IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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NO. SCWC-10-0000072
(ICA NO. CAAP-10-0000072; CASE NO. 1DTA-10-01055)

STATE OF HAWAIʻI, Respondent/Plaintiff-Appellee,

vs.

KEVIN K. NESMITH, Petitioner/Defendant-Appellant.

NO. SCWC-30438
(ICA NO. 30438; CASE NO. 1DTA-09-04944)

STATE OF HAWAIʻI, Respondent/Plaintiff-Appellee,

vs.

CHRIS F. YAMAMOTO, Petitioner/Defendant-Appellant.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS

April 12, 2012

CONCURRING AND DISSENTING OPINION BY ACOBA, J.

I concur in the majority's holding that a culpable state of mind must be alleged in a charge of Operating a Vehicle Under the Influence of an Intoxicant (OVUII) under Hawaiʻi Revised Statutes (HRS) §§ 291E-61(a)(1) in order to inform a defendant of the nature and cause of the accusation against him

or her.[1] Although HRS § 291E-61(a)(1) does not specify a state of mind, pursuant to HRS § 702-204, "[w]hen the state of mind required to establish an element of an offense is not specified by the law, that element is established if, with respect thereto, a person acts intentionally, knowingly, or recklessly." Thus, an HRS § 291E-61(a)(1) charge must allege that the operator of the vehicle committed the acts with an intentional, knowing, or reckless state of mind. However, I must respectfully disagree with the remainder of the majority's opinion.

Contrary to the majority's position, our decisions require that with respect to an HRS § 291E-61(a)(1) charge, a state of mind must also be alleged in order to confer jurisdiction on the court. State v. Yonaha, 68 Haw. 586, 587, 723 P.2d 185, 186 (1986); State v. Faulkner, 61 Haw. 177, 178, 599 P.2d 285, 286 (1979); State v. Jendrusch, 58 Haw. 279, 281-82, 567 P.2d 1242, 1244 (1977). Additionally, in my view, HRS § 291E-61(a)(3)[2] is not a strict liability offense. Respectfully,

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[1] HRS § 291E-61(a)(1) (Supp. 2009) states:

> (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[.]

[2] HRS § 291E-61(a)(3) (Supp. 2009) states:

> (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:

to so conclude disregards the principle that criminal liability generally must be based on a culpable state of mind, and ignores the mandate that, in the "[a]bsen[ce of] statutory language expressly imposing absolute liability, the states of mind denominated in HRS § 702-204 will generally apply, because we will not lightly discern a legislative purpose to impose absolute liability." State v. Eastman, 81 Hawaiʻi 131, 140, 913 P.2d 57, 66 (1996) (quoting State v. Rushing, 62 Haw. 102, 105, 612 P.2d 103, 106 (1980)).

I.

In this case, Respondent/Plaintiff-Appellee State of Hawaiʻi (Respondent) charged Petitioners/Defendants-Appellants Kevin K. Nesmith (Nesmith) and Chris F. Yamamoto (Yamamoto) (collectively, "Petitioners") with OVUII under HRS §§ 291E-61(a)(1) "and/or" (a)(3). The charge against Nesmith stated as

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

HRS § 291E-61(a)(4) (Supp. 2009) states:

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

Although HRS § 291E-61(a)(4) was not charged and therefore not at issue in this case, the analysis set forth herein would likewise apply to that provision. The term "BAC" is used throughout this opinion to refer to both the blood or breath alcohol content provisions in HRS § 291E-61 and its predecessor statute, HRS § 291-4, interchangeably.

follows:

> On or about the 7th day of January, 2010, in the City and County of Honolulu, State of Hawaiʻi, [Nesmith] did operate or assume actual physical control of a vehicle upon a public way, street, road, or highway while under the influence of alcohol in an amount sufficient to impair his normal mental faculties or ability to care for himself and guard against casualty; and/or did operate or assume actual physical control of a vehicle upon a public way, street, road, or highway[3] with .08 or more grams of alcohol per two hundred ten liters of breath, thereby committing the offense of [OVUII], in violation of Section 291E-61(a)(1) and/or 291E-61(a)(3) . . . of the [HRS].

(Emphases added.) The charge against Yamamoto was similar, and also failed to allege any state of mind.[4] Petitioners present the same questions in their applications for writ of certiorari.[5]

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[3] In State v. Wheeler, 121 Hawaiʻi 383, 386, 391, 219 P.3d 1170, 1173, 1178 (2009) this court held the definition of the term operate, i.e., "to drive or assume actual physical control of a vehicle a vehicle on a public way, street, road, or highway," created an attendant circumstance element of OVUII.

[4] The charge against Yamamoto stated as follows:

> On or about the 28th day of October, 2009, in the City and County of Honolulu, State of Hawaiʻi, [Yamamoto] did operate or assume actual physical control of a vehicle upon a public way, street, road, or highway while under the influence of alcohol in an amount sufficient to impair his normal mental faculties or ability to care for himself and guard against casualty; and/or did operate or assume actual physical control of a vehicle upon a public way, street, road, or highway with .08 or more grams of alcohol per two hundred ten liters of breath, thereby committing the offense of [OVUII], in violation of Section 291E-61(a)(1) and/or 291E-61(a)(3) of the [HRS].

[5] The questions presented in Petitioners' Applications were as follows:

> 1. Was the OVUII charge herein legally sufficient[?]
> 2. Did the OVUII charge herein "fully define" the offense in "unmistakable terms readily comprehensible to persons of common understanding[?] . . .
> 3. What are the "essential facts" that must be included in an OVUII charge?
> 4. What mens rea, if any, is [Respondent] required to prove in an OVUII case?

II.

In this jurisdiction, a charge serves two primary, yet distinct, functions. First, because "[t]he criminal process begins when the accused is charged with a criminal offense[,]" State v. Sprattling, 99 Hawaiʻi 312, 317, 55 P.3d 276, 281 (2002), a charge must state an offense in order to establish that the court has jurisdiction over the case for "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." State v. Cummings, 101 Hawaiʻi 139, 142, 63 P.3d 1109, 1112 (20003) (emphasis added); see also Territory v. Gora, 37 Haw. 1, 6 (Haw. Terr. 1944) (referring to an alleged failure of the charge to state an offense as a "jurisdictional point"); Territory v. Goto, 27 Haw. 65, 102 (Haw. Terr. 1923) (Peters, C.J., concurring) ("Failure of an indictment to state facts sufficient to constitute an offense against the law is jurisdictional and is available to the defendant at any time.") (Emphasis added.); HRS § 806-34 (1993) (stating that, in an indictment, "the transaction may be stated with so much detail of time, place, and circumstances and such particulars as to the person (if any) against whom, and the thing

5. What mens rea, if any, is [Respondent] required to plead in an OVUII complaint?

(if any) in respect to which the offense was committed," all of which "are necessary to . . . show that the court has jurisdiction, and to give the accused reasonable notice of the facts") (emphasis added).

The inquiry as to whether an offense has been sufficiently charged in this regard is confined to the charge itself since the foregoing inquiry is not a question of whether the defendant had adequate notice of the charges against him or her. Cummings, 101 Hawaiʻi at 143, 63 P.3d at 1113 (stating 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 the defect "is one of substantive subject matter jurisdiction, 'which may not be waived or dispensed with'" (quoting Jendrusch, 58 Haw. at 281, 567 P.2d at 1244)); see also id. (stating that "just as the prosecution must prove beyond a reasonable doubt all of the essential elements of the offense charged, the prosecution is also required to sufficiently allege them and" such "requirement is not satisfied by the fact that the accused actually knew them and was not misled by the failure to sufficiently allege all of them") (quoting State v. Israel, 78 Hawaiʻi 66, 73, 890 P.2d 303, 310 (1995) (brackets omitted) (emphasis added))).

The second and equally important function of a charge is to provide a defendant with sufficient information to "inform [the defendant] of the nature and cause of the accusation" against him or her, Haw. Const. Art I § 14 ("In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation[.]"); See State v. Corder, 121 Hawaiʻi 451, 458, 220 P.3d 1032, 1039 (2009) (stating that because the "'accused shall enjoy the right to be informed of the nature and cause of the accusation[,] . . . a charge must be in a legally sufficient form which correctly advises the defendant about the allegations against him or her'" (quoting Israel, 78 Hawaiʻi at 69, 890 P.2d at 306) (brackets and ellipsis omitted))); State v. Stan's Contracting, Inc., 111 Hawaiʻi 17, 31, 137 P.3d 331, 345 (2006) (stating that HRS § 806-34, which sets forth what an indictment must include, "is grounded in article I, section 14 of the Hawaiʻi Constitution, which requires that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation'" (brackets and ellipsis in original)); Sprattling, 99 Hawaiʻi at 318, 55 P.3d at 282 (stating that, "'[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation'" (quoting Haw. Const. art. I, § 14) (brackets in original)); accord Israel, 78 Hawaiʻi at 70, 890 P.2d at 307.

It is apparent from the foregoing that a charge must state an offense for purposes of jurisdiction and of adequately informing the defendant of the nature and cause of the accusation against him or her. See Jendrusch, 58 Haw. at 281, 567 P.2d at 1244 ("Not only does [the charge] fail to state an offense, but it also fails to meet the requirement that an accused must be informed of the nature and cause of the accusation against him.") (Internal quotation marks and citation omitted.) (Emphasis added.)

III.

A.

The sufficiency of a charge for jurisdictional purposes is measured, inter alia, by "'whether it contains the elements of the offense intended to be charged[.]'") Cummings, 101 Hawaiʻi at 142, 63 P.3d at 1112 (quoting State v. Wells, 78 Hawaiʻi 373, 379-80, 894 P.2d 70, 76-77 (1995) (brackets omitted))). "'A charge defective in this regard amounts to a failure to state an offense,'" which renders any subsequent trial, judgment of conviction, or sentence a nullity." Id. (quoting Jendrusch, 58 Haw. at 281, 567 P.2d at 1244) (emphases added).

The charges against Petitioners fail to state an offense because the complaints lack any reference to the requisite states of mind. In Jendrusch, 58 Haw. at 280, 567 P.2d at 1243, the defendant alleged that his disorderly conduct charge

failed to charge an offense. This court explained in Jendrusch, that "[a]n essential element of an offense [of disorderly conduct] is an intent or a reckless disregard on the part of the defendant that his conduct will have a specific result." Id. at 281, 567 P.2d at 1244 (emphases added). According to Jendrusch, the "consequence which the statute seeks to prevent is actual or threatened physical inconvenience to, or alarm by, a member or members of the public" and "[t]he intent to produce this particular effect, or recklessly creating a risk thereof, is an essential ingredient of the conduct proscribed by the statute." Id. at 281-82, 567 P.2d at 1244 (emphases added). This court held that "[t]he failure of the complaint to set forth this essential element [i.e., the requisite state of mind,] as defined by the statute or to describe it with sufficient specificity so as to establish penal liability rendered it fatally defective." Id. at 282, 567 P.2d 1245; see also Yonaha, 68 Haw. at 587, 723 P.2d at 186 (holding that because the charge omitted the element of intent, "the charge was fatally defective for failure to allege a necessary element"); Faulkner, 61 Haw. at 178, 599 P.2d at 286 (stating that "[i]ntent is an essential element of the crime of criminal intent" and "[n]o allegation of intent was made").

State v. Elliott would also appear to suggest that the requisite state of mind for an offense is an "essential element"

that must be alleged in a charge. In Elliot, 77 Hawaiʻi 309, 310, 884 P.2d 372, 373 (1994), the defendant was charged, inter alia, with resisting arrest in violation of HRS § 710-1026(1)(a) (1985).[6] The defendant was orally charged as follows:

> On or about the 28th day of June, 1991 in Kona, County and State of Hawaiʻi, [the defendant] attempted to prevent a Peace Officer acting under color of his official authority from effecting an arrest by using or threatening to use physical force against the peace officer or another thereby committing the offense of resisting arrest in violation of Section 710-1026(1)(a) [HRS] as amended.

Id. at 310, 884 P.2d at 373 (emphasis in original) (brackets omitted). Elliot held that the charge was defective because "the requisite state of mind was omitted from the charge[.]" Id. at 313, 884 P.2d at 376 (emphasis added).

Hence, under our case law, for purposes of establishing jurisdiction, the "essential elements" of the offense, Jendrusch, 58 Haw. at 281, 567 P.2d at 1244, are not defined solely by what is designated as "elements" by the Hawaiʻi Penal Code (HPC), see HRS § 702-205 (defining the elements of an offense as "conduct," "attendant circumstances," and the "results of conduct" as "[a]re specified by the definition of the offense" and "[n]egative a

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[6] At the time, HRS § 710-1026(1)(a) provided in pertinent part:

> **Resisting arrest.** (1) A person commits the offense of resisting arrest if he intentionally prevents a peace officer acting under color of his official authority from effecting an arrest by:
>
> (a) Using or threatening to use physical force against the peace officer or another[.]

Elliott, 77 Hawaiʻi at 310 n.2, 884 P.2d at 373 n.2 (emphasis and brackets in original).

defense"), but by what the prosecution must prove beyond a reasonable doubt. If the charge omits the "essential element" of a culpable state of mind, Jendrusch, 58 Haw. at 281, 567 P.2d at 1244, that must be proved beyond a reasonable doubt,[7] the charge would be insufficient to establish penal liability and, thus, the jurisdiction of the court.[8]

B.

HRPP Rule 7(d) confirms that the sufficiency of a charge is not measured solely by whether it contains the elements as defined by HRS § 702-205. As set forth, HRPP Rule 7(d) provides that "[t]he charge shall be a plain, concise and definite statement of the essential facts constituting the offense charged." (Emphases added.) "Facts" denote matters that are broader than elements, as defined in HRS § 702-205, and a culpable state of mind is an "essential fact constituting the offense charged[,]" HRPP Rule 7(d), inasmuch as "no person may be convicted of an offense unless" the prosecution proves, inter alia, "[t]he state of mind required to establish each element of the offense" "beyond a reasonable doubt[,]" HRS § 701-114 (1993).

[7] It would appear beyond purview that the requisite culpable state of mind is an essential element that must be proven beyond a reasonable doubt except in the rare case where the offense is a strict liability one.

[8] Although HRS § 291E-61 is not an offense under the HPC, the HPC nevertheless applies "unless the HPC] otherwise provides." HRS § 701-102 (1993).

C.

Moreover, because HRS § 291E-61(a)(1) and (3) do not expressly set forth a requisite state of mind, to reiterate, HRS § 702-204 mandates that each element (as defined in HRS § 702-205) "is established if, with respect thereto, a person acts intentionally, knowingly, or recklessly." HRS § 702-204 (emphasis added). Thus, by virtue of HRS § 702-204, an intentional, knowing, or reckless state of mind is expressly incorporated into statutes like HRS § 291E-61 and, hence, must be included in the charge. The HPC does not draw any distinction for this purpose between an offense that contains the requisite state of mind in the definition of the offense and one that does not. Thus, whether the charge expressly includes the requisite state of mind in the definition of the offense or not, the state of mind must be alleged in the charge for purposes of jurisdiction. But, the requisite states of mind were not alleged in the charges against Petitioners. Consequently, the charges "contain[ed] within [them] a substantive jurisdictional defect, . . . render[ing Petitioners'] . . . judgment[s] of conviction . . . a nullity") Cummings, 101 Hawaiʻi at 142, 63 P.3d at 1112. Petitioners' convictions therefore cannot stand.

IV.

As discussed supra, a charge not only serves the function of establishing the jurisdiction of the court, but also

"inform[s the defendant] of the nature and cause of the accusation" against him or her, Haw. Const. Art I § 14, and provides the defendant with notice for purposes of due process, Haw. Const. Art I § 5 ("No person shall be deprived of life, liberty or property without due process of law[.]").

A.

Haw. Const. Art I § 14 mandates that a charge "be worded in a manner such 'that the nature and cause of the accusation could be understood by a person of common understanding.'" Sprattling, 99 Hawaiʻi at 318, 55 P.3d at 282 (quoting Israel, 78 Hawaiʻi at 71, 890 P.2d at 308); cf. State v. Beltran, 116 Hawaiʻi 146, 151, 172 P.3d 458, 463 (2007) (stating that a penal statute must "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'"). "'[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.'" Id. at 318, 55 P.3d at 282 (quoting Israel, 78 Hawaiʻi at 71, 890 P.2d at 308) (brackets omitted); see also Haw. Const. Art I § 14; Haw. Const. Art I § 5.

Based on the charges herein, a person of common understanding would not know that he or she was being accused of committing the OVUII offense, whether under HRS § 691E-61(a)(1) or (a)(3), "intentionally, knowingly, or recklessly." Relatedly, a person of common understanding also would not know that negligent conduct is insufficient to establish criminal liability under the statute. Without the allegation of a state of mind, a defendant would be led to believe that criminal liability is automatically imposed without respect to proof of that essential element. The charges, therefore, were neither "unmistakable" nor "readily comprehensible," State v. Wheeler, 121 Hawaiʻi 383, 393, 219 P.3d 1170, 1180 (2009), and thus failed to "inform [Petitioners] of the nature and cause of the accusation" against them, Haw. Const. Art I § 14.

B.

Along these lines, this court has further declared that "[t]he onus is on the prosecution to inform the accused fully of the accusations presented against him or her[.]" Sprattling, 99 Hawaiʻi at 318, 55 P.3d at 282 (emphasis added). It is plain that informing the accused "fully" of the nature and cause of the accusation against him or her, and sufficiently apprising the defendant of what he or she must be prepared to meet to defend against the charges, requires notifying the defendant of all essential elements of the offense, as defined in HRS § 702-205,

as well as the state of mind that applies to each of those elements, Jendrusch, 58 Haw. at 281, 567 P.2d at 1244; HRS § 702-204.

Furthermore, although a culpable state of mind is not referred to as an "element" in HRS § 702-205, it would be legally incomprehensible to hold that a state of mind need be alleged only for offenses specifically designating a state of mind in the description of the offense. At oral argument in this case, it was noted that "in practically every indictment we look at, the indictment sets out the elements of the crime, that is, the elements as defined in the penal code," and alleges "the state of mind, even though the penal code says 'state of mind is not an element."[9] Hence, there is no rational or constitutionally defensible basis for excluding a state of mind allegation for defendants charged under HRS § 291E-61 and thus denying them notification of the requisite state of mind that defendants charged with other offenses must be afforded. Haw. Const. Art I § 5.

V.

A.

The majority concludes, that a state of mind is a "fact[]" that must be included in an HRS § 291E-61(a)(1) charge

[9] The oral argument in this case may be found at http://www.courts.state.hi.us/courts/oral_arguments/archive/oasc10_0000072.html at 15:10-16:29.

for due process purposes only, but not an element of HRS § 291E-61(a)(1) that must be included in a charge for purposes of jurisdiction. Id. at 9, 15, 18. According to the majority, a state of mind is not listed as an element under HRS § 702-205, and State v. Klinge, 92 Hawaiʻi 577, 584 n.3, 994 P.2d 509, 516 n.3 (2000), stated that "under HRS § 702-205, state of mind is not an 'element' of a criminal offense." Id. at 16 (emphasis added). While acknowledging that Jendrusch, 58 Haw. at 281, 567 P.2d at 1244, Faulkner, 61 Haw. at 178, 599 P.2d at 286, and Yonaha, 68 Haw. at 587, 723 P.2d at 186, characterized a state of mind as an essential element of an offense, the majority concludes those cases "are in tension with the statutory definition of 'essential elements' in HRS § 702-205,[10] which does not include mens rea[,]" and merely "complicat[e] the issue" with respect to what must be included in a charge. Id. at 15-16.

Plainly, a state of mind is not an element as defined by HRS § 702-205, and Klinge merely pointed this out. Klinge's reference to HRS § 702-205 only is accurate enough. However, nothing in HRS § 702-205 limits essential elements of an offense that must be included in a charge to the elements expressly delineated thereunder. HRS § 702-205 says nothing of, and does not govern, charging instruments or jurisdiction. Jendrusch,

[10] It should be noted that the term "essential elements" is from our case law, e.g., Jendrusch, 58 Haw. at 281, 567 P.2d at 1244, and not used in HRS § 702-205.

Faulkner, and Yonaha, decided after the adoption of the HPC, including HRS § 702-205, hold that a state of mind is an "essential element" or "necessary element" of an offense for jurisdictional purposes, and the failure to include the requisite state of mind in the charge renders a charge fatally defective.

B.

Respectfully, contrary to the majority's assertion, statutes, rules, and case law governing what must be alleged in a charge are not "complicated" or "in tension." Majority opinion at 14. Except for the limited circumstances provided for in HRS § 702-212, no person may be convicted "of an offense unless the person acted intentionally, knowingly, recklessly, or negligently, as the law specifies, with respect to each element of the offense." As stated, although HRS § 291E-61 does not specify the requisite state of mind, HRS § 702-204 does. In that respect, a charge "'must sufficiently allege all of the essential elements of the offense charged[.]'" Cummings, 101 Hawaiʻi at 142, 63 P.3d at 1112 (quoting Jendrusch, 58 Haw. at 281, 567 P.2d at 1244); accord Israel, 78 Hawaiʻi at 69-70, 890 P.2d at 306-07; Elliott, 77 Hawaiʻi at 311, 884 P.2d at 374.

Our case law could not be clearer that the essential elements of an offense include the requisite state of mind, Jendrusch, 58 Haw. at 282, 67 P.2d at 1245; Yonaha, 68 Haw. at 587, 723 P.2d at 186; Faulkner, 61 Haw. at 178, 599 P.2d at 286,

as well as "conduct," "attendant circumstances," and "results of conduct," as defined in HRS § 702-205. Thus, our case law is not "complicated," but in fact clarifies what must be included in a charging document for purposes of jurisdiction, for purposes of fully informing the defendant as to the nature and cause of the accusation, and for purposes of guaranteeing due process.

Nor does our case law create "tension" with respect to the elements that must be included in a charge to confer jurisdiction on the court. The aforementioned cases plainly set forth the requisite state of mind as an essential element in addition to those elements set forth in HRS § 702-205 that must be alleged in order to confer jurisdiction. The case law on "essential elements" embodies the long-standing common law of this jurisdiction and complements HRS § 702-205, which as noted before, does not govern charging instruments or jurisdiction.

C.

Respectfully, the majority's position that the HRS § 291E-61(a)(1) charge in this case was deficient for failing to provide "fair notice" to Petitioners, but nevertheless jurisdictionally sound, cannot be reconciled. Under the majority's holding today, a charge under HRS § 291E-61 is defective and thus deprives the trial court of jurisdiction only if it omitted the requisite state of mind and one of the elements set forth under HRS § 702-205. But, this court has said, "the

sufficiency of the charging instrument is measured, inter alia, by 'whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he or she must be prepared to meet.'" Cummings, 101 Hawaiʻi at 142, 63 P.3d at 1112 (quoting Wells, 78 Hawaiʻi at 379-80, 894 P.2d at 76-77) (emphasis added). Thus, a charge defective for purposes of due process, necessarily, fails to allege an essential element of the offense and, consequently, must be defective for purposes of jurisdiction also.

VI.

Although the majority agrees that a state of mind must be included in an HRS § 291E-61(a)(1) charge, it concludes that HRS § 291E-61(a)(3) is a strict liability offense, for which a state of mind need not be alleged or proven. Majority opinion at 23. In this regard, the commentary to HRS § 702-204 states that a "state of mind [] will, in most instances, be required for the imposition of penal liability[,]" and, consequently, HRS § 702-212 "provides for those relatively few instances when absolute or strict liability will be recognized." (Emphasis added.) Thus, HRS § 702-212 states that, for "crime[s] defined by statute other than [the HPC]," the states of mind specified by the HPC "do not apply . . . insofar as a legislative purpose to impose absolute liability for such offense or with respect to any element thereof plainly appears."

The reason for this is plain. The central premise of the HPC is that conviction and punishment should be based on moral culpability. See commentary to HRS § 702-204 ("The distinct punitive nature of penal law dictates its sanction be reserved for those individuals who can be morally condemned.") Hence, under the HPC, "[t]he penal law does not, in most instances, condemn a person's conduct alone" but, rather, "condemns the individual whose state of mind with regard to the individual's conduct, attendant circumstances, and the result of the individual's conduct, exhibits an intent to harm, an indifference to harming, or a gross deviation from reasonable care for protected societal values." Id. Thus, "within the immediate context of the [HPC] criminal liability must be based on culpability[,]" and for "crimes defined by statutes other than the [HPC] -- when and only when -- 'a legislative purpose to impose absolute liability for such offense or with respect to any element thereof plainly appears.'" Commentary to HRS § 702-212(2) (emphasis added). The HPC is "applicable to offenses defined by other statutes, unless the Code otherwise provides." HRS § 701-102(2). The HPC, then, "takes the general position that absolute or strict liability in the penal law is indefensible in principle if conviction results in the possibility of imprisonment and condemnation[,]" whether or not

the offense is defined by the HPC or other statute. Id. (emphasis added). In this case, conviction may result in "imprisonment and condemnation."[11] Id. Accordingly, to treat HRS § 291E-61(a)(3) as a strict liability offense under the circumstances is indefensible under the code. There is no "statutory language [in HRS § 291E-61(a)(3)] expressly imposing absolute liability[,]" and therefore a legislative purpose to impose absolute liability should not be "lightly discerned." Eastman, 81 Hawaiʻi at 140, 913 P.2d at 66. This "seems very clear." Commentary to HRS § 702-212. Thus, the states of mind denominated under HRS § 702-204 . . . apply." Id.

A.

In support of its assertion that it is "well established that the legislature plainly intended to make [HRS § 291E-61] a 'per se' or 'absolute liability' offense, for which no mens rea element need be proven or even alleged," the majority relies primarily on State v. Mezurashi, 77 Hawaiʻi 94, 881 P.2d 1240 (1994), State v Christie, 7 Haw. App, 368, 764 P.2d 1245 (App. 1998), State v. Young, 8 Haw. App. 145, 795 P.2d 285 (App. 1990), and State v. Wetzel, 7 Haw. App. 532, 539, 782 P.2d 891, 895 (App. 1989). Majority opinion at 24.

[11] A person committed of OVUII for the first time may receive "[n]ot less than forty-eight hours and not more than five days of imprisonment[.] HRS § 291E-61(b)(1).

In Christie, 7 Haw. App. at 370, 764 P.2d at 1246, the ICA stated that "[s]ince 1983, DUI[12] has been a per se offense under [HRS] § 291-4(a)(2) (1985)[, the blood alcohol content (BAC)[13] section at the time,] requiring the mere proof of 0.10 percent or more by weight of alcohol in the driver's blood." Christie did not involve any issue regarding whether HRS § 291-4(a)(2) was a strict liability offense but involved a challenge to the method by which the intoxilyzer machine was calibrated. Id. at 370-71, 764 P.2d at 1247. Christie did not discuss HRS § 702-212, the commentary thereto, whether a legislative purpose to impose absolute liability under the BAC section plainly appeared in HRS § 291-4 or in its legislative history, or whether defenses could be raised to that section of the statute. Rather, in concluding that the BAC section was an absolute liability

[12] The statute in effect at the time, HRS § 291-4 (1985) (hereinafter, "DUI statute) provided:

> Driving under the influence of intoxicating liquor. (a) A person commits the offense of driving under influence of intoxicating liquor if:
>
> (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 0.10 per cent or more, by weight of alcohol in the person's blood.

[13] As indicated the breath alcohol content (also, hereinafter, referred to as "BAC") under HRS § 291E-61(a)(3) is at issue in this case, not the blood alcohol content under HRS § 291E-61(a)(4).

offense, Christie only reproduced the BAC section of the DUI statute. Id.

Wetzel relied on Christie when noting in a footnote, that the ICA had previously stated that DUI, HRS § 291-4, is a per se offense. See Wetzel, 7 Haw. App. at 539 n.8, 782 P.2d at 895 n.8. Wetzel, like Christie, did not involve the issue of whether the BAC section of the DUI statute was an "absolute liability" offense, but concerned a challenge to the foundation for the admission of BAC evidence. Id. at 535, 782 P.2d at 893. As in Christie, there was no discussion of HRS § 702-212, the commentary thereto, whether a legislative purpose to impose absolute liability under the BAC section plainly appeared in HRS § 291-4 or its legislative history, or whether defenses could be raised to HRS § 291-4.

Young, 8 Haw. App. at 153, 795 P.2d at 291, an ICA case relied upon heavily by the majority, only quoted HRS § 702-212 in holding that the legislative purpose of the BAC section of HRS § 291-4 "'was to impose absolute liability for such offense or with respect to any element thereof,' as provided in HRS § 702-212(2). (Quoting HRS § 702-212(2).) Young did not point to any language in HRS § 291-4 or its legislative history, nor did Young consider whether defenses could be raised to HRS § 291-4. Rather, Young merely relied on Wetzel, noting that Wetzel determined that "[b]y enacting [the BAC section], 'the legislature permitted proof of

DUI by merely showing that a defendant drove a vehicle with a BAC of 0.10 percent or more." Id. (quoting Wetzel, 7 Haw. App. at 539, 782 P.2d at 895). But, as stated, Wetzel, merely relied on Christie, which did not engage in the required HRS § 702-212(2) analysis, and Wetzel itself failed to engage in any independent analysis under HRS § 702-212(2). In this regard, Young, notwithstanding it recitation of the language of HRS § 702-212(2), lightly discerned a legislative intent to impose absolute liability under the BAC section. Notably, Christie, Wetzel, and Young are all ICA cases and are not binding on this court. I respectfully disagree with the majority's reliance on cases that have failed to identify any express language in the DUI statute or its legislative history indicating the BAC section was intended to be a strict liability offense.

Mezurashi, the only supreme court case relied upon by the majority did not involve whether the BAC section of HRS § 291-4 was an absolute liability offense.[14] Mezurashi relied on Christie for the proposition that the BAC section of the DUI statute was a per se offense. See Mezurashi, 77 Hawaiʻi at 96, 881 P.2d at 1242.

[14] The issue was "whether the Prosecution may rely on an intoxilyzer test result to prosecute a violation of [HRS] § 291-4(a)(1) [(driving under the influence of intoxicating liquor)] . . . when the HRS § 291-4(a)(2) [(BAC section)] charge has been dismissed." Mezurashi, 77 Hawaiʻi at 95, 881 P.2d at 1241.

It is apparent that the classification of the BAC section of the DUI statute, the predecessor of the BAC section of the OVUII statute, as a per se offenses originated in Christie, without any HRS § 702-212(2) analysis, and Christie was merely followed in subsequent cases. In Young, the ICA did conclude that there is no mens rea requirement for the BAC section of DUI, but again, without any analysis of HRS § 702-212, its requirements, or its commentary or the legislative history of the DUI statute. see 8 Haw. App. at 153, 795 P.2d at 291. Accordingly, it would appear that a legislative intent to impose absolute liability was "discerned lightly," Eastman, 81 Hawaiʻi at 140, 913 P.2d at 66, by the foregoing cases, an approach that the commentary to HRS § 702-212 cautions against "clearly" and which Eastman disavowed.

B.

In contrast to the foregoing cases, in Eastman, 81 Hawaiʻi at 140, 913 P.2d at 66, this court held that although the abuse of a family or household member statute did not refer to a requisite state of mind, the offense is not an absolute liability offense.[15] Eastman noted that HRS § 702-212(2) permits a penal

[15] The statute at issue in Eastman, HRS § 709-906(5) (Supp.1994), provides in pertinent part as follows:

> 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:

statute to dispense with the state of mind requirement "only 'insofar as a legislative purpose to impose absolute liability . . . plainly appears.'" Id. (emphasis in original). According to Eastman, this means, to reiterate, that "[a]bsent statutory language expressly imposing absolute liability, the states of mind denominated in HRS § 702-204 will generally apply because [this court] will not lightly discern a legislative purpose to impose absolute liability." Id. (quoting Rushing, 62 Haw. at 105, 612 P.2d at 106).

In Rushing, 62 Haw. at 105, 612 P.2d at 106, this court rejected the defendant's argument that HRS § 346-34, which provided at the time that "a recipient who fails to report income from outside sources 'shall be deemed guilty of fraud,'" created a "statutory presumption of intent . . . in violation of the Due Process Clause of the Fourteenth Amendment." This court did "not find the legislative purpose to impose absolute liability plainly to appear from the wording of HRS [§] 346-34." Id. (citing Commentary to HRS § 702-212). Thus, this court held that under HRS § 346-34, a defendant must act intentionally, knowingly, or recklessly. Id.

(a) For the first offense the person shall serve a minimum jail sentence of forty-eight hours; and
(b) For a second offense and any other subsequent offense which occurs within one year of the previous offense the person shall be termed a "repeat offender" and serve a minimum jail sentence of thirty days.

There is no express language imposing strict liability in HRS § 291E-61(a)(3). It would be inconsistent with the more recent admonitions in Eastman and Rushing to follow the older line of Christie cases referred to earlier. Because they lack any analysis or application of HRS § 702-212(2), those cases violated the admonition that, in the "[a]bsen[ce of] statutory language expressly imposing absolute liability," this court "will not lightly discern a legislative purpose to impose absolute liability." Eastman, 81 Hawaiʻi at 140, 913 P.2d at 66 (emphasis added). Construing HRS § 291E-61(a)(3) to dispense with a state of mind requirement in such circumstances would violate HRS § 702-212. To the extent Young, an ICA case, failed to adhere to HRS § 702-212(2) and, instead, appears to have "lightly discern[ed]" that the BAC provision creates an "absolute liability" offense under HRS § 702-212, it should not control.[16]

C.

1.

Next, in the absence of any express language in HRS § 291E-61(a)(3) and the lack of any cogent analysis in the cases

[16] The majority contends that "from Territorial days to the present, [DUI/OVUII law] has not changed much" and thus, "the line of cases holding the [BAC section under the DUI statute] to an absolute offense continues to apply with the same force to the instant appeals." Majority opinion at 28-29. However, because those cases failed to engage in any sort of analysis with respect to a legislative intent to impose strict liability under the BAC section of the DUI statute, as was done in Eastman and Rushing, those cases should not "continue[] to apply."

declaring the BAC section of the prior DUI statute a "per se offense," the majority asserts that in 1983, the legislature indicated its intent to qualify for "federal grants," majority opinion at 25 (citing S. Conf. Comm. Rep. No. 999, in 1983 Senate Journal, at 1478), and tracked one of the federal goals that a "'defendant shall be deemed under the influence of intoxicating liquor if he has ten-hundredths per cent or more by weight of alcohol in his blood[,]" id. (quoting H. Stand. Comm. Rep. No. 591, in 1983 House Journal, at 1105) (emphasis in original). Also, the majority states that one of the requirements for such grants was that a person "'shall be deemed to be driving while intoxicated" if that person has "a blood alcohol concentration of 0.10 percent or greater.'" Majority opinion at 24-25 (quoting Alcohol Traffic Safety - National Driver Register Act of 1982, Pub. L. No. 97-364, § 101, 96 Stat. 1738, 1738 (1982). According to the majority, the legislature then amended the statute to provide that a "person commits the offense of driving under the influence of intoxicating liquor if: . . . (2) The person operates or assume actual physical control of the operation of any vehicle with 0.10 per cent or more by weight of alcohol in the person's blood." Majority opinion at 26 (quoting 1983 Sess. Laws Act 117, § 1 at 208).

In 1995, the legislature amended HRS § 291-4 to change the specified BAC from .10 to .08. See 1995 Sess. Laws Act 226,

§ 9 at 587. In amending the statute, the legislature intended "to toughen the laws regarding driving under the influence of intoxicating liquor or drugs" by, inter alia, "lower[ing] the blood alcohol concentration threshold from .10 to .08." H. Conf. Comm. Rep. No. 715, in 1995 House Journal, at 962 (emphasis added). The legislature determined that "lowering the BAC to .08 would set the threshold for driving under the influence of intoxicating liquors at a level at which driving skills are proven to be compromised for the vast majority of drivers." H. Conf. Comm. Rep. No. 716, in 1995 House Journal, at 1346 (emphasis added). According to the legislature, ".08 BAC is a limit which is reasonable and necessary for the safety of all[.]" Id. (emphasis added).

The term "deem" is ordinarily defined as "[t]o treat (something) as if (1) it were really something else, or (2) it had qualities that it does not have[.]" Black's Law Dictionary 446 (8th ed. 2004). The definition notes that the term "deem" "has been traditionally considered to be a useful word when it is necessary to establish a legal fiction either positively by deeming something to be what it is not or negatively by deeming something not be what it is." Id. (internal quotation marks and citation omitted). Thus, in amending the DUI statute to include the BAC provision, the legislature established two alternative methods of proving the element of "influence of intoxicating

liquor." The prosecution could seek to submit evidence tending to establish that the defendant was "under the influence of intoxicating liquor[,]" which might include evidence that the defendant had blood-shot eyes or the odor of an alcoholic beverage on his or her breath, or to submit evidence that there was ".10 per cent or more, by weight of alcohol in the [defendant]'s blood[,]" at the time the defendant was in control of a vehicle, thus equating being under the influence with a .10 BAC.

The prescribed BAC level thus sets forth the "threshold," H. Conf. Comm. Rep. No. 716, in 1995 House Journal, at 1346, or "limit" for intoxication, H. Conf. Comm. Rep. No. 716, in 1995 House Journal, at 1346. But the fact that one is "deemed" intoxicated at a certain BAC percentage merely equated that level with being under the influence. That amendment did not indicate that a culpable state of mind did not attach to intoxication. Nothing in the legislative history suggests that the federal government or the legislature intended to dispense with any culpable state of mind for the offense. Given its ordinary meaning, the words "shall be deemed . . . intoxicated" did not eliminate a culpable state of mind with respect to the BAC element, or as to any of the other elements of the DUI offense, such as exercising control of a vehicle.

Further, although in amending HRS § 291-4 in 1995, the legislature sought to "toughen the laws regarding driving under the influence of intoxicating liquor or drugs," H. Conf. Comm. Rep. No. 715, in 1995 House Journal, at 962, the legislature never made any reference to omitting a state of mind requirement or to precluding any defenses to the BAC section of the statute. Accordingly, the legislative history pertaining to the BAC amendments do not support the conclusion that the legislature intended that a defendant should be strictly liable for all elements under the BAC section of the DUI/OVUII statute. With all due respect, in the absence of language in the DUI/OVUII statutes, or legislative history expressly evincing a clear intent to make the BAC section a strict liability offense, the majority violates the admonition that this court "not lightly discern a legislative intent" to impose absolute liability with respect to HRS § 291E-61(a)(3). Eastman, 81 Hawaiʻi at 140, 913 P.2d at 66 (quoting Rushing, 62 Haw. at 105, 612 P.2d at 106).

State v. Buch, 83 Hawaiʻi 308, 926 P.2d 599 (1996), is instructive with respect to the kind of legislative history that might evince an intent to make an offense one of strict liability. In Buch, the defendant was convicted of sexual assault in the third degree, HRS § 707-732(1)(b), which provided in relevant part that "a person commits the offense of sexual assault in the third degree if the person knowingly subjects to

sexual contact another person who is less than fourteen years old or causes such a person to have sexual contact with the person.'" Id. at 309 n.1, 926 P.2d at 600 n.1 (brackets and ellipsis omitted) (emphasis added). The defendant requested an instruction on sexual assault in the fourth degree, which provided that a person commits the fourth degree offense if the person "knowingly" subjects another person to sexual contact. Id. at 312, 926 P.2d at 603 (brackets and ellipsis omitted). The trial court refused to give the instruction. Id.

At the close of the prosecution's case, the defendant moved for a judgment of acquittal, asserting that the prosecution had not proven beyond a reasonable doubt that the defendant knew the complaining witness was less than fourteen years old. Id. at 311, 926 P.2d at 602. The trial court denied the defendant's motion. Id. On appeal, the defendant contended, pursuant to HRS § 702-207, that "[w]hen the definition of an offense specifies the state of mind, . . . the specified state of mind shall apply to all elements of the offense, unless a contrary purpose plainly appears." Id.

Buch noted that under 1970 proposed draft of the HPC, sexual assault offenses required knowledge of the attendant circumstance of the minor's age. Id. at 314, 926 P.2d at 605. The legislative history pertinent to the sexual assault offense stated that various sections had been amended by the legislature

"'to increase the age of consent from 12 to 14" and "'to eliminate the requirement of actual knowledge[.]'" Id. at 315-16, 926 P.2d at 606-07 (quoting Conf. Comm. Rep. No. 1, in 1972 House Journal, at 1038) (emphasis added). According to Buch, "[t]he legislative history unequivocally indicates that, where the age of the victim is an element of a sexual offense, the specified state of mind is not intended to apply to that element." Id. at 316, 926 P.2d at 607. This court thus held that "a defendant is strictly liable with respect to the attendant circumstance of the victim's age in a sexual assault[.]" Id.

The majority does not point to any legislative history remotely similar to the legislative history in Buch. The legislative history does not state that it sought "'to eliminate the [state of mind] requirement[.]'" Id. at 315-16, 926 P.2d at 606-07 (quoting Conf. Comm. Rep. No. 1, in 1972 House Journal, at 1038). Nor does the majority cite to any legislative history that "unequivocally indicates[,]" id. at 316, 926 P.2d at 607, that the legislature intended that no state of mind requirement apply to HRS § 291E-61(a)(3). Thus, no legislative purpose to impose absolute liability for HRS § 291E-61(a)(3) is reflected in the statute or its legislative history.

2.

The majority attempts to draw a distinction between

crimes that fall within the HPC and those that do not, suggesting that the imposition of strict liability as "indefensible" does not apply to those offenses not defined in the HPC. See majority opinion at 31 n.8. Respectfully, the majority's suggestion that the requirement of moral culpability is any less applicable because a penal offense is found outside the HPC is not supported by the HPC or its commentary. HRS § 702-212(2) does not suggest that offenses defined outside the code do not require moral culpability. HRS § 702-212(2) merely "recognize[s] that the scope of the Penal Code is finite," and penal offenses may be defined outside the HPC. Commentary to HRS § 702-212(2). Indeed, the HPC is "applicable to offenses defined by other statutes, unless the Code otherwise provides." HRS § 701-102(2). Thus, the HPC presumes states of mind apply to offenses defined by the HPC and offenses defined outside the HPC. See Commentary to HRS § 702-212(2) (explaining that the exception in HRS § 702-212(2), which allows an offense to dispense with a state of mind "provides for an extremely limited situation").

Accordingly, the fact that HRS § 291E-61(a)(3) is outside the HPC does not diminish the requirements that strict liability should only be imposed if there is express language to that effect or, second, if the legislature clearly said so. We have already confirmed this standard in a case like this one,

involving a statute outside the HPC that did not contain a state of mind designation, see Rushing, 62 Haw. at 105, 612 P.2d at 106. Contrary to the majority's view, for the reasons stated supra, it does not "plainly appear[,]" HRS § 702-212(2), that merely equating a BAC level with driving under the influence, demonstrates that the legislature intended to impose strict liability. When the legislature intended to do so, it "unequivocally" expressed its intent. Buch, 83 Hawaiʻi at 316, 926 P.2d at 607.

3.

The majority also asserts that "[t]he legislature is presumed to be aware of judicial constructions . . . and it has had abundant opportunities to amend the statute if it intended for [the former DUI statute] and its successor HRS § 291E-61(a)(3) not to constitute absolute liability offenses." Majority opinion at 29. Although this court has suggested that the legislature's failure to respond to judicial construction of statute may be deemed tacit approval of such construction, see Hussein, 122 Hawaiʻi at 529, 229 P.3d at 347; Gray v. Admin. Dir., 84 Hawaiʻi at 143 n.9, 931 P.2d at 585 ; State v. Dannenberg, 74 Haw. 75, 83, 837 P.2d 776, 780 (1992), the validity of this proposition has been questioned by the United States Supreme Court and other federal courts.

In United States v. Wells, 519 U.S. 482, 495-96 (1997), for example, the Supreme Court suggested that congressional inaction or silence is not a realistic indicator of legislative intent:

> [Respondents] contend that Congress has ratified holdings of some of the Courts of Appeals that materiality is an element of § 1014 by repeatedly amending the statute without rejecting those decisions. But the significance of subsequent congressional action or inaction necessarily varies with the circumstances, and finding any interpretive help in congressional behavior here is impossible. Since 1948, Congress has amended § 1014 to modify the list of covered institutions and to increase the maximum penalty, but without ever touching the original phraseology criminalizing "false statement [s]" made "for the purpose of influencing" the actions of the enumerated institutions. We thus have at most legislative silence on the crucial statutory language, and we have "frequently cautioned that '[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law[.]'"

(Emphases added.)[17] Moreover, a court should view legislative inaction or silence as evidence of the legislature's tacit approval only with extreme care, Agency of Northern Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159, 169 (2001) (stating that, "[a]lthough we have recognized congressional acquiescence to administrative interpretations of a statute in some situations, we have done so with extreme care"), and should be deemed evidence of such approval only where it is apparent the

[17] See also Bob Jones Univ. v U.S., 461 U.S. 574, 600 (1983) ("Non-action by Congress is not often a useful guide . . . ."); United States v. Rutherford, 442 U.S. 544, 554 n.10 (1979) ("To be sure, it may not always be realistic to infer approval of a judicial or administrative interpretation from congressional silence alone.") First Nat'l City Bank v. United States, 557 F.2d 1379, 1384 (1977) (acknowledging "that the doctrine of legislative acquiescence is at best only an auxiliary tool for use in interpreting ambiguous statutory provisions").

legislature was indeed aware of the particular statutory construction.[18]

There is nothing in the legislative history to indicate that the legislature was fully aware of this court's construction of HRS § 291E-61(a)(3) as a per se offense, or that such construction was brought to the legislature's attention for the purpose of enacting HRS § 291E-61(a)(3). See Rutherford, 442 U.S. at 554. By relying, at least in part on the legislature's purported tacit approval, respectfully, the majority "lightly discern[s]" a legislative intent in order to impose absolute liability. Eastman, 81 Hawaiʻi at 140, 913 P.2d at 66 (1996) (quoting Rushing, 62 Haw. at 105, 612 P.2d at 106).

D.

1.

The majority's construction of HRS § 291E-61(a)(3) is

[18] See also U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121, 137 (1985) (Although we are chary of attributing significance to Congress' failure to act, a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it."); See also Rutherford, 442 U.S. at 554 (explaining that deference to an agency's interpretation of a statute is particularly appropriate when "an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned"); FDA v. Brown & Williamson, 529 U.S. 120, 155-56 (2000) ("Indeed, this is not a case of simple inaction by Congress that purportedly represents its acquiescence in an agency's position[;]" rather "Congress has enacted several statutes addressing the particular subject of tobacco and health, creating a distinct regulatory scheme for cigarettes and smokeless tobacco" such that "it is clear that Congress' tobacco-specific legislation has effectively ratified the FDA's previous position that it lacks jurisdiction to regulate tobacco).

further undercut by the defenses of nonself-induced intoxication and pathological intoxication, HRS § 702-230(2). Nothing in HRS § 291E-61(a)(3) or its legislative history suggests that the BAC section of the DUI statute, now OVUII statute, is absolved from these defenses.

HRS § 702-230 provides that "[e]vidence of the nonself-induced or pathological intoxication of the defendant shall be admissible to prove or negative the conduct alleged or the state of mind sufficient to establish an element of the offense." (Emphases added.) "Self-induced intoxication" is defined as "intoxication caused by substances which the defendant knowingly introduces into the defendant's body, the tendency of which [is] to cause intoxication the defendant knows or ought to know[.]" HRS § 702-230(5)(a). Conversely, then, nonself-induced intoxication would be intoxication caused by substances which the defendant knowingly introduces into the defendant's body, the tendency of which is to cause intoxication the defendant does not know or ought to know about. Self-induced intoxication would clearly encompass instances in which a person drinks something without knowing that it will cause intoxication, for example, "spiked punch."

"Pathological intoxication" is defined as "intoxication grossly excessive in degree, given the amount of the intoxicant, to which the defendant does not know the defendant is susceptible

and which results from a physical abnormality of the defendant." HRS § 702-230(5)(c) (emphasis added). The commentary to HRS § 702-230 explains that "'pathological intoxication' is defined and employed 'to provide a defense in a few, extremely rare, cases in which an intoxicating substance is knowingly taken into the body and, because of a bodily abnormality, intoxication of an extreme and unusual and unforeseen degree results.'" (Brackets omitted.)

Nothing in HRS § 702-230 indicates that nonself-induced intoxication or pathological intoxication are not available as defenses to an HRS § 291E-61(a)(3) charge. Indeed, the opposite is true inasmuch as the defenses refer to intoxication, and OVUII is an offense based upon act(s) committed while one is intoxicated. The majority states that it does not decide whether its holding that HRS § 291E-61(a)(3) is a strict liability offense would be inconsistent with the defenses under HRS § 702-230. Majority opinion at 31 n.8. However, in light of the formulation of the defenses, it would appear inconsistent to treat HRS § 291E-61(a)(3) as a strict liability offense. The majority's reserves the question as one that "splits" the jurisdictions. However, State v. Teschner, 394 N.E. 2d 893, 895 (1979) State v. West, 416 A.2d 5, 7, 9 (Me. 1980), State v. Gurule, 252 P.3d 823, 825, 828, (N.J. 2011), State v. Hammond, 571 A.2d 942, 943 (1990), cited by the majority, all hold that an involuntary intoxication defense would be inconsistent with a

strict liability statute. The one case cited by the majority as holding that the defense can be asserted in a strict liability charge, rested not on a statutory analysis but on overriding constitutional due process grounds. As Carter v. State, 710 So.2d 110, 113 (Fla. App. 1998) stated, "We have considered the state's argument that the failure to give the instruction [on involuntary intoxication] was harmless[.] . . ." "[H]owever, this error has constitutional due process implications[,]" id. and "at least three other states agree with our conclusion that due process requires that involuntary intoxication is available as a defense in DUI cases." Id. n.2. Carter does not imply that the majority's position is correct, but that it would be subject to due process challenge.

VII.

Conceivably, the majority's holding creates two classes of OVUII offenders, although all would have essentially engaged in the same conduct. There may be instances where two individuals in virtually the same factual circumstances are equally intoxicated. However, one will be able to raise defenses and the other will be held strictly liable. For example, a defendant charged with OVUII under HRS § 291E-61(a)(1) ("the first driver") will have the benefit of the requirement that the State prove beyond a reasonable doubt each element of HRS § 291E-61 (as defined in HRS § 702-205) intentionally, knowingly, or

recklessly. This would include, for example, proof that the defendant intentionally, knowingly, or recklessly drove or operated his or her vehicle "on a public way, street, road, or highway[.]" Wheeler, 121 Hawaiʻi at 386, 219 P.3d at 1173. Thus, the first driver will be able to assert as a defense, that he or she had no knowledge whatsoever that he or she was on a public way, street, road, or highway, or was only negligent in that belief. That defendant may also avail himself or herself of the defenses set forth HRS § 702-230, if applicable.

On the other hand, under the majority's holding, if an equally intoxicated defendant is charged under HRS § 291E-61(a)(3) ("the second driver"), that defendant will be strictly liable and convicted of the offense, irrespective of whether he or she did not intentionally, knowingly, or recklessly drive or operate a vehicle on a public way, street, road, or highway, or did so with a negligent state of mind. The State will not be required to prove that the second driver committed the offense with any culpable state of mind. For example, even if there was indisputable proof that the second driver could not have known that he or she was on a public way, street, road, or highway, the second driver would nevertheless be held strictly liable. If the second driver had proof that he or she did not know there was alcohol in his or her beverage; for instance, if a restaurant had

mistakenly given him or her an alcoholic beverage instead of punch, the second driver nevertheless would be strictly liable. Presumably, the second driver would not be able to avail himself or herself of the defenses in HRS § 702-230. Respectfully, the majority's construction of the statute invites unfair and unjust results because persons who are in the same or similar circumstances will be subject to materially different consequences under the law.

In any event, the majority raises serious consequences for any driver charged under HRS § 291E-61(a)(3). To reiterate, the central premise of the HPC is that conviction and punishment should be based on moral culpability and, generally, mere conduct is not punishable. See commentary to HRS § 702-204. However, where, for example, there is indisputable proof that a driver could not have known he or she was on a public way, street, road, or highway, or indisputable proof that a driver was unaware he or she had consumed an alcoholic beverage (e.g., "spiked punch"), conviction under such circumstances contravenes any justification for punishment. The majority's holding, which eliminates the prosecution's burden of proving any state of mind as to operating or assuming actual physical control of a vehicle or as to having a BAC level of .08 or more grams or as to driving upon a public way, street, road, or highway, significantly departs from the

principle of moral culpability underlying all criminal law. Respectfully, because HRS § 291E-61(a)(3) is not merely a regulatory statute and conviction thereunder can result "in the possibility of imprisonment and condemnation[,]" to reiterate, construing it as a strict liability offense under these circumstances is "indefensible." Commentary to HRS § 702-212(2).

VIII.

As observed, the legislative history does not indicate that because one is "deemed" intoxicated at a certain BAC level, he or she should not be charged with a culpable state of mind in becoming "intoxicated," or a culpable state of mind with respect to the other elements of HRS § 291E-61(a)(3). Although it may be impractical to establish that a defendant intentionally or knowingly attained the statutory BAC level, it would not be difficult to establish that the person acted recklessly in attaining that level.[19] Eastman, 81 Hawaiʻi at 140-41, 913 P.2d at 66-67 ("[T]he prosecution did not introduce direct evidence showing [the defendant's] state of mind at the time when he physically abused [the complainant]"; however, "[g]iven the

[19] HRS § 702-206(3) provides that a person acts recklessly (1) with respect to his conduct when he consciously disregards a substantial and unjustifiable risk that her or her conduct is of the specified nature; (2)with respect to attendant circumstances when he or she consciously disregards a substantial and unjustifiable risk that such circumstances exist; and (c) with respect to a result of his or her conduct when he or she consciously disregards a substantial and unjustifiable risk that his conduct will cause such a result. HRS § 702-206(3).

difficulty of proving the requisite state of mind by direct evidence in criminal cases, proof by circumstantial evidence and reasonable inferences arising from circumstances surrounding the defendant's conduct is sufficient").

IX.

As stated, I concur in the majority's holding that a culpable state of mind must be alleged in an HRS § 291E-61(a)(1) charge in order to adequately inform the defendant as to the nature and cause of the accusation against him or her.[20] However, I must respectfully disagree with the majority's conclusions that a state of mind need not be alleged in an HRS § 291E-61(a)(1) charge for purposes of jurisdiction and that HRS § 291E-61(a)(3) is a strict liability offense for which no state of mind must be alleged or proven. Because a culpable state of mind was not alleged as an "essential element" of HRS § 291E-61(a)(1) and

[20] I also concur in the majority's conclusion that "[t]he distinction between 'general intent' and 'specific intent' crimes . . . no longer applies." Majority opinion at 19. This jurisdiction has abandoned distinctions between general and specific intent "in favor of four defined culpable states of mind[,]" State v. Kalama, 94 Hawaiʻi 60, 65, 8 P.3d 1224, 1229 (2000), i.e., intentional, knowing, reckless and negligent. As discussed, because HRS § 291E-61 does not specify a state of mind, the requisite state of mind that is required to be charged for jurisdictional purposes and for the purposes of informing the defendant of the nature and cause of the accusation against him or her is an intentional, knowing, or reckless state of mind.

I also agree that HRS § 806-28, which provides that an "indictment need not allege that the offense was committed or the act done 'feloniously', 'unlawfully', 'wilfully', 'knowingly', 'maliciously', 'with force and arms', or otherwise except where such characterization is used in the statutory definition of the offense[,]" does not apply to district courts. (Emphasis added.) However, insofar as HRS § 702-204 specifies the states of mind for offenses such as HRS § 291E-61(a)(1) and (3), such states of mind are "used in the statutory definition of the offense." HRS § 806-28.

(a)(3) in this case, the charges against Petitioners should be dismissed without prejudice for want of jurisdiction.

/s/ Simeon R. Acoba, Jr.