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NOS. CAAP-15-0000651 AND CAAP-15-0000652

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

NO. CAAP-15-0000651

STATE OF HAWAII, Plaintiff-Appellant, v.  
RUSSELL KAHO'OKELE, Defendant-Appellee  
(CASE NO. 2DCW-14-0000531)

AND

NO. CAAP-15-0000652

STATE OF HAWAII, Plaintiff-Appellant, v.  
HENRY M. NOA, Defendant-Appellee  
(CASE NO. 2DCW-14-0000523)

APPEALS FROM THE DISTRICT COURT OF THE SECOND CIRCUIT

MEMORANDUM OPINION

(By: Ginoza, C.J., and Leonard and Reifurth, JJ.)

In August 2006, the State of Hawaii charged Russell Kaho'okele, Henry Maile Noa, and Nelson Armitage, all native Hawaiians, with entering the Kaho'olawe island reserve without authorization, a petty misdemeanor in violation of Hawaii Administrative Rules section 13-261-10 (2002).<sup>1/</sup> After trial,

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<sup>1/</sup> The administrative rules provide, in relevant part:

(a) Any person violating the rules in this chapter shall be punished as provided in sections 6K-8 and 6K-8.5, Hawaii Revised Statutes.

Haw. Admin. R. § 13-261-5 (2002).

No person or vessel shall enter or attempt to enter into or remain within the reserve unless such person or vessel: (a) Is specifically authorized to do so by the commission or its  
(continued...)

the District Court of the Second Circuit, Wailuku Division ("District Court"), found all three defendants guilty as charged. They appealed and this court affirmed. *State v. Armitage*, No. 29794, 2013 WL 1829663 (Haw. Ct. App. Apr. 30, 2013). The Hawai'i Supreme Court vacated our decision, holding that, even though no party had raised the issue below or on appeal, the complaint must be dismissed without prejudice because the charges failed to reference the requisite state of mind of intentionally, knowingly, or recklessly. *State v. Armitage*, 132 Hawai'i 36, 40, 319 P.3d 1044, 1048 (2014). The State re-filed charges against all three defendants on February 26, 2014.

Armitage's re-filed case went to trial on December 3, 2014, where he was acquitted. At a status conference on August 6, 2015, the District Court<sup>2/</sup> dismissed the cases against Kaho'okele and Noa with prejudice under Hawai'i Rules of Penal Procedure ("HRPP") Rule 48 ("Rule 48").<sup>3/</sup> The State filed

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<sup>1/</sup>(...continued)

authorized representative as provided in section 13-261-11; or,

(b) Is specifically authorized to do so through a written agreement approved by the commission[.]

Haw. Admin. R. § 13-261-10(a), (b) (2002).

The statute provides in relevant part:

Any person who violates any of the laws or rules applicable to the island reserve shall be guilty of a petty misdemeanor and shall be fined not more than \$1,000 or imprisoned not more than thirty days, or both, for each offense. Each day of each violation shall be deemed a separate offense.

Haw. Rev. Stat. § 6K-8 (Supp. 2005).

<sup>2/</sup> The Honorable Adrienne N. Heely presided over the 2015 dismissals and the subsequent motions for reconsideration.

<sup>3/</sup> The rule provides for dismissal, in relevant part:

(b) *By Court*. Except in the case of traffic offenses that are not punishable by imprisonment, the court shall, on motion of the defendant, dismiss the charge, with or without prejudice in its discretion, if trial is not commenced within 6 months:

(1) from the date of arrest if bail is set or from the filing of the charge, whichever is sooner, on any offense based on the same conduct or arising from the same criminal episode for which the arrest or charge was

(continued...)

motions to reconsider in both cases and, on August 28, 2015, the District Court denied the motions.

The State appeals from the dismissals with prejudice of the charges against Kaho'okele (appellate case no. CAAP-15-0000651) and Noa (appellate case no. CAAP-15-0000652). Specifically, the State appeals from the "Order and Notice of Entry of Order" ("Kaho'okele Order"), and the "Decision and Order Denying State's Motion to Reconsider Order Dismissing Case with Prejudice Filed August 14, 2015" ("Kaho'okele Decision & Order") in District Court case no. 2DCW-14-0000531; and the "Order and

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<sup>3/</sup>(...continued)  
made; or

(2) from the date of re-arrest or re-filing of the charge, in cases where an initial charge was dismissed upon motion of the defendant; or

(3) from the date of mistrial, order granting a new trial or remand, in cases where such events require a new trial.

. . . .

(c) *Excluded Periods.* The following periods shall be excluded in computing the time for trial commencement:

(1) periods that delay the commencement of trial and are caused by collateral or other proceedings concerning the defendant, including but not limited to penal irresponsibility examinations and periods during which the defendant is incompetent to stand trial, pretrial motions, interlocutory appeals and trials of other charges;

(2) periods that delay the commencement of trial and are caused by congestion of the trial docket when the congestion is attributable to exceptional circumstances;

(3) periods that delay the commencement of trial and are caused by a continuance granted at the request or with the consent of the defendant or defendant's counsel;

(4) periods that delay the commencement of trial and are caused by a continuance granted at the request of the prosecutor if:

(i) the continuance is granted because of the unavailability of evidence material to the prosecution's case, when the prosecutor has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will be available at a later date[.]

Notice of Entry of Order" ("Noa Order"), and the "Decision and Order Denying State's Motion to Reconsider Order Dismissing Case with Prejudice Filed August 14, 2015" ("Noa Decision & Order") in District Court case no. 2DCW-14-0000532. Each of the orders was entered on August 28, 2015. The State contends that the District Court erred in charging the State with 247 days between December 3, 2014, when Noa and Kaho'okele filed notices of removing the case to federal court, and August 6, 2015, when a status hearing was held with the District Court. The State further contends that the District Court failed to consider required factors in dismissing both cases with prejudice.

We vacate the dismissals and remand the cases for further proceedings.

## I. BACKGROUND

Consideration of a Rule 48 motion requires an assignment of responsibility for the period of time between arrest or charge and trial. Haw. R. Pen. P. 48(c). Although the State's challenge is focused on the District Court's allocation of 247 days after the removal of the case by Noa and Kaho'okele to the federal court, the context of that period within the entirety of the case proceedings is helpful in evaluating the District Court's conclusion that an allocation of excludable time is moot. Therefore, we address in some detail the pre-trial proceedings.

### (a) *Hearings on April 3, 10 and 24, 2014*

Following the re-filing of charges against Armitage, Kaho'okele, and Noa, the District Court<sup>4/</sup> presided over a series of separate-but-related hearings for each of the three defendants.

The initial arraignment and plea hearings were scheduled for April 3, 2014, but neither Noa nor Kaho'okele appeared, so the District Court continued the hearings to

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<sup>4/</sup> The Honorable Kelsey Kawanao presided over all proceedings after the charges were re-filed in February 2014, until the August 6, 2015 status conference.

April 10, 2014.<sup>5/</sup> Kaho'okele was the only defendant to appear on April 10, and he requested a continuance until April 24, 2014, in his own case and on behalf of Noa and Armitage, so that the three cases could be consolidated. On April 24, 2014, the defendants appeared together and orally moved to consolidate their cases, but the District Court instructed them to make their motions in writing. The District Court continued the arraignment and plea hearings to May 29, 2014, to "deal with the consolidation," if requested in writing, to "deal with appointments of counsel," to finish the arraignment and plea, and to set pretrial and trial dates.

*(b) May 29, 2014 Arraignment & Plea*

At the May 29, 2014 hearing, the defendants stated that they wished to proceed pro se. Before the court proceeded with arraignment, the defendants also informed the court that they no longer wished to consolidate their cases. Not guilty pleas were entered for all three defendants,<sup>6/</sup> and pre-trial hearings were then set for June 25, 2014.

*(c) June 25, 2014 Pre-Trial Hearing*

Noa and Kaho'okele each appeared *pro se* for their respective June 25, 2014 pre-trial hearings.<sup>7/</sup>

During Noa's hearing, the State informed the court that "defendant has an intent to file a motion which is disputing jurisdictional issues[.]" Noa explained that he intended to address, among other issues: due process; statute of limitations; alleged deficiency of charges in the amended complaint; failure to prosecute within one year, as "it [had been] eight years to the day" since the State filed its original complaint; and speedy

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<sup>5/</sup> Apparently, due to some confusion between the return hearing date referenced on the penal summons and the date written on the Return and Acknowledgment of Service form by the serving officer.

<sup>6/</sup> During arraignment, Kaho'okele refused to enter a plea on the charges against him due to his objections as to the court's jurisdiction, so the court entered a plea of "not guilty" on his behalf. Noa also would not enter an explicit plea, claiming to not understand the charges against him, and the court also entered a plea of "not guilty" on Noa's behalf.

<sup>7/</sup> Armitage's pretrial hearing was scheduled for August 6, 2014.

trial issues under the Sixth Amendment to the United States Constitution. In response to Noa's oral summary, the District Court instructed Noa "to file [the] document that [he] presented to the prosecutor" with the court and "to follow through with an appropriate declaration of what you believe the facts of the case are. . . ."<sup>8/</sup> The District Court then advised the parties of their respective briefing deadlines and scheduled a hearing on Noa's anticipated written motion to occur on August 27, 2014. Noa filed a motion to dismiss the complaint on June 25, 2014 and a supplement to the motion and declaration on July 17, 2014.

During the portion of the hearing related to his case, Kaho'okele informed the court that he was making a "special appearance," and that the court had not answered the question that he had posed previously regarding its purported jurisdiction over Kingdom of Hawaii's nationals. Kaho'okele presented a motion which the District Court recognized as a "document . . . styled as a motion to dismiss with prejudice" that had been filed earlier that morning in Kaho'okele's case. The court determined that it was unclear whether Kaho'okele's statements made the "same argument as Mr. Noa made." The District Court told Kaho'okele "if you have anything you would like to add, such as a declaration, I recommend that you do file it so the Court can take notice of whatever facts that you are asserting in support of your motion." Then the District Court set the same briefing deadlines for Kaho'okele's motion as it did with Noa's and scheduled another hearing for August 27, 2014.

*(d) August 27, 2014 Hearings*

The defendants appeared together on August 27, 2014. The District Court explained to them that "[t]he three cases have not been consolidated. So the arguments that any of you would make [would not] bind any of the other two, because you only have

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<sup>8/</sup> The court specifically explained what such a declaration should address:

You argued prejudice due to dimming of memories, due to passage of time. You should set out in your declaration how you feel you've been prejudiced specifically as to -- for example, you asked a rhetorical question of what witnesses could you call. I . . . don't know that. But that's for you to show me.

different defenses that may be inconsistent with each other at the trial." The District Court further explained that, although Noa's case file contained his motion to dismiss, the State's opposition, Noa's reply, and Noa's supplemental declaration, the court did not receive a filed motion to dismiss in Kaho'okele's case. Kaho'okele's case file did, however, contain the "State's memo in opposition," which suggested that Kaho'okele had served a copy of the motion to dismiss. The court soon discovered that "this pleading may have been filed in the case number indicated, 2P106-02018, which may have been the original case." The court ordered this misfiled document to be scanned into the proper record and determined that each defendant wished to join in the other's motion.

Noa then re-asserted the arguments in his motion -- namely, that his motion to dismiss the complaint with prejudice was based on: (1)] lack of sufficiency of facts to support the mens rea verbiage, (2) the statute of limitations, and (3) general concerns for "judicial economy." The court took the matter under advisement and scheduled a further hearing for September 24, 2014. The court also sought to determine whether the parties desired to "go ahead and make further scheduling orders today to reserve court time for trial if that is necessary[.]" In response, the State requested that trial be set, but the defendants objected, so no trial was scheduled.

*(e) September 24, 2014 Hearings*

At the September 24, 2014 hearing, the defendants submitted further arguments to support their motions to dismiss. The court denied the motions and found that "there [was] insufficient evidence to allow the Court to find that defendants have suffered prejudice in preparing the defense of their case under the [*Barker v. Wingo*, 407 U.S. 514 (1972)] analysis." The District Court informed the parties that regardless of any Rule 48 implications, "the earliest days" it could schedule for trial would be December 3, 2014, and the parties would have to file a motion to move the date, if desired. "[I]n an abundance of caution," the District Court then stated, "I am going to appoint private stand-by counsel for each of you. . . . So that

there's no question about your being prejudiced by not knowing what to do at the trial."<sup>2/</sup> Kaho'okele interrupted the court several times, before turning to exit the courtroom while the court was still addressing the defendants. Another warning from the court was given, brief discussion was had regarding oral motions to dismiss for lack of jurisdiction, and the oral motions were denied. The court proceeded with the assignment of three private attorneys for each defendant to contact for representation. The record indicates that Noa double-checked and wrote down his three names, but Kaho'okele stated that one attorney already expressed his opinion that the case had no merit. "And as for the other two," Kaho'okele told the District Court, "you can give 'em my name and number and have 'em call me. And if they want to represent me and be my stand-by, maybe they can go to jail for me too."

*(f) The December 3, 2014 Trial-Date Hearings*

All three defendants appeared in court on December 3, 2014, accompanied by stand-by counsel. At the outset, stand-by counsel for Armitage orally moved "for a two week continuance so that we can possibly present the Court with a brief as far as removal to Federal Court. I've discussed the issue with Mr.

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<sup>2/</sup> Kaho'okele told the District Court that he could not "sit here and stomach any more of this fraud that's going on." The following exchange took place as Kaho'okele continued:

I filed my motion. The prosecutor never answered my motion. . . . You asked the State what is their position. They wanted it in writing. We never put nothing in writing because your public defenders told us they cannot represent us, that we sovereign heirs.

Yet, you guys continue to perpetrate this fraud. . . .

Well, we'll put you on notice that there is war crimes going on around here, and if this Court going to perjure itself, then I have no control . . . .

THE COURT: Mr. Kaho'okele, are you referring to this Court as being a war crime tribunal?

MR. KAH'OKELE: I'm referring to some of the actions[.]

The District Court warned Kaho'okele that he would be held in contempt of court if he was not careful about what he was saying before deciding to appoint stand-by counsel.



Armitage. I believe two out of three of the cases here are in the same position." Stand-by counsel for Noa continued, "the case is ripe with Federal issues, albeit decided by the Supreme Court." The State, however, explicitly objected to any potential continuance due to the longevity of the case, "[t]he time is now to get this done."

The District Court declined to grant the continuance:

I'm not inclined to continue today's hearing. We have witnesses here. I believe the State is ready to proceed based upon its representations. And the Court's view is that now is the time to get it done.

If any removal was to have occurred, it should have occurred long prior to today. I do understand and I'm not laying any kind of responsibility or blame on stand-by counsel. You're stand-by and w[ere] not appointed to enter any appearances or representation, other than to provide stand-by services at this trial.

And I do appreciate the situation that you're in, which is why I'm saying what I'm saying. The record will reflect that defendants waived their right to counsel, insisted that they proceed without counsel, and that's why the Court went ahead and appointed you as stand-by counsel to ensure that their rights are recognized with regard to this trial. So that's what we're going to do today.

The court then conducted Armitage's trial and acquitted him of all charges. Noa's trial was scheduled to take place after lunch.

Over the lunch hour, Noa apparently filed a formal notice of removal. When the court reconvened, the court stated that it was in receipt of a notice of removal that had been filed that day and that "pursuant to this notice this matter has been removed and no further action shall be taken." The court then scheduled a status hearing for August 6, 2015, and released court-appointed stand-by counsel. The court made the same announcements and took the same actions in Kaho'okele's case. Neither the State nor the defendants objected to, or otherwise commented on, the court's decision to schedule the status hearing in eight months' time.

(g) *The August 6, 2015 Status Hearings*

The status hearings took place as scheduled on August 6, 2015. At Noa's hearing, the District Court began by inquiring into the status of the federal case and asked the

parties for "a case number, file or anything to reference it by[.]" Neither party provided that information. According to Noa's standby counsel, "[a]s far as we know the notice was filed, and I think at this point the Federal Court is the one that either remands it or not, or decides there is grounds for it, or the State can go up there and ask for a remand, which hasn't been done to date." Counsel for the State claimed, "I don't have access to the Federal Court system to actually confirm that there is a case number. But the representation's that it was properly filed."

Notwithstanding any pending federal case, the State urged the District Court to "proceed with the trial and proceed with this case" because an unnamed statute "does allow for these proceedings to continue with the caveat that the judgment of conviction can not be entered." Noa's standby counsel, who at the December 3, 2014 hearing had expressed a willingness to serve as re-appointed counsel for the status hearing, responded with the following:

On behalf of [Noa], as stand-by counsel, I would suggest that he moves to dismiss the case or for violation of his right to a speedy trial.

If [the State] had the right to go forward with the trial and they did not, and that's the position that counsel's taking right now, it's a petty misdemeanor under administrative -- Chapter 261 Subchapter Section 6K-8, penalty.

And it says under it is that it's a petty misdemeanor. If they had the ability to go forward, as they are now taking the position, then they have violated his right to a speedy trial and it should be dismissed.

The District Court construed counsel's suggestion as an oral motion to dismiss that, pursuant to HRPP Rule 12, the court had "discretion to hear" regardless of whether the motion was submitted in writing.

The court then made clear its intent to make a Rule 48- ruling that day, after which the State argued that the issue of who is responsible for the delay "needs to be briefed" so that "the Court can make the proper findings, and the Court can make a determination of whether or not it should be dismissed with or without prejudice." Moreover, the State explained that "[t]his notice of removal was done at the defendant's request[, t]he

status was set at the defendant's request[,]" and as such, the State urged the court to charge "any time between the [December 3, 2014] notice of removal that was supposedly filed with the Federal Court" to Noa, rather than to the State. The District Court, however, concluded that it would "follow . . . Rule 48 that this Court has to dismiss if trial's not given within six months."

When the State attempted to clarify whether the court was "therefore making a finding of fact that the time from the notice of removal to [the status hearing] is charged to the State" in order to support its conclusion that Rule 48 was violated the court answered, in relevant part:

Oh, and I'm not -- I'm not saying it's the State's fault. I'm not saying it's the defense fault. But I do recall, and I'm sure counsel's well aware, on Rule 48 that it's a shared responsibility to bring the accused a speedy trial. So it's a shared responsibility, shared duty of due diligence.

Although the court recognized that "various motions were filed [regarding the right to a speedy trial], but Judge Kawano heard them, denied them[,]" and although the "moving paper [made no] mention of Rule 48[,]" it determined that the right encompassed by that rule is constitutional in nature, and under the facts of the case, there was "obviously a clear violation" of the rule.<sup>10/</sup>

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<sup>10/</sup> The District Court explained why it believed that the matter did not require briefing or an analysis of responsibility for any of the periods of delay:

I find that Rule 48 was violated based on just the length of the delay, as well as the non-setting of the trial within the after [sic] the refiling, as well as the date that was given to Mr. Noa and the prosecution for the status. And no trial date set.

So, I'm not granting it based on the arguments made [before Judge Kawano], because although I respect [Noa's] choice of citizenship, I do feel that even Hawaiian citizens are nationals [and] are not immune from the law --

. . . .

. . . I also respect and I will follow the Constitution as -- the Hawaii State Constitution, as well as Hawaii Rules of Penal Procedure Rule 48 that requires a trial to be set within six months.

So it has not been set and/or completed for that matter. So I'm going to be dismissing this and I do want to cite, however, Mr. Noa's page four of his June 25th, 2014

(continued...)

Thus, the District Court dismissed the charge against Noa with prejudice for violation of HRPP Rule 48.

Kaho'okele's status hearing took place a few hours after Noa's. At the outset, the District Court indicated that, "based on the Court's explanation in Mr. Noa's case," it was inclined to dismiss for a violation of HRPP Rule 48. Like Noa, Kaho'okele spoke very little during the hearing, but unlike Noa, Kaho'okele did not appear with any standby counsel. After some colloquy between the court and the State, the court also dismissed Kaho'okele's case with prejudice.

*(h) Motion for Reconsideration and Findings of Fact/Conclusions of Laws*

The State filed motions for reconsideration in the Kaho'okele and Noa cases on August 14, 2015. The District Court heard the motions on August 28, 2015, denied them, and affirmed the August 6, 2015 dismissals with prejudice. In anticipation of its decision, the court prepared the following findings of fact ("FOFs") and conclusions of law ("COLs") for the parties:<sup>11/</sup>

FINDINGS OF FACT

1. The alleged violation occurred in 2006, over 9 years ago.  
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10. On June 25, 2014, Defendant[s] filed [their] Motion to Dismiss Complaint.<sup>2/</sup>  
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19. The court minutes as well as the audio transcript of proceedings on December 3, 2014 is devoid of any colloquy or waiver of time from Defendant[s] or State in regards to whom the time of eight month continuance be charged to for Rule 48 purposes.  
20. At no time prior to the status hearing on August 6, 2015, did the State or court follow up with the

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<sup>10/</sup> (...continued)  
motion. Although it's already ruled by Judge Kawano denying the same.

Page four, last paragraph, it says in the interest of judicial economy this action needs to be dismissed with prejudice. And in the words of my kupuna, enough already.

<sup>11/</sup> In both cases, the FOFs follow the same wording and content and the same numbering sequence until FOF 14. Thereafter, FOFs referring to Kaho'okele are one number behind in sequence from Noa's. The FOFs here are taken from the Noa Decision and Order.

Federal court re: the removal.

21. At no time prior to the August 6, 2015 status hearing did the State or Defendant[s] file a Motion for Reconsideration of the Court's December 3, 2014 decision to cancel trial and set for status on August 6, 2015, eight months away.
22. At no time after the December 2014 canceled trial date did any party, the State or Defense file pursuant to Rule 12.2(b) a Motion for advancement or continuance of trial.
23. There was no indication that Defendant waived his constitutional right to a speedy trial at the December 3, 2015 court date.
24. The number of days from December 3, 2015 [sic] canceled trial date to the August 5, 2014 [sic] status date is 247 which is more than 180.

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<sup>2/</sup> . . . Despite the State's Motion stating that Defendant's Motion to Dismiss requests dismissal for speedy trial at p.3, Defendant's Motion does not mention Hawaii Rule Penal Procedure ("H.R.P.P."), Rule 48, however on page 4 mentions the 6th Amendment to the United States Constitution and explains how the 8 year lapse in time has prejudiced his right to prepare for trial.

(Footnote omitted.)

The State timely filed its Notice of Appeal in each case on September 2, 2015. The cases were consolidated for disposition on February 13, 2019.

## II. POINTS OF ERROR

On appeal, the State contends that the District Court erred: (A) "in making Finding of Fact No. 25";<sup>12/</sup> (B) "by not mak[ing] any FOF or [COLs] regarding dismissal with prejudice pursuant to HRPP Rule 48" and pursuant to the three-factor test enunciated in *State v. Estencion*, 63 Haw. 264, 625 P.2d 1040 (1981); and (C) "by failing to provide FOFs and COLs that Appellant[s'] constitutional right[s] to a speedy trial [were] violated."

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<sup>12/</sup> We construe this as a challenge to FOF 24 of the Noa Decision & Order, FOF 25 of the Kaho'okele Decision & Order, and footnote 5 to those FOFs, which is essentially a COL despite not being labeled as such.

### III. STANDARDS OF REVIEW

#### *HRPP Rule 48*

This court reviews a trial court's denial of HRPP Rule 48 motion to dismiss under both the "clearly erroneous" and "right/wrong" tests:

A trial court's findings of fact (FOFs) in deciding an HRPP 48(b) motion to dismiss are subject to the clearly erroneous standard of review. An FOF is clearly erroneous when, despite evidence to support the finding, the appellate court is left with the definite and firm conviction that a mistake has been committed. However, whether those facts fall within HRPP 48(b)'s exclusionary provisions is a question of law, the determination of which is freely reviewable pursuant to the "right/wrong" test.

*State v. Abregano*, 136 Hawai'i 489, 497, 363 P.3d 838, 846 (2015) (quoting *State v. Samonte*, 83 Hawai'i 507, 514, 928 P.2d 1, 8 (1996)); see also *State v. Cenido*, 89 Hawai'i 331, 334, 973 P.2d 112, 115 (App. 1999) ("In reviewing the grant of an HRPP Rule 48 motion to dismiss, we apply the same standard [as when the motion is denied].").

#### *Constitutional Right to Speedy Trial*

"We answer questions of constitutional law by exercising our own independent constitutional judgment based on the facts of the case. Thus, we review questions of constitutional law under the right/wrong standard." *State v. Pratt*, 127 Hawaii 206, 212, 277 P.3d 300, 306 (2012) (quoting *State v. Hanapi*, 89 Hawai'i 177, 182, 970 P.2d 485, 490 (1998)).

### IV. DISCUSSION

#### A. HRPP Rule 48; *Estencion* Factors

The State's first point of error contends that the District Court erred in finding that "[t]he number of days from December 3, 2015 [sic] canceled trial date to the August 5, 2014 [sic] status date is 247 which is more than 180." According to the State, "those 247 days are not chargeable to the State because the delay was caused by [Noa]'s filing indicat[ing] that he would remove this matter to federal court." To that end, the State asserts that "only 175 days chargeable to the State elapsed." As such, the State argues that Noa's FOF 24 and Kaho'okele's FOF 25 are both "clearly erroneous as there is no

evidence to support [those] finding[s]."

We construe the State's point of error as challenging the District Court's decision to charge the State with the 247 days after the notice of removal was filed by Noa and Kaho'okele and the subsequent status conference. In identical footnotes in both the Noa Decision & Order and the Kaho'okele Decision & Order, the District Court stated:

The State's Motion breaks down whom it thinks the time for each continuance should be attributed, however this Court believes those items are moot as this court held that there is a violation of H.R.P.P. Rule 48 pursuant to [Kaho'okele's FOFs] 24 and 25, *supra*, and violation of Article VI of the U.S. Constitution and Article I Section 14 of the Hawaii State Constitution.

We agree with the State that the District Court erred.

"Rule 48 accords defendants the right to seek dismissal if they are not brought to trial within six months," but it "does not compel courts to bring defendants to trial within any given time frame (irrespective of excludable periods)." *State v. Lindsey*, No. 30390, 2013 WL 2383005, at \*4 (Haw. Ct. App. May 31, 2013) (Reifurth, J., concurring). HRPP Rule 48 "provides courts with an incentive to mitigate undue delays." *Id.* Pursuant to Rule 48(c), however, certain periods of delay are excluded from this calculation. Specifically, excludable time periods include, in relevant part:

(1) periods that delay the commencement of trial and are caused by collateral or *other proceedings concerning the defendant*, including but not limited to penal irresponsibility examinations and periods during which the defendant is incompetent to stand trial, pretrial motions, interlocutory appeals and trials of other charges.<sup>13/1</sup>

(2) periods that delay the commencement of trial and are caused by congestion of the trial docket when the congestion is attributable to exceptional circumstances; [and]

(3) periods that delay the commencement of trial and are caused by a continuance granted at the request or with the consent of the defendant or defendant's counsel[.]

Haw. R. Penal P. 48(c) (emphasis and footnote added). Based on the rule's language alone, then, the District Court's conclusion

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<sup>13/</sup> Additionally, "[f]or purposes of subsection (c)(1) of this rule, the period[s] of time, from the filing through the prompt disposition of the following motions filed by a defendant, shall be deemed to be periods of delay resulting from collateral or other proceedings concerning the defendant: motions to dismiss, to suppress, . . ." Haw. R. Penal P. 48(d)(1).

that the issue of "whom . . . the time for each continuance should be attributed . . . [is] moot" is incorrect and vacated. In light of our conclusion regarding the District Court's failure to consider any time that should be excluded from the 180-day calculation under HRPP Rule 48, we need not address the State's second point of error. However, we note for purposes of the remand that if the 180-day period is exceeded, the District Court must consider the various factors outlined in *Estencion*, 63 Haw. at 269, 625 P.2d at 1044, when deciding whether to dismiss this case with or without prejudice under HRPP Rule 48 as the State highlights under its second point.

B. Constitutional Right To A Speedy Trial

The District Court, while noting once during the status conference that there exists a constitutional right to a speedy trial, appeared to base its decision to dismiss the two cases exclusively on the basis of an HRPP Rule 48 violation. There were no arguments made outside of Rule 48, and no discussion of anything more or less that needed to be proven in order to establish a constitutional violation.

Nevertheless, the Kaho'okele Decision and Order and the Noa Decision and Order (i) note that the defendant's earlier-filed motion to dismiss "mention[ed]" the 6th Amendment to the United States Constitution; (ii) concludes that the State's proposed breakdown of responsibility for the delay between charging and trial was "moot" because "there is a violation of [HRPP] Rule 48 pursuant to Finding of Facts 24 and 25, *supra*, and violation of Article VI of the U.S. Constitution and Article I Section 14 of the Hawaii State Constitution"; (iii) quotes the two constitutional provisions as COL 1 and COL 2; and (iv) notes the standards for determining whether dismissal with or without prejudice is appropriate under HRPP Rule 48 and under the constitutions as COL 7 and COL 8 without discussing which was appropriate or why.

The State argues in its third point of error that the District Court erred when it determined that Noa's constitutional right to a speedy trial had been violated without making findings with respect to the four factors enumerated by the Supreme Court



of the United States in *Barker v. Wingo*, 407 U.S. 514, 530 (1972) (identifying the four factors as "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant"). See *State v. Lau*, 78 Hawai'i 54, 62, 890 P.2d 291, 299 (1995) (quoting *State v. Wasson*, 76 Hawai'i 415, 419, 879 P.2d 520, 524 (1994)) (noting further that these so-called "*Barker Factors*" were adopted by the Supreme Court of Hawai'i in *State v. Almeida*, 54 Haw. 443, 509 P.2d 549 (1973)). Although the District Court addressed the third *Barker* factor in FOF 10 n.2, the court's failure to analyze factors i, ii, and iv amounts to error. Therefore, the District Court erred to the extent that it dismissed the charges against Kaho'okele and Noa with prejudice based on any constitutional right to a speedy trial.

V. DISPOSITION

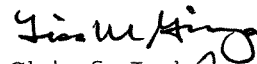
Based on the foregoing, the Kaho'okele Order, the Kaho'okele Decision and Order, the Noa Order, and the Noa Decision and Order, all filed on August 28, 2016, are vacated and the cases are remanded to the District Court of the Second Circuit, Wailuku Division, for proceedings consistent with this memorandum opinion.


DATED: Honolulu, Hawai'i, April 15, 2019.

On the briefs:

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Henry M. Noa,  
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Chief Judge

  
Associate Judge

  
Associate Judge