

CONCURRING AND DISSENTING OPINION BY NAKAMURA, C.J.

Under existing precedent of the Hawai'i Supreme Court, a criminal charge serves two primary, yet distinct, purposes: (1) establishing the court's jurisdiction over a case; and (2) ensuring that the defendant is informed of the nature and cause of the accusation. See State v. Tominiko, 126 Hawai'i 68, 85-86, 266 P.3d 1122, 1139-40 (2011) (Acoba, J., concurring and dissenting).¹ In this case, I believe the majority's analysis -- that information provided to a defendant outside of the charging instrument can be considered in determining the sufficiency of the charge -- is inconsistent with existing Hawai'i Supreme Court precedent which views the sufficiency of a charge as "jurisdictional."² Based on my understanding of this precedent, I must respectfully dissent, in part, to the majority's decision.

Although constrained by controlling Hawai'i precedent, as explained below, I believe that viewing the sufficiency of a charge as jurisdictional is incorrect and should be re-examined. Other courts, including the United States Supreme Court, have

¹ A third purpose for a criminal charge, to protect a person from being charged twice for the same offense in violation of the double jeopardy clause, see State v. Nesmith, 127 Hawai'i 48, 52, 276 P.3d 617, 621 (2012), is rarely in issue. Generally, there is sufficient information in a charge with respect to the date and circumstances of the alleged offense to identify the offense for purposes of the application of double jeopardy. In addition, if the charge is sufficient to inform the defendant of the nature and cause of the accusation, it will almost always provide sufficient detail to enable the defendant to plead former jeopardy and provide protection against double jeopardy. The purpose of a charge to protect against double jeopardy is not in issue in this case and will not be addressed in my analysis.

² See State v. Johnson, No. 28471, 2010 WL 1718802, at *1-2 (Hawai'i App. Apr. 29, 2010) (SDO) (Nakamura, C.J., concurring). There is a suggestion in Nesmith, a recent Hawai'i Supreme Court decision, that only deficiencies in a charge that are based on the failure to allege an element of the offense are jurisdictional, and that non-element deficiencies are not jurisdictional. Nesmith, 127 Hawai'i at 66, 276 P.3d at 635 (Acoba, J., concurring and dissenting) (reading the majority opinion as concluding "that a state of mind is a 'fact' that must be included in an HRS [(Hawaii Revised Statutes)] § 291E-61(a)(1) charge for due process purposes only, but not an element of HRS § 291E-61(a)(1) that must be included in the charge for purposes of jurisdiction." (brackets omitted)). My analysis in this opinion excludes and does not consider the exception suggested in Nesmith for non-element deficiencies to a charge.

eschewed this view. Furthermore, viewing the charge as jurisdictional can lead to anomalous results. Because jurisdictional challenges cannot be waived, at least on direct appeal,³ and do not require a showing of prejudice, a defendant can wait until after the conclusion of the trial proceedings to contest the sufficiency of the charge on appeal and can overturn a conviction, even if the deficiency in the charging language was not prejudicial and had no bearing on the defendant's conviction.

Nevertheless, the sufficiency of a charge is jurisdictional under controlling Hawai'i precedent. If the sufficiency of the charge is jurisdictional, then to serve that purpose, information outside of the charging instrument cannot properly be considered in determining whether the charge is sufficient, even under the liberal construction standard.

The majority cites Hawai'i Supreme Court decisions in which the court has held that information provided to a defendant prior to an objection to the charge may be considered in determining the sufficiency of the charge. E.g. State v. Treat, 67 Haw. 119, 120, 680 P.3d 250, 251 (1984); State v. Sprattling, 99 Hawai'i 312, 315-21, 55 P.3d 276, 279-85 (2002). These decisions, however, can be explained and distinguished as focusing on the purpose of a charge to inform the defendant of the nature and cause of the accusation (the "fair-notice purpose"), rather than the purpose of the charge to establish the court's jurisdiction over a case (the "jurisdictional purpose"). Information provided to a defendant outside the charging instrument would clearly be relevant to determining whether the defendant had fair notice of the accusation or was prejudiced by the alleged charging deficiency. On the other hand, such information would not be pertinent to, and would have no bearing

³ Because the question is not presented by this case, I do not consider whether a jurisdictional challenge to the sufficiency of a charge can be deemed waived if it is not raised until a collateral attack of a conviction, such as a petition pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 40 (2006). The interest in finality is stronger on collateral attack than on direct review.

on, whether the charging language was sufficient to establish the court's jurisdiction.

In State v. Tominiko, 126 Hawai'i 68, 266 P.3d 1122 (2011), the Hawai'i Supreme Court held that under the liberal construction standard, the deficiency of a charge for failing to allege an essential element can be cured by reading the charging instrument as a whole. Tominiko, 126 Hawai'i at 75-77, 266 P.3d at 1129-31. If the missing element is alleged in a companion count in the same charging instrument, the charges can be read together so that the otherwise deficient charge can be reasonably construed to charge a crime. Id. Based on Tominiko, I concur that the charges of Operating a Vehicle after License and Privilege have been Suspended or Revoked for Operating a Vehicle Under the Influence of an Intoxicant (OVLPSR-OVUII) in Case Nos. 2DTA-08-00722, 2DTC-08-011610, and 2DTC-09-009261, which are all coupled with companion counts in the same charging instrument that allege the missing public-road element, can be reasonably construed to charge a crime and are not deficient. Id.; State v. Bryan, 124 Hawai'i 404, 408-11, 245 P.3d 477, 481-84 (App. 2010). Accordingly, I agree with the majority that the judgments on these charges should be affirmed.

However, with respect to the charge of Operating a Vehicle Under the Influence of an Intoxicant (OVUII) in Case No. 2DTA-08-01628, there is no companion count in the charging instrument that alleges the missing public-road element. Because under controlling Hawai'i precedent, I do not believe that information outside of the charging instrument can be considered in determining whether the jurisdictional purpose of the charge has been satisfied, I would vacate the OVUII conviction in Case No. 2DTA-08-01628 and remand the case with instructions to dismiss the OVUII charge without prejudice. With respect to the charge of Driving Without a License (DWOL) in Case No. 2DTA-08-01628, I conclude that the licencing exemptions referred to in the offense statute are not elements of the DWOL offense. Thus, I concur in the majority's decision to the affirm the conviction

on that charge, albeit for a different reason than identified by the majority.

I.

The criminal process begins when the defendant is charged with a criminal offense. Sprattling, 99 Hawai'i at 317, 55 P.3d at 282. "The purpose of this process is to 'sufficiently apprise the defendant of what he or she must be prepared to meet.'" Id. at 317-18, 55 P.3d at 281-82 (brackets and citation omitted).

The fair-notice purpose of a charge is based on the requirements of the Hawai'i Constitution. Article I, section 14 of the Hawai'i Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation[.]" The fair-notice purpose is also tied to the defendant's due process rights under Article I, section 5, which provides: "No person shall be deprived of life, liberty or property without due process of law[.]" See Nesmith, 127 Hawai'i at 52, 276 P.3d at 621; Sprattling, 99 Hawai'i at 318, 55 P.3d at 282 ("[T]he principle of fundamental fairness, essential to the concept of due process of law, dictates that the defendant in a criminal action should not be relegated to a position from which he or she must speculate as to what crime he or she will have to meet in defense." (internal quotation marks, citation, and brackets omitted)).

The jurisdictional purpose of a charge is not based on a constitutional provision, but is derived from case law. In State v. Cummings, 101 Hawai'i 139, 142, 63 P.3d 1109, 1112 (2003), the Hawai'i Supreme Court concluded that "an oral charge, complaint, or indictment that does not state an offense contains within it a substantive jurisdictional defect, rather than simply a defect in form, which renders any subsequent trial, judgment of conviction, or sentence a nullity."

The characterization of the sufficiency of a charge as "jurisdictional" has several significant consequences. While

constitutional requirements can be waived, jurisdiction is not subject to waiver, at least on direct appeal. In addition, while a constitutional violation can be overcome by a showing that no prejudice resulted, the lack of jurisdiction is not subject to harmless error analysis.⁴

The United States Supreme Court discussed the effect of characterizing a rule as jurisdictional, in the context of a civil claim for veterans' benefits, that is also applicable to criminal cases:

Branding a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system. Under that system, courts are generally limited to addressing the claims and arguments advanced by the parties. See Sanchez-Llamas v. Oregon, 548 U.S. 331, 356-357, 126 S. Ct. 2669, 165 L.Ed.2d 557 (2006). Courts do not usually raise claims or arguments on their own. But federal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press. See Arbaugh, supra, at 514, 126 S. Ct. 1235.

Jurisdictional rules may also result in the waste of judicial resources and may unfairly prejudice litigants. For purposes of efficiency and fairness, our legal system is replete with rules requiring that certain matters be raised at particular times. See Sanchez-Llamas, supra, at 356-357, 126 S. Ct. 2669. Objections to subject-matter jurisdiction, however, may be raised at any time. Thus, a party, after losing at trial, may move to dismiss the case because the trial court lacked subject-matter jurisdiction. Arbaugh, 546 U.S., at 508, 126 S. Ct. 1235. Indeed, a party may raise such an objection even if the party had previously acknowledged the trial court's jurisdiction. Ibid. And if the trial court lacked jurisdiction, many months of work on the part of the attorneys and the court may be wasted.

Because the consequences that attach to the jurisdictional label may be so drastic, we have tried in recent cases to bring some discipline to the use of this term. We have urged that a rule should not be referred to as jurisdictional unless it governs a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction. Reed Elsevier, supra, at ---, 130 S. Ct., at 1243-1244; Kontrick, supra, at 455, 124 S. Ct. 906. Other

⁴ In Cummings, the Hawai'i Supreme Court stated that "a defect in a complaint is not one of mere form, which is waivable, nor simply one of notice, which may be deemed harmless if a defendant was actually aware of the nature of the accusation against him or her, but, rather, is one of substantive subject matter jurisdiction, which may not be waived or dispensed with, and that is *per se* prejudicial." Cummings, 101 Hawai'i at 143, 63 P.3d at 1113 (internal quotation marks and citations omitted).

rules, even if important and mandatory, we have said, should not be given the jurisdictional brand. See Union Pacific, 558 U.S., at ----, 130 S. Ct., at 596.

Henderson ex. rel. Henderson v. Shinseki, 131 S. Ct. 1197, 1202-03 (2011).

The characterization of the sufficiency of a charge as jurisdictional permits a defendant to raise a challenge to the sufficiency of the charge for the first time on appeal and to overturn a conviction despite the absence of any prejudice from the deficiency in the charge. This result would not be possible if the sufficiency of the charge were not deemed jurisdictional, and it could not be justified by a charge's fair-notice purpose.

II.

Other courts, including the United States Supreme Court, have held that the sufficiency of a charge is not jurisdictional and that defects in a charge do not deprive a court of jurisdiction. In doing so, the courts have re-examined and overruled their prior precedents holding that the sufficiency of a charge was jurisdictional.

A.

In its 2002 decision in United States v. Cotton, 535 U.S. 625 (2002), the United States Supreme Court explicitly overruled its century-old holding in Ex parte Bain, 121 U.S. 1 (1887), that a defective indictment deprives a court of jurisdiction. Cotton, 535 U.S. at 631. The Court explained that Bain was "a product of an era in which [the] Court's authority to review criminal convictions was greatly circumscribed. Id. at 629. When Bain was decided, a defendant could not obtain direct review of a criminal conviction in the Supreme Court, and the Supreme Court could only issue a writ of habeas corpus if the convicting court had no jurisdiction to render the judgment of conviction. Id. at 629-30. Thus, at that time, the Court could not review constitutional errors in a criminal trial except on a writ of habeas corpus, and only then if it deemed the error to be "jurisdictional." Id. at 630. The Court stated that its "desire to correct obvious constitutional violations led to a somewhat

expansive notion of jurisdiction, which was more a fiction than anything else." Id. (internal quotation marks and citations omitted).

The Court noted that post-Bain cases had cast doubt on Bain's "elastic concept of jurisdiction" and had "confirm[ed] that defects in an indictment do not deprive a court of its power to adjudicate a case." Id. at 630. The Court cited Justice Holmes's explanation that "a district court 'has jurisdiction of all crimes cognizable under the authority of the United States and the objection that the indictment does not charge a crime against the United States goes only to the merits of the case.'" Id. at 630-31 (ellipsis points, brackets, and citation omitted). The Court also cited its prior holding in United States v. Williams, 341 U.S. 58, 66 (1951), that "a ruling 'that the indictment is defective does not affect the jurisdiction of the trial court to determine the case presented by the indictment.'" Cotton, 535 U.S. at 631.

B.

In State v. Parkhurst, 845 S.W.2d 31 (Mo. 1993), the Missouri Supreme Court overruled what it described as "the confusing statement of law found in a number of cases that if an indictment is insufficient, the trial court acquires no jurisdiction of the subject matter." Parkhurst, 845 S.W.2d at 34. The court reasoned as follows:

Subject matter jurisdiction of the circuit court and the sufficiency of the information or indictment are two distinct concepts. The blending of those concepts serves only to confuse the issue to be determined. Circuit courts obviously have subject matter jurisdiction to try crimes, including the felony [charged in the case]. At the same time, a person cannot be convicted of a crime with which the person was not charged unless it is a lesser included offense of a charged offense. Cases stating that jurisdiction is dependent upon the sufficiency of the indictment or information mix separate questions. That language [in prior cases that a trial court has no subject matter jurisdiction if an indictment is insufficient] should not be relied on in the future.

Id. at 34-35 (citations omitted).

After overruling prior precedents that viewed the sufficiency of a charge as jurisdictional, the court set forth the following test for evaluating a belated challenge to the sufficiency of a charge:

When the issue is raised for the first time after verdict, the indictment or information will be deemed insufficient only if it is so defective that (1) it does not by any reasonable construction charge the offense of which the defendant was convicted or (2) the substantial rights of the defendant to prepare a defense and plead former jeopardy in the event of acquittal are prejudiced. In either event, a defendant will not be entitled to relief based on a post-verdict claim that the information or indictment is insufficient unless the defendant demonstrates actual prejudice.

Id. at 35 (emphasis added; footnote omitted).

C.

In Ex parte Seymour, 946 So. 2d 536 (Ala. 2006), Seymour filed a petition for post-conviction relief based on a claim that his indictment was defective. The Alabama Supreme Court considered the question of whether the failure to allege an element of the offense in the indictment would render Seymour's conviction void for lack of subject matter jurisdiction. Seymour, 946 So. 2d at 536. The court acknowledged that Seymour's contention that his defective-indictment claim was jurisdictional was supported by prior Alabama precedent holding that "failure to allege an essential element of the charged offense is a jurisdictional defect." Id. at 538 (internal quotation marks, brackets, ellipsis points, and citation omitted). The court, however, overruled its prior precedents and held that a defect in an indictment does not deprive the trial court of jurisdiction. The court explained:

Jurisdiction is "a court's power to decide a case or issue a decree." Black's Law Dictionary 867 (8th ed. 2004). Subject-matter jurisdiction concerns a court's power to decide certain types of cases. Woolf v. McGaugh, 175 Ala. 299, 303, 57 So. 754, 755 (1911) ("By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought.") (quoting Cooper v. Reynolds, 77 U.S. (10 Wall.) 308, 316, 19 L.Ed. 931 (1870)). That power is derived from the Alabama Constitution and the Alabama Code. See United States v. Cotton, 535 U.S. 625, 630-31, 122 S. Ct. 1781, 152 L.Ed.2d 860 (2002) (subject-matter jurisdiction refers to a court's "statutory or constitutional power" to adjudicate a case). In deciding

whether Seymour's claim properly challenges the trial court's subject-matter jurisdiction, we ask only whether the trial court had the constitutional and statutory authority to try the offense with which Seymour was charged and as to which he has filed his petition for certiorari review.

Under the Alabama Constitution, a circuit court "shall exercise general jurisdiction in all cases except as may be otherwise provided by law." Amend. No. 328, § 6.04(b), Ala. Const. 1901. The Alabama Code provides that "the circuit court shall have exclusive original jurisdiction of all felony prosecutions" § 12-11-30, Ala. Code 1975. The offense of shooting into an occupied dwelling [(Seymour's offense)] is a Class B felony. § 13A-11-61(b), Ala. Code 1975. As a result, the State's prosecution of Seymour for that offense was within the circuit court's subject-matter jurisdiction, and a defect in the indictment could not divest the circuit court of its power to hear the case.

Id. at 538 (brackets omitted).

In support of its analysis, the court cited Cotton and decisions from numerous other states. Id. at 538. The court stated:

The validity of Seymour's indictment is irrelevant to whether the circuit court had jurisdiction over the subject matter of this case. A defect in an indictment may be error, see Rule 15.2(d), Ala. R. Crim. P. -- or even constitutional error, see Ala. Const., Art. I, § 8 -- but the defect does not divest the circuit court of the power to try the case. A defendant who challenges a defective indictment is thus subject to the same preclusive bars as one who challenges any other nonjurisdictional error, such as an illegal seizure or a violation of the Confrontation Clause.

Id. at 359. The court held that "a circuit court has subject-matter jurisdiction over a felony prosecution, even if that prosecution is based on a defective indictment," and it overruled prior cases that held to the contrary. Id. Because Seymour failed to raise his defective-indictment claim at trial or on direct appeal, the court affirmed the denial of his petition for post-conviction relief. Id.

D.

In State v. Gentry, 610 S.E.2d 494 (S.C. 2005), the South Carolina Supreme Court considered the issue of whether the failure of an indictment to allege an element of the offense deprived the trial court of subject matter jurisdiction. Gentry, 610 S.E.2d at 497-98. The court noted the "confusion that has

arisen in past jurisprudence between the sufficiency of the indictment and the subject matter jurisdiction of the trial court." Id. at 498. The court explained that it, like the United States Supreme Court in Bain, had through prior case law "broadened the meaning of jurisdiction" by holding that fundamental defects in an indictment cannot be waived and that a "trial court lacks subject matter jurisdiction to convict a defendant for an offense when there is no indictment charging him with that offense when the jury was sworn." Id. at 498-99. The court concluded that its prior case law had "conflated the meaning of subject matter jurisdiction and mixed two separate questions, *i.e.* whether the trial court has the power to hear a case and whether the indictment is sufficient." Id. at 499. Citing Cotton and Parkhurst, the court overruled its prior precedent and held that "if an indictment is challenged as insufficient or defective, the defendant must raise that issue before the jury is sworn and not afterwards." Id.

E.

In Parker v. State, 917 P.2d 980 (Okla. Crim. App. 1996), the Oklahoma Court of Criminal Appeals overruled prior precedent which had held that a charge that was defective for failing to allege every material element of an offense was fatal to the trial court's jurisdiction. Parker, 917 P.2d at 985-86. The court explained that the requirement that a defendant receive fair notice of the charges against which he or she must defend is rooted in the due process clauses of the United States and Oklahoma Constitutions. Id. at 985. In addition to the due process clause, Oklahoma statutes require that a criminal charge "contain a statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended." Id. Oklahoma case law also requires that a charge must be "sufficient to form the essentials of the crime and apprise a defendant of what he [or she] must meet" and "enable a person of common understanding to know against what charge they must be prepared

to defend." Id. The court had previously held that a charge that did not allege every material element was inadequate to charge a crime, and that such a charge was defective and could not confer subject matter jurisdiction on the trial court. Id.

Upon re-examination of its precedents, the court continued to hold that defects in a charge are governed by the due process clause, but it rejected its prior holding that defects in a charge are fatal to jurisdiction. Id. The court concluded that "[j]urisdiction is conferred on the trial court by the commission of a public offense where venue properly lies in that trial court," and therefore a trial court's jurisdiction is triggered by a charge alleging the commission of a public offense with appropriate venue. Id. The court held that while any failure to allege facts constituting the offense raises due process concerns, it does not affect the trial court's jurisdiction. Id. The court noted that "[t]he failure to allege each element of a crime does not always constitute a due process violation[,]" and it rejected the requirement that a charge "must specifically allege each element of the crime" in order to confer jurisdiction on the trial court. Id. at 986.

The court adopted the following test for evaluating the sufficiency of a charge:

[T]his Court will thus ask whether the [charging instrument] gives the defendant notice of the charges against him and apprises him of what he must defend against at trial. This determination will be made on a case-by-case basis in each appeal where the issue is raised. This Court will look to the "four corners" of the [charging instrument] together with all material that was made available to a defendant at preliminary hearing or through discovery to determine whether the defendant received notice to satisfy due process requirements. If upon review of the [charging instrument] and the material record we find the defendant did not have sufficient notice, a due process violation will be found to have occurred.

Id. (emphasis added). In applying this test, the court concluded that based on the information provided during the preliminary hearing, the defendant received fair notice of the felony murder charge and thus was not entitled to relief on his claim that the charge was defective. Id. at 986-87.

III.

Similar to other states, Hawai'i trial courts have subject matter jurisdiction over criminal offenses. Article VI, section 1 of the Hawai'i Constitution provides: "The several courts shall have original and appellate jurisdiction as provided by law[.]" The Hawai'i Legislature has conferred jurisdiction over criminal offense to the circuit courts, district courts, and family courts. See Hawaii Revised Statutes (HRS) §§ 603-21.5 604-8, 571-14.⁵ There is no constitutional or statutory provision that specifically conditions a trial court's exercise of criminal jurisdiction on the sufficiency of a charge. Indeed, HRS § 806-27 (1993) provides that "[n]o indictment shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected, by reason of any defect or imperfection in matter or form, which shall not prejudice or tend to prejudice the defendant."⁶

⁵ HRS § 603-21.5 (Supp. 2011) provides in relevant part:

(a) The several circuit courts shall have jurisdiction, except as otherwise expressly provided by statute, of:

- (1) Criminal offenses cognizable under the laws of the State, committed within their respective circuits or transferred to them for trial by change of venue from some other circuit court[.]

HRS § 604-8 (Supp. 2011) provides in relevant part:

(a) District courts shall have jurisdiction of, and their criminal jurisdiction is limited to, criminal offenses punishable by fine, or by imprisonment not exceeding one year whether with or without fine. They shall not have jurisdiction over any offense for which the accused cannot be held to answer unless on a presentment or indictment of a grand jury.

HRS § 571-14 (2006) provides in relevant part that the family courts shall have jurisdiction over specified criminal offenses.

⁶ HRS § 806-34 (1993) does not condition a trial court's exercise of jurisdiction on the sufficiency of a charge. HRS § 806-34 provides:

Sufficiency of averments as to offense and transaction. In an indictment the offense may be charged either by name or by reference to the statute defining or making it punishable; and the transaction may be stated with so much detail of time, place, and circumstances and such particulars as to the person (if any)

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In Cummings, the Hawai'i Supreme Court determined that an insufficient charge constituted "a substantive jurisdictional defect . . . which renders any subsequent trial, judgment of conviction, or sentence a nullity." Cummings, 101 Hawai'i at 142, 63 P.3d 1112. In support of this conclusion, the supreme court cited the quotation from State v. Jendrusch, 58 Haw. 279, 281, 567 P.2d 1242, 1244 (1977), that "the omission of an essential element of the crime charged is a defect in substance rather than of form." Jendrusch, however, characterized a conviction based on a charge that omitted an essential element as "a denial of due process" and cited federal precedents, which have effectively been overruled by Cotton, for the proposition that this defect in a charge cannot be waived and is a ground for reversal, even when raised for the first time on appeal. See Jendrusch, 58 Haw. at 281, 567 P.2d 1242.⁷

⁶(...continued)

against whom, and the thing (if any) in respect to which the offense was committed, as are necessary to identify the transaction, to bring it within the statutory definition of the offense charged, to show that the court has jurisdiction, and to give the accused reasonable notice of the facts.

Averments which so charge the offense and the transaction shall be held to be sufficient.

(Emphasis added.)

The reference in HRS § 806-34 to permitting an offense to be stated with "so much detail of time, place, and circumstances and such particulars . . . as are necessary . . . to show that the court has jurisdiction," does not mean that the trial court's jurisdiction is dependent on the sufficiency of the charge. The jurisdiction of the court and sufficiency of the charge are different concepts and involve separate questions. Parkhurst, 845 S.W.2d at 34-35; Gentry, 610 S.E.2d at 499. For example, a charge can show the jurisdiction of the court by alleging that the crime took place within the territorial boundaries of the state, see HRS 701-106 (1993) (establishing territorial limitations on criminal jurisdiction), or by citing the statute defining the defense to reveal whether the offense was a felony or misdemeanor, see HRS § 604-8 (limiting district court jurisdiction to misdemeanor offenses), and yet still be insufficient for failing to allege an element of the offense. HRS § 806-34 sets forth what is required for a charge to be held sufficient, and not what is required for the trial court to exercise jurisdiction.

⁷ Cummings also cited two Territory of Hawai'i cases in support of its conclusion that an insufficient charge constituted a jurisdictional defect. The first case, Territory v. Gora, 37 Haw. 1 (Terr. 1944) characterized the
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IV.

From my perspective, there is no clear explanation of why the sufficiency of a charge *should* be viewed as jurisdictional. The fundamental purpose of a charge is to give the defendant fair notice of the charge so that he or she may prepare a defense. See Sprattling, 99 Hawai'i at 317-18, 55 P.3d at 281-82; State v. Vanstory, 91 Hawai'i 33, 44, 979 P.2d 1059, 1070 (1999). In my view, where a defendant waits to challenge the sufficiency of a charge for the first time on appeal, as in this case, the defendant should be required to show that he or she was prejudiced by the alleged deficiency in the charge.

If writing on a clean slate, I would adopt the reasoning of Cotton, Parkhurst, Seymour, Gentry, and Parker and conclude that the sufficiency of a charge and a trial court's jurisdiction present separate questions, and that a defective charge does not prevent a trial court from having and exercising jurisdiction but "goes only to the merits of the case." Cotton, 535 U.S. at 631 (internal quotation marks and citation omitted). Without the jurisdictional limitation, a challenge to the sufficiency of the charge could be addressed like other substantive disputes raised during the criminal trial process. Thus, a defendant who raised a timely objection to the sufficiency of the charge in the trial court would be entitled to dismissal of the charge upon a showing that the charge failed to allege an essential element of the offense or otherwise failed to

⁷(...continued)

defendant's claim that his charge failed to state an offense as a "jurisdictional point." Gora, 37 Haw. at 6. However, the court further held that the defendant was deemed to have abandoned this point by not arguing it on appeal, and that he also waived the claim that the charge was insufficient by not objecting to the charge on that basis in the trial court. Id. at 7. The court's conclusion that the insufficient charge claim could be waived and abandoned is inconsistent with the view that the sufficiency of a charge is jurisdictional. With respect to the second case, Territory v. Goto, 27 Haw. 65 (Terr. 1923), Cummings cited the concurring opinion of Chief Justice Peters, which referred to a sufficient indictment as essential to the court's jurisdiction. Goto, 27 Haw. at 103. The majority opinion, however, noted that constitutional rights guaranteed to persons accused of a crime may be waived, and it concluded that the alleged insufficiency of the charge asserted by the defendants was subject to waiver. Id. at 70-74.

provide the defendant with fair notice of what he or she must be prepared to meet. However, a defendant who failed to timely object and raised the issue for the first time on appeal would have to show plain error and convince the appellate court that his or her substantial rights had been affected by the alleged deficient charge. See Cotton, 535 U.S. at 631-32 (applying plain error standard of review to claim of insufficiency of the indictment raised for the first time on appeal.) This would require the defendant to make a showing that he or she was prejudiced by the omitted essential element that rendered the charge deficient. See Parkhurst, 845 S.W.2d at 35.

Under this approach, where an OVUII charge or OVLPSR-OVUII charge was deficient for failing to allege the public-road element, a defendant who challenged the charge for the first time on appeal would not have suffered prejudice and would not be entitled to relief where: (1) the defendant received actual notice that he or she was driving on a public road; or (2) there was no dispute that he or she had been driving on a public road. However, the defendant would be entitled to relief where: (1) the defendant did not receive such notice or there was a legitimate dispute over whether the defendant was driving on a public road; and (2) the deficiency in the charge prejudiced the defendant's ability to mount a defense on this basis.

In this case, if the sufficiency of a charge is not jurisdictional, then Defendant-Appellant Clarence Stone (Stone) would not be entitled to any relief with respect to his OVUII conviction in Case No. 2DTA-08-01628. Stone pleaded guilty to the OVUII charge, and a knowing and voluntary plea of guilty or no contest "precludes a defendant from later asserting any nonjurisdictional claims on appeal." Adams v. State, 103 Hawai'i 214, 226, 81 P.3d 394, 406 (2003). In addition, because the record shows that Stone was informed at the change of plea hearing that his offense occurred on "Kahului Beach Road, . . . a public roadway of the State," Stone received actual notice that he was driving on a public road. Furthermore, Stone has not

alleged, much less shown, that he was prejudiced by the missing public-road allegation in the deficient charge.

V.

I am not, however, writing on a clean slate. Instead, the Hawai'i Supreme Court has characterized the sufficiency of a charge as jurisdictional. Cummings, 101 Hawai'i at 142, 63 P.3d 1112. In my view, the clear implication of this characterization is that a court must look to the charge itself, or companion counts in the same charging instrument pursuant to Tominiko, in determining whether the charge is sufficient. If one of the purposes of a sufficient charge is to establish jurisdiction, then I cannot see how information outside the charging instrument would be relevant or could permissibly be considered in determining whether the charge is sufficient to establish jurisdiction.

In his concurring and dissenting opinion in Tominiko, Justice Acoba explained that a criminal charge has two primary, yet distinct, functions:

[A] charge must state an offense as a jurisdictional prerequisite *and* inform the defendant of the nature and cause of the accusation against him or her as a constitutional requirement.

In determining whether a charge is sufficient for purposes of jurisdiction, we must look to the charge itself. Because the foregoing inquiry is not a question of whether a defendant had adequate notice of the charges against him or her, other information beyond the charge that may have been supplied to the defendant is irrelevant.

Contrastingly, as to the sufficiency of the charge in terms of the constitutional right to be informed of the nature and cause of the accusation against him or her, we may look beyond the four corners of the charge itself. In other words,

in determining whether the accused's right to be informed of the nature and cause of the accusation against him or her has been violated, we must look to all of the information supplied to him or her by the State to the point where the court passes upon the contention that the right has been violated.

Thus, "if a defendant actually knows the charges against him or her, that defendant's constitutional right to be informed of the nature and cause of the accusation is satisfied."

Tominiko, 126 Hawai'i at 86, 266 P.3d at 1140 (citations, brackets, and section heading omitted).

In my view, the above-quoted passage from Justice Acoba's opinion accurately captures Hawai'i's current jurisprudence with respect to the sufficiency of a charge and the distinction between the jurisdictional purpose and the fair-notice purpose of a charge. The Hawai'i case law that refers to the court's ability to consider information supplied to the defendant outside the charging instrument in evaluating the sufficiency of a charge can be understood and explained as focusing on whether the constitutional fair-notice purpose of the charge has been satisfied. On the other hand, as Justice Acoba states, in determining whether the jurisdictional purpose of the charge has been satisfied, "we must look to the charge itself" and "other information beyond the charge that may have been supplied to the defendant is irrelevant." Id.

I believe that the distinction between the jurisdictional purpose and the fair-notice purpose of a charge is embodied in and carried through under the liberal construction standard, which is applicable to challenges to the sufficiency of a charge made for the first time on appeal. Under the liberal construction standard, a charge is presumed valid and the appellate courts will "not reverse a conviction based upon a defective indictment or complaint unless the defendant can show prejudice or that the indictment or complaint cannot within reason be construed to charge a crime." State v. Wheeler, 121 Hawai'i 383, 399-400, 219 P.3d 1170, 1186-87 (2009) (internal quotation marks, citation, and brackets omitted).

The showing of prejudice goes to whether the defendant had fair notice of the charge and thus whether the fair-notice purpose of the charge has been satisfied. In making this determination, information provided to the defendant outside the charging instrument is relevant. If the defendant was given notice of the nature and cause of the accusation through such outside information, the defendant was not prejudiced by the

deficient charge and his or her constitutional rights to due process and fair notice of the accusation were not violated.

On the other hand, in my view, whether the charging instrument can within reason be construed to charge a crime goes to the jurisdictional purpose of the charge. The liberal construction standard specifically refers to construing the charging instrument. It seems odd and counterintuitive to me to consider information provided to a defendant outside the charging instrument in determining whether the charging instrument itself can within reason be construed to charge a crime. In addition, whether jurisdiction exists is not affected by the presence or absence of prejudice to the defendant. See Cummings, 101 Hawai'i at 143, 63 P.3d at 1113. Thus, information provided to a defendant outside the charging instrument should have no bearing on whether the jurisdictional purpose of the charge has been satisfied.

Accordingly, I conclude that under the liberal construction standard, information provided to a defendant outside the charging instrument cannot be considered by the court in determining whether the charging instrument can within reason be construed to charge a crime. Therefore, the OVUII charge in Case No. 2DTA-08-01628 is insufficient, even under the liberal construction standard, because it is missing the public-road element and cannot within reason be construed to charge a crime.

VI.

Stone argues that the DWOL charge in Case No. 2DTA-08-01628 was defective, and thus the trial court lacked jurisdiction over that charge. Stone's argument is premised on his contention that the licencing exemptions referred to in the offense statute are elements of the DWOL offense, rather than a defense to the charge. Stone argues that the DWOL charge was deficient because it failed to allege that Stone "was not excepted by statute from

the driver's licencing requirements." I conclude that Stone's argument lacks merit.⁸

Stone was charged with DWOL, in violation of HRS § 286-102 (2006), which provides in relevant part:

a) No person, except one exempted under section 286-105, one who holds an instruction permit under section 286-110, one who holds a provisional license under section 286-102.6, one who holds a commercial driver's license issued under section 286-239, or one who holds a commercial driver's license instruction permit issued under section 286-236, shall operate any category of motor vehicles listed in this section without first being appropriately examined and duly licensed as a qualified driver of that category of motor vehicles.

I believe that the Hawai'i Supreme Court's analysis in State v. Lee, 90 Hawai'i 130, 976 P.2d 444 (1999), is controlling. In Lee, the supreme court addressed the question of whether the statutory exception for self-insured drivers was an element of the offense that the prosecution was required in every case to negate in order to convict a defendant of driving without no-fault insurance. Lee, 90 Hawai'i at 135-39, 976 P.2d at 449-53. HRS § 431:10C-104 (1993), the statute defining Lee's charged offense, provided in relevant part: "Except as provided in section 431:10C-105 [(the section pertaining to self-insurance)], no person shall operate or use a motor vehicle upon any public street, road, or highway of the State at any time unless such motor vehicle is insured at all times under a no-fault policy." Lee, 90 Hawai'i 132 n.1, 976 P.2d at 446 n.1.

Applying the framework adopted by this court in State v. Nobriga, 10 Haw. App. 353, 873 P.2d 110 (1994), for

⁸ The majority affirmed Stone's DWOL conviction without reaching the merits of his claim on the ground that he waived the issue by failing to make any argument under the Motta/Wells liberal construction rule. The majority also cited this as an alternate ground for affirming Stone's OVUII conviction in Case No. 2DTA-08-01628. However, because the sufficiency of the charge is jurisdictional, I disagree with the majority's reliance on waiver. See Cummings, 101 Hawai'i at 143, 63 P.3d at 1113 (concluding that a defect in a charge implicates substantive subject matter jurisdiction, which cannot be waived); State v. Graybeard, 93 Hawai'i 513, 516, 6 P.3d 385, 388 (App. 2000) ("An appellate court has . . . an independent obligation to ensure jurisdiction over each case and to dismiss the appeal *sua sponte* if a jurisdictional defect exists.").

determining whether a statutory exception is a defense (on which the defendant bears the initial burden of producing evidence) or an element of the offense (which the prosecution must disprove in every case), the supreme court concluded that the self-insurance exception was a defense. Lee, 90 Hawai'i at 137-38, 976 P.2d at 451-52. The supreme court reasoned that although the statute defining the offense of driving without no-fault insurance (HRS § 431:10C-104) referred to the self-insurance provisions in HRS § 431:10C-105, the self-insurance provisions were not located in the enacting clause of the statute defining the offense. Id. at 138, 976 P.2d at 452. In addition, the supreme court concluded that "[i]nasmuch as self-insurance is likely to be quite rare, it would be absurd to require the prosecution to disprove it in every case." Id.

As in Lee, although the statute defining the DWOL offense refers to a series of separate provisions which exempt drivers from the HRS § 286-102 licencing requirements, see HRS § 286-102(a), the exemption provisions are not located within the enacting clause of the DWOL offense. In addition, the number of people covered by the exemption provisions would appear to be relatively rare when compared to those covered by HRS § 286-102, and it would be absurd to require the prosecution to disprove all the possible exemptions in every case in which the State charged a driver with driving without a license.⁹

Pursuant to Lee, I conclude that the licencing exemptions referred to in HRS § 286-102(a) are not elements of

⁹ Furthermore, a defendant would likely be in a better position to produce evidence supporting the exemption than the State would be to produce evidence negating every exemption, a factor courts have considered in assigning evidentiary burdens. See Campbell v. United States, 365 U.S. 85, 96 (1961) ("[T]he ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary."); United States v. Cont'l Ins. Co., 776 F.2d 962, 964 (11th Cir.1985) (adhering to the common law guide of assigning the evidentiary burden on the party in the best position to present the requisite evidence).

the DWOL offense, but constitute defenses to the offense.¹⁰ Therefore, the State was not required to allege that the exemptions were inapplicable to Stone in the DWOL charge. Accordingly, the DWOL charge was not deficient for failing to allege that Stone did not fall within any of the licencing exemptions, and I would affirm his DWOL conviction.

VII.

For the foregoing reasons, I respectfully concur in part and dissent in part.

¹⁰ In support of his claim, Stone cites this court's decision in State v. Matautia, 81 Hawai'i 76, 83, 912 P.2d 573, 580 (App. 1996), in which we listed "the defendant . . . was not excepted by statute from the driver's licencing requirements[,]" as an element of the DWOL offense. In Matautia, however, we did not focus on, and were not called upon to apply, the test for determining whether a statutory exception is a defense to, or an element of, the offense. In any event, the supreme court's subsequent analysis in Lee would supersede any contrary analysis by this court in Matautia.