

**Electronically Filed
Supreme Court
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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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

vs.

TERRY J. DAVIS, Petitioner/Defendant-Appellant.

SCWC-12-000074

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-12-000074; CASE. NO. 1DTC-11-032838)

February 26, 2014

CONCURRING OPINION BY ACOBA, J.

The majority opinion indicates there are two possible approaches to resolving on appeal claims that the insufficiency of the evidence at trial precludes a retrial based on the double jeopardy clause. First, appellate courts may review sufficiency of the evidence questions under the double jeopardy clause of article 1, section 10 of the Hawai'i Constitution if expressly

raised by a party.¹ See majority opinion at 45. Second, appellate courts may review sufficiency of the evidence questions "as a matter of prudent policy." Majority opinion at 50. I read the majority opinion to clarify that challenges to the sufficiency of the evidence must be expressly raised by a party in order to invoke review under the double jeopardy clause.²

/s/ Simeon R. Acoba, Jr.



¹ Article 1, Section 10 of the Hawai'i Constitution provides in relevant part as follows:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury or upon a finding of probable cause after a preliminary hearing held as provided by law or upon information in writing signed by a legal prosecuting officer under conditions and in accordance with procedures that the legislature may provide, except in cases arising in the armed forces when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy; nor shall any person be compelled in any criminal case to be a witness against oneself.

(Emphasis added.)

² It has been held that the failure of a charge to state an offense renders the charge jurisdictionally defective and leaves the court without subject matter jurisdiction to decide the merits of the case. See State v. Walker, 126 Hawai'i 475, 492, 273 P.3d 1161, 1178 (2012) (holding that a Habitually Operating a Vehicle Under the Influence charge was defective because it did not allege that the defendant had three prior convictions for Operating a Vehicle Under the Influence in the last ten years, and therefore remanding the case with instructions to dismiss without prejudice). It is axiomatic that if "a lower court is found to have lacked jurisdiction, we have jurisdiction [] on appeal, not of the merits, but for the purpose of correcting an error in jurisdiction." In re Rice, 68 Haw. 334, 335, 713 P.2d 426, 427 (1986) (emphasis added). If an insufficient charge constituted a jurisdictional defect, then this court could not evaluate whether sufficient evidence existed before the trial court inasmuch as it would not have jurisdiction over the merits of the case.