DISSENTING OPINION BY NAKAMURA, C.J.

I disagree with the majority's conclusion that the charge in this case was insufficient. I therefore respectfully dissent.

I.

This case involves the prosecution of Defendant-Appellant Wanda Ruriko Mita (Mita) for owning two dogs engaged in animal nuisance, in violation of the Revised Ordinances of Honolulu (ROH) Section 7-2.3 (1990 & Supp. No. 6, 2-05). The complaining witness was Mita's neighbor who asserted that Mita's dogs engaged in animal nuisance by their barking on June 3, 2008.

On June 5, 2008, Mita was issued an "Animal License & Regulation -- Complaint & Summons" (Citation). The Citation stated that Mita "[d]id on/or about this 3 day of June Yr 08 at about 1940-2050 did own, harbour or keep (animal description): Boxers[,] Name Roxy/Obie[,] Color Brown[,] at (location): [Mita's residence address] and did commit the offense of: animal nuisance--Sec: 7-2.3 Barking Dog." The Citation also contained a section entitled "Officer's Report" which stated, "Mita was issued a Barking 3rd citation. She was already issued a previous Barking 2 warning citation." The summons portion of the Citation advised Mita that her appearance date in court was July 17 at 8:30 a.m. Mita acknowledged her receipt of the Citation by signing it.

Mita was represented by counsel when she appeared in court on July 17, 2008. Mita, through her counsel, waived reading of the charge and entered a not guilty plea. The case was set for trial.

On the date scheduled for trial, Mita appeared with her counsel. Prior to trial, the Deputy Prosecuting Attorney (DPA) read the following oral charge to Mita:

> [DPA]: On or about June 3rd, 2008, in the city and county of Honolulu, state of Hawaii, you as the owner of an animal, farm animal, or poultry engaged in

> animal nuisance as defined in section 7-2.2,[1/] thereby violating section 7-2.3 of the Revised Ordinances of Honolulu.[2/]

(Footnotes added.)

Mita's counsel objected to the oral charge, arguing that it was insufficient because it did not specify what part of the definition of animal nuisance with which Mita was being charged.

> [Mita's counsel]: Your Honor, if I may make for the record an objection to the arraignment. I do not believe that arraignment is specific enough to put the defendant 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 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 of 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 it's our position that under *State v. Jendrusch*, 58 Haw. 279, a 1977 case, we should receive specificity in the arraignment so

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[1] ROH § 7-2.2 (1990 & Supp. No. 6, 2-05) is a definitions section, which contains the definition of a number of terms. ROH § 7-2.2 defines the term "animal nuisance" as follows:

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

[2] ROH § 7-2.3, entitled "Animal nuisance--Prohibited[,]" provides in relevant part: "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 . . . ."

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

The DPA argued that the oral charge was sufficient, but she offered to read the statutory definition of "animal nuisance" if the trial court found that necessary for the oral charge to be sufficient. The trial court ruled that it was not necessary to read the definition.

> [DPA]: Your Honor, the prosecution's position, Defendant 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 the State'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 Court would like me to read the definition of animal nuisance, I will be -- I would be happy to do that.
>
> THE COURT: And the Court is going to agree with the prosecution's position. They have arraigned on 7-2.3, which is the prohibition section, and that does incorporate the definition section, which is not a prohibition. So, therefore, I find that the arraignment is proper.

II.

In concluding that the charge against Mita was insufficient, the majority relies upon the recent decision of the Hawai‘i Supreme Court in State v. Wheeler, 121 Hawai‘i 383, 219 P.3d 1170 (2009). However, as explained below, I do not believe that Wheeler leads to the conclusion that the charge in Mita's case was insufficient.

A.

"[T]he purpose of an indictment is to apprise the accused of the charges against him, so that he may adequately prepare his defense, and to describe the crime charged with sufficient specificity to enable him to protect against future jeopardy for the same offense." State v. Vanstory, 91 Hawai‘i 33, 44, 979 P.2d 1059, 1070 (1999) (quotation marks and citation omitted).

> It is well settled that an accusation must sufficiently allege all of the essential elements of the offense charged, a requirement that obtains whether an accusation is in the nature of an oral charge, information, indictment, or complaint. Put differently, the sufficiency of the charging instrument is measured, *inter alia*, by whether it contains the elements of the offense intended to

> be charged, and sufficiently apprises the defendant of what he or she must be prepared to meet.

Wheeler, 121 Hawai‘i at 391, 219 P.3d at 1178 (internal quotation marks, brackets, and citations omitted) (quoting State v. Merino, 81 Hawai‘i 198, 212, 915 P.2d 672, 686 (1996)).

Generally, a charge which tracks the language of the statute proscribing the offense is sufficient. See State v. Cordeiro, 99 Hawai‘i 390, 406, 56 P.3d 692, 708 (2002); State v. Silva, 67 Haw. 581, 585, 698 P.2d 293, 296 (1985). "Where the statute sets forth with reasonable clarity all essential elements of the crime intended to be punished, and fully defines the offense in unmistakable terms readily comprehensible to persons of common understanding, a charge drawn in the language of the statute is sufficient." Wheeler, 121 Hawai‘i at 393, 219 P.3d at 1180 (quotation marks and brackets omitted) (quoting State v. Jendrusch, 58 Haw. 279, 282, 567 P.2d 1242, 1245 (1977)).

B.

In Wheeler, the defendant was prosecuted for operating a vehicle under the influence of an intoxicant (OVUII), in violation of Hawaii Revised Statutes (HRS) §§ 291E-61(a)(1) (2007). Wheeler, 121 Hawai‘i at 385, 219 P.3d at 1127. That section provides:

> (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[.]

HRS § 291E-1 (2007), the definitions section for HRS Chapter 291E, provides in relevant part that the term "'[o]perate' means to drive or assume actual physical control of a vehicle upon a public way, street, road, or highway . . . ." (Emphasis added.)

The oral charge in Wheeler tracked the language of HRS § 291E-61(a)(1) and alleged that Wheeler "did operate or assume actual physical control of a . . . vehicle." Wheeler, 121 Hawai‘i at 386-87, 219 P.3d at 1173-74. The oral charge did not, however, include the statutory definition of "operate," namely,

that Wheeler drove or assumed actual physical control of a vehicle "upon a public way, street, road, or highway." HRS § 291E-1 (emphasis added). The "upon a public way, street, road, or highway" language of HRS § 291E-1 creates a location requirement (hereinafter, the "location requirement") for the OVUII offense. Wheeler, 121 Hawai‘i at 391-93, 219 P.3d at 1178-80.

The supreme court held that the location requirement, which is contained in the statutory definition of the term "operate," is an attendant circumstance of the OVUII offense and therefore is an essential element that had to be charged against Wheeler. Id. at 391-93, 219 P.3d at 1178-80. The supreme court further held that merely alleging that Wheeler did "operate" a vehicle was insufficient to charge the location requirement, an essential element of the offense. Id. at 393-96, 219 P.3d at 1180-83. The court's decision was based on the uncommon statutory definition of "operate," which imposes a location requirement that does not comport with the commonly understood meaning of the term "operate." Id. at 394, 219 P.3d at 1181. The court noted that the common definition of the term "operate" does not "geographically limit where the conduct must take place." Id. The court therefore concluded that alleging that Wheeler did "operate" a vehicle did not serve to fairly apprise Wheeler of the location requirement element in terms that were "unmistakable" or "readily comprehensible to persons of common understanding." Id. (quotation marks and citations omitted).[3/]

[3] The Hawai‘i Supreme Court explained that the lack of conformity between the commonly understood meaning of the term "operate" and its statutory definition distinguished Wheeler from the United States Supreme Court decision in Hamling v. United States, 418 U.S. 87 (1974). Wheeler, 121 Hawai‘i at 394, 219 P.3d at 1181. In Hamling, the United States Supreme Court rejected the defendant's claim that the indictment was insufficient because the government used the term "obscene" in the indictment without pleading the component elements of the constitutional definition of obscenity. Hamling, 418 U.S. at 117-19. Unlike in Wheeler, there is no comparable lack of conformity between the commonly understood meaning of "obscenity" and its constitutional definition. In distinguishing Hamling, the Hawai‘i Supreme Court observed that "it is significant that the term 'obscenity' itself provided a person of common understanding with some notice of the nature of the prohibited conduct." Wheeler, 121 Hawai‘i at 394, 219 P.3d at 1181.

Wheeler objected to the sufficiency of the charge before trial. Id. at 387, 219 P.3d 1170. Because Wheeler timely objected, the supreme court did not apply the liberal construction rule used in cases where a defendant fails to timely challenge the sufficiency of the charge. Id. at 399-400, 219 P.3d at 1186-87. In this case, Mita likewise objected to the sufficiency of the charge before trial. Thus, the liberal construction rule does not apply to Mita's case.

C.

The majority apparently concludes that Wheeler controls the decision in this case because, like Wheeler, the prosecution's oral charge tracked the language of the statutory offense but failed to allege the separate statutory definition of the term "animal nuisance." Defining terms in a separate definitions section and then using those terms in describing the conduct proscribed by a criminal offense is a standard practice used by the Legislature in enacting criminal offenses. A perusal of the Hawai‘i Penal Code reveals that there are a large number of criminal offenses that are set forth in this fashion. Moreover, the statutory definition of a term used in describing the prohibited conduct itself frequently contains terms that also have a statutory definition.[4/] Requiring every charge to include the statutory definition of every term used in describing the prohibited conduct in order for the charge to be sufficient would lead to charges that are prolix and unduly complicated. It would subvert the command of the Hawai‘i Rules of Penal Procedure (HRPP) Rule 7(d) (2008) that "[t]he charge shall be a plain, concise and definite statement of the essential facts constituting the offense charged."

In my view, Wheeler turned on two significant factors that are not present in this case. First, the statutory definition of "operate" that the prosecution failed to allege

[4] For example, in this case, the statutory definition of "animal nuisance" uses the term "unreasonable noise" which itself has a separate statutory definition. See ROH §§ 7-2.2 and 7-2.4(c) (1990 & Supp. No. 6, 2-05).

departs from the commonly understood meaning of the term "operate." The term "operate," as commonly understood, does not imply or connote a geographical limitation. Indeed, operate is a verb, while a noun is used to refer to a location. Thus, excluding other factors, a person reading an allegation that he or she did "operate" a vehicle would not generally be provided with adequate notice that there was a location requirement attached to that term.

Second, the statutory definition of the term "operate" creates an additional essential element. The requirement that one "operate" a vehicle, under the common understanding of "operate," creates a conduct element. The statutory definition of "operate," however, establishes an additional attendant circumstances element that does not comport with the common meaning of the term "operate." It was the failure of the OVUII charge in Wheeler to allege this separate attendant circumstances element that rendered the charge deficient. In other words, it was only because the statutory definition created an additional essential element that the statutory definition had to be alleged in Wheeler.

D.

In Mita's case, neither of these two factors are present. The statutory definition of "animal nuisance" does not depart from the commonly understood meaning of the term. Furthermore, the statutory definition of "animal nuisance" does not purport to create an additional essential element for the offense.

Mita's oral charge referred to her being the owner of an animal engaged in animal nuisance. Based on dictionary definitions, the commonly understood meaning of the terms "animal" and "nuisance" are as follows. The term "animal" is defined as "[a]ny living creature other than a human being." Black's Law Dictionary 102 (9th ed. 2009). The term "nuisance" is defined as "[a] condition, activity, or situation (such as a loud noise or foul odor) that interferes with the use or

enjoyment of property[,]" id. at 1171, or "[a] use of property or course of conduct that interferes with the legal rights of others by causing damage, annoyance, or inconvenience." The American Heritage Dictionary of the English Language (4th ed. 2009). The oral charge therefore informed Mita that she was accused of being the owner of a non-human living creature that engaged in an activity, such as loud noise, that interfered with another's use or enjoyment of property. This encompassed the essential elements of the animal nuisance offense.

The oral charge also referred to "animal nuisance as defined in Section 7-2.2" and thus specifically directed Mita to the statutory definition of the term "animal nuisance." This served to further inform and apprise Mita of the nature of the charge against her. Indeed, Mita's counsel was clearly aware of the statutory definition of "animal nuisance" as he argued that the prosecution was required to specify which part of the ROH § 7-2.2 definition of animal nuisance was applicable. Although including a citation to the offense statute in a charge does not cure a charge that omits an essential element of the offense, Wheeler, 121 Hawai‘i at 393, 219 P.3d at 1180 (citing State v. Elliot, 77 Hawai‘i 309, 311, 884 P.2d 372, 374 (1994)), it can be argued that a specific reference to the statutory definition, which tells the defendant where to look for additional information, may be considered where the charge already encompasses the essential elements of the offense.

In any event, in Mita's situation, the charge consists of both the oral charge and the Citation. When both the Citation and the oral charge are considered, the charge against Mita was sufficient.

HRPP Rule 7(a) provides in relevant part:

> (a) *Use of Indictment, Information, or Complaint.* The charge against a defendant is an indictment, an information, or a complaint filed in court, provided 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 (other than Operating a Vehicle Under the Influence of an Intoxicant) and is issued a citation in lieu of

> physical arrest pursuant to Section 803-6(b) of the Hawai‘i Revised Statutes and summoned to appear in court, the citation and an oral recitation of the essential facts constituting the offense charged as set forth in Rule 5(b)(1), shall be deemed the complaint, notwithstanding any waiver of the recitation.

(Emphasis added.)

Mita's situation is covered by the above-emphasized portion of HRPP Rule 7(a). Thus, Mita's Citation and oral charge are deemed the complaint against her. The Citation advised Mita that she was being charged with the offense of animal nuisance for being the owner of Boxers named Roxy and Obie who were barking at about 7:40-8:50 p.m. on June 3, 2008. When the Citation and oral charge are considered together, they sufficiently alleged the essential elements of the ROH § 7-2.3 offense of animal nuisance.

IV.

For the foregoing reasons, I respectfully dissent from the majority's determination that the charge against Mita was insufficient.