehicle while under the influence of intoxicating liquor, meaning that he was under the influence of intoxicating liquor in an amount sufficient to impair his normal mental faculties or ability to care for himself and guard against casualty, and had been convicted three or more times for driving under the influence offenses during a ten-year period, and/or did operate or assume actual physical control of the operation of any vehicle while with .08 or more grams of alcohol per one hundred milliliters, or cubic centimeters of blood or .08 or more grams of alcohol per two hundred ten liters of breath, and had been convicted three or more times for driving under the influence offenses during a ten year period, thereby committing the offense of Habitually Driving Under the Influence of Intoxicating Liquor or Drugs, in violation of Sections 291-4.4(a)(1) and/or 291-4.4(a)(2) of the Hawaii Revised Statues.

(Emphases added).

On June 4, 2002, Domingues filed a motion to dismiss the indictment in open court. In relevant part, the motion maintained that, because HRS §§ 291-4.4(a)(1) and (a)(2) had been repealed prior to the indictment date, Domingues should not be charged thereunder. On June 4, 2002, the circuit court granted the motion and on June 21, 2002, entered an order dismissing the indictment without prejudice. On June 26, 2002, the prosecution filed a motion for reconsideration and the circuit court denied the motion that same day. On July 12, 2002, the prosecution filed a timely notice of appeal.

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[3] The circuit court did not specifically rule as to Counts II and III, but apparently dismissed the indictment in its entirety. Inasmuch as the motion to dismiss referred only to Count I, we vacate the circuit court's June 21, 2002 order insofar as it pertains to Count II and III.

II. STANDARDS OF REVIEW

A. Sufficiency Of A Charge

"'Whether an indictment [or complaint] sets forth all the essential elements of [a charged] offense . . . is a question of law,' which we review under the de novo, or 'right/wrong,' standard." State v. Cordeiro, 99 Hawai'i 390, 403, 56 P.3d 692, 705 (2002) (quoting State v. Merino, 81 Hawai'i 198, 212, 915 P.2d 672, 686 (1996) (quoting State v. Wells, 78 Hawai'i 373, 379, 894 P.2d 70, 76 (1995) (citations omitted))).

B. Statutory Interpretation

> "[T]he interpretation of a statute . . . is a question of law reviewable de novo." State v. Arceo, 84 Hawai'i 1, 10, 928 P.2d 843, 852 (1996) (quoting State v. Camara, 81 Hawai'i 324, 329, 916 P.2d 1225, 1230 (1996) (citations omitted)). See also State v. Toyomura, 80 Hawai'i 8, 18, 904 P.2d 893, 903 (1995); State v. Higa, 79 Hawai'i 1, 3, 897 P.2d 928, 930 (1995); State v. Nakata, 76 Hawai'i 360, 365, 878 P.2d 699, 704 (1994). . . .
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> Gray v. Administrative Director of the Court, 84 Hawai'i 138, 144, 931 P.2d 580, 586 (1997) (some brackets added and some in original). See also State v. Soto, 84 Hawai'i 229, 236, 933 P.2d 66, 73 (1997). Furthermore, our statutory construction is guided by established rules:
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> > When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.
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> > When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. . . .
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> > In construing an ambiguous statute, "[t]he meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared,

> in order to ascertain their true meaning." HRS § 1-15(1) [(1993)]. Moreover, the courts may resort to extrinsic aids in determining legislative intent. One avenue is the use of legislative history as an interpretive tool. Gray, 84 Hawai'i at 148, 931 P.2d at 590 (quoting State v. Toyomura, 80 Hawai'i 8, 18-19, 904 P.2d 893, 903-04 (1995)) (brackets and ellipsis points in original) (footnote omitted). This court may also consider "[t]he reason and spirit of the law, and the cause which induced the legislature to enact it . . . to discover its true meaning." HRS § 1-15(2)(1993). "Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called upon in aid to explain what is doubtful in another." HRS § 1-16 (1993).

State v. Kaua, 102 Hawai'i 1, 7-8, 72 P.3d 473, 479-480 (2003) (quoting State v. Rauch, 94 Hawai'i 315, 322-23, 13 P.3d 324, 331-32 (2000) (quoting State v. Kotis, 91 Hawai'i 319, 327, 984 P.2d 78, 86 (1999) (quoting State v. Dudoit, 90 Hawai'i 262, 266, 978 P.2d 700, 704 (1999) (quoting State v. Stocker, 90 Hawai'i 85, 90-91, 976 P.2d 399, 404-05 (1999) (quoting Ho v. Leftwich, 88 Hawai'i 251, 256-57, 965 P.2d 793, 798-99 (1998) (quoting Korean Buddhist Dae Won Sa Temple v. Sullivan, 87 Hawai'i 217, 229-30, 953 P.2d 1315, 1327-28 (1998)))))))).

III. DISCUSSION

A. HRS § 291E-61 Is A "Substantial Reenactment" Of HRS § 291-4.4.

The prosecution argues that prosecuting Domingues "under the repealed statute was permissible[,] as the new statute no[t] only encompasses the same conduct as the repealed statute[,] but also imposes the same punishment upon conviction." We agree.

HRS §§ 291-4.4(a)(1) and (a)(2) were in effect on the date that Domingues allegedly committed the offense; however, those statutes were no longer in effect on the date of his indictment. Effective January 1, 2002, the legislature repealed HRS § 291-4.4 and enacted HRS §§ 291E-61(a) and (b)(4).[4] See 2000 Haw. Sess. L. Act 189,[5] §§ 21-22 at 404.

In Queen v. Ah Hum, 9 Haw. 97, 98 (1893), the Supreme Court of the Republic of Hawai'i stated that "the repeal of a penal statute operates as a remission of all penalties for violation of it committed before its repeal, and a release from prosecution therefor after said repeal unless there be either a clause in the repealing statute, or a provision of some other statute, expressly authorizing

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[4] In examining HRS § 291E-61, we review only those parts of the statute raised on appeal.

[5] HRS § 291-4, entitled "Driving Under the Influence of Intoxicating Liquor" was amended by Act 189 and, as amended, was in effect from September 30, 2000 through December 31, 2001. See 2000 Haw. Sess. L. Act 189, Part IV, § 41 at 433. Act 189 amended HRS § 291-4 by increasing the amount of community service hours required for those convicted of more than one offense of driving under the influence within five years. See 2000 Haw. Sess. L. Act 189, Part II, § 22 at 404.

HRS § 291-4.4, entitled "Habitually Driving Under the Influence of Intoxicating Liquor or Drugs," was amended by Act 189 and was in effect as amended from September 30, 2000 through December 31, 2001. See 2000 Haw. Sess. L. Act 189, Part IV, § 41 at 433. Act 189 amended HRS § 291-4.4 to include sentencing provisions, requiring, inter alia, the revocation of an offender's driver's license for a minimum of one year, a minimum imprisonment of ten days, and referral to a substance abuse counselor. See 2000 Haw. Sess. Laws Act 189, Part II, § 21 at 405.

Thus, on August 9, 2001, the date Domingues allegedly committed the crime charged, HRS § 291-4 and HRS § 291-4.4, as amended by Act 189, were in effect.

Effective January 1, 2002, Act 189 repealed HRS § 291-4 and HRS § 291-4.4 and, simultaneously, HRS § 291E-61, entitled "Operating a Vehicle Under the Influence of an Intoxicant," became effective. See 2000 Haw. Sess. L. Act 189, Part IV, § 41 at 433.

such prosecution." As such, "all prosecutions under the repealed [a]ct should thereafter" cease, unless the legislature has included a general savings clause or a statute provides otherwise. Id.

In the present matter, the prosecution concedes that Act 189 did not include a savings clause and that HRS § 1-11 (1993),[6] "the general savings clause for criminal statutes[,] did not apply in this case[,] as the case was pending investigation, not prosecution[,] after the repeal of HRS § 291-4.4 . . . ."

Domingues, quoting the California Supreme Court in In re Dapper, 454 P.2d 905, 907 (Cal. 1969), argues that "[t]he law is well-established that the outright repeal of a criminal statute without a savings clause bars prosecution for violations of the statute committed before the repeal." (Internal quotation marks omitted). To explain the rationale of the foregoing rule, the California Supreme Court stated:

> It is based on presumed legislative intent, it being presumed that the repeal was intended as an implied legislative pardon for past acts. This rule results, of course, in permitting a person who has admittedly committed a crime to go free, it being assumed that the Legislature, by repealing the law making the act a crime, did not desire anyone in the future whose conviction had not been reduced to final judgment to be punished under it. But this rule only applied in its full force where there is an outright repeal, and where there is no other new or old law under which the offender may be punished.

[6] HRS § 1-11 provides that "[n]o suit or prosecution pending at the time of the repeal of any law, for any offense committed, or for the recovery of any penalty or forfeiture incurred under the law so repealed, shall be affected by such repeal."

Sekt v. Justice's Court of San Rafael, 159 P.2d 17, 21 (Cal. 1945) (citations omitted).

By contrast, the prosecution cites In re Dapper for the proposition that it is not barred from proceeding with the case against Domingues where the repealed law has been substantially reenacted:

> It is established that the rule which bars prosecution under a repealed law for offenses occurring before repeal does not apply where there is an outright repeal and a substantial reenactment, because it will be presumed that the legislative body did not intend that there should be a remission of crimes not reduced to final judgment. When a statute, although new in form, re-enacts an older statute without substantial change, even though it repeals the older statute, the new statute is but a continuation of the old. There is no break in the continuous operation of the old statute, and no abatement of any of the legal consequences of acts done under the old statute. Especially does this rule apply to the consolidation, revision, or codification of statutes, because obviously, in such event the intent of the Legislature is to secure clarification, a new arrangement of clauses, and to delete superseded provisions, and not to affect the continuous operation of the law.

454 P.2d at 908 (emphases added) (citations and internal quotation marks omitted); cf. State v. Levi, 102 Hawai'i 282, 287, 75 P.3d 1173, 1178 (2003) (explaining that "a change to the law, such as a repeal, has no bearing on previous applications of the prior law absent legislative expression to the contrary").

In re Dapper held a defendant's convictions under certain sections of the San Diego municipal code invalid because the old sections had been repealed and not substantially reenacted by any provisions in the new code. In applying its ruling, the California Supreme Court examined each section of the municipal code under which the

defendant had been charged. It affirmed those convictions charged under the sections of the repealed code that had been substantially reenacted and reversed the convictions charged under sections that had not been substantially reenacted. 454 P.2d at 909-10.

On August 9, 2001, the date that Domingues allegedly committed the offense, HRS § 291-4.4 was in effect. See supra note 2; see also 2000 Haw. Sess. L., Act 189 at 405-406. HRS §§ 291E-61(a) and 291E-61(b)(4) were in effect on the date of the indictment, March 21, 2002. See supra note 1.

The legislature's intent in enacting Act 189 was to consolidate Hawaii's impaired driving statutes. The legislature explained that Act 189 "consolidates the various statutes relating to operating a vehicle while under the influence of intoxicants, and makes these provisions more uniform and consistent." Hse. Stand. Comm. Rep. No. 70-00, in 2000 House Journal, at 974. The legislature also declared that HRS chapter 291E "consolidates, into a new chapter within the HRS, all provisions relating to impaired (alcohol or drugs) driving or boating . . . . This offense also includes the present class C felony habitual DUI (section 291-4.4)." Sen. Stand. Comm. Rep. No. 3347, in 2000 Senate Journal, at 1399-1401. HRS § 291E-61 was already in effect at the time HRS § 291-4.4 was repealed. Furthermore, in the original enactment of HRS chapter 291E, the act stated that "[i]f any provision of this Act, or the application thereof

to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable." 2000 Haw. Sess. L., Act 189, at 433.

"Substantially" means "[e]ssentially; without material qualification; in the main; in substance; materially; in a substantial manner." Black's Law Dictionary 1428-29 (6th ed. 1990) To "re-enact" means "[t]o enact again; to revive." Id. at 1280. Thus, a statute is "substantially reenacted" when the legislature revives a statute in essentially the same terms, form, or substance as the previous statute, with only minor changes that do not alter its essential substantive content. See Natatorium Preservation Comm. v. Edelstein, 55 Haw. 55, 61, 515 P.2d 621, 625 (1973) (explaining that the latter provisions of the statute were "substantially reenacted" and "any and all variation being only in provisions as to the form in which legislative approval or disapproval might be expressed"); see also State Farm Mut. Auto Ins. Co. v. Murata, 88 Hawai'i 284, 285, 965 P.2d 1284, 1285 (1998) (noting that "HRS § 294-36 was reenacted in substantially the same form" as the previous statute, HRS § 431:10C-315).

By their plain language, the relevant provisions of HRS § 291E-61 "re-enact" the definition of the offense

contained in HRS § 291-4.4 "without substantial changes."[7] The offense with which Domingues was charged, HRS § 291-4.4, is substantially reenacted in HRS § 291E-61. As such, Domingues may be prosecuted under HRS § 291-4.4, as there is no evidence that "the legislative body 'did not intend that there should be a remission of crimes not reduced to final judgment.'" In re Dapper, 545 P.2d at 900 (quoting Sekt 159 P.2d at 22).

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[7] Domingues argues that: (1) HRS § 291E-61(b) divests the sentencing court of its discretion to impose probation or suspend part or all of the sentences by mandating that the offender's sentence must be "without [the] possibility of probation or suspension of sentence," [HRS § 291E-61(b)]; (2) HRS §§ 291E-61(c) and 291E-4(a) add a conviction under HRS § 200-81 (Supp. 1996) to the Hawai'i offenses that qualify for sentencing as a "habitual" DUI offender; (3) HRS § 291E-61 defines any conviction obtained in "any other state or federal jurisdiction for an offense that is comparable to operating or being in physical control . . . while under the influence of an intoxicant" and thus, it is much broader than that which had been defined in HRS § 291-4.4" (emphasis added); (4) HRS § 291E-61 converts what had been an element of the offense under HRS § 291-4.4, i.e., that the accused had been convicted three or more times of having committed the requisite prior offenses, into a sentencing factor, see HRS § 291E-61(b); (5) HRS § 291E-61 adds restitution to the police for the cost of any blood or urine testing as part of the sentence; and (6) HRS § 291E-61(b)(4) prescribes additional incarceration and an additional five hundred dollar fine if a minor was in the vehicle at the time of the crime. The prosecution does not respond to the foregoing arguments in its reply brief.

As to Domingues's first point, we need not decide the exact parameters of the prohibition against probation or suspension of sentence as pertaining to the conviction of a class C felony or the ten-day prison sentence. The prosecution argues that "there are no statutory provisions that allow suspension of sentence for felony convictions ([HRS §] 706-605 (1998))[.]" It is important to note that Act 314 of the 1986 Hawai'i Session Laws deleted suspension of sentence as a sentencing alternative, and this court has interpreted the deletion to mean that "suspension of sentence" is no longer a sentencing alternative unless explicitly allowed. See State v. Scott, 69 Haw. 458, 459 n.3, 746 P.2d 976, 977 n.3 (1987). The prosecution argues that because HRS § 291-4.4 required "mandatory jail time which is contrary to probation (H.R.S. Section 706-605 (1993))[,]" prohibition of probation was implied in HRS § 291-4.4.

As indicated, infra, we do not agree that Domingues's fourth point should result in invalidating the statute. Inasmuch as he has not been convicted, Domingues's other points are raised prematurely.

Furthermore, we observe, that HRS § 291-4.4(a)(1) described the offense of habitually driving under the influence (DUI) of intoxicating liquor or drugs as having been convicted, three or more times in a ten-year period, of a driving under the influence offense and of actual physical control or the operation of any vehicle "while under the influence of an intoxicating liquor." Under HRS § 291-4.4(a)(1), this means "the person is under the influence of intoxicating liquor in an amount sufficient to impair the person's normal mental faculties or ability to care for onself and guard against casualty." In the alternative, this element may be established by the appointed blood alcohol level or requisite "drug" influence. See HRS § 291-4.4(a)(2) and (3), respectively, supra note 2.

In HRS § 291-4.4(a), the operative words describing the offense of habitual DUI, to wit, that "during a ten-year period the person has been convicted three or more times for a driving under the influence offense[,]" define an element of the offense. These words, however, are omitted from the offense of operating a vehicle under the influence of an intoxicant as described in HRS § 291E-61. Rather, in HRS § 291E-61(b), the determination of whether a person has been convicted three or more times for driving under the influence is incorporated into its sentencing provisions. Specifically, HRS § 291E-61(b)(4) states that "a person committing the offense of [DUI] shall be sentenced" to the sanctions prescribed "[f]or an offense that occurs within ten

years of three or more prior conviction for offenses under this section, section 707-702.5, or section 291E-4(a)[.]" (Emphasis added.) Accordingly, Domingues argues that the offense described in HRS § 291-4.4 was not substantially reenacted because HRS § 291E-61 converts what had been an element of the offense under HRS § 291-4.4, i.e., that the accused had been convicted three or more times of having committed the requisite prior offenses, into a sentencing factor that the prosecution need neither allege in the charging instrument nor prove beyond a reasonable doubt at trial. Domingues is mistaken.

It is fundamental that, as a matter of basic due process, "[a] defendant must be put on sufficient notice of the 'nature and cause of the accusation' with which he is charged." State v. Lemalu, 72 Haw. 130, 134, 809 P.2d 442, 444 (1991) (quoting State v. Jendrusch, 58 Haw. 279, 281, 567 P.2d 1242, 1245 (1977)) (internal quotation signals omitted). On its face, the degree of punishment for a violation of HRS § 291E-61(a) escalates as a function of whether the violation constitutes: (1) a "first offense, or any offense not preceded within a five-year period by a [prior and like] conviction," HRS § 291E-61(b)(1); (2) "an offense that occurs within five years of a prior [and like] conviction," HRS § 291E-61(b)(2); (3) "an offense that occurs within five years of two prior [and like] convictions," HRS § 291E-61(b)(3); or, as in the present case, "an offense that occurs within ten years of three or more prior [and like]

convictions," HRS § 291E-61(b)(4). See supra note 1.[8] In other words, the foregoing prefatory language of HRS § 291E-61(b)(1) through 291E-61(b)(4) describes attendant circumstances, see HRS 702-205 (1993), that are intrinsic to and "enmeshed" in the hierarchy of offenses that HRS § 291E-61 as a whole describes.

Under analogous circumstances, this court has unanimously ruled that

> if the "aggravating circumstances" justifying the imposition of an enhanced sentence are "enmeshed in," or, put differently, intrinsic to the "commission of the crime charged," then, in accordance with the [State v.] Estrada[, 69 Haw. 204, 738 P.2d 812 (1987)] rule, such aggravating circumstances "must be alleged in the [charging instrument] in order to give the defendant notice that they will be relied on to prove the defendant's guilt and support the sentence to be imposed, and they must be determined by the trier of fact.
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> State v. Schroeder, 76 Hawai`i 517, 528, 880 P.2d 192, 203 (1994) . . . .
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>
> . . . [I]t is an impermissible dilution of the jury's role as factfinder to remove the responsibility for determining the existence of facts leading to the imposition of a particular punishment. . . . We hold that when a fact susceptible to jury determination is a predicate to the imposition of an enhanced sentence, the Hawai`i Constitution requires that such factual determinations be made by the trier of fact. The legislature may not dilute the historical province of the jury by relegating facts necessary to the imposition of a certain penalty for criminal behavior to the sentencing court. The jury is the body responsible for

[8] Indeed, "[a]n offense under [HRS § 291E-61(b)(4)] is a class C felony," see supra note 1, entitling a defendant to a jury trial, whereas the offenses described in HRS §§ 291E-61(b)(1) through 291E-61(b)(3) would appear to be petty misdemeanors, as to which no right to a jury trial would attach. See id. If the prefatory language of HRS §§ 291E-61(b)(1) through 291E-61(b)(4) were mere "sentencing factors" that the prosecution was not obliged to allege and prove to the trier of fact, as Domingues suggests, then defendants charged with HRS § 291E-61 offenses would have no idea what the particular offense was that they were charged with committing or whether they were entitled to a jury trial.

> determination of intrinsic facts necessary for the imposition of punishment for an offense criminalized by the legislature. The analysis in Schroeder protects the jury's role by mandating that the determination of facts intrinsic to the offense be made by the trier of fact.

State v. Tafoya, 91 Hawai`i 261, 270, 273, 982 P.2d 890, 899, 902 (1999) (footnote omitted) (some emphasis added and some in original) (Some brackets added and some in original) (quotation signals in original).

HRS § 291E-61, then, does require that the prosecution prove that "during a ten-year period the person has been convicted three or more times for a driving under the influence offense[.]" Inasmuch as the prosecution is still required to prove that the three prior convictions occurred, the offense of habitual DUI, HRS § 291-4.4, is substantially reenacted in HRS § 291E-61(b)(4).

B. Charging Domingues Under The Repealed Statute Was Not Inconsistent With The *Ex Post Facto* Rule.

The prosecution contends that the indictment charged Domingues under the statute that was in effect at the time of his arrest, and that, therefore, it did not violate the ex post facto rule.[9] Moreover, Domingues concedes that "this case does not present an ex post facto problem" and that "an ex post facto problem would have arisen in this case had the prosecution charged Domingues under HRS § 291E-61

[9] "The ex post facto clause prohibits . . . the states from enacting any law that imposes a punishment for an act which is not punishable at the time it was committed; or imposes additional punishment to that then prescribed." United States v. Snowden, 677 F. Supp. 1108, 1110 (Kan. 1988).

(Supp. 2001), which was not in effect on the date of the alleged offense." Consequently, inasmuch as Domingues was properly charged under HRS § 291-4.4 and we hold that the prosecution may proceed under the charged statute, no ex post facto problem arises.[10]

IV. CONCLUSION

In light of the foregoing analysis, we vacate the circuit court's June 21, 2002 order dismissing the indictment without prejudice and remand the present matter for further proceedings.

On the briefs:

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[10] Based on our decision discussed above, we need not reach the other points raised by the prosecution.