*** NOT FOR PUBLICATION ***

NO. 26357

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee

vs.

EDWARD Y.C. CHUN, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 03-1-1098)

MEMORANDUM OPINION
(By: Moon, C.J., Nakayama, Acoba, and Duffy, JJ.
and Circuit Judge Raffetto, in place of Levinson, J., recused)

Defendant-appellant Edward Y.C. Chun (Chun) appeals from the December 1, 2003 judgment of the circuit court of the first circuit, the Honorable Steven S. Alm presiding, convicting Chun of and sentencing him for violation of Hawai'i Revised Statutes (HRS) § 11-204(a)(3) (Supp. 1999)[1] [hereinafter, "Count II"] -- which limits campaign contributions by individuals.

On appeal, Chun argues that: (1) the circuit court lacked subject matter jurisdiction over the proceeding because the indictment failed to allege the state of mind required for

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[1] At the time Chun committed the offense described in Count II, HRS § 11-204(a)(3) (Supp. 1999) provided:

> No person, other than a candidate for the candidate's own campaign, political party, political committees established and maintained by a national political party, or any other entity shall make contributions to . . . [a] candidate seeking nomination or election to a four-year nonstatewide office or to the candidate's committee in an aggregate amount greater than $4,000 during an election period.

See also note 10, infra. The offense is currently codified at HRS § 11-204(a)(1)(C) (Supp. 2003).

commission of the offense charged in Count II; (2) the circuit court abused its discretion in rejecting Chun's no contest plea, inasmuch as the court's "categorical refusal" to accept a no contest plea from any defendant violated Chun's right to due process; (3) the circuit court abused its discretion in denying Chun's motion to disqualify, inasmuch as (a) Judge Alm was "personally biased or prejudiced" against Chun, and (b) the proceeding violated Chun's right to due process by its "appearance of impropriety"; and (4) the circuit court abused its discretion in sentencing Chun to a ten-day term of imprisonment, inasmuch as the court ignored its statutory obligation to avoid "unwarranted sentence disparities" among defendants with similar records who have been found guilty of similar conduct.

For the reasons that follow, we conclude that the indictment's omission of the state of mind required to establish the offense charged in Count II deprived the circuit court of subject matter jurisdiction over the proceeding. Notwithstanding the judgment's reversal on jurisdictional grounds, however, we find it necessary to address Chun's additional allegation that the circuit court's "categorical refusal" to accept no contest pleas violated his right to due process.

I. BACKGROUND

A. Factual Background

Chun served as legal counsel for Food Pantry, Inc. (Food Pantry), throughout the Honolulu mayoral race that preceded the November 2000 general election. In that capacity, Chun assisted Food Pantry in making political contributions to the

electoral campaign of then-mayor Jeremy Harris in January 2000. To conceal the source of those contributions, Chun instructed two of Food Pantry's vice presidents, Andrew Kawano (Kawano) and Darcy Takushi (Takushi), to write personal checks totaling $5,000 to the "Harris 2000 Campaign Committee." When Kawano asked "Why them?" Chun explained that "we think it's better for you two rather than anyone related to the family or [to Food Pantry president] Tom [Weston (Weston)]." Chun further reasoned that Kawano and Takushi "were both not so high profile people from the company," and that "it was best not to have Food Pantry's name on the donation." The men were assured of being reimbursed via a "bonus" from Food Pantry equal to their respective "contributions."

Kawano and Takushi delivered their personal checks to Chun, who advised them that the contributions "could be made without being in violation of the election laws." Chun then forwarded the $5,000 combined donation to the Harris campaign.

In November 2002, investigators with the Honolulu Police Department (HPD) identified Food Pantry as a contributor suspected of campaign spending violations involving the Harris campaign. Interviews with several Food Pantry executives led the HPD to Chun, who admitted to the investigators that he was "guilty of the way the donations [to the Harris campaign] were made." Chun also conceded during his police interrogation that he was not "completely aware of the precise prohibitions of the election laws," and that he failed to "go to the election laws contained in the statutes to read them" prior to advising Kawano

and Takushi that their conduct was legal.

B. Procedural History

On May 20, 2003, a grand jury investigating illegal campaign contributions to the Harris campaign issued a two-count indictment that charged Chun as follows:

> Count I: On or about the 1st day of August, 1996, to and including the 28th day of February, 2000, in the City and County of Honolulu, State of Hawaii, EDWARD Y. C. CHUN did make a contribution of the person's own money or property, or money or property of another person to a candidate, party, or committee in connection with a nomination for election, or election, in any name other than the true name of the person who owns the money or who supplied the money or property, thereby committing the offense of False Name, in violation of Section 11-202 of the Hawaii Revised Statutes.[2]
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> Count II: On or about the 1st day of August, 1996, to and including the 28th day of February, 2000, in the City and County of Honolulu, State of Hawaii, EDWARD Y. C. CHUN did make a contribution to a candidate seeking nomination or election to a four-year, non-statewide office, or to the candidate's committee, in an aggregate amount greater than Four Thousand Dollars ($4,000.00), during an election period, thereby committing the offense of Campaign Contribution, Limits as to Persons, in violation of Section 11-204 of the Hawaii Revised Statutes.[3]

Chun was arrested on May 27, 2003. At his June 2, 2003 arraignment, Chun pled not guilty and requested a jury trial, which was tentatively scheduled for July 21, 2003.

Chun thereafter commenced plea negotiations with the State of Hawai‘i [hereinafter, "the prosecution"] through his

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[2] HRS § 11-202 provides, in pertinent part:

> No person shall make a contribution of the person's own money or property, or money or property of another person to any candidate, party, or committee in connection with a nomination for election, or election, in any name other than the true name of the person who owns the money or who supplied the money or property.

[3] See note 1, supra.

counsel, Dale W. Lee (Lee). Those negotiations yielded a plea agreement under which Chun consented to plead "no contest" to Count II and pay a $1,000 fine in exchange for a nollo prosequi of Count I. On July 9, 2003, Lee contacted Judge Alm's chambers to schedule a hearing on Chun's proposed change of plea. He was informed that Judge Alm did not accept no contest pleas.

Lee relayed the information to the deputy prosecuting attorney, who agreed to accompany Lee to an off-the-record meeting with Judge Alm the following morning. At the July 10, 2003 morning meeting, the attorneys were unsuccessful in persuading Judge Alm to reconsider his position regarding the proposed plea. A second meeting with Judge Alm later that afternoon, this time with Prosecutor Peter Carlisle in attendance, produced the same result.

On September 8, 2003, Chun filed a motion seeking Judge Alm's disqualification or recusal based on off-the-record statements Judge Alm allegedly made during the July 10, 2003 morning meeting. In an affidavit accompanying the motion, Lee alleged in pertinent part:

> B. On Wednesday, July 9, 2003, based upon negotiations completed with the Office of the Prosecuting Attorney, I placed a call to the Chambers of the Hon. Steven Alm to schedule a Change of Plea hearing for Defendant.
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> C. During this call, I also requested a form for the entry of a "No Contest" plea. The Court Clerk informed me that it was Judge Alm's practice not to accept pleas of "No Contest."
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> D. Because the negotiated plea agreement had contemplated the entry of a plea of "No Contest," I asked Deputy Prosecuting Attorney Randal Lee ("DPA Lee") to accompany me to a meeting with the Court.
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> E. DPA Lee agreed to such a meeting, and with me, met with

> Judge Alm on Thursday, July 10, 2003.
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> F. At the commencement of that meeting, DPA Lee confirmed, in response to a question for the Court as [to] the nature of the charges, that the indictment charged Defendant with having violated the campaign contribution law. DPA Lee also noted that Food Pantry, Inc. had made the allegedly violative contributions based upon advice given by the Defendant in his capacity as Food Pantry's legal counsel.
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> G. I asked the Court whether under the circumstances before the bar (i.e., a plea negotiation with the prosecution that contemplated a "no contest" plea), the Court might accept such a plea.
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> H. The Court advised that it "does not allow 'no contest' pleas because 'no contest' pleas allow the defendant to say that he hasn't done anything wrong."
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> I. Given the Court's very clear statement that it would not entertain a "no contest" plea, I told the Court that subject to Defendant's confirmation, I was prepared to proceed with the plea agreement that had been reached with the prosecution, but to enter a plea of "guilty" instead of "no contest."

Chun's motion to disqualify was heard on September 15, 2003, and orally denied. A thirty-one page "Findings of Fact, Conclusion of Law, and Order Denying Defendant Edward Y.C. Chun's Motion to Disqualify the Honorable Steven S. Alm from Presiding as Judge in This Action, or in the Alternative Motion to Recuse" was filed post-judgment on December 24, 2003. Pertinent to this appeal, those findings and conclusions provided:

> 18. The Court informed [the deputy prosecuting attorney] and [counsel for Chun] that it is the practice of the Court not to accept no contest pleas, but rather guilty pleas, a practice that any number of attorneys that have appeared before this Court can attest to.
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> 19. The Court told Counsel that when a person is permitted to plead no contest, it is the Court's belief that the person is not really taking responsibility for his or her conduct and that the Court believed that it was important for a defendant to take responsibility for his or her conduct in all cases, whether domestic violence, theft, or white collar crime cases.

On September 16, 2003, Chun conditionally pled guilty

to Count II, reserving his right to contest on appeal the circuit court's denial of his motion to disqualify. A sentencing hearing was thereafter held on December 1, 2003. Prior to discussing the sentence, the court granted the prosecution's motion for nolle prosequi of Count I as called for in the plea agreement. The court then voiced its reasons for declining to accept Chun's proposed "no contest" plea:

> Initially, . . . Rule 11(b) of the Hawai'i Rules of Penal Procedure refers to nolo contendere plea and that a defendant may plead nolo contendere only with the consent of the Court. And such a plea shall be accepted by the Court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.
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> And while a no contest plea was requested by the defense in this court and the [prosecution] had no objection to it, I did not find it to be in the interest of the public in the effective administration of justice.
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> And, Mr. Chun, your counsel was as eloquent in chambers as he was here in court today; but the Court just did not feel a no contest is appropriate. Campaign finance abuse is a serious matter. A no contest plea allows someone to enter a plea without taking responsibility for his or her actions, and the Court did not see that as being appropriate. Pleading guilty requires people to take responsibility for their actions, and that is in the public's interest in the effective administration of justice.

Finally, the court entered a judgment of conviction and sentenced Chun to ten days' imprisonment, one year probation, $200 in fines, a probation services fee of $75, and a payment of $50 to the crime victim compensation fund. Mittimus was stayed pending appeal. On January 23, 2004, Chun filed a notice of appeal.

II. STANDARDS OF REVIEW

A. Jurisdiction

> "The existence of jurisdiction is a question of law that we review de novo under the right/wrong standard." Amantiad v. Odum, 90 Hawai'i 152, 158, 977 P.2d 160, 166 (1999) (quoting Lester v. Rapp, 85 Hawai'i 238, 241, 942 P.2d 502, 505 (1997)) (internal quotation marks omitted). Regarding appellate jurisdiction, this court has noted,
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> > [J]urisdiction is "the base requirement for any court resolving a dispute because without jurisdiction, the court has no authority to consider the case." Housing Finance & Dev. Corp. v. Castle, 79 Hawai'i 64, 76, 898 P.2d 576, 588 (1995). With regard to appeals, "[t]he remedy by appeal is not a common law right and exists only by virtue of statutory or constitutional provision." In re Sprinkle & Chow Liquor License, 40 Haw. 485, 491 (1954). Therefore, "the right of appeal is limited as provided by the legislature and compliance with the methods and procedure prescribed by it is obligatory." In re Tax Appeal of Lower Mapunapuna Tenants' Ass'n, 73 Haw. 63, 69, 828 P.2d 263, 266 (1992).
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> TSA Int'l Ltd. v. Shimizu Corp., 92 Hawai'i 243, 265, 990 P.2d 713, 735 (1999).

State v. Adam, 97 Hawai'i 475, 481, 40 P.3d 877, 883 (2002).

B. Sufficiency of a Charge

> "'Whether an indictment or complaint sets forth all the essential elements of a charged offense . . . is a question of law,' which we review under the de novo, or 'right/wrong,' standard." State v. Merino, 81 Hawai'i 198, 212, 915 P.2d 672, 686 (1996) (quoting State v. Wells, 78 Hawai'i 373, 379, 894 P.2d 70, 76 (1995) (citations omitted)).

State v. Cordeiro, 99 Hawai'i 390, 403, 56 P.3d 692, 705 (2002) (ellipses in original; brackets omitted).

III. DISCUSSION

A. This court has jurisdiction over Chun's appeal.

Preliminarily, we note that Chun's failure to file a timely notice of appeal places this court's appellate jurisdiction in issue. The notice was filed on January 23, 2004, well beyond the 30-day deadline to appeal from the December 1,

2003 judgment of conviction and sentence prescribed under Hawai‘i Rules of Appellate Procedure (HRAP) Rule 4(b)(1).[4] The record contains no order granting Chun an extension of time under HRAP Rule 4(b)(5).[5]

Non-compliance with HRAP Rule 4(b)(1) may be excused, however, where the filing of an untimely notice of appeal resulted from counsel's failure to competently pursue the defendant's first appeal from a criminal conviction. State v. Knight, 80 Hawai‘i 318, 323-324, 909 P.2d 1133, 1138-1139 (1996); State v. Erwin, 57 Haw. 268, 554 P.2d 236 (1976). In the instant case, counsel for Chun evidently believed that HRAP Rule 4(b)(1)'s 30-day deadline began to run from the December 24, 2003 order denying Chun's motion to disqualify, and not from the December 1, 2003 judgment of conviction and sentence.[6] Inasmuch as this is the defendant's first appeal from this criminal conviction, we accept jurisdiction to address the points of error.

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[4] HRAP Rule 4(b)(1) provides: "In a criminal case, the notice of appeal shall be filed in the circuit, district, or family court within 30 days after the entry of the judgment or order appealed from."

[5] HRAP Rule 4(b)(5) provides:

> Upon showing of good cause, the circuit or district court may, no later than 30 days after the time has expired, on motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision (b). Any such motion that is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires.

[6] At the December 29, 2003 hearing on the execution of mittimus, Chun requested an extension of time to appeal from the December 1, 2003 judgment. The circuit court neither granted nor denied the request.

B. The indictment was substantively defective for failing to allege the state of mind of the offense charged in Count II.

Chun argues, for the first time on appeal, that the indictment failed to allege the state of mind needed to establish the elements of the offense charged in Count II -- namely, that he committed the acts described in the indictment "knowingly, intentionally, or recklessly" as required for a misdemeanor violation under his reading of HRS § 11-204. Chun further asserts that the indictment's failure to allege the requisite mens rea creates a substantive jurisdictional defect that is non-waivable and contestable at any time. We agree.

1. Chun's right to contest the indictment.

The prosecution initially suggests that Chun is foreclosed from disputing the indictment, inasmuch as: (1) Chun's conditional guilty plea failed to reserve his right to challenge the charging instrument on appeal;[7] and (2) the challenge is untimely under HRPP Rule 12(b)(2).[8]

Neither suggestion has merit. Chun's claim that the indictment did not allege the mental state needed to establish the offense charged in Count II is, in essence, a challenge to the subject matter jurisdiction of the circuit court. As we have

[7] The prosecution bases its waiver argument on HRPP Rule 11(a)(2), which authorizes the circuit court to accept "a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to seek review of the adverse determination of any specified pretrial motion." The prosecution claims that Chun did not reserve the issue of the indictment's sufficiency in his conditional plea.

[8] The prosecution bases its timeliness argument on HRPP Rule 12(b)(2), which requires that "defenses and objections based on defects in the charge" "must be raised prior to trial."

previously noted,

> [t]he failure sufficiently to allege the essential elements of an offense in an . . . indictment . . . results [in] the failure to invoke the subject matter jurisdiction of the court. In other words, an . . . 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. Sprattling, 99 Hawai‘i 312, 327, 55 P.3d 276, 291 (2002); see also State v. Cummings, 101 Hawai‘i 139, 142, 63 P.3d 1109, 1112 (2003) (same); State v. Morin, 71 Haw. 159, 162, 785 P.2d 1316, 1318 (1990) (while "a guilty plea made voluntarily and intelligently precludes a defendant from later asserting any nonjurisdictional claims, . . . the defendant may still challenge the sufficiency of the indictment or other like defects bearing directly upon the government's authority to compel the defendant to answer to charges in court").[9]

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[9] In determining whether a charge contains the "essential elements" of the offense alleged, we note that HRS § 702-205 statutorily defines the term "element" as follows:

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

Moreover, HRS § 702-204 clarifies that the mens rea component of an offense is not in itself an "element" of that offense:

> § **702-204 State of mind required.**
> Except as provided in section 702-212, a person is not guilty of an offense unless the person acted intentionally, knowingly, recklessly, or negligently, as the law specifies, with respect to each element of the offense. When 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.

Questions of "substantive subject matter jurisdiction . . . may not be waived or dispensed with." Cummings, 101 Hawai'i at 143, 63 P.3d at 1113 (quoting State v. Jendrusch, 58 Haw. 279, 281, 567 P.2d 1242, 1244 (1977)). Nor may an "objection for want

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See also State v. Aganon, 97 Hawai'i 299, 303, 36 P.3d 1269, 1273 (2001) (noting that "the circuit court erroneously listed the requisite state of mind as a 'material element,' contrary to HRS § 702-205").

Notwithstanding the analytical distinction between "elements" and "states of mind," we have previously held -- on due process grounds -- that a charge was insufficient for failing to allege the "essential elements" of a crime where it omitted the state of mind specified in the statutory definition of the offense. See State v. Yonaha, 68 Haw. 586, 586, 723 P.2d 185, 185-186 (1986) (oral charge was "fatally defective" where it "omitted the element of intent which is expressly included in the statute" defining the offense); State v. Faulkner, 61 Haw. 177, 178, 599 P.2d 285, 286 (1979) (conviction reversed where "[n]o allegation of intent was made" in oral charge of attempt to commit third degree theft and where "[i]ntent [was] an essential element of the crime of criminal attempt"); State v. Jendrusch, 58 Haw. 279, 281-282, 567 P.2d 1242, 1244 (1977) (where an "essential element of an offense under [the charging] statute is an intent or a reckless disregard on the part of the defendant that his conduct will have a specific result[,] . . . [t]he failure of the complaint to set forth this essential element as defined by the statute or to describe it with sufficient specificity so as to establish penal liability rendered it fatally defective"). In so holding, we employed the term "elements" with less precision than that contemplated in HRS § 702-205.

We now clarify that an indictment, complaint, or oral charge fails to "state an offense" if the charge does not allege the state of mind specified in the statutory definition of the offense. The "substantive jurisdictional defect" thereby created "renders any subsequent trial, judgment of conviction, or sentence a nullity," see Sprattling, 99 Hawai'i at 327, 55 P.3d at 291, even though the charge does not technically omit an "essential element" of the offense under HRS § 702-205.

Of course, where the definition of an offense does not contemplate a particular mens rea, the charge need not allege the defendant's mental state. See HRS § 806-28 ("The 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."); see also State v. Torres, 66 Haw. 281, 289, 660 P.2d 522, 527 (1983) ("Our conclusion that the crime [of incest] was unmistakably defined despite the lack of an explicit averment of the mental state accompanying the prohibited act rests on the nature of the offense charged and the earlier conclusion that it is not a crime that can be accidentally or innocently committed."); State v. McDowell, 66 Haw. 650, 651, 672 P.2d 554, 555 (1983) ("[A] particularized allegation of the general intent in the indictment is not required" because the charging statute did not "specif[y] the requisite general intent to prove the crime."); State v. Kane, 3 Haw. App. 450, 455-457, 652 P.2d 642, 646-648 (1982) (holding that indictment omitting mens rea allegation was sufficient where charging statute was "silent as to the requisite state of mind").

of jurisdiction" be denied appellate review merely because the issue is "raised . . . for the first time on appeal." State v. Miyahira, 98 Hawai'i 287, 290, 47 P.3d 754, 757 (App. 2002) (quoting State v. Rodrigues, 67 Haw. 70, 83 n.8, 679 P.2d 615, 624 n.8 (1984)) (ellipses in original).

The foregoing authorities clarify that an indictment's failure to state an offense -- as is the case when the indictment omits the state of mind specified in the offense alleged -- is a non-waivable jurisdictional error that is never untimely when raised initially on direct appeal. The prosecution's effort to bar Chun's argument accordingly cannot stand.

2. The indictment failed to charge Chun with a crime.

Chun contends that the indictment was legally insufficient for omitting an essential element of the offense charged in Count II. Specifically, he argues that the omitted element is the state of mind referenced in HRS § 11-229(a), which classifies a violation of HRS § 11-204 as a misdemeanor offense if done "knowingly, intentionally, or recklessly." In sharp contrast, the prosecution posits that HRS § 11-204 creates a "general intent" crime, such that the indictment is excused from alleging a particular state of mind.

We agree with Chun that the indictment in this case was insufficient to state an offense. As a general rule,

> [t]he sufficiency of an indictment is measured by the following criteria: (1) "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[;]" and (2) if any other proceedings are brought against him [or her] for a similar offense, "whether the record shows with accuracy to what extent he [or she] may plead a former acquittal or conviction." State v. Israel,

> 78 Hawai‘i 66, 69, 890 P.2d 303, 306 (1995). Territory v. Yoshimura, 35 Haw. 324, 330 (1940) (internal quotations and citations omitted). Accord Russell v. United States, 369 U.S. 749, 763-64, 82 S. Ct. 1038, 1047, 8 L. Ed. 2d 240, 250-51 (1962) (citations omitted); United States v. ORS, Inc., 997 F.2d 628, 629 (9th Cir. 1993) (citations omitted); State v. Torres, 66 Haw. 281, 288-89, 660 P.2d 522, 527 (1983) (citations omitted); State v. Daly, 4 Haw. App. 52, 54, 659 P.2d 83, 85 (1983) (citations omitted); State v. Kane, 3 Haw. App. 450, 456, 652 P.2d 642, 646-47 (1982) (citations omitted). Moreover, "the charge 'must be specific enough to ensure that the grand jury [or the court before which a preliminary hearing is held] had before it all the facts necessary to find probable cause.'" Israel, 78 Hawai‘i at 70, 890 P.2d at 307 (citations omitted).

State v. Wells, 78 Hawai‘i 373, 379-380, 894 P.2d 70, 76-77 (1995) (footnote omitted, brackets and ellipses in original).

Chun's failure to question the indictment until after the judgment was entered requires the criteria in Wells to be "liberally construed" to favor the charge's sufficiency. In this regard,

> [while] [t]he failure of an accusation to charge an offense may be raised "at any time during the pendency of the proceedings[,]" HRPP 12(b)(2) (1995); see also State v. Motta, 66 Haw. 89, 90, 657 P.2d 1019, 1019-20 (1983)[,] . . . this court has
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> > adopted the rule [hereinafter, the "Motta/Wells post-conviction liberal construction rule"] followed in most federal courts of liberally construing indictments . . . challenged for the first time on appeal. Motta, 66 Haw. at [90-]91, 657 P.2d at 1020. Elaborating on this standard, this court [will] "not reverse a conviction based upon a defective indictment . . . unless the defendant can show prejudice or that the indictment . . . cannot within reason be construed to charge a crime." Id.
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> [State v.] Wells, 78 Hawai‘i [373,] 381, 894 P.2d [70,] 78 [(1995)].

State v. Merino, 81 Hawai‘i 198, 212, 915 P.2d 672, 686 (1996) (some brackets in original).

Invoking the second prong of the Motta/Wells post-conviction liberal construction rule, Chun contends that "the

indictment . . . cannot within reason be construed to charge a crime." In the instant case, Count II of the indictment provided:

> On or about the 1st day of August, 1996, to and including the 28th day of February, 2000, in the City and County of Honolulu, State of Hawaii, EDWARD Y. C. CHUN did make a contribution to a candidate seeking nomination or election to a four-year, non-statewide office, or to the candidate's committee, in an aggregate amount greater than Four Thousand Dollars ($4,000.00), during an election period, thereby committing the offense of Campaign Contribution, Limits as to Persons, in violation of Section 11-204 of the Hawaii Revised Statutes.

The acts described in Count II closely track the language of the charging statute, HRS § 11-204. At the time the offense was committed,[10] HRS § 11-204(a)(3) (Supp. 1999) provided:

> **§ 11-204 Campaign contributions; limits as to persons.**
>
> (a) No person, other than a candidate for the candidate's own campaign, political party, political committees established and maintained by a national political party, or any other entity shall make contributions to:
>
> . . . .
>
> (3) A candidate seeking nomination or election to a four-year nonstatewide office or to the candidate's committee in an aggregate amount greater than $4,000 during an election period.

HRS § 11-204 specifies no mens rea for the conduct prohibited therein, nor does the section stipulate the penalty for its violation. A related section, HRS § 11-229(a) (Supp. 2003), provides those terms:

> **§ 11-229 Criminal prosecution.**
>
> (a) Any person who knowingly, intentionally, or recklessly

[10] Because the parties stipulated that the factual basis for Count II was limited to acts occurring in January 2000, the version of HRS § 11-204 in effect at that time controls.

> violates any provision of this subpart shall be guilty of a misdemeanor. A person who is convicted under this section shall be disqualified from holding elective public office for a period of four years from the date of conviction.

(Emphasis added.)

The statutory scheme thus requires a conjunctive reading of the foregoing sections to construe a violation of HRS § 11-204 as a misdemeanor offense.[11] Indeed, absent the mens rea stated in HRS § 11-229(a), infringement of HRS § 11-204 invites, at most, an administrative fine under the campaign spending law. See HRS § 11-228(a) (Supp. 2003) ("In the performance of its required duties, the commission may render a decision or issue an order affecting any person violating any provision of this subpart or section 281-22 that shall provide for the assessment of an administrative fine[.]").

In light of HRS § 11-229(a), the prosecution's contention that HRS § 11-204 "appears to create a general intent crime" is without merit. To suggest that "the statement of the act itself [in HRS § 11-204] implies the requisite intent" in our view is to render nugatory the express mens rea requirement of HRS § 11-229(a). Such a reading we are disinclined to adopt.[12]

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[11] It is not anomalous for the state of mind required to establish the elements of an offense to be set forth in a separate section from the elements themselves. See HRS § 702-204 cmt. ("When a particular state of mind is required to establish the elements of an offense, it will usually be specified in the definition of the offense, however it may be separately specified by another provision of law.") (emphasis added).

[12] In this regard, the prosecution's reliance on State v. Kane, 3 Haw. App. 450, 652 P.2d 642 (1982), is misplaced. The defendant in Kane was charged with carrying a concealed firearm in violation of HRS § 134-6 and § 134-9. Id. at 451, 652 P.2d at 644. While violations of those statutes were punishable as criminal offenses, neither HRS § 134-6 nor § 134-9 "specifie[d] the state of mind required, if any," for either offense. Id. at 453, 652 P.2d at 644-645. Because the indictment failed to contain any allegation of the

That being the case, a conviction under Count II of Chun's indictment required proof beyond a reasonable doubt of the following essential ingredients of that offense: (1) that the defendant "ma[de] contributions to . . . [a] candidate seeking nomination or election to a four-year nonstatewide office or to the candidate's committee in an aggregate amount greater than $4,000 during an election period"; and (2) that the defendant engaged in the prohibited conduct "knowingly, intentionally, or recklessly." HRS § 11-204(a)(3) (Supp. 1999), § 11-229(a) (Supp. 2003).

The prosecution concedes that the charging language of Count II did not expressly accuse Chun of "knowingly, intentionally, or recklessly" violating HRS § 11-204. Nor does the indictment, when read as a whole and liberally construed, reasonably ascribe to Chun the mental state required for his

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defendant's mens rea, the trial court dismissed the charge. Id. at 451, 652 P.2d at 643.

On appeal, the Intermediate Court of Appeals (ICA) reversed. Quoting from HRS § 806-28, the ICA noted 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." Id. at 454, 652 P.2d at 645. In light of the foregoing, the court concluded that, where the statutory language defining the charged offense "is silent as to the requisite state of mind[,] . . . HRS § 806-28 clearly authorizes the non-allegation of the requisite state of mind in [an] indictment[]" that charges the offense. Id. at 455, 652 P.2d at 646.

Unlike Kane, the statutory language that defines a violation of HRS § 11-204 as a misdemeanor offense is not silent as to the state of mind required for conviction. Without belaboring the point, HRS § 11-229(a) explicitly states that "[a]ny person who knowingly, intentionally, or recklessly violates [HRS § 11-204] shall be guilty of a misdemeanor." Accordingly, and in contrast to Kane, HRS § 806-28 does not excuse the indictment's omission of the necessary mens rea.

conviction.[13] Accordingly, because the charging instrument "cannot within reason be construed to charge a crime," the judgment of conviction is a nullity irrespective of any prejudice or lack thereof to Chun. See Merino, 81 Hawai'i at 212, 915 P.2d at 686.

C. Judge Alm abused his discretion by "categorically refusing" to accept Chun's "no contest" plea.

Notwithstanding the reversal of Chun's conviction for the jurisdictional reason stated above, we are troubled by Chun's allegation of a "categorical" policy in Judge Alm's court of rejecting no contest pleas as a matter of course. That policy, if true, "implicates a matter of public concern that is likely to recur" -- especially if Judge Alm's sentiments are adopted by others who hold the no contest plea in similar regard.[14] See State v. Brown, 70 Haw. 459, 465, 776 P.2d 1182, 1186-1187 (1989). The potential impact on the due process rights of future defendants makes the question of the policy's propriety "worthy of resolution here." See id. (reversing conviction on criminal contempt charge for insufficient evidence, but addressing the

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[13] The instant case is thus distinguishable from State v. Sprattling, which applied the Motta/Wells post-conviction liberal construction rule to uphold the validity of an indictment that omitted the descriptive word "bodily" from the charge of assault in the third degree. See 99 Hawai'i at 320, 55 P.3d at 284. Sprattling reasoned that the "essential elements" of third degree assault were nonetheless apparent under a liberal construction of the charge as a whole. Id. In contrast to Sprattling, the omission at issue here was not of a single "descriptive word," but rather involved the entire mens rea component of the offense charged.

[14] An aversion to pleas of no contest is shared by more than a few in the field of criminal justice. See Charles Alan Wright, Federal Practice & Procedure: Criminal 3d § 177, at 285-286 (1999) ("Retention of the plea has had its defenders, but it also has been subjected to severe criticism.").

separate question whether due process permitted a judge who accused defendant of criminal contempt to also preside over the contempt trial).

The record confirms Judge Alm's "categorical refusal" to accept no contest pleas. Reflective of the court's policy was its statement at the hearing on Chun's motion to disqualify:

> [I]t had been my practice to -- not to accept no contest pleas, but only to accept guilty pleas, a practice that any number of attorneys to this court would attest to. That when people plead no contest, they aren't taking responsibility. That I thought it was important for defendants to take responsibility for their actions in all cases, whether domestic violence, theft, or white collar crime cases.

The court reiterated its position in its written findings of fact, conclusions of law, and order denying Chun's motion to disqualify:

> 18. The Court informed [the prosecution] and [counsel for Chun] that it is the practice of the Court not to accept no contest pleas, but rather guilty pleas, a practice that any number of attorneys that have appeared before this court can attest to.
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> 19. The Court told Counsel that when a person is permitted to plead no contest, it is the Court's belief that the person is not really taking responsibility for his or her conduct and that the Court believed that it was important for a defendant to take responsibility for his or her conduct in all cases, whether domestic violence, theft, or white collar crime cases.

In making those remarks, Judge Alm undoubtedly believed his position to be justified in light of the broad authority given him under HRPP Rule 11(b), which provides:

> A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice. (Emphasis added.)

Because HRPP Rule 11(b) accords the circuit courts

"wide discretion to accept or refuse a nolo contendere plea," Merino, 81 Hawai'i at 211, 915 P.2d at 685, "the plea is strictly a matter of grace" "to which defendants are by no means automatically entitled." State v. Medeiros, 8 Haw. App. 39, 45, 791 P.2d 730, 734 (1990) (quoting United States v. Cepeda Penes, 577 F.2d 754, 756 (1st Cir. 1978)), overruled on other grounds, Schutter v. Soong, 76 Hawai'i 187, 873 P.2d 66 (1994). A trial court's disposition of a proffered no contest plea may consequently be reversed only upon "abuse of that discretion." Merino, 81 Hawai'i at 211, 915 P.2d at 685; see also Medeiros, 8 Haw. App. at 44, 791 P.2d at 734 ("[T]he court's rejection of a nolo contendere plea . . . will not be overturned on appeal absent a manifest abuse.").

Nonetheless, even the broad authority found in HRPP Rule 11(b) must, of necessity, have its bounds. "[T]he existence of discretion requires its exercise," see United States v. Miller, 722 F.2d 562, 565 (9th Cir. 1983), and by definition contemplates an individualized assessment of the facts and circumstances pertinent to the case at hand. See State v. Martin, 56 Haw. 292, 294, 535 P.2d 127, 128 (1975) ("Discretionary action must be exercised on a case-by-case basis, not by any inflexible blanket policy of denial."). A "blanket policy" that categorically rejects all proffered no contest pleas is inimical to the essence of that concept.[15]

[15] Courts in other jurisdictions have cast "discretion" in similar terms in a variety of other contexts. See, e.g., Lonergan-Gillen v. Gillen, 785 N.E.2d 1285, 1288 (Mass. App. Ct. 2003) ("Discretion 'implies the absence of a hard-and-fast rule' . . . [and] imports a willingness, upon proper request, to consider all of the lawfully available judicial options.");

Addressing the identical issue, the Ohio Court of Appeals eloquently summarized concerns that are applicable with equal force here:

> We agree with [the defendant] that the record clearly demonstrates that the trial court had a blanket policy of not accepting no-contest pleas. . . . [W]e will examine [the defendant's] remaining argument that the trial court's policy of never accepting no-contest pleas was an abuse of discretion.
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> . . . . The trial court has discretion to accept or reject a no-contest plea. Absent an abuse of that discretion, the judgment of the trial court must be affirmed. See State v. Mehozonek (1983), 8 Ohio App. 3d 271, 273, 8 OBR 364, 365-366, 456 N.E.2d 1353, 1355-1356.
>
> In Ohio, the universally accepted definition of an abuse of discretion is an attitude by the court that is unreasonable, arbitrary, or unconscionable. See Blakemore v. Blakemore (1983), 5 Ohio St. 3d 217, 219, 5 OBR 481, 482-483, 450 N.E.2d 1140, 1141-1142. The word "arbitrary" has been defined as "'without adequate determining principle, . . . not governed by any fixed rules or standards.'" Dayton, ex rel. Scandrick v. McGee (1981), 67 Ohio St. 2d 356, 359, 21 O.O.3d 225, 226, 423 N.E.2d 1095, 1097, quoting Black's Law Dictionary (5 Ed. Rev.). Other definitions include "[i]n an unreasonable manner, as fixed or done capriciously or at pleasure[;] . . . [w]illful and unreasoning action, without consideration and regard for facts and circumstances presented." Black's Law Dictionary (6 Ed. Rev. 1990) 104.
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> We find that the trial court's policy of not accepting no-contest pleas constituted an abuse of discretion in that the trial court arbitrarily refused to consider the facts and circumstances presented, but instead relied on a fixed policy established at its whim. Although the trial court has the discretion to refuse to accept a no-contest plea, it must exercise its discretion based on the facts and circumstances before it, not on a blanket policy that

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Commonwealth v. Mola, 838 A.2d 791, 794 (Pa. Super. Ct. 2003) ("Imposing a standardized sentence on all drug offenders is a manifest abuse of discretion."); State v. Johnson, 472 A.2d 1267, 1271 (Conn. 1984) (in exercising discretion, "it is not appropriate to have guiding principles applied formalistically and rigidly without recognition of the specific facts of a particular criminal action"); Colter v. State, 466 A.2d 1286, 1288-1289 (Md. 1983) ("[W]hen a court has discretion to act, it must exercise that discretion. . . . Implicit in the definition is the concept that judicial discretion applies absent a hard and fast rule."); Olney v. Mun. Ct., 184 Cal. Rptr. 78, 82 (Cal. Ct. App. 1982) ("[A] mechanical policy ignores the . . . exercise of judicial discretion.").

> affects all defendants regardless of their situation. In short, the trial court must exercise its discretion in each case.

State v. Carter, 706 N.E.2d 409, 412-413 (Ohio Ct. App. 1997) (emphasis added, some citations omitted). The court in the instant case should need no further reason to abandon its per se rejection of no contest pleas.[16]

[16] We reject the position taken by some of our federal brethren, who have declined to hold against the permissibility of "blanket" rejections of no contest pleas under analogous Federal Rule of Criminal Procedure 11(b). See, e.g., United States v. Bearden, 274 F.3d 1031, 1036 (6th Cir. 2001) ("[T]he district court . . . reject[ed] [defendant's] nolo plea based on a general policy against accepting such pleas[.] . . . [While] we are reluctant to conclude that there is no possible set of circumstances in which a district court would abuse its discretion in refusing to accept a nolo plea based on a general policy[,] [w]e conclude . . . that the present case does not present such a set of circumstances."); United States v. Gratton, 525 F.2d 1161, 1163 (7th Cir. 1975) ("[I]n this case the court refused to even consider [the proffered no contest plea], stating an unbroken record for many years of not accepting nolo pleas[.] . . . At the outset, it seems at least arguable that the acceptance of a nolo plea is so broadly a matter of discretion that a judge's adoption of a policy against such a plea is itself within his discretion[.]"); United States v. Dorman, 496 F.2d 438, 440 (4th Cir. 1974) ("Here the judge explained . . . that he usually did not consent to pleas of nolo contendere except in income tax evasion cases. . . . We find no abuse of discretion in his general rule for pleas of nolo contendere[.]").

V. CONCLUSION

Inasmuch as the indictment was defective, the circuit court was without jurisdiction in this matter. The judgment of conviction is reversed and the matter remanded to the circuit court with instructions to dismiss.

DATED: Honolulu, Hawai‘i, February 2, 2005.

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