CONCURRING OPINION BY NAKAMURA, C.J.

The majority concludes that the complaint charging Defendant-Appellee Marianne L. Codiamat (Codiamat) with harassment was fatally defective because it charged the alternative ways of committing the harassment offense in the disjunctive. I concur in the majority's decision because it is dictated by existing precedent of the Hawaiʻi Supreme Court. I write separately, however, because I believe that this precedent -- which concludes that disjunctive pleading of alternative ways to commit an offense renders the charge defective -- is wrong, conflicts with the rationale cited to support it, and is illogical. Accordingly, I believe that this precedent should be re-examined and overturned.

I.

Codiamat was charged with harassment, in violation of Hawaii Revised Statutes (HRS) § 711-1106(1)(a) (Supp. 2011), which states:

> **§ 711-1106 Harassment.** (1) A person commits the offense of harassment if, with intent to harass, annoy, or alarm any other person, that person:
>
> (a) Strikes, shoves, kicks, or otherwise touches another person in an offensive manner ***or*** subjects the other person to offensive physical contact[.]

(Emphasis added.) Under (HRS) § 711-1106(1)(a), a person acting with the requisite intent commits the offense of harassment through the alternative means of either (1) "strik[ing], shov[ing], kick[ing], or otherwise touch[ing] another person in an offensive manner" ***or*** (2) "subject[ing] the other person to offensive physical contact[.]"

Consistent with the statutory language, Plaintiff-Appellant State of Hawaiʻi (State) charged Codiamat with the alternative means of committing the harassment offense in the disjunctive ("or"), rather than in the conjunctive ("and"):

> On or about the 6th day of January, 2011, in the City and County of Honolulu, State of Hawaii, MARIANNE L. CODIAMAT, with intent to harass, annoy, or alarm Richard Buchanan, did strike, shove, kick, or otherwise touch Richard Buchanan in an offensive manner ***or*** subject Richard Buchanan to offensive physical contact, thereby committing

> the offense of Harassment, in violation of Section 711-1106(1)(a) of the [HRS].

(Emphasis added.)

II.

A.

The majority cites a footnote from State v. Jendrusch, 58 Haw. 279, 283 n.4, 567 P.2d 1242, 1245 n.4 (1977), in support of its holding that Codiamat's charge was defective because the alternative means were "pleaded in the disjunctive, [and thus the charge] did not sufficiently apprise Codiamat of what she must be prepared to meet." The footnote in Jendrusch stated, in pertinent part, as follows:

> In charging the defendant in the disjunctive rather than in the conjunctive, [the complaint] left the defendant uncertain as to which of the acts charged was being relied upon as the basis for the accusation against him. Where a statute specifies several ways in which its violation may occur, the charge may be laid in the conjunctive but not in the disjunctive. Territory v. Lii, 39 Haw. 574 (1952).

Jendrusch, 58 Haw. at 283 n.4, 567 P.2d at 1245 n.4 (emphases added).[1]

B.

The Jendrusch rule cannot withstand rational scrutiny. The Jendrusch rule permits charging alternative means of committing an offense in the conjunctive, but prohibits charging alternative means in the disjunctive on the purported ground that charging in the disjunctive would fail to give a defendant fair notice of the accusation so that he or she may prepare a defense. I do not see why charging in the disjunctive under the circumstances of this case would fail to give a defendant fair notice of the accusation, or why charging in the conjunctive, which Jendrusch permits, would provide a defendant with better notice.

[1] Although the Jendrusch footnote is arguably dicta, it has been cited with approval in other cases by the Hawaiʻi Supreme Court. See State v. Batson, 73 Haw. 236, 249-50, 831 P.2d 924, 932 (1992); State v. Lemalu, 72 Haw. 130, 134, 809 P.2d 442, 444 (1991).

The State is entitled to establish the harassment offense under HRS § 711-1106(1)(a) ***by proving its commission through either of the alternative means*** of (1) "strik[ing], shov[ing], kick[ing], or otherwise touch[ing] another person in an offensive manner" or (2) "subject[ing] the other person to offensive physical contact[.]" HRS § 711-1106(1)(a); State v. Pesentheiner, 95 Hawaiʻi 290, 294-95, 22 P.3d 86, 90-91 (App. 2001). The same is true of other offenses in which the offense can be established in alternative ways. See State v. Batson, 73 Haw. 236, 249-51, 831 P.2d 924, 931-32 (1992) (concluding that the offense of second-degree murder can be proven by establishing that it was committed by the alternative means of murder by commission or murder by omission); State v. Nesmith, 127 Hawaiʻi 48, 61, 276 P.3d 617, 630 (2012) (concluding that the offense of driving under the influence of an intoxicant can be proven by the alternative means of driving while impaired by alcohol or driving with .08 or more grams of alcohol per two hundred ten liters of breath). Because the State can establish the harassment offense against Codiamat by proving either of the charged alternative means of committing the offense, charging her in the disjunctive clearly provided her with fair notice of the accusation and what she was required to meet. Indeed, what better way is there to give a defendant fair notice of the accusation than to draft the charge to correspond directly with what the State will have to prove. By charging the alternative means in the disjunctive, the State properly informed and notified Codiamat that she must be prepared to defend against either of the alternative ways in which the offense could be proved by the State.[2]

Certainly, charging Codiamat in the conjunctive, as the Jendrusch rule permits, would not have provided her with any better notice of the accusation than charging her in the

[2] Based on this analysis, the charge against Codiamat was valid regardless of whether the alternative means of committing the offense, which were charged in the disjunctive, were factually synonymous.

disjunctive. As noted, for an offense that can be committed by alternative means A and B, the State can establish the defendant's guilt by proving either means A ***or*** means B. In this situation, notice of the accusation to enable a defendant to prepare a defense is not improved by charging that the defendant engaged in means A ***and*** B rather than in means A ***or*** B. Indeed, charging in the conjunctive provides less effective notice to a defendant because it suggests that the State must prove both means A and B, whereas in actuality, proof of either means A or B will suffice. Thus, charging in the conjunctive could lead a defendant to erroneously believe that he or she will prevail by refuting either means A or means B and therefore cause the defendant to only prepare a defense as to one of these means, when in fact, a successful defense must necessarily encompass and overcome both means A and means B.

In light of the rationale for the Jendrusch rule, which is to provide fair notice of the accusation to a defendant so that he or she may prepare a defense, charging in the disjunctive better serves that purpose than charging in the conjunctive.[3] In my view, it makes little sense to condemn and preclude the practice of disjunctive charging that is superior to other approved methods of charging in fulfilling the overriding purpose of the charge itself -- to provide fair notice to the defendant.

To illustrate why disjunctive charging should be permitted, I have reproduced the Codiamat charge using conjunctive charging language, the "and/or" language, and disjunctive charging language:

[3] Based on similar reasoning, I believe that charging in the disjunctive provides better notice of the accusation than charging alternative-means offenses through using "and/or," which this court and the Hawaiʻi Supreme Court have stated is "the most appropriate method to allege one offense committed in two different ways" in a single count. State v. Batson, 73 Haw. at 250, 831 P.2d at 932 (internal quotation marks and citation omitted); State v. Cabral, 8 Haw. App. 506, 511, 810 P.2d 672, 675-76 (1991).

1. Conjunctive charging.

On ***and*** about the 6th day of January, 2011, in the City and County of Honolulu, State of Hawaii, MARIANNE L. CODIAMAT, with intent to harass, annoy, ***and*** alarm Richard Buchanan, did strike, shove, kick, ***and*** otherwise touch Richard Buchanan in an offensive manner ***and*** subject Richard Buchanan to offensive physical contact, thereby committing the offense of Harassment, in violation of Section 711-1106(1)(a) of the [HRS].

2. And/or.

On ***and/or*** about the 6th day of January, 2011, in the City and County of Honolulu, State of Hawaii, MARIANNE L. CODIAMAT, with intent to harass, annoy, ***and/or*** alarm Richard Buchanan, did strike, shove, kick, ***and/or*** otherwise touch Richard Buchanan in an offensive manner ***and/or*** subject Richard Buchanan to offensive physical contact, thereby committing the offense of Harassment, in violation of Section 711-1106(1)(a) of the [HRS].

3. Disjunctive charging.

On ***or*** about the 6th day of January, 2011, in the City and County of Honolulu, State of Hawaii, MARIANNE L. CODIAMAT, with intent to harass, annoy, ***or*** alarm Richard Buchanan, did strike, shove, kick, ***or*** otherwise touch Richard Buchanan in an offensive manner ***or*** subject Richard Buchanan to offensive physical contact, thereby committing the offense of Harassment, in violation of Section 711-1106(1)(a) of the [HRS].

In comparing these methods of charging, I cannot see why if charging in the conjunctive and using "and/or" is permissible, why charging in the disjunctive is not also a permissible method of charging an offense that can be proven in multiple ways.

C.

Courts from other jurisdictions have agreed with this analysis and have held that charging an alternative-means offense in the disjunctive is permissible and does not render the charge deficient. E.g., State v. Kirkpatrick, 584 P.2d 670, 671-72

(Nev. 1978) ("[N]otice of the charged offense is not improved by alleging that the crime was committed by acts 'a' And 'b' rather than by acts 'a' Or 'b.' In either case, the accused must prepare a defense to all means by which it is alleged the crime was committed."); Hunter v. State, 576 S.W.2d 395, 399 (Tex. Crim. App. 1979) (concluding that charging alternative mental states in the disjunctive provided the defendant with fair notice of the charge); State v. Rodriguez, 347 N.W.2d 582, 583 (S.D. 1984) (holding that disjunctive pleading which tracked the language of the statue was proper); State v. Scott, 395 P.2d 377, 377-78 (Wash. 1964) (holding that disjunctive pleading of alternative means of committing the single crime charged was proper); United States v. Scott, 884 F.2d 1163, 1166 (9th Cir. 1989) (holding that disjunctive pleading was proper); Grant v. State, 622 So.2d 186, 186-87 (Fla. Dist. Ct. App. 1993) (upholding disjunctive pleading).

In Hunter v. State, the court characterized the rule prohibiting disjunctive pleading as "a hyper-technical rule such as might be found in a 19th Century pleading book . . . [that] has no place in the pleading of criminal cases in the 20th Century." Hunter, 576 S.W.2d at 399. In my view, the rule prohibiting disjunctive pleading is not only "hyper-technical," but it is contrary to the fair-notice rationale that is cited to justify it.

Charging alternative means of committing an offense in the disjunctive fully satisfies the general standards set forth by the Hawaiʻi Supreme Court for measuring the sufficiency of a charge. The supreme court has stated that "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.'" State v. Wheeler, 121 Hawaiʻi 383, 391, 219 P.3d 1170, 1178 (2009) (citation and brackets omitted). "In general, '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.'" Id. at 393, 219 P.3d at 1180 (citation and brackets omitted). Disjunctive pleading of alternative means, such as was used in this case, comports with both these standards.

Disjunctive pleading is also consistent with provisions of the HRS and the Hawaiʻi Rules of Penal Procedure (HRPP) that relate to charging alternative means for committing an offense. HRS § 806-30 (1993), entitled "Alternative allegations," states:

> In an indictment for an offense which is constituted of one or more of several acts or which may be committed by one or more of several means or with one or more of several intents, or which may produce one or more of several results, two or more of those acts, means, intents, or results may be charged in the alternative.

(Emphasis added.) HRPP Rule 7(d) (2012) provides, in relevant part: "It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means." (Emphasis added.)

HRS § 806-30 and HRPP 7(d) indicate that it is permissible to charge alternative means in the disjunctive. They certainly do not suggest that charging in the disjunctive would render the charge defective *per se*, such that dismissal of the charge is mandated.

III.

Based on the foregoing analysis, I believe that the Hawaiʻi Supreme Court should re-examine and overturn its precedent that concludes that disjunctive pleading of alternative ways to commit an offense renders the charge deficient.