IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

---o0o---

STATE OF HAWAIʻI,
Petitioner/Plaintiff-Appellee,

vs.

WANDA RURIKO MITA,
Respondent/Defendant-Appellant.

NO. 29347

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(HPD Criminal No. 164978DL (1P108009607)

DISSENTING OPINION BY ACOBA, J.,
IN WHICH DUFFY, J., JOINS

I respectfully dissent on two grounds. First, the oral charge herein failed to "'sufficiently allege all of the essential elements of the offense charged[.]'" State v. Wheeler, 121 Hawaiʻi 383, 391, 219 P.3d 1170, 1178 (2009) (quoting State v. Jendrusch, 58 Haw. 279, 281, 567 P.2d 1242, 1244 (1977)). In other words, the charge in the instant case, "fail[ed] to state an offense," State v. Elliott, 77 Hawaiʻi 309, 311, 884 P.2d 372, 374 (1994), and "contain[ed] within it a substantive

jurisdictional defect[,]" thereby rendering "any subsequent trial, judgment of conviction, or sentence a nullity[,]" State v. Cummings, 101 Hawaiʻi 139, 142, 63 P.3d 1109, 1112 (2003) (citing State v. Israel, 78 Hawaiʻi 66, 73, 890 P.2d 303, 310 (1995)) (other citations omitted).

Second, the charge in this case failed to "sufficiently apprise[] [Respondent/Defendant-Appellant Wanda Ruriko Mita (Respondent)] of what . . . she [had to] be prepared to meet[.]" State v. Wells, 78 Hawaiʻi 373, 379-80, 894 P.2d 70, 76-77 (1995) (internal quotation marks, citations and brackets omitted). A charge defective in that regard cannot sustain a conviction, for "'that would constitute a denial of due process.'" Wheeler, 121 Hawaiʻi at 391, 219 P.3d at 1178 (quoting Jendrush, 58 Haw. at 281, 567 P.2d at 1244).

I would therefore affirm the judgment of the Intermediate Court of Appeals (ICA), entered pursuant to its February 23, 2010 Summary Disposition Order (SDO), vacating the August 28, 2008 judgment of the District Court of the First Circuit, Honolulu Division (the court).

I.

In this case, Respondent was issued an "Animal License & Regulation -- Complaint & Summons" (Citation). The Citation stated that "on/or about th[e] 3 day of JUNE 08[, Respondent] . . . did own, harbour or keep (animal description): BOXERS . . . at (location) . . . and did commit the offense of: ANIMAL NUISANCE-SEC: 7-2.3 BARKING DOG . . . ." On August 14, 2008,

Respondent was arraigned before the court by Petitioner/Plaintiff-Appellee State of Hawaiʻi (Petitioner) on the charge of Animal Nuisance, Revised Ordinances of Honolulu (ROH) Section 7-2.3 (2005).

Respondent was orally charged as follows:

> On or about June 3rd, 2008, in the [C]ity and [C]ounty of Honolulu, [S]tate of Hawaiʻi, you as the owner of an animal, farm animal, or poultry engaged in animal nuisance[1] as defined in section 7-2.2, thereby violating section 7-2.3 of the [ROH].[2]

(Emphasis added.) After the charge was read, Petitioner asked Respondent, "Do you understand the charge?" Respondent then objected to the arraignment on the ground that Petitioner had failed to identify which of "the four acts [under ROH § 7-2.2]" Respondent would need to "defend against." Respondent entered the following objection into the record.

> Your Honor, if I may make for the record an objection to the arraignment. I do not believe that the arraignment is specific enough to put [Respondent] specifically on notice what part of the -- if I may call "barking dog" ordinance she's being charged with. There's basically four violations or four acts which may constitute a violation of the ordinance. One is whether or not the dog made noise continuously and/or incessantly for a period of ten minutes; that's ordinance section 7-2.2(a); or made noise intermittently for one half-hour or more to the disturbance of any person at any time of day or night; that's ordinance section 7-2.2(a); or bark, whine, howl, cry or make other unreasonable noise which interfered with reasonable individual or group activity such as but not limited to communication, work, rest, recreation, or sleep; that's ordinance section 7-2.2(a) and incorporating 7-2.4(c); or failed to heed the admonition of a police officer or a special officer or the animal control contractor that the noise was unreasonable and should be stopped; that's ordinance section 7-2.2(a) and 7-2.4(c). And its our position that under *State v. Jendrusch*, 58 Haw. 279, a 1977 case, we should receive specificity in the arraignment so

[1] See infra page 7 for the definition of "animal nuisance" as set forth in ROH § 7-2.2.

[2] See infra page 7 for the text of ROH § 7-2.3.

> that we know exactly which of these sections of the ordinance we must defend against.

Petitioner's position was that because the term "animal nuisance" in ROH § 7-2.3 itself was so broad, Petitioner did not need to charge Respondent with violating a specific subsection of ROH § 7-2.2. Petitioner stated:

> Your honor, [Petitioner's] position, [Respondent] is charged under Section 7-2.3. 7-2.2 is a definition section, in which it defines animal nuisance, and section 7-2.3 incorporates a general animal nuisance as defined in section 7-2.2; and [Petitioner's] position would be that the wording of the statute is broad enough to encompass all subsections (a), (b), and (c) listed under animal nuisance. But if the [c]ourt would like me to read the definition of animal nuisance, I will be -- I would be happy to do that.

The court ruled in favor of Petitioner in determining that the definition of animal nuisance in ROH § 7-2.2 did not enumerate additional elements of the offense and therefore, although the charge omitted any definition of animal nuisance, it was sufficient. The court stated that

> [it would] have to agree with [Petitioner's] position. [Petitioner was] arraigned on [ROH §] 7-2.3, which is the prohibition section, and that does not incorporate the definition section, which is not a prohibition. So, therefore, [the court] find[s] that the arraignment is proper.

At the close of trial, Respondent moved for a judgment of acquittal on several grounds, one of which was that "the charge constituted a general 'Animal Nuisance' charge, and thus failed to adequately apprise [Respondent] of the specific prohibited conduct." The court denied Respondent's motion, ruling that "the charge was sufficient and the ordinance not vague."

On appeal to the ICA, Respondent reiterated her original arguments. In issuing its SDO, a majority of the ICA concluded that the charge was insufficient, vacated the August 28, 2008 judgment of the court, and remanded to the court with instructions to dismiss without prejudice. State v. Mita, No. 29347, 2010 WL 617628, at *2 (App. Feb. 23, 2010) (SDO). In a dissent to the majority opinion, Chief Judge Nakamura stated that he would have concluded that, taking into consideration both the oral charge and Citation, the charge against Respondent was sufficient. Id. at *6 (Nakamura, J., dissenting).

On February 23, 2010, Petitioner filed an application for writ of certiorari (Application), seeking review of the SDO issued by the ICA. In its Application, Petitioner argues, inter alia, that the ICA gravely erred in concluding that the charge in this case was insufficient. The majority agrees with Petitioner and vacates the ICA judgment, asserting that the oral charge provided "fair notice of the offense" because (1) the definition of animal nuisance under ROH § 7-2.2 "does not create an additional essential element of the offense," and therefore, did not need to be included in the charge, and (2) the definition of animal nuisance in ROH § 7-2.2 "is consistent with its commonly understood meaning." Majority opinion at 2-3. Hence, the majority maintains that Petitioner needed to prove only that (1) Respondent was the owner of an animal, farm animal or poultry which (2) engaged in animal nuisance, in its commonly-understood sense. Id. at 13.

II.

Because Respondent disputed the oral charge immediately after it was read, the question as to whether the charge sufficiently set forth all of the essential elements of the offense is a question of law, which this court reviews de novo. Wheeler, 121 Hawaiʻi at 390, 219 P.3d at 1177.

III.

A.

This court has held that a charge must "sufficiently allege all of the essential elements of the offense[,]" regardless of whether the charging instrument is "an oral charge, information, indictment or complaint[.]" Jendrusch, 58 Haw. at 281, 567 P.2d at 1244 (citations omitted).

> In other words, 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. See Israel, 78 Hawaiʻi at 73, 890 P.2d at 310 (quoting Elliott, 77 Hawaiʻi at 311, 884 P.2d at 374 (quoting Jendrusch, 58 Haw. at 281, 567 P.2d at 1244)); Elliott, 77 Hawaiʻi at 312, 884 P.2d at 375 ("the omission of an essential element of the crime charged is a defect in substance rather than form" (quoting Jendrusch, 58 Haw. at 281, 567 P.2d at 1244)); Territory v. Koa Gora, 37 Haw. 1, 6 (1944) (failure to state an offense is a "jurisdictional point"); Territory v. Goto, 27 Haw. 65, 102 (1923) (Peters, C.J., concurring) ("[f]ailure of an indictment[,] [complaint, or oral charge] to state facts sufficient to constitute an offense against the law is jurisdictional[;] . . . an indictment[,] [complaint, or oral charge] . . . is essential to the court's jurisdiction," (brackets added)); [Hawaiʻi Revised Statutes (HRS)] § 806-34 (1993) (explaining that an indictment may state an offense "with so much detail of time, place, and circumstances and such particulars as to the person (if any) against whom, and the thing (if any) in respect to which the offense was committed, as are necessary[,]" inter alia, "to show that the court has jurisdiction, and to give the accused reasonable notice of the facts").

Cummings, 101 Hawaiʻi at 142, 63 P.3d at 1112 (emphasis added).

The essential elements of an offense are "conduct," "attendant circumstances," and the "results of conduct." HRS § 702-205 (1993).[3] This court has stated that "'any circumstances defined in an offense that are neither conduct nor the results of conduct would, by default, constitute attendant circumstances elements of the offense.'" State v. Murray, 116 Hawaiʻi 3, 8, 169 P.3d 955, 960 (2007) (quoting State v. Aiwohi, 109 Hawaiʻi 115, 127, 123 P.3d 1210, 1222 (2005) (brackets, internal quotation marks, and internal citation omitted)).

ROH § 7-2.3 provides:

> Sec. 7-2.3 Animal Nuisance--Prohibited.
>
> It is unlawful to be the owner of an animal, farm animal or poultry engaged in animal nuisance as defined in Section 7-2.2; provided, however, that it shall not be deemed to be animal nuisance for purposes of this article if, at the time the animal, farm animal or poultry is making any noise, biting or stinging, a person is trespassing or threatening trespass upon private property in or upon which the animal, farm animal or poultry is situated, or for any other legitimate cause which teased or provoked said animal, farm animal, or poultry.

(Emphasis added.)

ROH § 7-2.2 in turn defines "animal nuisance" in several ways:

> "Animal nuisance," for the purposes of this section, shall include but not be limited to any animal, farm animal or poultry which:

---

[3] HRS § 702-205 provides:

> **§ 702-205. Elements of an Offense.** The elements of an offense are such (1) conduct, (2) attendant circumstances, and (3) results of conduct, as:
>
> (a) Are specified by the definition of the offense, and
>
> (b) Negative a defense (other than a defense based on the statute of limitations, lack of venue, or lack of jurisdiction.

> (a) Makes noise continuously and/or incessantly for a period of 10 minutes or intermittently for one-half hour or more to the disturbance of any person at any time of day or night and regardless of whether the animal, farm animal or poultry is physically situated in or upon private property;
> (b) Barks, whines, howls, crows, cries or makes any other unreasonable noise as described in Section 7-2.4(c) of this article; or
> (c) Notwithstanding the provisions of HRS Section 142-75 or any other applicable law, bites or stings a person.

(Emphases added).

ROH § 7-2.4(c) defines "unreasonable noise" as follows:

> (c) Noise is unreasonable within the meaning of this article if considering the nature and the circumstances surrounding the animal nuisance, including the nature of the location and the time of the day or night, it interferes with reasonable individual or group activities such as, but not limited to, communication, work, rest, recreation or sleep; or the failure to heed the admonition of a police officer or a special officer of the animal control contractor that the noise is unreasonable and should be stopped or reduced.

(Emphases added.)

Under the foregoing, Petitioner was required to prove, as elements of the offense, that (1) Respondent was an owner of "an animal," (2) which "engage[d] in animal nuisance[,]" and (3) "animal nuisance as defined in [ROH] Section 7-2.2" occurred. ROH § 7-2.3. The conduct element is the owning of an animal. The result of the conduct is that the animal engaged in animal nuisance. What constitutes "animal nuisance" under ROH § 7-2.3 must be ascertained by reference to ROH § 7-2.2 inasmuch as ROH § 7-2.3 specifically references ROH § 7-2.2 as to the meaning of that term. ROH §§ 7-2.2 (a) and (b) encompass four specific alternative acts, each of which would constitute "animal nuisance." Because each act under ROH § 7-2.2 would amount to "animal nuisance," each of those acts is an alternative attendant

circumstance of the offense. Thus, Petitioner was required to charge one or more of the specific acts separately defined as "animal nuisance" under ROH § 7-2.2 and was required to establish that element by proof beyond a reasonable doubt.

In the instant case, the charge failed to state any act under ROH § 7-2.2 in which the animal was alleged to have engaged. The majority maintains that the Citation, which may be construed in conjunction with the oral charge, "put [Respondent] on notice that she was cited for violating ROH § 7-2.3 . . . because her two dogs were barking." Majority opinion at 18. Under the Hawaiʻi Rules of Penal Procedure (HRPP) Rule 7(a), the oral charge can be considered in conjunction with the Citation.[4] However, considering the Citation, Respondent was charged only with (1) being the owner (2) of a "barking dog." Mere barking would not constitute "animal nuisance" inasmuch as the ordinance designates specific circumstances for how barking constitutes "animal nuisance."

As set forth under ROH § 7-2.2 and § 7-2.4, incorporated by reference thereby, the attendant circumstance of how barking was specifically a nuisance could be established only by proof beyond a reasonable doubt that (1) the dog had barked

[4] HRPP Rule 7(a) provides that

> in any case where a defendant is accused of an offense that is subject to a maximum sentence of less than six months in prison[,] . . . and is issued a citation in lieu of physical arrest . . . and summoned to appear in court, the citation and an oral recitation of the essential facts constituting the offense charged . . . shall be deemed the complaint[.]

"continuously and/or incessantly for a period of 10 minutes," or (2) the dog had barked "intermittently for one-half hour or more to the disturbance of any person," or (3) the barking was "unreasonable . . . as described in Section 7-2.4(c)[,]" that is, that it "interfere[d] with reasonable individual or group activities such as, but not limited to, communication, work, rest, recreation or sleep[,]" or (4) the dog had barked notwithstanding "the admonition of a police officer or a special officer of the animal control contractor that the [barking was] unreasonable and should be stopped or reduced."[5] Therefore, one or more of these attendant circumstances had to be included in the charge, but having been omitted, the charge in the instant case was insufficient to allege an offense. Elliott, 77 Hawaiʻi at 311-12, 884 P.2d at 374-75 (stating that a charge which fails to allege all essential elements of the offense "'amounts to a failure to state an offense, and a conviction based upon it cannot be sustained'" (quoting Jendrusch, 58 Haw. at 281, 567 P.2d 1244)).

B.

State v. Nobriga, 10 Haw. App. 353, 873 P.2d 110 (1994), overruled on other grounds by State v. Maelega, 80 Hawaiʻi 172, 907 P.2d 758 (1995), supports the foregoing construction. On March 12, 1992, Nobriga, who lived on property upon which he kept approximately twenty-five to fifty roosters, was cited by an

[5] Whether any of these acts could be subject to constitutional challenge is not raised in this case and therefore, is not discussed.

assistant investigator for the Hawaiian Humane Society for "Animal Nuisance," ROH § 7-2.3. Id. at 355, 873 P.2d at 112. The Nobriga court construed the same ordinance at issue in the instant case.[6]

At trial, "[a]n animal control officer for the Hawaiian Humane Society testified that he had [previously] issued a warning citation to [the d]efendant" which notified the defendant "that his roosters were creating too much noise." Id. at 356, 873 P.2d at 112. The animal control officer also specifically advised the defendant that "the roosters could not 'make noise for ten minutes constantly or thirty minutes intermittently[,]'" and that the defendant had "responded that he would try to comply with the law." Id. (citation omitted). Additionally, an assistant investigator testified "that on March 12, 1992, he monitored roosters on [the d]efendant's property crowing

---

[6] The Nobriga court explained that

> [ROH] § 7-2.3 (1990), provides, in pertinent part, as follows:
>
> > It is unlawful to be the owner of an animal, farm animal or poultry engaged in animal nuisance as defined in Section 7-2.2[.]
>
> The term "animal nuisance" is defined in ROH § 7-2.2 (1990), partly, as follows:
>
> > "Animal nuisance," for the purposes of this section, shall include but not be limited to any animal, farm animal or poultry which:
> > (a) Makes noise continuously and/or incessantly for a period of 10 minutes or intermittently for one-half hour or more to the disturbance of any person at any time of day or night and regardless of whether the animal, farm animal or poultry is physically situated in or upon private property[.]

10 Haw. App. at 355, 873 P.2d at 112 (brackets in original).

continuously for a twenty-minute period between 7:25 a.m. and 8:10 a.m." and that "[t]he [d]efendant's neighbor also testified that on March 12, 1992, she could not sleep because [the d]efendant's roosters crowed continuously from two o'clock in the morning." Id.

On appeal, the defendant argued that his conviction should be overturned because the State had failed to prove an essential element of the offense of Animal Nuisance; namely, that the keeping of roosters was not a permitted use of the defendant's property under ROH § 7-2.4(a). Id. The Nobriga court noted that

> a specific exception to the offense of "Animal Nuisance" is established in ROH § 7-2.4(a) (1990), which provides[,] "Nothing in this article applies to animals, farm animals or poultry raised, bred or kept as a commercial enterprise or for food purposes where commercial kennels or the keeping of livestock is a permitted use."

Id. at 355-56, 873 P.2d at 112 (formatting altered).

The ICA explained that, under the Hawaiʻi Penal Code, the State has the initial burden of negativing statutory exceptions to an offense only if the exceptions are incorporated into the definition of the offense. Id. at 359, 873 P.2d at 113. However, the ICA stated that if a statutory exception to an offense constitutes a separate and distinct defense, the State has the burden of disproving the defense beyond a reasonable doubt only if evidence of the defense is first raised by the defendant. Id.

According to the Nobriga court, "the general prohibition against Animal Nuisance[] [is] set forth in ROH

§§ 7-2.2 and 7-2.3, [and] does not incorporate the ROH § 7-2.4 exceptions into the definition of the offense." Id. (emphasis added). Because the exception is located in a separate and distinct section of the ordinance, the ICA explained that the defendant had the initial burden of bringing himself within the exception by presenting facts constituting the defense. Id. Ultimately, the ICA concluded that because the defendant offered no evidence constituting his defense, the State was not required to present any evidence disproving that defense beyond a reasonable doubt. Id. at 359, 873 P.2d at 113-14.

In Nobriga, the ICA read ROH § 7-2.3 with ROH § 7-2.2 as constituting the offense of animal nuisance. Accordingly, ROH § 7-2.2(a) was identified as the specific subsection of ROH § 7-2.2 that the defendant violated. See id. at 356, 873 P.2d at 112. The foregoing establishes that ROH § 7-2.2 must be referred to in order to constitute a violation under ROH § 7-2.3, and, thus, it would not have been sufficient to convict the defendant for simply owning or harboring "noisy roosters." Thus, the court's conclusion and the majority's assertion in the instant case that the prohibition against "Animal Nuisance" is set forth solely under ROH § 7-2.3, and that ROH § 7-2.2 is merely a non-exhaustive list of examples of what "animal nuisance" may include, is contrary to Nobriga's determination that "the general prohibition against Animal Nuisance[] [is] set forth in ROH §§ 7-2.2 and 7-2.3[.]" Id. at 359, 873 P.2d at 113 (emphasis added).

IV.

Respondent maintains that Wheeler is similar to the instant case. In that case, the defendant was orally charged with Operating a Vehicle Under the Influence of an Intoxicant (OVUII) as follows:

> [Wheeler], on or about May 31st, 2007, in the City and County of Honolulu, State of Hawaii, you did operate or assume actual physical control of a motor vehicle while under the influence of alcohol in amounts sufficient to impair your normal mental faculties and your ability to care for yourself and guard against casualty, and thereby committing the offense of Operating a Vehicle Under the Influence of Intoxicants in violation of 291E-61(a)(1) of the [HRS].
>
> . . . .

121 Hawaiʻi at 386-87, 219 P.3d at 1173-74 (some brackets in original) (emphasis added). Although the charge in Wheeler tracked the language of the statute, it did not include the statutory definition of the term "operate," defined as "'dr[iving] or assum[ing] actual physical control of a vehicle upon a public way, street, road or highway.'" Id. at 391, 219 P.3d at 1178 (quoting HRS § 291E-1 (2007) (emphasis in original)). This court stated that "the conduct element of [OVUII]" requires one to "either drive or assume actual physical control of a vehicle. HRS § 291E-61(a)(1)." Id. However, according to Wheeler, the statutory definition of the offense established an attendant circumstance of where the conduct must occur. See id. at 393, 219 P.3d at 1180. Because the charge omitted that attendant circumstance, this court determined that the charge was insufficient. See id.

Likewise, in the instant case, the conduct element of the ordinance required Respondent to be the owner of a dog that engaged in "animal nuisance." As in Wheeler, the term "animal nuisance" used in the conduct element is defined. Similarly, the ordinance definitions of "animal nuisance" were attendant circumstances that establish how barking would constitute animal nuisance and, thus, prohibited conduct under the ordinance. Analogous to Wheeler, although those acts are listed in the ordinance, none were included in the charge. Because, then, the charge in this case alleged only that the dog had been barking, which is not in and of itself "animal nuisance" under ROH § 7-2.2, the charge was insufficient.

Petitioner maintains that Wheeler is unlike this case because, in Wheeler, the statutory definition of the term "operate" was not readily comprehensible to persons of common understanding inasmuch as the definition specifically required that the conduct occur on a public road; but in the instant case, "animal nuisance" is readily comprehensible to persons of common understanding, and, thus, the language tracking the statute was sufficient. In Wheeler, this court distinguished the case before it from Hamling v. United States, 418 U.S. 87, 118 (1974), where the Supreme Court determined that the term "obscenity" was "sufficiently definite in legal meaning to give a defendant notice of the charge against him." The majority asserts that, as in Hamling, a charge of "animal nuisance" provided Respondent with sufficient notice because "the common meaning of the term

'animal nuisance' is sufficiently broad enough to encompass the component parts of its definition" in ROH § 7-2.2. Majority opinion at 17.

To the contrary, the error here is even more egregious than that in Wheeler, for the term "nuisance" does not have a commonly-understood meaning, nor is the term "sufficiently definite in legal meaning to give a defendant notice of the charge against him." Hamling, 418 U.S. at 118. The majority posits that "nuisance" is commonly understood and is defined as, inter alia, "'an offensive, annoying, unpleasant, or obnoxious thing or practice[,]'" majority opinion at 16 (quoting Webster's 3rd Int'l Dictionary of the English Language Unabridged 85 (3d ed. 1967)) (brackets omitted); or "a person, thing, or circumstance causing inconvenience or annoyance[,]" id. at 16-17 (quoting The New Oxford American Dictionary 1175 (2001)) (brackets omitted); or something which "caus[es] [an] inconvenience or annoyance," id. (quoting The New Oxford American Dictionary at 1175) (brackets omitted). But the majority's arguments fail under Wheeler's rationale.

Manifestly, the majority's so called "commonly-understood" definition of "nuisance" is not limited to barking for specific time increments, or barking under particularly described circumstances. The majority's asserted definition of the term "nuisance" is so broad as to encompass the acts proscribed under ROH § 7-2.2. In Wheeler, this court noted that the commonly-understood meaning of the term operate "does not

geographically limit where the conduct must take place." 121 Hawaiʻi at 394, 219 P.3d at 1181. Because the statutory definition of operate in HRS § 291E-1 was narrower and more specific than the commonly-understood meaning of operate, this court concluded that the statutory definition was "neither 'unmistakable' nor 'readily comprehensible to persons of common understanding'" in the term "operate" included in the charge. Id. (quoting State v Merino, 81 Hawaiʻi 198, 214, 915 P.2d 672, 688 (1996)) (other citations omitted).

Applying the foregoing rationale, because ROH § 7-2.2 defines "animal nuisance," as it pertains to barking, more narrowly and specifically than the purported commonly-understood meaning of "nuisance," the term "animal nuisance" in and of itself is "neither 'unmistakable' nor 'readily comprehensible to persons of common understanding.'" Id. (quoting Merino, 81 Hawaiʻi at 214, 915 P.2d at 688) (other citations omitted). Therefore, the charge must include a relevant and narrower definition from among those set forth under ROH § 7-2.2, rather than a mere reference to "animal nuisance." Otherwise, the term "animal nuisance" alone would not be readily comprehensible to persons of common understanding.

Moreover, the definition of the term "nuisance" in fact cautions that "[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to

a cockroach baked in a pie." Black's Law Dictionary 1096 (8th ed. 2004) (citation omitted). Thus, the term "animal nuisance" is not "sufficiently definite in legal meaning to give a defendant notice of the charge against him." Hamling, 418 U.S. at 118.

V.

Additionally, on appeal, Respondent argued that the charge "did not adequately inform her of the nature of the charge being brought against her." This court has stated that a defendant must have knowledge of the specific crime for which he or she is charged, including the "time, place, and circumstances[,] . . . the person (if any) against whom, and the thing (if any) in respect to which the offense was committed[.]" Cummings, 101 Hawaiʻi at 142-43, 63 P.3d at 1112-13 (citing HRS § 806-34 (1993)). "In particular, 'where the definition of an offense includes generic terms, it is not sufficient that the [charge] shall charge the offense in the same generic terms as in the definition; but it must state the species and descend to particulars.'" Israel, 78 Hawaiʻi at 73, 890 P.2d at 310 (quoting Russell v. United States, 369 U.S. 749, 765 (1962)) (brackets and ellipses omitted).[7]

[7] In Israel, the court affirmed an order of the circuit court dismissing one count of a multi-count complaint against the defendant. 78 Hawaiʻi at 67-68, 890 P.2d at 304-05. The dismissed count had charged the defendant "with knowingly possessing or intentionally using or threatening to use a firearm while engaged in the commission of a felony[,]" id. at 67, 890 P.2d at 304, but failed to "specify which felony [the defendant] [] allegedly committed at the time he possessed, used, or threatened to use a firearm[,]" id. at 68, 890 P.2d at 305. This court determined that "[t]he generic term 'felony' did not, indirectly or by inference, inform [the defendant] that the (continued...)

Because the definition of the offense includes a generic term such as "nuisance," "it is not sufficient" to "charge the offense in the same generic terms as in the definition[.]" Id. (internal quotation marks and citation omitted). Due process required notice to Respondent of the specific act for which she was being charged. Because, then, a "barking dog" could be encompassed by any of the four acts included within subsections (a) and (b) of ROH § 7-2.2, the charge had to "state the species and descend to particulars[,]" id., by indicating which one or more of the four alternative acts was being charged. Otherwise, Respondent would be "relegated to a position from which . . . [she would need to] speculate as to what crime . . . [she would] have to meet in defense." Id. at 71, 890 P.2d at 308 (internal quotation marks and citation omitted).

In this case, the charge failed to inform Respondent of how her dog's barking amounted to "animal nuisance" as defined by ROH § 7-2.2. Respondent could not be certain whether Petitioner intended to prove, for example, that the dog had barked "intermittently for one-half hour or more to the disturbance of any person," that the barking had "interfere[d] with reasonable individual or group activities[,]" or that the dog had barked

[7](...continued)
underlying felony was Terroristic Threatening in the First Degree." Id. at 70, 890 P.2d at 307. It was determined that the nature and cause of the accusation could not be understood by a person of common understanding from reading the complaint itself. Id.

notwithstanding the prior "admonition of a police officer or a special officer of the animal control contractor that the [barking was] unreasonable and should be stopped or reduced." ROH §§ 7-2.2 & 7-2.4. Consequently, Respondent was relegated to a position from which she had to speculate as to what act or acts she would have to meet in defense. Israel, 78 Hawaiʻi at 71, 890 P.2d at 308.

VI.

A.

With respect to the majority's first assertion, see supra page 4-5, the majority maintains that the phrase "shall include but not be limited to" in ROH § 7-2.2 refers to the subsections following, and that the various descriptions of "animal nuisance" stated in those subsections merely constitute "an inclusive, rather than exclusive, list of examples of what the term may include[.]" Majority opinion at 14. But this construction of the ordinance by the majority renders ROH § 7-2.3 unconstitutionally vague.

"'[T]he void-for-vagueness' doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" State v. Beltran, 116 Hawaiʻi 146, 151, 172 P.3d 458, 463 (2007) (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983) (internal citation omitted)). In other words, a statute is unconstitutionally vague if (1) "a

person of ordinary intelligence cannot obtain an adequate description of the prohibited conduct or how to avoid committing illegal acts[,]" State v. Kam, 69 Haw. 483, 487, 748 P.2d 372, 375 (1988); see also State v. Sturch, 82 Hawaiʻi 269, 274, 921 P.2d 1170, 1175 (App. 1996) (stating that "'[s]tatutes must give the person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited so that he or she may choose between lawful and unlawful conduct'" (quoting State v. Gaylord, 78 Hawaiʻi 127, 138, 890 P.2d 1167, 1178 (1995) (quoting State v. Tripp, 71 Haw. 479, 482, 795 P.2d 280, 282 (1990)))), and (2) it "encourage[s] arbitrary and discriminatory enforcement[,]" Beltran, 116 Hawaiʻi at 151, 172 P.3d at 465 (citations omitted), by "fail[ing] to provide an explicit standard of enforcement," thereby leaving law enforcement officers, judges, and jurors "free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case[,]" State v. Bloss, 62 Haw. 147, 150, 613 P.2d 354, 356-57 (1980) (citing State v. Kaneakua, 61 Haw. 136, 597 P.2d 590 (1979)) (other citations omitted).

In Beltran, this court held that an ordinance which prohibited, inter alia, "camping without a permit,"[8] was

[8] The ordinance, ROH § 10-1.3(a)(2), stated in pertinent part:

> Sec. 10-1.3 Permits.
>
> (a) Required. Any person . . . shall first obtain a permit from the department for the following uses:
>
> . . . .
>
> (2) Camping[.]

unconstitutionally vague. 116 Hawaiʻi at 147, 172 P.3d at 459. The ordinance itself did not define "camping," but a definition was contained in the Rules and Regulations which were also promulgated by the City and County (Rule). The Rule defined "camping" as follows:

> "Camping" means the use of public park for living accommodation purposes such as sleeping activities, or making preparations to sleep (including the laying down of bedding for the purpose of sleeping), or storing personal belongings, or making any fire, or using any tents or shelter or other structure or vehicle for sleeping or doing any digging or earth breaking or carrying on cooking activities. The above-listed activities constitute camping when it reasonably appears, in light of the circumstances, that the participants, in conducting these activities, are in fact using the area as a living accommodation regardless of the intent of the participants or the nature of any other activities in which they may also be engaging.

Id. at 148-49, 172 P.3d at 460-61 (emphases omitted and emphasis added.) This court determined that the phrase, "it reasonably appears, in light of the circumstances," rendered the statute unconstitutionally vague because that standard (1) "require[d] the actor to view his or her conduct as a third person would, rather than informing the actor as to how to avoid violating the regulation[,]" and (2) was "susceptible of subjective application among persons enforcing the regulation[.]" Id. at 154, 172 P.3d at 466. Beltran said that, in sum, that phrase "[did] not instruct the actor on what is permissible or impermissible, but [was] broadly all encompassing, and [] invite[d] ad hoc and subjective resolution of the regulation policy by the police officer." Id.

Likewise, inasmuch as the phrase "shall include but not be limited to" is said by the majority to be "broadly all

encompassing[,]" the ordinance fails to "instruct the actor on what is permissible or impermissible" under the ordinance. Id. If, as the majority suggests, the definition of "animal nuisance" in ROH § 7-2.2 does not create an element of the offense, but only a non-exclusive "list of examples of what the term may include[,]" majority opinion at 14 (emphasis added), there would be no limits as to what acts "may" constitute "animal nuisance." Under the phrase "shall include but not be limited to," how is a person to "know whether his [or her] dog's barks[,]" State v. Ferraiolo, 748 N.E.2d 584, 588 (Ohio Ct. App. 2000), or other conduct constitutes "animal nuisance?" For example, under the majority's construction, a person would not know whether his or her dog, for example, had engaged in "animal nuisance" by emitting a foul odor; wearing a bell on its collar; sniffing, growling, or barking at someone who passes by; chasing after someone; or rolling around in the middle of the sidewalk, all of which could conceivably constitute an offense of the ordinance under the definition of "animal nuisance" espoused by the majority. As a result, the term "animal nuisance" alone, or the phrase "shall include but not be limited to," are "subjective term[s] that offer[] virtually no guidance to the [animal] owner who must comply with this legislation." Id. at 587. Persons of ordinary intelligence would be left to speculate as to all of the possible ways in which their animal could cause them penal liability under the ordinance.

B.

The ordinance, as construed by the majority, is also susceptible to subjective application by those enforcing the ordinance and invites ad hoc and discriminatory enforcement of the law. Under the majority's reading of ROH § 7-2.2, enforcement of the term "animal nuisance" alone, or of the phrase "shall include but not be limited to" unstated acts, becomes highly subjective. As previously indicated, the majority asserts that the definition of the term "nuisance" includes, inter alia, "a person, thing, or circumstance causing inconvenience or annoyance[.]" Majority opinion at 16-17 (quoting The New Oxford American Dictionary at 1175). But what may be an "inconvenience" or an "annoyance" to one person is not necessarily an "inconvenience" or an "annoyance" to another. Thus, law enforcement officers and judges are now "free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.'" Bloss, 62 Haw. at 150, 613 P.2d at 356-57 (internal quotation marks and citations omitted).

Coates v. City of Cincinnati, 402 U.S. 611 (1971), is relevant. In Coates, the challenged ordinance made it unlawful "for three or more persons to assemble, except at a public meeting of citizens, on any of the sidewalks, street corners, vacant lots, or mouths of alleys, and there conduct themselves in a manner annoying to persons passing by, or occupants of adjacent buildings." Id. at 612 n.1 (emphasis added). The Court struck down the ordinance as unconstitutionally vague, reasoning that

the statute subjected the exercise of the right of assembly to an unascertainable standard and that therefore, "men of common intelligence [had to] necessarily guess at its meaning." Id. at 614 (internal quotation marks and citation omitted). The Court explained that "the ordinance [was] vague, not in the sense that it require[d] a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct [was] specified at all" inasmuch as "[c]onduct that annoys some people does not annoy others." Id.

According to the Court, although a city may prohibit certain conduct "through the enactment and enforcement of ordinances[,]" "[the city] cannot constitutionally do so through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed." Id. Thus, the ordinance "contain[ed] an obvious invitation to discriminatory enforcement" and was therefore unconstitutional. Id. at 616.

Pertinent to the instant case, "[a] single bark, howl, or yelp may be considered [an 'inconvenience,'] unreasonable[, or 'annoying'] by someone if it occurs at an inopportune time[]" or to someone with particular sensitivities. Ferraiolo, 748 N.E.2d at 584. Thus, under the majority's construction, the ordinance is not "directed with reasonable specificity toward the conduct to be prohibited." Id. As indicated, in endorsing a broad and all-encompassing definition of "animal nuisance" and affirming the "shall include but not be limited to" language in ROH

§ 7-2.2, "no standard of conduct is specified at all" under the ordinance. Coates, 402 U.S. at 614. A violation of the ordinance "may entirely depend upon whether or not a[n officer]" determined the animal's acts were a "nuisance" based on his or her own subjective concept of the term. Id. The majority's construction of the ordinance thus renders it unconstitutional.

C.

However, a penal statute or ordinance should be read "'in such a manner as to preserve its constitutionality. To accord a constitutional interpretation of a provision of broad or apparent unrestricted scope, courts will strive to focus the scope of the provision to a narrow and more restricted construction.'" State v. Bayly, 118 Hawaiʻi 1, 7-8, 185 P.3d 186, 192-93 (2008) (quoting State v. Bates, 84 Hawaiʻi 211, 220, 933 P.2d 48, 57 (1997)).

The subsections of ROH § 7-2.2, which specifically define animal nuisance, set forth specific prohibited acts. That one is charged simply as an owner of an animal that engaged in animal nuisance does not provide notice of culpable conduct. In other words, charging Respondent with mere "animal nuisance" was insufficient inasmuch as (1) such a charge does not, in and of itself, describe any of the culpable acts enumerated in the ordinance and (2) such charge relegated Respondent to a position from which she had to speculate as to the acts that she would need to defend against. However, it would seem apparent that ROH § 7-2.2 sets forth alterative attendant circumstances, i.e., the

various specific acts of an animal that constitute "animal nuisance."[9] Construed in a more restricted manner, the ordinance would escape a challenge of vagueness under the construction of the ordinance imposed by the majority.[10]

VII.

In my view, the definition of "animal nuisance" in ROH § 7-2.2 sets forth alternative attendant circumstances as elements of the offense of "Animal Nuisance," that must be charged under ROH § 7-2.3. Additionally, the term "animal nuisance" alone is not susceptible of a commonly-understood meaning so as to dispense with the definition of that term in ROH § 7-2.2. Therefore, the charge in the instant case did not provide fair notice of the offense for which Respondent was prosecuted. Finally, in concluding that the term "animal nuisance" need not be defined because the phrase "shall include but not be limited to" in ROH § 7-2.2 creates a broad and all-encompassing definition of "animal nuisance," the majority has

[9] Because dog barking is covered by one or more of the specific acts listed under ROH § 7-2.2, the charge would not be insufficient if the prosecution had charged that the dogs had engaged in one of the acts specifically listed.

[10] The majority maintains that the phrase "shall include but not be limited to" establishes a non-exhaustive list of examples of animal nuisance exemplified by the subsections of ROH § 7-2.2. See majority opinion at 14. However, that language could be construed as applying to the clause which immediately follows it -- "any animal, farm animal or poultry." Under that interpretation, ROH § 7-2.2 would be read to provide that "[a]nimal nuisance[]" . . . shall include but not be limited to any animal, farm animal or poultry which" engages in one or more of the specifically defined acts listed in the subsections of ROH § 7-2.2.

rendered the ordinance unconstitutionally vague. For the foregoing reasons, I respectfully dissent.

/s/ Simeon R. Acoba, Jr.

/s/ James E. Duffy, Jr.