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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I,
Respondent/Plaintiff-Appellant,

v.

BRIAN LEE SMITH,
Petitioner/Defendant-Appellee.

SCWC-21-0000504

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-21-0000504; CASE NO. 3CPC-18-0000543)

SEPTEMBER 12, 2025

CONCURRING AND DISSENTING OPINION OF McKENNA, J.

This appeal concerns whether the State must include a state of mind that applies to a sentence enhancement in a charging instrument, such as the indictment here. Although this indictment said the State would be seeking a mandatory minimum sentence enhancement based on Hawai'i Revised Statutes ("HRS") § 706-660.1 (2014), it did not include any state of mind applicable to that enhancement in the indictment.

Before reaching the majority's express holdings, I note that the majority states, "Smith had actual knowledge of the required state of mind for the sentencing enhancement to apply." Here, that was the "intentional" state of mind included in the jury instruction in the first trial. Therefore, the majority implicitly holds that an "intentional" state of mind applies to the firearm possession mandatory minimum sentence enhancement of HRS § 706-660.1. To that extent, I concur in the majority opinion.

But I respectfully dissent from the majority's express holdings that relate to whether that state of mind must also be included in a charging instrument. The majority holds that the sentencing enhancement was not an element of the underlying offenses, such that a state of mind had to be alleged in the indictment. The majority further holds that due process is satisfied when a charging instrument notifies a criminal defendant that a sentence enhancement will be sought if convicted of the underlying crime and the charging instrument contains sufficient allegations supporting its application, even if the notification does not include an applicable state of mind.

I dissent from these holdings for the following reasons.

We have held that “any fact, however labeled, that serves as a basis for an extended term sentence must be proved beyond a reasonable doubt to the trier of fact” and, therefore, the charging instrument must include “all allegations, which if proved, would result in the application of a statute enhancing the penalty of the crime committed.” State v. Jess, 117 Hawai‘i 381, 398, 184 P.3d 133, 150 (2008) (emphases added). That a defendant possessed or used a firearm “intentionally” is such a fact, however labeled. The majority distinguishes Jess on the grounds it addressed an unrelated legal issue and does not mention mens rea, but the majority also holds that an indictment must contain all “allegations” that would result in the application of the sentence enhancement. It is difficult to understand why mens rea is not one of the “sufficient allegations supporting . . . application” of a sentencing enhancement, per the majority’s formulation.

Relatedly, in State v. Auld, 136 Hawai‘i 244, 361 P.3d 471 (2015), we were asked to determine “whether the State, in seeking to sentence a defendant to a mandatory minimum sentence as a repeat offender under HRS § 706-606.5 (2014), (1) must include the defendant’s predicate prior convictions in a charging instrument; and (2) must prove these convictions to a

jury, beyond a reasonable doubt." Auld, 136 Hawai'i at 246-47, 361 P.3d at 473-74.

We answered both questions in the affirmative, holding that

under article I, section 5 and 10 of the Hawai'i Constitution, the State must allege the predicate prior conviction(s) in a charging instrument in order to sentence the defendant to a mandatory minimum sentence as a repeat offender under HRS § 706-606.5.

Auld, 136 Hawai'i at 257, 361 P.3d at 484.

The appeal in Auld arose from legal developments brought about by the United States Supreme Court's opinions in Apprendi v. New Jersey, 530 U.S. 466 (2000), and Alleyne v. United States, 570 U.S. 99 (2013).

Apprendi held, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490. The Court so ruled based on the due process clause of the Fourteenth Amendment as well as the Sixth Amendment right to a jury trial. Apprendi, 530 U.S. at 476-77. Alleyne extended Apprendi to mandatory minimum sentencing. Alleyne, 570 U.S. at 103.

The majority in this case notes that HRS § 702-205 (2014) defines the "elements of an offense" under the Hawai'i Penal Code, which generally only includes conduct, attendant circumstances, and results of conduct. According to the

majority, because sentence enhancements are not "offenses" under the Hawai'i Penal Code, the factors that must be proven for their imposition are not "elements."

But in Alleyne, the United States Supreme Court also ruled that "any fact that increases the mandatory minimum [sentence] is an 'element.'" 570 U.S. at 103. (emphasis added). And this court has held that state of mind, or mens rea, is an allegation or "fact" that the State must include in a charging instrument.

We held in State v. Nesmith, 127 Hawai'i 48, 276 P.3d 617 (2012), that the applicable mens rea must be alleged in an instrument charging a defendant with Operating a Vehicle under the Influence of an Intoxicant ("OVUII") under HRS § 291E-61(a)(1). 127 Hawai'i at 50, 276 P.3d at 619. No mens rea requirement appears in the OVUII statute. But we held that the "intentional, knowing, or reckless" mens rea applied, citing HRS § 702-204. Nesmith, 127 Hawai'i at 56, 276 P.3d at 625. Although we noted that the "intentional, knowing, or reckless" state of mind was not an "element of an offense" under § 702-205, we nevertheless held the state of mind must be alleged to "alert the defendants of precisely what they needed to defend against to avoid a conviction." Id.

The "sentencing enhancement" of HRS § 706-660.1 subjected Smith to a mandatory minimum of fifteen years, as imposed after

his first trial. The majority acknowledges that the "intentional" state of mind applicable to the enhancement must be proved. Due process requires that the state of mind be alleged in a charging instrument, even though it is technically not an "element" under Hawai'i law, due to the case law above.

Not requiring that the state of mind applicable to a sentencing enhancement be included in a charge implicates serious due process concerns under both the Hawai'i and United States Constitutions. The Circuit Court of the Third Circuit got it right.

/s/ Sabrina S. McKenna

