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Supreme Court  
SCWC-29794  
28-JAN-2014  
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IN THE SUPREME COURT OF THE STATE OF HAWAII

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SCWC-29794

STATE OF HAWAII, Respondent/Plaintiff-Appellee,

vs.

NELSON KUUALOHA ARMITAGE, Petitioner/Defendant-Appellant.  
(ICA NO. 29794; CASE NO. 2P106-02017)

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SCWC-29795

STATE OF HAWAII, Respondent/Plaintiff-Appellee,

vs.

RUSSELL K. KAHOOKELE, Petitioner/Defendant-Appellant.  
(ICA NO. 29795; CASE NO. 2P106-02018)

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SCWC-29796

STATE OF HAWAII, Respondent/Plaintiff-Appellee,

vs.

HENRY MAILE NOA, Petitioner/Defendant-Appellant.  
(ICA NO. 29796; CASE NO. 2P106-01909)

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SCWC-29794, SCWC-29795 AND SCWC-29796

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS

JANUARY 28, 2014

CONCURRING AND DISSENTING OPINION BY  
RECKTENWALD, C.J., IN WHICH NAKAYAMA, J., JOINS

For the reasons set forth in my dissenting opinion in State v. Apollonio, 130 Hawai'i 353, 364-371, 311 P.3d 676, 687-694, I respectfully dissent from the majority's conclusion that the lack of a mens rea allegation in the charges requires that the cases be dismissed without prejudice despite the defendants' lack of objection to the sufficiency of the charges. In my view, where a defendant does not object to a deficient charge in the trial court, the defendant is required to show how he or she was prejudiced by the error.

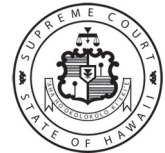
In the instant case, the defendants have not demonstrated how they were prejudiced by the deficient charge. To the contrary, the circuit court's unchallenged findings of fact state that the defendants purposefully entered Kaho'olawe Island Reserve and intentionally disregarded the process for seeking authorization to enter the Reserve set forth in Hawai'i Administrative Rules § 13-261-11. These facts are binding on this court. State v. Pacquing, 129 Hawai'i 172, 186 n.18, 297 P.3d 188, 202 n.18 (2013). Moreover, the defendants conceded these facts in the trial court. Accordingly, the defendants

cannot plausibly assert that the deficient charge prevented them from defending against the case based on the lack of a culpable state of mind.<sup>1</sup> Respectfully, the majority's application of the Apollonio rule in these circumstances unnecessarily prolongs the final resolution of this case<sup>2</sup> with no discernible benefit to the defendants or the public.

Accordingly, I respectfully dissent from the majority's decision to remand for dismissal of the charges. However, I concur in the majority's discussion of the defendants' arguments on the merits, and would affirm their convictions for the reasons set forth therein.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama



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<sup>1</sup> Similarly, the other deficiencies alleged by the State in its supplemental brief would not warrant vacating the defendants' convictions. It is apparent from the record that the defendants knew the charges stemmed from their entry into Kaho'olawe Island Reserve, and that their entry was not authorized by the Kaho'olawe Island Reserve Commission.

<sup>2</sup> As noted by the majority, the complaints in the instant case were filed over seven years ago in August 2006.