*** FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER ***

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

ADAM RUGGIERO, Defendant-Appellant.



NO. 26940

APPEAL FROM THE DISTRICT COURT OF THE SECOND CIRCUIT
(Case Nos. B-94-96:9/30/04, MPD Rep. No. 04-22073)

JUNE 5, 2007

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

OPINION BY LEVINSON, J.
ANNOUNCING THE JUDGMENT OF THE COURT

The defendant-appellant Adam Ruggiero appeals from the September 30, 2004 judgment and sentence of the district court of the second circuit, the Honorable Douglas H. Ige presiding, convicting him of operating a vehicle under the influence of an intoxicant [hereinafter, "DUI"], in violation of Hawai'i Revised Statutes (HRS) § 291E-61 (Supp. 2003), see infra note 10.

On appeal, Ruggiero asserts that the district court erred in sentencing him as a repeat offender, pursuant to HRS § 291E-61(b) and (c), see infra note 10, inasmuch as nine days after his DUI arrest but prior to his conviction and sentencing, this court, in summary disposition order (SDO) No. 25671 (March 19, 2004) [hereinafter, "SDO No. 25671"], reversed his previous

January 29, 2003 DUI conviction, thereby, Ruggiero alleges, removing the basis for the enhanced penalty.

For the reasons discussed infra in section III, we hold that the language set forth in HRS § 291E-61(c), see infra note 10, manifests a clear legislative intent to create a status offense in HRS § 291E-61 and, therefore, that it was not a violation of Ruggiero's due process rights, guaranteed by section 1 of the fourteenth amendment to the United States Constitution[1] and article I, section 5 of the Hawai'i Constitution[2] to sentence him as a second-time offender on the basis of a prior conviction that was valid at the time of his arrest for the present offense.

However, in keeping with the due process protections articulated in State v. Cummings, 101 Hawai'i 139, 142-43, 63 P.3d 1109, 1112-13 (2003), State v. Israel, 78 Hawai'i 66, 73, 890 P.2d 303, 310 (1995), and State v. Schroeder, 76 Hawai'i 517, 525, 880 P.2d 192, 200 (1994), see infra section III.C.5, in order for his conviction and sentencing as a second-time offender to be valid, Ruggiero's prior conviction, as an essential element of the offense charged, had to be alleged in the complaint and proven beyond a reasonable doubt at trial. Insofar as the complaint in the present matter failed to allege Ruggiero's prior conviction, it was insufficient to charge Ruggiero with a

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[1] The fourteenth amendment, section 1, provides in relevant part that "[n]o State shall . . . deprive any person of . . . liberty, or property, without due process of law."

[2] Article I, § 5 provides in pertinent part that "[n]o person shall be deprived of . . . liberty or property without due process of law."

violation of HRS § 291E-61(a) and (b)(2) as a second-time offender. We therefore vacate his conviction of and sentence for driving under the influence for the second time within a five-year period, in violation of HRS § 291E-61(a) and (b)(2) and remand to the district court for the entry of a judgment of conviction for driving under the influence of an intoxicant with no prior offenses, in violation of HRS § 291E-61(a) and (b)(1), see infra note 10, and sentencing in accordance therewith. State v. Elliott, 77 Hawai'i 309, 313, 884 P.2d 372, 376 (1994). We affirm the district court's judgment with respect to Ruggiero's convictions of the infractions alleged in Counts II, III, and IV of the complaint, none of which Ruggiero appealed, see infra note 3.

## I. BACKGROUND

On March 10, 2004 -- while his appeal of a January 29, 2003 conviction for operating a vehicle under the influence of an intoxicant, in violation of HRS § 291E-61(a)(1) (Supp. 2002), was pending before this court -- Ruggiero was again arrested for DUI. Nine days later, on March 19, 2004, we reversed the January 29, 2003 conviction on the grounds that the prosecution failed to prove an essential element of the offense.

Following from the March 10, 2004 arrest, on April 19, 2004, Ruggiero was charged by complaint with, inter alia, DUI (Count I), in violation of HRS § 291E-61 (Supp. 2003), see infra

note 10.[3] On September 8, 2004, the district court of the second circuit, the Honorable Douglas H. Ige presiding, conducted a trial and convicted Ruggiero, inter alia, of that charge.

The district court then proceeded to the sentencing phase of the trial, whereupon the plaintiff-appellee State of Hawai'i [hereinafter, "the prosecution"] moved for an enhanced sentence based on the prior January 29, 2003 conviction. After a conference in chambers, the district court made the following statement:

> [Ruggiero]'s co-counsel[] brought to the Court's attention that the conviction that the prosecution is relying on for [DUI] that occurred on October 6, 2002 whereby the defendant was convicted on January 29, 2003, had been appealed and the Supreme Court by summary disposition order reversed the conviction [on March 19, 2004].
>
> So the defense was arguing that, accordingly, it should not be considered as a prior conviction. There is a provision, however, in [HRS §] 291[E-]61(c), whereby it states that any judgment on a verdict of a finding of guilty . . . that at the time of the offense has not been expunged by pardon, reverse[d], [or] set aside shall be deemed a prior conviction under this section.

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[3] The portion of the complaint charging Ruggiero with DUI (Count I) reads in its entirety:

> That on or about the 10th day of March, 2004, in the Division of Wailuku, County of Maui, State of Hawai[']i, ADAM M. RUGGIERO did operate or assume actual physical control of a vehicle while under the influence of an intoxicant meaning that he was under the influence of alcohol in an amount sufficient to impair his normal mental faculties or ability to care for himself and guard against casualty, thereby committing the offense of Operating a Vehicle Under the Influence of an Intoxicant in violation of Section 291E-61 of the Hawai[']i Revised Statutes.

Inasmuch as Ruggiero does not appeal his conviction of and sentence for driving without no-fault insurance, in violation of HRS § 431:10C-104(a) (Count II), driving a motor vehicle with delinquent tax, in violation of HRS § 249-11 (Count III), and failure to signal, in violation of HRS § 291C-84(b) (Count IV), we affirm the district court's judgment and sentence regarding those counts.

> The question now is the legal [e]ffect of that statutory provision. Because the reversal took place on March . . . 19, 2004 . . . . And the date of this violation was March 10, 2004, nine days earlier. So at the time of the commission of this offense, that conviction had not been reversed by the Supreme Court.

The district court then continued the sentencing hearing to allow both parties to brief the issue of whether Ruggiero's prior conviction could serve as the basis for an enhanced sentence as a repeat offender, pursuant to HRS § 291E-61(c), see infra note 10. In his memorandum in opposition, Ruggiero argued only that the language of the statute was ambiguous and that the ambiguity should therefore be construed in his favor.[4]

At the September 30, 2004 hearing, Ruggiero reiterated the argument set forth in his memorandum. The district court asked Ruggiero's counsel whether any other arguments came to mind:

> The Court: [I]s there anything outside the clear reading of the statute. . .
> . . . .
> . . .
> -- constitutional grounds, anything else that would prevent the Court from . . . applying the clear reading of the statute[?]
>
> Counsel: Just, your Honor, in the interest of justice and fairness the first conviction should not count as it was overturned before this current conviction . . . .
> First, he already completed classes and other requirements for the first conviction that was overturned, even though it was overturned. He has faced those penalties already for that offense.
> Second, your Honor, the legislative history does not indicate a reason for the language of the statute at issue. So, basically, your Honor, he is punished for the first offense, although it's overturned. Now he faces a second conviction and a second conviction penalties.

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[4] The only argument that conceivably was not based on statutory construction asserted that "[i]n the interests of justice, [Ruggiero]'s current conviction should be considered his first offense."

> Your Honor, the legislature may have intended that the language of the statute provides notice to defendants about their convictions so that they can conform their behavior, but here Mr. Ruggiero had a valid issue for appeal and believed he would win on appeal[;] therefore he wasn't on notice that he would be facing a second conviction penalty.
> . . . .
> The Court: Well, you're making the arguments that you made in your . . . written -- I don't need you to read it back to me. . . . So, anything else?
> Counsel: No, your honor.

(Some capitalization altered.) The district court then concluded that

> [o]n the clear reading of [HRS § 291E-61(c)] when the defendant committed this offense it would have been his second. There was a previous conviction that had not yet been overturned by the appellate courts.
> . . . .
> The Court believes that that reading of that statute is clear. It's not ambiguous. And at the time of the commission of this offense on March 10, 2004, the conviction of the previous [DUI] [that] occurred on October 6, 2002[,] resulting in conviction on January 29th, 2003[,] had not been set aside.
> [T]he Court has not been cited [and no] argument has been made to the Court . . . whereby any statutory or constitutional provision or requirement would prevent the Court from . . . interpreting or applying the statute as it clearly reads in the statute.
> So the Court will find that this offense is the second offense for the defendant within a five year period under [HRS §] 291E-61.

The court proceeded to sentence Ruggiero, as a second-time offender, to fines, fourteen days in jail, and a one-year license suspension.

Ruggiero filed a timely notice of appeal on October 29, 2004.

## II. STANDARD OF REVIEW

> "[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) . . . .

> Gray v. Admin[.] Dir[.] of the Court, 84 Hawai'i 138, 144, 931 P.2d 580, 586 (1997). Furthermore, our statutory construction is guided by established rules:
>
> > 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.
> >
> > When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists.
> >
> > 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 (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) . . . . "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. Koch, 107 Hawai'i 215, 220-21, 112 P.3d 69, 74-75 (2005) (some internal citations omitted) (some brackets and ellipses added and some in original) (quoting 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))))))). Nonetheless, absent an absurd or unjust result, see State v. Haugen, 104 Hawai'i 71, 77, 85 P.3d 178, 184 (2004), this court is bound to give effect to the plain meaning of unambiguous statutory language and may only resort to the use of legislative history when interpreting an ambiguous statute. State v. Valdivia, 95 Hawai'i 465, 472, 24 P.3d 661, 668 (2001).

## III. DISCUSSION

### A. Ruggiero Failed To Preserve His Constitutional Arguments For Appeal.

In opposing the imposition of a repeat-offender sentence, Ruggiero relied virtually exclusively on statutory arguments, principally that HRS § 291E-61(c), see infra note 10, was ambiguous. As we have noted, his only departure from that line of argument, raised in his memorandum in opposition to the enhanced sentence and again at the September 30, 2004 sentencing hearing, was that "the interest of justice and fairness" weighed against his vacated conviction being used as the basis for sentencing him as a second-time offender.

Ruggiero contends that the invocation of "justice and fairness" is sufficient to preserve for appeal constitutional grounds for vacating the district court's September 30, 2004 judgment and sentence. (Quoting Lisenba v. California, 314 U.S. 219 (1941), for the proposition that "denial of due process is the failure to observe that fundamental fairness essential to the

very concept of justice.") In so arguing, Ruggiero essentially contends that the invocation was sufficient to put the district court on notice that he was arguing that his right to due process was violated by the enhanced sentence. The record reflects, however, that the district court gave him ample opportunity to articulate a due process ground with specificity. Inasmuch as Ruggiero was represented by counsel and failed to invoke, either in his brief or in oral argument, the protections of either the United States or Hawai'i Constitutions, to accept Ruggiero's contentions (1) that the district court erred in its ruling on his purported constitutional arguments and (2) that he adequately preserved those arguments for appeal would be to conclude that virtually any invocation of basic fairness is sufficient to preserve virtually any conceivable constitutionally-based argument for appeal.

We hold that Ruggiero failed to preserve the constitutional arguments for appeal and, therefore, we may only reach the merits of his arguments by noticing plain error on the district court's part. See HRPP Rule 52(b); In re John Doe, Born on January 25, 1985, 102 Hawai'i 75, 87, 73 P.3d 29, 41 (2003); Jenkins, 93 Hawai'i 87, 101, 997 P.2d 13, 27 (2000); State v. McGriff, 76 Hawai'i 148, 155, 871 P.2d 782, 789 (1994) (this court may sua sponte notice plain errors that affect a defendant's substantial rights).

B. The Parties' Arguments Regarding The Enhanced Sentence

1. Ruggiero's argument

Ruggiero proposes that the district court erred in premising his sentence on the commission of a second offense within a five-year period, pursuant to HRS § 291E-61(b)(2), see infra note 10, because the prior conviction was a nullity due to constitutional defects. He asserts that sentencing him according to the provisions set forth for second-time offenders "denies [him] his Due Process and Double Jeopardy rights" under the fifth and fourteenth amendments to the United States Constitution[5] and Article I, §§ 5 and 10 of the Hawai'i Constitution.[6] (Citing State v. Sinagoga, 81 Hawai'i 421, 918 P.2d 228 (App. 1996).)

Ruggiero contends that HRS § 291E-61 is a purely recidivist statute and that the district court erred by failing to follow the sentencing procedure prescribed by the Intermediate Court of Appeals (ICA) in Sinagoga, 81 Hawai'i at 447, 918 P.2d at 254, for the ordinary sentencing of repeat offenders, which he contends requires that the sentencing court confirm that any prior convictions upon which an enhanced sentence will be based

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[5] The fifth amendment to the United States Constitution provides in relevant part that "[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law . . . ." The fourteenth amendment is set forth in relevant part supra in note 1.

[6] Article I, § 10 provides that "[n]o person shall . . . be subject for the same offense to be twice put in jeopardy." Effective November 2, 2004, Article I, § 10 was amended by Senate Bill No. 2851 in respects immaterial to the present matter by voters in a general election. See 2004 Haw. Sess. L., at 1085. Article I, section 5 is set forth supra in note 2.

are valid at the time of sentencing.[7] He maintains that under a straightforward recidivist statute, due process requires that enhanced sentences be based on convictions that are valid at the time of sentencing. (Citing State v. Veikoso, 102 Hawai'i 219, 74 P.3d 575 (2003); State v. Shimabukuro, 100 Hawai'i 324, 60 P.3d 274 (2002); State v. Hahn, 618 N.W.2d 528, 535 (Wis. 2000).)

2. The prosecution's arguments

The prosecution asserts that, by amending HRS § 291E-61(c) to require the sentencing court to treat the time of commission of the subsequent offense as the touchstone for determining the validity of prior convictions for sentencing purposes, the legislature clearly intended to create a status offense. Therefore, the prosecution argues, the underlying predicate conviction need only be valid at the time of the

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[7] In dictum, the ICA in Sinagoga concluded that, "where ordinary sentencing procedures are applicable and there is a possibility that the court may use the defendant's prior conviction(s) as a basis for the imposition or enhancement of a prison sentence," 81 Hawai'i at 447, 918 P.2d at 254, Hawai'i courts must thereinafter follow a five-step procedure: (1) the court must supply both parties with any relevant presentence reports implicating prior criminal convictions; (2) the defendant must alert the court to any prior convictions that were allegedly uncounseled, "otherwise invalidly entered," and/or "not against the defendant"; (3) the court must inform the defendant that any prior convictions not challenged at this stage are deemed valid and cannot later be raised, absent good cause, to attack the court's sentence; (4) "with respect to each reported prior conviction that the defendant challenges, the [Hawai'i Rules of Evidence] shall apply and the court shall expressly decide before the sentencing whether the [prosecution has] satisfied its burden of proving to the reasonable satisfaction of the court that the opposite of the defendant's challenge is true"; and (5) "if the court is aware of the defendant's prior . . . invalid criminal conviction[], it shall not impose or enhance a prison sentence prior to expressly stating on the record that it did not consider it . . . as a basis for the imposition or enhancement of a prison sentence." Id. at 447, 918 P.2d at 254.

Nevertheless, recognizing that the ICA, in permitting defendants to challenge any previous conviction "otherwise invalidly entered," was opening the door to collateral attacks on prior convictions "whenever the validity of a conviction is challenged," this court, in State v. Veikoso, 102 Hawai'i 219, 226 n.8, 74 P.3d 575, 582 n.8 (2003), expressly directed that the language "otherwise invalid criminal conviction" be disregarded.

commission of the subsequent offense, regardless of whether the underlying conviction is later vacated.[8] (Citing State v. Lobendahn, 71 Haw. 111, 113, 784 P.2d 872, 873 (1989).) This reading of HRS § 291E-61, the prosecution maintains, comports with the legislative intent to deal harshly with "scofflaws" who reoffend while appealing previous DUI convictions. (Quoting Sen. Stand. Comm. Rep. No. 1185, in 2003 Senate Journal, at 1523.)

C. While The District Court Did Not Plainly Err In Applying HRS § 291E-61(c), It Plainly Erred In Convicting And Sentencing Ruggiero As A Second-Time Offender.

1. A status offense statute requires only that the conviction be valid at the time of the commission of the subsequent violation.

Conviction of or imposition of sentence for a "status" offense, in which one element of the offense is the status of the defendant at the time of the alleged violation, does not require that the conviction continue to be valid at the time of sentencing. See Lobendahn, 71 Haw. at 113, 784 P.2d at 873, quoted in Veikoso, 102 Hawai'i at 227 n.5, 74 P.3d at 583 n.5 ("In Lobendahn we held that, inasmuch as the statute created a

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[8] Black's Law Dictionary 400 (8th ed. 2004) defines a "status crime" as "[a] crime of which a person is guilty by being in a certain condition or of a specific character." A status offense therefore generally includes, as a material element, a particular condition or characteristic that renders otherwise potentially legal behavior illegal. See, e.g., HRS § 134-7 (Supp. 2006), which provides in pertinent part that "[n]o person who is a fugitive from justice or is a person prohibited from possessing firearms or ammunition under federal law shall own, possess, or control any firearm or ammunition therefor." In State v. Lobendahn, 71 Haw. 111, 113, 784 P.2d 872, 873 (1989), a conviction under HRS § 134-7 (1985) remained valid despite the underlying predicate felony conviction being overturned later on appeal. See discussion infra in section III.C.1.

'status offense,' the subsequent invalidation of the predicate felony conviction did not affect the validity of the criminal possession charge because the defendant was 'a convicted felon at the time he possessed the firearm and ammunition. Such possession was unlawful and the subsequent reversal of the conviction does not then render such possession lawful.'"). But see United States v. Bagley, 837 F.2d 371, 374-75 (9th Cir. 1988) (concluding that a prior felony conviction obtained in violation of federal constitutional rights cannot serve as the basis for a subsequent conviction under a federal law prohibiting felons from possessing firearms).

2. Under a purely recidivist statute, a conviction must continue to be valid at the time of adjudication and sentencing.

Purely recidivist statutes address repeat offender behavior by increasing the punishment for every subsequent violation. See Shimabukuro, 100 Hawai'i at 330, 60 P.3d at 280 (Levinson, J., concurring) (noting that HRS § 291-4(b) (Supp. 1998)[9] "created an escalating sentencing scheme keyed to the

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[9] At the time of the decision in Shimabukuro, HRS § 291-4(b) provided in pertinent part:

> A person committing the offense of driving under the influence of intoxicating liquor shall be sentenced as follows . . . :
>
> (1) For the first offense, or any offense not preceded within a five-year period for a conviction under this section, by:
>
> (A) A fourteen-hour minimum alcohol abuse rehabilitation program . . . ; and
>
> (B) Ninety-day prompt suspension of license. . . ; and
>
> (C) Any one or more of the following:
>
> (i) Seventy-two hours of community service work;

(continued...)

defendant's degree of recidivism"); id. at 333, 60 P.3d at 283 (Nakayama, J., dissenting) (noting that HRS § 291E-61 (Supp. 2001)[10] resembled a recidivist statute in that "the

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[9](...continued)

(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 which occurs within five years of a prior conviction under this section, by:
(A) Prompt suspension of license for a period of one year . . . ;
(B) Either one of the following:
(i) Not less than one hundred hours of community service work; or
(ii) Not less than forty-eight consecutive hours but not more than fourteen days of imprisonment . . . ; and
(C) A fine of not less than $500 but not more than $1,500.

(3) For an offense which occurs within five years of two prior convictions under this section, by:
(A) A fine of not less than $500 but not more than $2,500;
(B) Revocation of license for a period of 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 . . . .

[10] HRS § 291E-61 (Supp. 2001) provided in relevant part that:

(a) A person commits the offense of operating a vehicle 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;
. . . .
(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 . . . :
(A) A fourteen-hour minimum substance abuse rehabilitation program . . . ;

(continued...)

[10](...continued)

(B) Ninety-day prompt suspension of license . . . ;
(C) Any one or more 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 section . . . by:
(A) Prompt suspension of license . . . for a period of one year . . . ;
(B) Either one of the following:
(i) Not less than two hundred forty hours of community service work; or
(ii) Not less than five days but not more than fourteen days of imprisonment . . . ;
(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 . . . :
(A) A fine of not less than $500 but not more than $2,500;
(B) Revocation of license . . . to operate a vehicle for a period not less than one year but not more than five years;
(C) Not less than ten days but not more than thirty days imprisonment . . .

(4) For an offense that occurs within ten years of three or more prior convictions for offenses under this section . . . :
(A) Mandatory revocation of license . . . for a period of not less than one year but not more than five years;
(B) Not less than ten days imprisonment . . . ;

. . . .

An offense under this paragraph is a class C felony.

(Emphasis added.) As discussed infra, effective January 1, 2004, the legislature amended HRS § 291E-61 by excising the class C felony offense for a fourth offense within ten years provided for in HRS § 291E-61(b)(4) and creating a separate offense of habitual drunk driving codified at HRS § 291E-61.5, see infra note 13. See 2003 Haw. Sess. L. Act 71, §§ 1, 3, and 7 at 123-27.

Central to the analysis of the present matter, the 2003 amendments also enacted two key changes in HRS § 291E-61. HRS § 291E-61(b)(4) was amended to read:

> Any person eighteen years of age or older who is convicted under this section and who operated a vehicle with a passenger, in or on the vehicle, who was younger than fifteen years of age, shall be

(continued...)

amended version includes, in its plain language, a 'multiplier' effect or enhanced sentencing" for the repeat offender).

In contrast to a status offense, under a purely recidivist statute, if a conviction was valid at the time of the commission of a subsequent offense but was later invalidated prior to adjudication of the subsequent offense, the defendant's conviction for that subsequent offense may not be based on the vacated conviction. See Shimabukuro, 100 Hawai'i at 330-32, 60 P.3d at 280-82 (Levinson, J., concurring) (reasoning that, inasmuch as at the time of adjudication of the habitual DUI offense at issue, one of the defendant's prior DUI convictions had been vacated, he could therefore not be convicted of habitual drunk driving -- as to which three prior convictions was a requisite attendant circumstance -- because, in light of the vacated conviction, at the time of adjudication he had been lawfully convicted of DUI only twice).[11]

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[10](...continued)
sentenced to an additional mandatory fine of $500 and an additional mandatory term of imprisonment of forty-eight hours; provided that the total term of imprisonment for a person convicted under this paragraph and paragraph (1), (2), or (3) shall not exceed thirty days.

In addition, HRS § 291E-61(c) was amended to add the underscored language:

> Notwithstanding any other law to the contrary, any:
> (1) Conviction under this section . . . :
> . . . .
> shall be considered a prior conviction for the purposes of imposing sentence under this section. Any judgment on a verdict or a finding of guilty, a plea of guilty or nolo contendere, or an adjudication in the case of a minor, that at the time of the offense has not been expunged by pardon, reversed, or set aside shall be deemed a prior conviction under this section.

[11] In fact, Justice Levinson's concurring opinion in Shimabukuro expressly distinguished the recidivist nature of the statute at issue, HRS (continued...)

In Veikoso, this court characterized the Shimabukuro analysis as follows:

> [c]entral to the judgment in Shimabukuro . . . was the fact that the defendant . . . had succeeded in having one of his prior convictions vacated by the rendering court prior to entering his . . . guilty plea. . . . A majority of this court agreed . . . that the vacated conviction could not be used to establish culpability . . . .

102 Hawai'i at 222, 74 P.3d at 578. We further reasoned in Veikoso that,

> [w]here a defendant succeeds in having a prior conviction expunged, reversed, or set aside, its use in connection with proceedings relating to subsequent offenses will be limited. Similarly, a defendant who succeeds in having prior convictions expunged, reversed, or set aside after they have been used to support guilt or enhance punishment in subsequent proceedings may have a basis for attacking that subsequent conviction or enhanced punishment.

Id. at 226-27, 74 P.3d at 582-83 (emphasis in original).[12] If a defendant who succeeds after sentencing in having a prior conviction expunged or vacated "may have a basis for attacking that subsequent conviction or enhanced punishment," id., it follows, a fortiori, that a defendant who, at sentencing, has, through direct appeal, succeeded in having a prior conviction

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[11](...continued)
§ 291-4.4, see infra note 14, from a status offense, such as the one set forth in HRS § 134-7, see supra note 8, and analyzed in Lobendahn. See Shimabukuro, 100 Hawai'i at 330 n.3, 60 P.3d at 280 n.3.

[12] This conclusion is supported by Hahn, 618 N.W.2d 528, upon which this court relied in part in Veikoso: in Hahn, the Wisconsin Supreme Court reasoned that "'[i]f the offender succeeds [in challenging the validity of a prior conviction in an appropriate forum], the offender may seek to reopen a sentence imposed as a persistent repeater under [the Wisconsin recidivist statute] if that sentence was based on a vacated conviction.'" 102 Hawai'i at 227, 74 P.3d at 583 (quoting Hahn, 618 N.W.2d at 535).

vacated as constitutionally defective, has grounds for opposing an enhanced sentence based upon that invalid conviction.

3. HRS § 291E-61 (Supp. 2001), a recidivist statute, required that any necessary prior convictions be valid at the time of adjudication and sentencing, but the 2003 amendments transformed HRS § 291E-61(b)(1) to (3) into status offenses.

HRS § 291E-61 (Supp. 2001), see supra note 10, "created an escalating sentencing scheme keyed to the defendant's degree of recidivism," Shimabukuro, 100 Hawai'i at 330, 60 P.3d at 280 (Levinson, J., concurring), and was devoid of language indicating, for purposes of sentencing, that any prior conviction upon which the sentence was premised need only be valid at the time of the commission of the subsequent offense. Therefore, consistent with Shimabukuro and Veikoso, pursuant to HRS § 291E-61(b) (Supp. 2001), any prior convictions to which a defendant's punishment was pegged would necessarily have had to be viable at the time of adjudication and sentencing.

In 2003, however, the legislature manifested a clear intent to transform HRS § 291E-61(b)(1) to (3) into three separate status offenses by adding the following language to HRS § 291E-61(c): "Any judgment on a verdict or a finding of guilty . . . that at the time of the offense has not been expunged by pardon, reversed, or set aside shall be deemed a prior conviction under this section." (Emphasis added.)

The conclusion that the legislature intended that HRS § 291E-61(b)(1) to (3) be treated as status offenses is reinforced by the legislative history surrounding the creation, through the same legislation, of the separate offense of habitual

intoxicated driving: As part of the 2003 amendments, the legislature excised the class C felony for four convictions within ten years set forth in HRS § 291E-61(b)(4), see supra note 10, and renumbered it as a wholly separate offense, entitled "Habitually operating a vehicle under the influence of an intoxicant," codified at HRS § 291E-61.5.[13] The Senate expressly

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[13] HRS § 291E-61.5 (Supp. 2003) provided in pertinent part that:

> (a) A person commits the offense of habitually operating a vehicle under the influence of an intoxicant if:
> (1) The person is a habitual operator of a vehicle while under the influence of an intoxicant; and
> (2) The person operates or assumes actual physical control of a vehicle:
> (A) 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;
> . . . .
> (b) For the purposes of this section:
> "Convicted three or more times for offenses of operating a vehicle under the influence" means that, at the time of the behavior for which the person is charged under this section, the person had three or more times within ten years of the instant offense:
> (1) A judgment on a verdict . . . for a violation of this section or [HRS §§] 291-4, 291-4.4, or 291-7 as those sections were in effect on December 31, 2001;
> . . . .
> that, at the time of the instant offense, had not been expunged by pardon, reversed, or set aside. All convictions that have been expunged by pardon, reversed, or set aside prior to the instant offense shall not be deemed prior convictions for the purposes of proving the person's status as a habitual operator of a vehicle while under the influence of an intoxicant.
> A person has the status of a "habitual operator of a vehicle while under the influence of an intoxicant" if the person has been convicted three or more times within ten years of the instant offense, for offenses of operating a vehicle under the influence of an intoxicant.
> (c) Habitually operating a vehicle while under the influence of an intoxicant is a class C felony.
> . . . .

(Emphases added.) Effective September 1, 2004, the legislature added "; or [HRS §§] 291E-61 or 707-702.5" to HRS § 291E-61.5(b)(1) to bring it into

(continued...)

indicated that it was creating a status offense in HRS § 291E-61.5: the Senate Committee on Transportation, Military Affairs, and Government Operations explained that it "amended the provisions of the habitual drunk driver offense so that it is clearly a status offense." Sen. Stand. Comm. Rep. No. 1185, in 2003 Senate Journal, at 1523. The Senate Committee on the Judiciary and Hawaiian Affairs further noted that it found

> that being punished as a status offender rather than receiving an enhanced sentence has distinct implications. Status offenders receive a specific punishment as long as the offender meets the criteria at the time the offender reoffends. The offender cannot defeat the charge by having a previous conviction reversed on a subsequent appeal. By contrast, enhanced sentences can be avoided if any prior convictions that are the basis for an enhanced sentence are overturned.
>
> Your Committee believes it is important that the habitually impaired driver understand that he or she will be charged with a felony for any further impaired driving arrests, even if one of [the driver's] prior convictions is reversed after their arrest.

Sen. Stand. Comm. Rep. No. 1268, in 2003 Senate Journal, at 1564. In order to effectuate its intent, the legislature included the following language in HRS § 291E-61.5(b):

> For the purposes of this section:
>
> "Convicted three or more times . . . " means that, at the time of the behavior for which the person is charged under this section, the person had three or more times within ten years of the instant offense . . . [a] judgment . . . that, at the time of the instant offense, had not been expunged by pardon, reversed or set aside.

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[13](...continued)
uniformity with HRS § 291E-61.5(b)(2) and (3) and further amended the section in respects immaterial to the present matter. See 2004 Haw. Sess. L. Act 90, §§ 13 and 17 at 362-64. Effective July 5, 2005, the legislature amended HRS § 291E-61.5 again, in respects immaterial to the present matter. See 2005 Haw. Sess. L. Act 194, §§ 2 and 5 at 609-10.

(Emphases added.) This language strongly resembles the amended language of HRS § 291E-61(c), see supra note 10 ("Any judgment on a verdict or a finding of guilty . . . that at the time of the offense has not been expunged by pardon, reversed, or set aside shall be deemed a prior conviction under this section."). Both the plain language of and the legislative history surrounding the 2003 amendments, accordingly, reflect a clear legislative intent that HRS § 291E-61(b)(1) to (3) be treated as separate status offenses. We therefore hold that the 2003 amendments to HRS § 291E-61 transformed HRS § 291E-61(b)(1) to (3) into status offenses.

4. The amendments to HRS § 291E-61 do not alter this court's conclusion in *State v. Domingues* that HRS § 291E-61(b)(1) to (4) describe intrinsic elements that the prosecution is required to plead and prove beyond a reasonable doubt.

Effective January 1, 2002, the legislature repealed an earlier DUI law, HRS § 291-4.4 (Supp. 2000),[14] and enacted HRS § 291E-61 (Supp. 2001), see supra note 10. See 2000 Haw. Sess. L. Act 189, §§ 21, 23, 32, and 41 at 405-06, 425-27, 432-33.[15]

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[14] HRS § 291-4.4 provided in pertinent part:

> (a) A person commits the offense of habitually driving under the influence of intoxicating liquor . . . if, during a ten-year period[,] the person has been convicted three or more times for a driving under the influence offense; and
>
> (1) The person operates or assumes actual physical control of the operation of any vehicle while under the influence of an intoxicating liquor . . . ;
>
> . . . .
>
> (c) Habitually driving under the influence of intoxicating liquor . . . is a class C felony. . . . .

[15] While both the 2000 and the 2001 HRS Cumulative Supplements contain the language of HRS § 291E-61, the revisor of statutes evidently failed to include a notation that the statute did not become effective until

(continued...)

In State v. Dominques, 106 Hawai'i 480, 107 P.3d 409, (2005), this court confronted the question whether HRS § 291E-61 (Supp. 2001) was a substantial reenactment of HRS § 291-4.4. In Dominques, the defendant had been arrested in August 2001 for violating HRS § 291-4.4, in effect at the time, but was subsequently indicted in March 2002 under the same law, three months after its repeal. 106 Hawai'i at 482-83, 107 P.3d at 411-12. This court analyzed the structure and purpose of the two statutes and held that the legislature had substantially reenacted HRS § 291-4.4 as HRS § 291E-61. Id. at 482, 107 P.3d at 411. In reaching that holding, this court concluded that the language of HRS § 291E-61(b)(1) to (4), see supra note 10, "describes attendant circumstances that are intrinsic to and 'enmeshed' in the hierarchy of offenses that HRS § 291E-61 as a whole describes." Id. at 487, 107 P.3d at 416 (citing HRS § 702-205 (1993) (defining elements of an offense)). This court thereby concluded that, as attendant circumstances and, therefore, essential elements of the offense intrinsic to the commission of the crime charged, "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.'" Id. at 487-88,

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[15](...continued)
January 1, 2002. Compare 2000 Haw. Sess. L. Act 189, §§ 23 and 41 at 425-27 and 433; 2001 Haw. Sess. L. Act 157, §§ 25 and 39 at 397-98, 404 with HRS 2000 Cumulative Supplement vol. 5 at 210-12; HRS 2001 Cumulative Supplement vol. 5 at 198-200.

107 P.3d at 416-17 (quoting Schroeder, 76 Hawai'i at 528, 880 P.2d at 203). That was required, we concluded, because

> ["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 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.["]

Id. at 488, 107 P.3d at 417 (quoting State v. Tafoya, 91 Hawai'i 261, 270, 273, 982 P.2d 890, 899, 902 (1999)) (emphases omitted).

The language of HRS § 291E-61(b)(1) to (3) remains unchanged by the 2003 amendments and, while the legislature, as noted supra in section III.C.3, excised the class C felony from HRS § 291E-61(b)(4), it inserted a new aggravating factor into § 291E-61(b)(4), imposing additional punishments beyond those provided for in HRS § 291E-61(b)(1) to (3), for any adult convicted of operating a vehicle while under the influence and with a passenger under the age of fifteen years in or on the vehicle, see supra note 10. The Domingues analysis, therefore, retains its vitality, inasmuch as considerations of due process continue to require that the aggravating factors set forth in HRS

§ 291E-61(b)[16] -- all of which remain "attendant circumstances that are intrinsic to and 'enmeshed' in the hierarchy of offenses that HRS § 291E-61 as a whole describes," Domingues, 106 Hawai'i at 487, 107 P.3d at 416 -- be alleged in the charging instrument and proven beyond a reasonable doubt at trial.

5. The district court plainly erred in convicting Ruggiero as a second time DUI offender pursuant to HRS § 291E-61(a) and (b)(2).

This court's holding in Tafoya requires that the essential elements of any offense be alleged in the complaint and found beyond a reasonable doubt by the trier of fact. 91 Hawai'i at 270, 273, 982 P.2d at 899, 902; see also Schroeder, 76 Hawai'i at 528, 880 P.2d at 203. Inasmuch as we conclude, supra, that a prior conviction, as described in HRS § 291E-61(b)(2) (Supp. 2003), is an elemental attendant circumstance, intrinsic to the offense of operating a vehicle under the influence of an intoxicant, it was necessary that Ruggiero's prior conviction be alleged in the charging instrument and proven at trial as

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[16] The holding in Domingues was based in part on the concern that due process required that the defendant be put on notice that, under HRS § 291E-61(b)(4), he or she was charged with a class C felony rather than the petty misdemeanors set forth in HRS § 291E-61(b)(1) to (3). See 106 Hawai'i at 487 & n.8, 107 P.3d at 416 & n.8 (noting that "[i]t 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'" and observing that the inclusion of a class C felony alongside three petty misdemeanors generated the conundrum that a defendant would be insufficiently put on notice of the right to a jury trial absent the requirement that the elements of HRS § 291E-61(b) be included in an indictment or complaint) (quoting 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))). In the amended version of HRS § 291E-61(b)(4), see supra note 10, due process would similarly require the prosecution to allege in the charging instrument and prove at trial that a passenger under the age of fifteen was in or on the defendant's vehicle at the time of the arrest. See Tafoya, 91 Hawai'i at 270, 273, 982 P.2d at 899, 902; Schroeder, 76 Hawai'i at 528, 880 P.2d at 203.

preconditions to his present conviction of operating a vehicle under the influence of an intoxicant for the second time within five years, in violation of HRS § 291E-61(a) and (b)(2).

The complaint charging Ruggiero with a violation of HRS § 291E-61 was silent with respect to the attendant circumstance of any prior conviction, see supra note 3, and, therefore, was insufficient as a matter of law in charging a violation of HRS § 291E-61(a) and (b)(2), because

> [i]t is well settled that an "accusation must sufficiently allege all of the essential elements of the offense charged," a requirement that "obtains whether an accusation is in the nature of an oral charge, information, indictment, or complaint[.]" State v. Jendrusch, 58 Haw. 279, 281, 567 P.2d 1242, 1244 (1977)[; accord . . . Israel, 78 Hawai'i [at] 69-70, 890 P.2d [at] 306-07 . . . ; . . . Elliott, 77 Hawai'i [at] 311, 884 P.2d [at] 374 . . . . Put differently, the sufficiency of the charging instrument is measured, inter alia, by "whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he [or she] must be prepared to meet[.]" State v. Wells, 78 Hawai'i 373, 379-80, 894 P.2d 70, 76-77 (1995) (citations and internal quotation marks omitted) (brackets in original). "A charge defective in this regard amounts to a failure to state an offense, and a conviction based upon it cannot be sustained, for that would constitute a denial of due process." Jendrusch, 58 Haw. at 281, 567 P.2d at 1244 (citations omitted).

Cummings, 101 Hawai'i at 142, 63 P.3d at 1112 (some bracketed material added and some in original) (quoting State v. Merino, 81 Hawai'i 198, 212, 915 P.2d 672, 686 (1996)).

For

> [j]ust as the [S]tate must prove beyond a reasonable doubt all of the essential elements of the offense charged, the State is also required to sufficiently allege them and that requirement is not satisfied by the fact that the accused actually knew them and was not misled by the failure to sufficiently allege all of them.

Israel, 78 Hawai'i at 73, 890 P.2d at 310 (brackets in original) (quoting State v. Tuua, 3 Haw. App. 287, 293, 649 P.2d 1180, 1184-85 (1982)).

In State v. Motta, 66 Haw. 89, 657 P.2d 1019 (1983), we adopted a "standard for post-conviction challenges to indictments [that] means we will not reverse a conviction based upon a defective indictment unless the defendant can show prejudice or that the indictment cannot within reason be construed to charge a crime." Id. at 92, 657 P.2d at 1020. But Ruggiero does not "challenge" the sufficiency of the complaint against him on appeal; rather he challenges only his sentence as a second-time offender. Therefore, any review of the sufficiency of the complaint under the Motta standard has to be undertaken on the basis of plain error.

> "We may recognize plain error when the error committed affects substantial rights of the defendant." State v. Cullen, 86 Hawai'i 1, 8, 946 P.2d 955, 962 (1997) (citations and internal quotation signals omitted)[; s]ee also Hawai'i Rules of Penal Procedure (HRPP) Rule 52(b) . . . ("Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").
>
> State v. Staley, 91 Hawai'i 275, 282, 982 P.2d 904, 911 (1999) (quoting [State v. ]Maumalanga, 90 Hawai'i [58,] 63, 976 P.2d [372,] 377 [(1998)], (quoting [State v.] Davia, 87 Hawai'i [249,] 253, 953 P.2d [1347,] 1351[ (1998)]).

Jenkins, 93 Hawai'i at 101, 997 P.2d at 27.

Ruggiero does not claim that the complaint "prejudiced" him; rather, he filed his appeal solely to reduce his sentence to that of a first-time offender. While the complaint -- by omitting any mention of a prior DUI conviction -- substantially

prejudiced him with regard to defending against a DUI charge as a second-time offender, cf. State v. Kekuewa, 112 Hawai'i 269, 145 P.3d 812 (App. 2006),[17] Ruggiero concedes that he is subject to sentencing under HRS § 291E-61(b)(1) as a first-time offender.

Moreover, on its face, the complaint can reasonably be construed to charge the crime of DUI as a first offense, in violation of HRS § 291E-61(a) and (b)(1). It plainly states the elements set forth in HRS § 291E-61(a) ("operates or assumes actual physical control of a vehicle") and -61(a)(1) ("[w]hile 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"). See supra note 3. While the complaint is silent as to the lack of prior DUI convictions, given the unique nature of the element -- the presence of an empty set, that is, the absence of any prior convictions[18] -- silence with respect to prior violations can only betoken that their absence, i.e., the import of HRS § 291E-61(b)(1), is

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[17] In Kekuewa, the defendant, convicted of DUI under the same statute at issue in the present matter, HRS § 291E-61 (Supp. 2003), had several prior DUI convictions. 112 Hawai'i at 277, 145 P.3d at 820. On appeal, he contended that the oral accusation was insufficient because, while it stated the present charge was his second offense, it omitted to specify whether the prosecution was relying on a prior offense within the preceding five years, as required by the plain language of HRS § 291E-61(b)(2), see supra note 10. Id. at 270-71, 145 P.3d at 813-14. The Intermediate Court of Appeals concluded that, in light of his multiple prior convictions, the defendant's due process right to notice of the elements of the charge against him was violated by the prosecution's failure specifically to allege a prior conviction that had occurred within the previous five years. Id. By contrast, Ruggiero evinces no prejudice from a complaint that on its face makes it clear that prior convictions will not be relied upon in seeking a conviction or sentencing terms.

[18] Indeed, we are hard pressed to imagine another instance where, in the charging instrument, silence as to a material element leaves no doubt as to the nature of the offense charged, rendering the element set forth in HRS § 291E-61(b)(1) possibly sui generis.

implicit in the charge.[19] Ruggiero himself impliedly acknowledges that the complaint was sufficient to charge DUI as a first-time offense when he concedes that he is subject to sentencing as a first time offender under HRS § 291E-61(b)(1). And while, in light of Ruggiero's January 29, 2003 DUI conviction, it was within the discretion of the prosecution to pursue a sufficiently articulated charge of DUI as a second-time status offender, it would also have fallen within the prosecution's discretion to charge the lesser included offense of DUI as a first-time offender. See State v. Holbron, 80 Hawai'i 27, 44, 904 P.2d 912, 929 (1995) ("Within constitutional limits, it is always the prosecution's prerogative to undercharge any offense for whatever reason it deems appropriate . . . ." (Emphasis in original.)); State v. Mendonca, 68 Haw. 280, 283, 711 P.2d 731, 734 (1985) (holding that the prosecution has "the discretion to decide which statutory subsection to charge the accused with"); Territory v.

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[19] We emphasize, contrary to Justice Nakayama's suggestion, concurring and dissenting opinion at 3, that, because the attendant circumstance of no prior convictions within the five preceding years, as set forth in HRS § 291E-61(b)(1), is elemental, it should be alleged in the charge and proved at trial. We also disagree with Justice Nakayama's assertion, see id. at 2, that the prosecution's burden of proof on the issue at trial results in an absurdity; as a practical matter, any attempt by the defendant to establish, as a "defense," that he or she did, in fact, have prior convictions would be self-defeating insofar as a violation of HRS § 291E-61(a) with no priors is a lesser included offense of the same violation with priors and, therefore, any such assertion would be a de facto admission of guilt of the lesser included offense. See State v. Burdett, 70 Haw. 85, 88, 762 P.2d 164, 166 (1988) ("[A] lesser . . . offense is necessarily included in a charge of the greater if the proof necessary to establish the greater offense will of necessity establish the lesser offense.") (internal quotation marks omitted); State v. Feliciano, 62 Haw. 637, 639, 618 P.2d 306, 308 (1980) (citing Olais-Castro v. United States, 416 F.2d 1155, 1157 (9th Cir. 1969)) ("Simply put, an offense is included if it is impossible to commit the greater offense without also committing the lesser."); HRS § 701-109(4)(c) (1993) (a lesser included offense "differs from the [greater] offense . . . only in the respect that a less serious injury . . . to the same . . . public interest . . . suffices to establish its commission.").

Ouye, 37 Haw. 176, 181 (1945) (noting that the prosecution had the discretion to select which charge upon which it wished to proceed).

Inasmuch as Ruggiero suffered no substantial prejudice from the complaint in defending against a DUI charge as a first-time offender, and the circuit court made the appropriate findings and conclusions to convict Ruggiero of DUI as a first-time offender, we remand the case to the district court for the entry of judgment of conviction of that offense. See Elliott, 77 Hawai'i at 313, 884 P.2d at 376.

## IV. CONCLUSION

Insofar as (1) the complaint was insufficient to support a conviction of, and sentence for, operating a vehicle under the influence of an intoxicant as a second offense within five years and (2) the district court therefore plainly erred in entering its judgment of conviction and sentence on that count, we vacate the district court's September 30, 2004 judgment and sentence as it pertains to the violation of HRS § 291E-61. However, insofar as the complaint was sufficient to support a conviction and sentence as a first-time violator of HRS § 291E-61(a) and (b)(1), we remand this matter to the district court for the entry of a judgment of conviction for operating a vehicle under the influence of an intoxicant with no prior

offenses, in violation of HRS § 291E-61(a) and (b)(1), and for resentencing in accordance therewith. We affirm the district court's judgment in all other respects.[20]

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[20] Inasmuch as our disposition of the matter does not rely on Ruggiero's January 29, 2003 conviction vacated by this court, we need not reach Ruggiero's double jeopardy arguments pertaining to that conviction.