CONCURRING OPINION BY NAKAMURA, C.J.

I concur with the result reached by the majority. I write separately, however, to express my view on the question of whether a defendant's prior methamphetamine trafficking convictions are an element of the first-degree methamphetamine trafficking offense for the jury to decide at trial, or a sentencing enhancement factor for the judge to decide at sentencing.

The Circuit Court permitted evidence of the defendant's prior felony conviction to be presented to the jury based on its view that such evidence was necessary to prove the charged methamphetamine trafficking offense. In affirming the Circuit Court, the majority necessarily agrees with the Circuit Court's interpretation of Hawaii Revised Statutes (HRS) § 712-1240.7 (2014) as making a defendant's prior methamphetamine trafficking convictions an element of the first-degree methamphetamine trafficking offense. I concur in the majority's decision on this issue because I believe it is dictated by precedents of the Hawaiʻi Supreme Court. However, if writing on a clean slate, I would hold that a defendant's prior methamphetamine trafficking convictions are not an element of the offense for the jury, but are a sentencing enhancement factor for the judge to decide. I believe that the supreme court should revisit its precedents because, in my view, the cases were incorrectly decided and have led to unintended and unsatisfactory consequences.

I.

A.

Defendant-Appellant John Albert Wagner, Jr. (Wagner) was charged in Count 1 of the second amended complaint with first-degree methamphetamine trafficking, in violation of HRS § 712-1240.7(1)(a), for possession of one ounce or more of substances containing methamphetamine. First-degree methamphetamine trafficking is a class A felony that carries a maximum penalty of twenty years of imprisonment. The first-degree methamphetamine trafficking statute also imposes a mandatory minimum imprisonment term of between two years and

eight years for a first offense, and it imposes higher mandatory minimum terms for defendants with prior methamphetamine trafficking convictions.

HRS § 712-1240.7 provides:

> (1) A person commits the offense of methamphetamine trafficking in the first degree if the person knowingly:
>
> (a) Possesses one or more preparations, compounds, mixtures, or substances of an aggregate weight of one ounce or more containing methamphetamine or any of its salts, isomers, and salts of isomers;
>
> (b) Distributes one or more preparations, compounds, mixtures, or substances of an aggregate weight of one-eighth ounce or more containing methamphetamine or any of its salts, isomers, and salts of isomers;
>
> (c) Distributes methamphetamine in any amount to a minor; or
>
> (d) Manufactures methamphetamine in any amount.
>
> (2) Methamphetamine trafficking in the first degree is a class A felony for which the defendant shall be sentenced as provided in subsection (3).
>
> (3) Notwithstanding sections 706-620(2), 706-640, 706-641, 706-659, 706-669, and any other law to the contrary, a person convicted of methamphetamine trafficking in the first degree shall be sentenced to an indeterminate term of imprisonment of twenty years with a mandatory minimum term of imprisonment of not less than two years and not greater than eight years and a fine not to exceed $20,000,000; provided that:
>
> (a) If the person has one prior conviction for methamphetamine trafficking pursuant to this section or section 712-1240.8, the mandatory minimum term of imprisonment shall be not less than six years, eight months and not greater than thirteen years, four months;
>
> (b) If the person has two prior convictions for methamphetamine trafficking pursuant to this section or section 712-1240.8, the mandatory minimum term of imprisonment shall be not less than thirteen years, four months and not greater than twenty years; or
>
> (c) If the person has three or more prior convictions for methamphetamine trafficking pursuant to this section or section 712-1240.8, the mandatory minimum term of imprisonment shall be twenty years.

(Emphases added.)

Wagner's second amended complaint alleged in Count 1 that he had one prior conviction for methamphetamine trafficking. Therefore, if the State proved both Wagner's alleged current methamphetamine trafficking violation and that he had a prior methamphetamine trafficking conviction, Wagner was subject to twenty years of incarceration and a mandatory minimum term of between six years, eight months and thirteen years, four months.

B.

In my view, given the plain language and structure of HRS § 712-1240.7, it should be interpreted as making a defendant's prior methamphetamine trafficking convictions a sentencing enhancement factor, and not an element of the offense. HRS § 712-1240.7(1), the portion of the statute that defines the methamphetamine trafficking offense, does not refer to a defendant's prior methamphetamine trafficking convictions. The references to a defendant's prior methamphetamine trafficking convictions only appear in the sentencing provisions of the statute, HRS § 712-1240.7(3). Under a plain reading of the statute, I believe that the Legislature did not intend a defendant's prior methamphetamine trafficking convictions to be an element of the offense, but instead intended that they be a factor that the trial judge must apply in imposing sentence, once the defendant is convicted of the offense described in HRS § 712-1240.7(1).

Construing a defendant's prior methamphetamine trafficking convictions as a sentencing factor for the judge to determine, and not an element of the offense for the jury to decide, would not contravene a defendant's constitutional jury-trial right. In Apprendi v. New Jersey, 530 U.S. 466 (2000), the United States Supreme Court held that "*[o]ther than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S.

at 490 (emphasis added).[1] Here, construing a defendant's prior methamphetamine trafficking convictions as a sentencing factor, consistent with the Legislature's apparent intent, would fall squarely within the exception in Apprendi for the fact of a prior conviction that need not be submitted to a jury.

Construing a defendant's prior methamphetamine trafficking convictions as a sentencing factor also serves to avoid the risk of unfair prejudice that may be created by the jury's knowledge that the defendant has previously been convicted of a crime. The risk of unfair prejudice is the reason why the rules of evidence restrict the circumstances in which a defendant's prior conviction can be admitted. Hawaiʻi Rules of Evidence (HRE) Rule 404(b) (Supp. 2014) provides that: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show he acted in conformity therewith." HRE Rule 609 (1993) provides that: "For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is inadmissible except where the crime is one involving dishonesty."

The risk of unfair prejudice is also why defense counsel generally fight so hard to keep evidence of a defendant's prior conviction from being revealed to the jury. Where a defendant's prior conviction is for the same crime as the one pending in a case, the risk of unfair prejudice becomes even more pronounced.

C.

There is no dispute that the Legislature has the power to make a defendant's prior conviction an element of an offense if it chooses to do so. Crimes making a prior conviction an

[1]In Alleyne v. United States, 133 S.Ct. 2151 (2013), the Court extended the general rule in Apprendi in holding that any fact that increases a mandatory minimum sentence for a crime is an element of the crime, not a sentencing factor, that must be submitted to the jury. Alleyne, 133 S.Ct. at 1255. However, Alleyne did not disturb the exception set forth in Apprendi for prior convictions. Id. at 2160 n.1.

element of the offense, such as those prohibiting felons from possessing firearms, have been on the books for a long time.

However, given the risk of unfair prejudice, I believe that when construing statutes that impose increased punishment for repeat offenders, courts should presume that the Legislature intended to make the prior conviction a sentencing factor and not an element of the offense, absent the Legislature's clearly expressed contrary intent. In other words, unless the Legislature's intent to make the prior conviction an element of the offense is clear, a defendant's prior conviction should be viewed as a sentencing factor for the judge (and not the jury) to decide.

II.

Precedents of the Hawaiʻi Supreme Court, however, have not reached this result. The supreme court has construed a defendant's prior conviction as an element of the offense, even where the language and structure of the statute indicate that the Legislature intended the prior conviction to be a sentencing enhancement factor. See State v. Domingues, 106 Hawaiʻi 480, 107 P.3d 409 (2005); State v. Kekuewa, 114 Hawaiʻi 411, 163 P.3d 1148 (2007) State v. Ruggiero, 114 Hawaiʻi 227, 160 P.3d 703 (2007); State v. Murray, 116 Hawaiʻi 3, 169 P.3d 955 (2007).

In this case, Wagner argued that his prior methamphetamine trafficking conviction was a sentencing factor, and not an element of the offense, and thus evidence of his prior conviction should not be presented to the jury. Relying on the supreme court's prior decisions in Ruggiero and Murray, the Circuit Court rejected Wagner's argument and ruled that Wagner's prior methamphetamine trafficking conviction was an element of the offense. The Circuit Court then relied on the procedures adopted by the supreme court in Murray to permit the State to present evidence of this "element" to the jury (without telling the jury of the name or specific nature of the prior conviction), which resulted in the jury being informed by stipulation that Wagner had a prior felony conviction.

III.

I will first discuss the Hawaiʻi Supreme Court's precedents, including the cases specifically relied upon by the Circuit Court. I will then explain why I believe these precedents should be revisited.

A.

I begin with State v. Domingues, 106 Hawaiʻi 480, 107 P.3d 409 (2005). The issue before the Hawaiʻi Supreme Court in Domingues was whether a newly enacted statute prohibiting the operation of a vehicle under the influence of an intoxicant (OVUII), HRS § 291E–61 (Supp. 2001), that took effect on January 1, 2002, was a substantial reenactment of the repealed HRS § 291-4.4 (Supp. 2000), which had previously prohibited habitually driving under the influence of intoxicating liquor or drugs. HRS § 291-4.4 had been repealed without a savings clause, and if HRS § 291E-61 was not a substantial reenactment of HRS § 291-4.4, the charge against Domingues for habitual driving under the influence of intoxicating liquor may have been subject to dismissal. See Domingues, 106 Hawaiʻi at 484-88, 107 P.3d at 413-17.

The repealed HRS § 291-4.4 specifically included the defendant's prior convictions as an element in the definition of the offense. 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
>
> (1) The person operates or assumes actual physical control of the operation of any vehicle while under the influence of intoxicating liquor, . . . ; [or]
>
> (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[.]

(Emphasis added.)

On the other hand, the newly enacted HRS § 291E–61 did not include the defendant's prior convictions in the portion of the statute defining the offense, but referred to the defendant's prior convictions in the portion of the statute discussing the sentence to be imposed. HRS § 291E-61(a) defined the OVUII offense in relevant part as follows:

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

HRS § 291E-61(b) then defined the sentences that shall be imposed on a person who committed the OVUII offense and provided for increased punishment for a defendant who had prior OVUII convictions:

> (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):
>
> [Punishment including attendance at a substance abuse rehabilitation program; license suspension; and 72 hours of community service, between two and five days of imprisonment, or a fine between $150 and $1,000]
>
> (2) For an offense that occurs within five years of a prior conviction for an offense under this section or section 291E–4(a):
>
> [Increased punishment over a first offense, including possible imprisonment of between five and fourteen days]
>
> (3) For an offense that occurs within five years of two prior convictions for offenses under this section or section 291E–4(a):
>
> [Increased punishment over one prior conviction, including mandatory imprisonment of between ten and thirty days]

> (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):
>
> [Increased punishment over two prior convictions]

(Emphases added.) HRS § 291E-61(b)(4) also provided that "[a]n offense under this paragraph is a class C felony."

Despite the different language and structure of HRS § 291-4.4 and HRS § 291E-61, the supreme court held that HRS § 291E-61 substantially reenacted HRS § 291-4.4. Domingues, 106 Hawaiʻi at 487-88, 107 P.3d at 416-17. The supreme court determined that HRS § 291E–61 was a "hierarchy" of separate offenses (three petty misdemeanors and one class C felony) and that qualifying prior convictions were an essential element of the offenses imposing enhanced penalties. Id. The supreme court concluded that the "prefatory language of HRS § 291E–61(b)(1) through 291E–61(b)(4)," which included language requiring qualifying prior convictions, "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 (citation omitted).

In support of its conclusion, the court noted that an offense under HRS § 291E–61(b)(4) (Supp. 2001) was a felony, which would entitle the defendant to a jury trial, "whereas the offenses described in HRS § 291E–61(b)(1) through (3) [(Supp.2001)] would appear to be petty misdemeanors, as to which no right to a jury trial would attach." Id. at 487 n.8, 107 P.3d at 416 n.8. The court explained:

> If the prefatory language of HRS §§ 291E–61(b)(1) through (b)(4) [(Supp.2001)] were mere 'sentencing factors' that the prosecution was not obliged to allege and prove to the trier of fact, . . . then defendants charged with HRS § 291E–61 [(Supp.2001)] 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.

Id.

B.

Two years after Domingues, the Hawaiʻi Supreme Court had the opportunity to address whether Domingues's analysis of HRS § 291E–61 (Supp. 2001) was still valid. In State v. Kekuewa, 114 Hawaiʻi 411, 163 P.3d 1148 (2007), the Hawaiʻi Supreme Court rejected the State's request that the court "overrule Domingues to the extent that it characterizes the provisions set forth in HRS § 291E–61(b)(1)–(4) (Supp. 2002) as attendant circumstances." Id. at 419, 163 P.3d at 1156.[2] The supreme court acknowledged that "a fair reading of HRS § 291E–61(b) (Supp. 2002) provides the initial impression that its contents describe sentencing factors, rather than attendant circumstances, given the fact that HRS § 291E–61(b) (Supp. 2002) is prefaced with language stating that 'a person committing the offense of operating a vehicle under the influence of an intoxicant shall be sentenced as follows[.]'" Id. at 420, 163 P.3d at 1157 (brackets in original). However, in support of its refusal to overturn Domingues, the court noted that Domingues "recognized that construing § 291E–61(b)(1)–(4) (Supp. 2002) as extrinsic sentencing factors[,]" rather than attendant circumstances elements that the prosecution was required to allege and prove to the trier of fact, "would have raised serious concerns regarding the statute's constitutionality, given a defendant's inability to ascertain the class and grade of the offense charged (i.e., a petty misdemeanor or a class C felony) and whether the right to a jury has or has not attached." Id. (emphasis added).

C.

In State v. Ruggiero, 114 Hawaiʻi 227, 160 P.3d 703 (2007), the Hawaiʻi Supreme Court considered whether the

[2]This difference between the "Supp. 2001" and "Supp. 2002" versions of HRS § 291E-61 was not material to the supreme court's analysis in Domingues and Kekuewa. The only difference between these versions of HRS § 291E-61 was that in the Supp. 2002 version, a $25 surcharge for the neurotrama special fund was added to the penalties set forth in HRS § 291E–61(b)(1) through (b)(4). See 2002 Haw. Sess. Laws Act 160, § 11 at 566–67.

Domingues analysis of HRS § 291E–61 retained its validity after the Hawaiʻi Legislature's amendment of HRS § 291E–61 in 2003. The 2003 amendments excised from HRS § 291E-61 the class C felony for a fourth OVUII offense within ten years previously set forth in HRS § 291E–61(b)(4) and created a separate offense of Habitual OVUII codified at HRS § 291E–61.5. See 2003 Haw. Sess. Laws Act 71, §§ 1 and 3 at 123–26. The supreme court also concluded that the 2003 amendments transformed the offenses under HRS § 291E-61(b)(1) to (3) into status offenses by adding language to subsection (c) providing that prior convictions used to enhance the defendant's punishment need only be valid at the time of the commission of the current pending offense. Ruggiero, 114 Hawaiʻi at 236-37, 160 P.3d at 712-13.

The supreme court declined to overrule its analysis in Domingues in light of the 2003 amendments and held:

> The Domingues analysis . . . retains its vitality, inasmuch as considerations of due process continue to require that the aggravating factors set forth in HRS § 291E–61(b) -- 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 Hawaiʻi at 487, 107 P.3d at 416 -- be alleged in the charging instrument and proven beyond a reasonable doubt at trial.

Ruggiero, 114 Hawaiʻi at 238, 160 P.3d at 714 (footnote omitted).

D.

In State v Murray, 116 Hawaiʻi 3, 169 P.3d 955 (2007), the supreme court extended its analysis in Domingues, Kekuewa, and Ruggeiro to the recidivist provisions of HRS § 709-906, the statute which defines the offense of abuse of family or household members. The supreme court construed HRS § 709–906 (Supp. 2004), which stated in pertinent part:

> (1) It shall be unlawful for any person, singly or in concert, to physically abuse a family or household member. . . .
>
> . . . .

> (5) Abuse of a family or household member and refusal to comply with the lawful order of a police officer under subsection (4) are misdemeanors and the person shall be sentenced as follows:
>
> (a) For the first offense the person shall serve a minimum jail sentence of forty-eight hours; and
>
> (b) For a second offense that occurs within one year of the first conviction, the person shall be termed a 'repeat offender' and serve a minimum jail sentence of thirty days.
>
> . . . .
>
> (7) For a third or any subsequent offense that occurs within two years of a second or subsequent conviction, the person shall be charged with a class C felony.

(Emphasis added.)

The supreme court held that whether Murray's violation of HRS § 709–906 was "a third or subsequent offense" was an attendant circumstances element of the class C felony offense. Id. at 8, 169 P.3d 955. Citing Domingues and Ruggiero, the supreme court noted that it had previously stated that "when 'the degree of punishment for a violation . . . escalates as a function of whether the violation' was committed within a certain number of years of a prior offense, such language 'describes attendant circumstances that are intrinsic to and enmeshed in the hierarchy of offenses that [the statute] as a whole describes.'" Id. (brackets in original) (quoting Domingues, 106 Hawaiʻi at 487, 107 P.3d at 416, and citing Ruggiero, 114 Hawaiʻi at 238, 160 P.3d at 714). In support of its holding that a defendant's prior abuse convictions were an element of the offense, the supreme court reasoned that the prior abuse convictions distinguished the felony offense of HRS § 709-906(7) from the misdemeanor offenses set forth in HRS § 709-906(5)(a) and (b). Id. The supreme court also reasoned that the Legislature's intent to impose greater punishment on repeat offenders supported the court's treatment of a defendant's prior abuse convictions as an element of the felony offense, rather than a sentencing enhancement. Id. at 8-9, 169 P.3d at 960-61.

While holding that a defendant's prior abuse convictions were an element of the felony abuse offense, the supreme court recognized the risk of unfair prejudice arising from the jury's knowledge that a defendant has a prior conviction, or in Murray's case, knowledge that he had two prior convictions for the same offense he was alleged to have committed in his pending case. Id. at 20-21, 169 P.3d at 972-73. To compensate for this risk, the supreme court adopted an extensive set of procedures. First, the court held that if a defendant decides to stipulate to the prior convictions, the trial court must accept the stipulation. Id. at 19, 169 P.3d at 971. Second, the trial court must engage the defendant in a colloquy to confirm that the defendant's stipulation is knowing and voluntary. Id. at 19-20, 169 P.3d 971-72. Third, even though HRS § 709-906 requires that the prior convictions be convictions for abuse of a family or household member, the defendant is allowed to stipulate to the fact of the required prior convictions, but the jury is not informed of the name or nature of the prior convictions. Id. at 21, 169 P.3d at 973. Instead, the jury shall be instructed that the defendant has stipulated to the prior conviction element of the charged offense, but "[t]he instruction must be carefully crafted to omit any reference to the 'name or nature' of the previous convictions." Id. Fourth, the trial court is required to give the jury a limiting instruction to "ensure that the prior convictions are not considered by the jury for any purpose other than conclusively establishing the 'prior conviction(s)' element." Id.

IV.

A.

In my view, these cases should be revisited. In Kekuewa, the supreme court acknowledged that "a fair reading of HRS § 291E–61(b)" indicated that its references to prior convictions describe sentencing factors, rather than an element of the offense. See Kekuewa, 114 Hawaiʻi at 420, 163 P.3d at 1157. The same is true of the references to a defendant's prior

convictions in HRS § 709-906, which was construed in Murray. Thus, in concluding that the defendant's prior convictions were an element of the offense, rather than a sentencing factor, the supreme court declined to apply one of the basic principles of statutory construction. See State v. Richie, 88 Hawaiʻi 19, 30, 960 P.2d 1227, 1238 (1998) ("It is a cardinal rule of statutory interpretation that, where the terms of a statute are plain, unambiguous and explicit, we are not at liberty to look beyond that language for a different meaning. Instead, our sole duty is to give effect to the statute's plain and obvious meaning." (internal quotation marks and citation omitted)); University of Hawaiʻi v. Befitel, 105 Hawaiʻi 485, 488, 100 P.3d 55, 58 (2004) ("When construing a statute, this court's 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." (internal quotation marks and citation omitted)).

The supreme court, however, justified its departure from the plain and fair reading of the statutes by citing constitutional concerns regarding notice to the defendant, and in particular, notice regarding whether the offense was a felony or misdemeanor and whether the defendant had a right to a jury trial. In my view, rather than departing from the plain meaning of the statutes, a better approach to addressing the concerns regarding notice would be to require the State to declare at the beginning of the case whether it will be seeking the enhancement for prior convictions. This would provide the defendant with notice of the potential penalties he or she is facing. It would also permit the trial court to determine: (1) whether a felony or misdemeanor is being alleged to ensure that the case is prosecuted in a court with the requisite jurisdiction;[3] and (2)

[3]Under HRS § 604-8 (Supp. 2014), the district court's criminal jurisdiction is limited to misdemeanor or lesser offenses. In addition, the district court loses jurisdiction over a case involving such offenses where a defendant who has the right to a jury trial timely demands a jury trial. HRS § 604-8.

whether the defendant is entitled to a jury trial. If the State fails to timely declare its intent to seek the enhancement, it would be barred from seeking the enhancement at sentencing. Indeed, the State could be required to give notice of its intent to seek an enhancement in the charging instrument -- the only difference from the current practice would be that the prior convictions would be proved at sentencing before a judge, and not proved to the jury at trial.

Given the exception in Apprendi for prior convictions, construing a defendant's prior convictions as a sentencing factor, rather than an element of the offense, would not violate a defendant's jury-trial right. Under the Apprendi exception, the fact of a prior conviction that is used to increase a defendant's punishment need not be submitted to the jury for its determination.

In Murray, the supreme court cited the Legislature's intent to increase punishment for recidivists as a basis for its analysis. However, in my view, this intent does not support making a defendant's prior convictions an element of the offense rather than a sentencing factor. Making a defendant's prior convictions a sentencing enhancement factor is fully consistent with the Legislature's intent to punish recidivists more harshly.

B.

In my view, construing statutes consistent with their plain reading and structure to make a defendant's prior convictions a sentencing factor, rather than an element of the offense, would eliminate the risk of unfair prejudice that may arise from the jury's learning that the defendant has one or more prior convictions. Pursuant to the exception for "the fact of a prior conviction" set forth in Apprendi, the jury need not determine, and thus need not hear evidence of, prior convictions that are sentencing factors which increase a defendant's punishment.

Treating the defendant's prior convictions as a sentencing factor, rather than an element of the offense, would

also avoid the need to engage in the extensive procedures set forth in Murray to compensate for and alleviate the risk of unfair prejudice. While the Murray procedures reduce the risk of unfair prejudice, the jury still hears that the defendant has one or more prior convictions. In addition, in my view, the Murray procedures are not intuitive and cannot be gleaned from a reading of the statute; therefore, they create potential traps for the unwary.

I also question the advisability of the some of the procedures adopted. If a defendant's prior convictions for abuse of a family or household member are indeed an element of the felony offense, I do not see how a stipulation to the fact of the required prior convictions, without the jury being informed of the name or nature of the prior convictions, is sufficient. As the trier of fact, the jury is required to determine all the essential elements of the offense beyond a reasonable doubt. I do not understand how a jury can determine that the defendant has two or more prior convictions for abuse of a family or household member if the stipulation conceals the name and nature of the prior convictions.[4] In seeking to avoid the risk of unfair prejudice, the procedures adopted in Murray, in my view, result in diminishing the role of the jury in our criminal justice system.[5]

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[4]In Murray, the Hawaiʻi Supreme Court relied in part on the analysis in Old Chief v. United States, 519 U.S. 172 (1997). However, Old Chief involved the federal felon-in-possession statute, which prohibits the possession of a firearm by anyone with a prior felony conviction. For the federal felon-in-possession offense, the specific name or nature of the prior conviction (other than its status as a felony) is not an element of the offense. Thus, any felony is sufficient to satisfy the prior-conviction element of the federal felon-in-possession offense, and the jury does not have to know or determine the specific type of crime of which the defendant was previously convicted. In contrast, where the statute specifies that the defendant's prior conviction must be for a particular type of offense to enhance the defendant's punishment, proof that the defendant had a prior conviction, without identifying the specific nature of the prior conviction, would not satisfy the requirements of the statute.

[5]I also disagree with the supreme court's imposition of a colloquy requirement in the circumstances presented by Murray and allowing a defendant

(continued...)

V.

Although I believe the supreme court should revisit its prior precedents, they establish binding authority and control the decision in this case. In State v. Bryan, 124 Hawaiʻi 404, 245 P.3d 477 (2011), this court applied the supreme court's precedents in holding that a defendant's prior convictions were an offense element, rather than a sentencing factor, for prosecutions under HRS § 291E-62. Bryan, 124 Hawaiʻi at 411-14, 124 Hawaiʻi at 484-87. Similarly, in this case, based on the supreme court's precedents, the Circuit Court did not err in treating Wagner's prior methamphetamine trafficking conviction as an element of the offense and in permitting the jury to be informed by stipulation that Wagner had a prior felony conviction.

[5](...continued)
to vacate his or her conviction if the colloquy requirement is not satisfied. The stipulation to a defendant's prior convictions permitted by Murray is for the benefit of the defendant; it provides the defendant with the chance to reduce the potential prejudice that would otherwise result from the prosecution proving the details of the defendant's prior convictions. To permit a defendant to overturn his or her conviction because the trial court failed to engage in a colloquy over a stipulation sought by, and for the benefit of, the defendant seems odd. At minimum, the defendant should be required to show that the defendant suffered some prejudice from the trial court's failure to engage in the required colloquy, such as there was some defect in or impediment to the prosecution's proof of the prior convictions. However, under the Murray analysis, the defendant would apparently be entitled to a new trial due to a deficient colloquy even though the stipulation was beneficial to the defendant and the prosecution would have been able to easily prove the prior convictions.

Stipulations regarding evidence are matters of trial strategy. In my view, imposing a colloquy requirement for essential-element stipulations injects the trial judge into matters of trial strategy and intrudes on the attorney-client relationship.