No. 18-8046

In the Supreme Court of the United States

STEPHEN L. PAULMEIR,

Petitioner,

v.

STATE OF HAWAI'I,

Respondents.

On Petition for Writ of Certiorari to the Intermediate Court of Appeals State of Hawaii

BRIEF IN OPPPOSITION

MITCHELL D. ROTH
Prosecuting Attorney

SYLVIA WAN*
Deputy Prosecuting Attorneys
County of Hawai`i
Office of the Prosecuting Attorney
655 Kīlauea Avenue
Hilo, Hawai`i 96720
Tel. No. 808-961-0466
Email: hilopros@co.hawaii.hi.us

Counsel for Respondents
*Counsel of Record

QUESTION PRESENTED

1. Does due process require that a waiver of jury include information about scheduling differences between a jury trial and bench trial in order for the waiver to be knowing, voluntary, and intelligent?

2. Does a bench trial need be heard on consecutive trial days to comply with the right to a speedy trial?

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STATEMENT

This case involves a criminal bench trial for the misdemeanor offense of Abuse of a Family or Household Member in violation of Hawaii Revised Statutes ("HRS") §709-906. Testimony was heard before the Family Court of Third Circuit of Hawaii, County of Hawai'i over the course of four trial days: August 27, 2014, November 26, 2014, February 25, 2015 and April 1, 2015. At the end of each trial day, the trial as recessed and continued by the Family Court to the next available date.

Petitioner Stephen Paulmier ("Defendant") contends that he did not knowingly, intelligently, and voluntarily waive his right to a jury trial because the trial court did not inform Defendant of the differences in the court's scheduling practices of jury trials and bench trials. Defendant additionally contends that his right to a speedy trial was infringed upon because the trial court held bench trial non-consecutively over four days.

Respondent State of Hawai'i ("State") can find no case law, statutes, or other authority to support the Defendant's contention that a defendant needs to be informed of collateral consequences regarding the choice between jury trial or bench trial in order for the waiver of jury trial to be valid. Defendant admits that "there are no statutes or caselaw" that supports his claim. Pet., 9.

Defendant then alleges "the ICA erroneously concluded that Mr. Paulmier [was] not entitled to relief." Pet., 10. The ICA concluded that Defendant was not entitled to relief, in part, because he did not cite any authority upon which relief

could be sought. The Intermediate Court of Appeals of Hawai'i ("ICA") found that 1) Defendant waived the of issue of jury trial waiver on appeal because he did not raise it before the Family Court, 2) Defendant cited no authority that supported his claim, 3) it was not clear how a trial judge would know what contingencies would affect the length of a bench trial compared to a jury trial, and 4) there was no authority in Hawaii case law that would support his contention. App. 1, 9. For the aforementioned reasons, the ICA rejected the Defendant's claim that his jury trial waiver was invalid. Id.

Regarding the Defendant's right to a speedy trial, the ICA **did not** find that the delay in trial was presumptively prejudicial as to trigger the Barker v. Wingo test. Id at 6. The ICA did, however, apply the Barker factors to the facts in this case in *arguendo* and held the Defendant's constitutional right to a speedy trial was not violated. Id.

PROCEDURAL HISTORY

Defendant, released on bail, was charged with Abuse of a Family or Household Member on March 24, 2014. On May 7, 2014, Defendant waived his right to a jury after colloquy with the court and requested a pretrial conference. The trial court set a pretrial conference for July 2, 2014. State informed the court that its calculation for the purposes of Rule 48[1] was November 2, 2014.

On May 12, 2014, Defendant filed a Motion to Amend Terms and Conditions of Bail. Within the motion, Petitioner requested leave of the court to travel outside

[1] Hawaii Rule of Penal Procedure Rule 48 codifies the means to calculate the reasonable period for holding a speedy trial for criminal trials in Hawai'i, and relief that can be sought.

of the jurisdiction. In addition, Defendant requested in the same motion to strike the July 2, 2014 pretrial conference and to set bench trial for August 27, 2014. The trial court denied Defendant's request to strike the July 2, 2014 pretrial conference, and set bench trial for August 27, 2014.

Bench trial commenced on August 27, 2014. State and defense counsel provided opening statements. State started its presentation of its case with testimony of the victim, Defendant's wife. Defense counsel started cross examination of the victim but ran out of time. After some discussion about witness's and the court's availability, a new trial date was provided for the continuation of trial on November 26, 2014. App. 5, 108-113. Defendant made no requests for a sooner court date at that time. See Id.

On November 26, 2014, the trial court heard the completion of the victim's testimony, testimony of a neighbor, and the responding police officer. After which, the State rested its case. Defense presented testimony of mutual friend and then started direct of the Defendant, during which the court ran out of time.

On the contemplation of the next trial date, Court asked the Deputy Prosecutor if there were any dates where she was unavailable and/or previously committed to other courts. App. 6, 117-118. State noted that did not have any other trials in other courts, but that the State's deputy prosecutor would not be available for the first two weeks in February. Id, 118. The court clerk gave a date of February 8th or February 25th. Id. The court chose February 25, 2015 and the State agreed. Id. When the Defense requested if there was an earlier date, the

court replied "I'm afraid that if we set it sooner, one of the three of us will become unavailable, and that won't work for anyone." App. 6, 118-119. The Court kept the February 25, 2015 date and the third trial day.

On December 24, 2015, Defense filed a Second Amended Witness List, adding a witness. App. 13. On February 2, 2018, State filed a response to the Defense's Second Amended Witness List in the form of a Motion in Limine. App. 14. On February 6, 2015, Defense filed a Motion to Dismiss Complaint For Violation of Speedy Trial Right. App. 15. On February 17, 2015, Defense filed a Third Amended Witness List another witness and a Memorandum in Opposition to State's Motion in Limine. App. 16.

On February 25, 2015, the court held hearings on Defendant's Motion to Dismiss Complaint For Violation of Speedy Trial Right, State's Motion in Limine, and Defendant's request to add witnesses prior to proceeding to the scheduled bench trial. App. 7, 4-26. Court denied Defendant's motion to dismiss and State's motion to preclude the testimony of defense witness in the Second Amended Witness List. Id, 21-24, 26. Defendant's testimony was concluded on February 25, 2015, but without enough time to start the testimony the added defense witnesses. Id, 28-92.

The trial court continued the bench trial until April 1, 2015. Id, 92. In response to hearing the new court date of April 1, 2015, Defense replied "we'd like to place a record objection, [], an objection on the record." Id. But no further argument was made by Defense stating, "we already filed a motion as to these arguments, and we know the court's already ruled." Id.

On April 1, 2015, testimony of Defendant's additional witness was heard and then stricken by agreement of both the Defense and the State. Then, State provided rebuttal testimony of the complaining witness. Both the State and Defense provided closing arguments. The trial court found Defendant guilty beyond a reasonable doubt.

On April 30, 2015, Defendant filed his Notice of Appeal to the Intermediate Court of Appeals of the State of Hawai'i ("ICA"). Defendant filed an Opening Brief of Defendant-Appellant before the ICA on December 7, 2015. App. 18. State filed an Answering Brief on February 18, 2016 and an Amended Answering Brief on March 1, 2016. App. 19.

On July 20, 2018, the ICA filed its Memorandum Opinion finding that Defendant's right to a speedy trial was not violated and that Defendant's claim, that his jury trial waiver was invalid, was without merit. App. 1, 9. On August 16, 2018, the ICA filed its Judgement on Appeal affirming the judgment of the Family Court of the Third Circuit. App. 2. On October 15, 2018, Defendant filed an Application for Writ of Certiorari from the Memorandum Opinion filed on July 20, 2018. App. 12.

The Hawai'i Supreme Court rejected Defendant's Petition for Writ on Certiorari on November 23, 2018.

FACTUAL BACKGROUND

Bench trial for the instant case commenced on August 27, 2014. Testimony was heard by the Honorable Judge Lloyd Van De Car over four days on August 27,

2014, November 26, 2014, February 25, 2015 and April 1, 2015. App. 5, 6, & 7. The State presented testimony of three witnesses: the victim, the next door neighbor, and the responding officer.

On August 27, 2014, the State arraigned the Defendant, the trial court went through its necessary advisements regarding the Defendant's rights, and the State and Defense provided opening statements. The State started the presentation of its case with the testimony of the victim, which had not concluded before the end of the day. App. 5, 108.

When contemplating dates for the continuation of trial, the date provided by the court was originally December 3, 2014. App. 5, 111-12. The State requested a different date due to the unavailability of a witness during that period. Id. The court went back and forth with dates and landed on November 26, 2014, which was suitable for all witnesses. Id, 109-13.

During the discussion of the next trial date, neither the Defendant nor Defense Counsel objected or insisted on a date sooner than November 26, 2014. See Id. On the November 26, 2014 date, the trial court heard the conclusion of the State's case. App. 6. The State rested its case on November 26, 2014. Id. Defense then proceeded with the presentation of its case. Id.

Defense presented testimony of a mutual friend, and partial testimony from the Defendant. App. 6. The court ran out of time during direct examination of the Defendant. Id. On the contemplation of the next trial date, Court asked Defense Counsel if he anticipated calling any other witnesses beside his client. Id, 116.

Defense counsel responded that he intended on calling no other witnesses. App. 6, 116. The State requested time for potential rebuttal the based on new information raised in Defendant's direct. Id, 117.

The Court then asked the Deputy Prosecutor if there were any dates where she was unavailable and/or previously committed to other courts. Id, 117-118. State's deputy prosecutor noted that she did not have any trials in other courts, but that she would be unavailable for the first two weeks in February. Id, 118. The court clerk gave a date of February 8th or February 25th. Id. The court chose February 25, 2015 and the State agreed. Id.

When the Defense requested if there was an earlier date, the court replied "I'm afraid that if we set it sooner, one of the three of us will become unavailable, and that won't work for anyone." Id, 117-118. What was not on the record, was that the presiding judge was unavailable for a few weeks prior to February 8, 2015 and a pre diem judge was scheduled to be presiding instead. After the response by the court, neither Defendant nor Defense Counsel made any further requests or assertions regarding a sooner trial date. Id, 118.

In the interim from the trial date of November 26, 2014 and February 25, 2015, Defense filed two amended witness lists and filed a motion to dismiss based on speedy trial grounds. App. 13, 15, & 16. On December 24, 2014, Defense filed a Second Amended Witness List that added Witness, Tomas Belsky. App. 13. State filed a response to the Defense's Second Amended Witness List in the form of a Motion in Limine. App. 14. The State requested that the trial court exclude this

witness because he had been present in the gallery for the entirety of the bench trial. App. 14, 3-4. On February 6, 2014, Defendant filed a Motion to Dismiss Complaint For Violation of Due Process and Speedy Trial Right. App. 15. On February 17, 2014, Defense filed a Third Amended Witness List, adding yet another defense witness, Cindy Taylor. App. 16. Defense also filed a Memorandum in Opposition to State's Motion in Limine on the same date. App. 17.

The hearing date for the defendant's Motion to Dismiss Complaint for Violation of Due Process and Speedy Trial was placed on the same date and time as the continued bench trial. App. 15, 1; App. 7. In the motion, Defendant alleged speedy trial violations in his February 6, 2014 motion was based on the time between the commencements of trial to the purposed end would be about 6 months, a total of 182 days. App. 15, 3. The Defense motion acknowledged that the reason for the delay between the court dates was congestion of the Court's calendar. Id. The Defense motion claimed that Defendant was prejudiced, in that Defendant suffered anxiety and emotional distress, and his ability to put on a defense because the passage of time gave opportunity for the State to "coach its complaining witness" and the court's ability to assess credibility was "blunted." App. 15, 3.

On February 25, 2015, the court held a hearing on the various motions filed by Defense and the State, as well as the continuation of the bench trial. App. 7. After hearing testimony by the defendant and discussion with Defense counsel on record, the court found that the amount of stress that Defendant had described appeared to be no greater stress than the stress all others experience in the course

of a criminal trial. App. 7, 22-23. The Court found that the passage of time did not impede the ability of Defendant to present his defense, partially based on his request to add additional witnesses. Id, 22. The Court remarked that it is common practice for the court to have continuances between trial dates and as a matter of course the Court keeps notes, has transcripts available, and even video to refresh its recollection of the proceedings. Id, 21-22. In his arguments to the court, Defense counsel conceded that in a jury waived trial where the judge is the finder of fact, the passage of time does not have the same effect as it would on a jury. Id, 17.

The Court questioned if the Defendant's position for arguing that the trial taking too long could be remedied by the Court declaring a mistrial and rescheduling the trial before another judge with two to three full days devoted to the trial proceedings without interruption. App. 7, 17-18. Defense responded only by insisting that the situation required a dismissal. Id, 18-19.

The Court suggested that to cure the Defendant's "unfair trial" argument the Court could call a mistrial and have the trial start over anew. Id, 19. The Defense argued it would be fatal error to restart a trial as it would not result in a "fair trial" and would cause only further delay and prejudice to the defendant. Id, 19. At this point, the Defense appears to equate the mere passage of time with the reasoning that Defendant would not receive a "fair trial." Id.

The assertion of the invalid jury trial waiver was first raised by the Defendant on appeal in his Opening Brief to the Hawai'i ICA. See App. 18, 20-21, 26-29. The Hawai'i ICA filed a memorandum opinion on July 20, 2018. App. 1.

As for Defendant's waiver of jury trial, the ICA found that Defendant did not challenge the validity of his jury trial waiver in the Family Court and did not preserve the issue for appeal. App.1, 9. Even so, the ICA found that Defendant's contention "that the waiver of his right to a jury trial was invalid because he was not informed "that a bench trial could be continued indefinitely"" was without merit. Id. The ICA noted "it is not clear how a trial judge would know in advance the future contingencies that would affect how long the bench trial would take to complete." Id. ICA found that there is no Hawaii case law that talks about including an advisement of anticipated length of bench trial or the comparison between the times required to complete a bench trial and a jury trial among the information that should be provided for a jury trial waiver to be valid. Id. Nor did Defendant cite a case supporting his claim. Id. Thus, the ICA rejected the Defendant's claim that his jury trial waiver was invalid. Id.

As for the Defendant's claim that his speedy trial rights were violated, the ICA found, after applying the Barker test, that the Defendant's right to a speedy trial had not been violated. Ultimately, the ICA found that the trial court had properly denied his motion to dismiss and upheld the conviction. Id, 6-8.

On October 15, 2018, Defendant filed his Application for Writ of Certiorari from the Memorandum Opinion. App. 12. Defendant argued in his application for writ that the ICA misapplied the Barker v. Wingo in that "[t]he *Barker* balancing factors are for speedy trials and do not address the issue of [a] knowing, intelligent and voluntary waiver of jury trial." Id, 7. Defendant claimed that his waiver of jury

trial was 'invalidated' because he "did not agree to the constant continuation of his bench trial." Id, 7-8. Defendant argued in his Application for Writ of Certiorari before the Hawaii Supreme Court various rules from Hawai'i's different civil courts, misconstrues them, and then asked that the misconstrued civil rules be applied to a criminal proceeding. App. 12, 7-9. Ultimately, the Hawaii Supreme Court denied certiorari on November 23, 2018. App. 3.

Defendant now makes similar claims in his Petition for Writ of Certiorari before the United States Supreme Court. Pet.,10-12.

STATUTORY BACKGROUND

The questions raised by Defendant go the United States and Hawai'i constitutional rights to waiver of jury trial right and speedy trial right. The Hawai'i appellate courts reviews questions of constitutional law under the right/wrong standard by apply its own independent constitutional judgment based on the facts of the case. State v. Friedman, 93 Hawai'i 63, 67 (2000). Claims affecting substantial rights are reviewed under the plain error standard of review. Id., at 68; State v. White, 92 Hawai`i 192, 201 (1999).

The bench trial against Stephen Paulmier, the Petitioner/Defendant, was held in the Family Court of Third Circuit of Hawaii, County of Hawai'i pursuant to HRS §571-14. According to HRS §571-14(a)(2)(B), the Family Court shall have exclusive original jurisdiction over any adult charged with a an offense, other than a felony, committed against the defendant's spouse. HRS 571-14. Defendant was charged with misdemeanor physical abuse of his wife.

The Hawaii Family Court Rules "govern the procedure in the family courts of the State in all suits of a civil nature with the exceptions stated in Rule 81 of these rules." HFCR Rule 1; App 10. Hawaii Family Court Rule 81(c) states "Cases for adults charged with the commission of a crime coming within the jurisdiction of the family courts shall be governed by the Hawai'i Rules of Penal Procedure." HFCR Rule 81; App 11.

The District and Family Courts of the Third Circuit hear both civil and criminal cases. The same courts hear both civil and criminal cases in calendars that they manage Monday through Friday. The District and Family Courts juggle the rights of hundreds of civil and criminal defendants day in and day out. The majority of the bench trials heard before the District and Family Courts of the Third Circuit are completed within one to two trial days.

In order to ensure that everyone is treated fairly, and their rights to due process and speedy trial honored, the courts provide bench trial time as it is requested. There are instances when the District and Family Courts have accommodated defendants that wanted bench trial to be concluded in a single day, or a short succession of days. The District and Family Courts in Hawai‘i have managed their calendars in this fashion for quite some time. The need arises from the sheer volume of cases demanding bench trial and then canceling bench trial the day of trial.

A. Waiver of Jury Trial

The right to waive a trial by jury is codified in HRS 806-61, which states "[t]he defendant in any criminal case may, with the consent of the court, waive the right to a trial by jury either by written consent filed with the court or by oral consent entered on the minutes." HRS 806-61. A defendant may, orally or in writing, voluntarily waive his or her right to trial by jury. State v. Friedman, 93 Haw. 63, 68 (2000). (citing HRPP Rule 5(b)(3)); App. 8). The waiver of a jury trial right must come from the defendant. Id.; State v. Ibuos, 75 Haw. 118, 121 (1993).

The validity of a defendant's waiver of jury trial is a federal constitutional law question, and therefore was reviewed under a right/wrong standard. State v. Friedman, 93 Haw. 63, 67 (2000). In determining the validity of a defendant's waiver of jury trial, the Hawai'i Supreme Court "will look to the totality of facts and circumstances of each particular case." Id., citing Friedman, 93 Hawai'i at 63, 68–69. "[W]here it appears from the record that a defendant has waived a constitutional right, the defendant carries the burden of proof to show otherwise by a preponderance of the evidence." Ibuos, 75 Haw. at 121.

There are no statutes, rules, or case law within the State of Hawai'i that require an advisement of collateral consequences between the choice of a jury trial or a bench trial in order for a waiver of jury trial to be valid.

B. Speedy Trial

Both the Unites States and Hawai'i Supreme courts have found that the right to a speedy trial, is "unlike other rights guaranteed by the United States and

Hawai‘i Constitutions, is unusually amorphous and serves to protect the separate, often conflicting interests of the accused and of the public in the speedy disposition of cases." State v. Wasson, 76 Hawai‘i 415, 419 (1994)(citing State v. Nihipali, 64 Haw. 65, 67-68 (1981)); Barker v. Wingo, 407 U.S. 514, 522 (1972). The U.S. Supreme Court noted that "[t]he States, of course, are free to prescribe a reasonable period consistent with constitutional standards, but our approach must be less precise." Barker, 407 U.S. at 523.

In Hawai‘i, the reasonable period for holding a speedy trial was codified in Hawai‘i Rules of Penal Procedure ("HRPP") Rule 48. See HRPP Rule 48; App. 9. Rule 48 set out that the court shall dismiss a charge that is not commenced within six months from date of arrest or filing of the charge, whichever is sooner. Id. Rule 48 allows for delays to be excluded from the calculation of the period required by the rule based on delays attributable to both the prosecution and defense. Id.

Hawai‘i courts have found instances in which Rule 48 was violated, but the constitutional right to a speedy trial was not. See State v. Dwyer, 78 Hawai‘i 367, 372 (1995); State v. Jackson, 81 Hawai‘i 39, 55 (1999). The State was not able to find any published court decision where the defendant's right to speedy trial was violated but not there was no violation of HRPP Rule 48.

Most assessments of speedy trial violations start at the point of accusation until the *commencement* of trial. See Dwyer, 78 Hawai‘i at 367, 371-72 (finding that defendant was not deprived of his speedy trial right, despite 32 month delay between arrest and commencement of trial); Nihipali, 64 Haw. at 58 (finding that a

trial that did not commence until one year and three weeks since defendant's incarceration was not a violation of speedy trial rights); State v. Wasson, 76 Hawai'i 415, 422 (1994)(finding that when 605 days had elapsed since the filing of the complaint to the commencement of trial did not violate defendant's speedy trial right); State v. White, 92 Hawai'i 192, 204 (1999)(finding that an 11 month delay between indictment of defendant and commencement of trial did not violate his speedy trial rights). The courts have been clear that the right to speedy trial "attaches the moment a person becomes an "accused"", Wasson, 76 Hawai'i at 418, but the courts have not been as clear as to when the speedy trial right definitively ends. Therefore, the State followed the guidance provided by the U.S. Supreme Court in its arguments to the Hawaii ICA.

In Barker v. Wingo, the U.S. Supreme Court stated that there is "no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months." Barker, 407 U.S. at 523. The U.S. Supreme Court described the right to a speedy trial as relative, as "[i]t secures the rights to a defendant", but it also "does not preclude the rights of public justice." Barker, 407 U.S. at 522. The right to a speedy trial "is consistent with delays and depends upon circumstances." Barker, 407 U.S. at 523; United States v. Ewell, 383 U.S. 116, 120 (1966). "A requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself." Ewell, 383 U.S. at 120. "The essential ingredient is orderly expedition and not mere

speed." Id., quoting Smith v. United States, 360 U.S. 1, 10 (1959); also quoted by United States v. Baillie, 316 F.Supp. 892, 894 (D. Haw. 1970).

The U.S. Supreme Court approached the question of speedy trial with a balancing test weighing the actions of the prosecution and the defendant. Barker v. Wingo, 407 U.S. 523 (1972). "A balancing test necessarily compels courts to approach seedy trial cases on an ad hoc basis." Id. at 530; see also State v. Wasson, 76 Hawai`i 415, 419 (1994). The factors of that balancing test are: 1) length of delay, 2) reason for delay, 3) the defendant's assertion of his right, and 4) the prejudice to the defendant. Barker, 407 U.S. at 523. However, the Barker Court cautioned that:

> [w]e regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant." Id. at 531. "In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. Id.

"Whether and how a defendant asserts his right is closely related to the other factors we have mentioned." Barker v. Wingo, 407 U.S. 531 (1972). "The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences." Id., at 531. "The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." Barker v. Wingo, 407 U.S. 531-532 (1972).

The Hawai'i Supreme Court has found that a defendant's motion to dismiss on speedy trial grounds is "tantamount to an assertion of his or her constitutional right to a speedy trial." Wasson, 76 Hawai'i 421 (quoting Nihipali, 64 Haw. at 70). The Supreme Court determined that unless a motion to dismiss based on violations of HRPP Rule 48 is "accompanied in some way by an alternative demand, even if made implicitly, for a speedy trial, it does not necessarily indicate that the defendant actually wants to be tried immediately." Id.

Similarly in Barker, the U.S. Supreme Court recognized that a defendant could have uncertain motives:

> Barker moved to dismiss the indictment. The record does not show on what grounds this motion was based, although it is clear that no alternative motion was made for an immediate trial. Instead the record strongly suggests that while he hoped to take advantage of the delay in which he acquiesced, and thereby obtain a dismissal of the charges, he definitely did not want to be tried.

407 U.S. at 535. In the Barker case, the length of delay between arrest and trial had been five years. Id at 533. There was also "[n]o question [was] raised as to the competency of [his] counsel." Id. at 534.

REASONS FOR DENYING THE PETITION

The decision by the ICA was correct. The ICA was correct that the Defendant did not raise the issue of the validity of his jury trial waiver at the trial level. Defendant did so first on appeal. Moreover, the ICA was correct in finding that Defendant's allegations that his jury trial waiver was invalid was without merit.

The ICA was correct in finding that Defendant's right to a speedy trial had not been violated and thus, a dismissal of the charges mid-trial was not warranted.

Defendant was informed of his rights regarding a jury trial. After a lengthy colloquy with the trial court, Defendant knowingly, intelligently, and voluntarily waived his right to a jury trial. App. 4, 2-6. On appeal, Defendant merely pointed to the lack of discussion between the trial court and defendant regarding the timing differences between a jury trial and bench trial to explain why his waiver was "invalid." App. 18, 26.

Defendant admitted before the ICA, Hawaii Supreme Court, and the United States Supreme Court that there is no authority that supports his claim that a jury trial waiver should include collateral consequences regarding the choice between a jury trial and bench trial. Defendant states in his writ to the Hawaii Supreme Court, "there are no statutes or case law precedent located for the issue of a knowing, voluntary, intelligent waiver which includes a statement of the length of time a bench trial could take." App. 12, 6. If there is no authority to support his claim, there was no basis for the ICA to find in his favor. Moreover, the Hawaii Supreme Court declined to take the issue up on cert. App. 3.

Defendant asks the U.S. Supreme Court to take up the issue on first impression, just as he asked the Hawaii Supreme Court. See App. 12, Pet., 9. Defendant equates notice of a trial court's customary scheduling practices with the notice of a constitutional right. See Pet., 8 & 26.

Defendant asks the U.S. Supreme Court to set down an edict that will bind all trial courts in the country because he did not ask his attorney about the scheduling differences that are common practice in our jurisdiction. This remedy is extreme and unjustified, especially when considering the record. See App. 4, 2-6; App. 7, 4-23.

A. There Was No Violation Of Due Process – Petitioner's Waiver Of Jury Trial Was Knowing, Intelligent, And Voluntary

Defendant claims that his waiver of jury trial was not knowing, intelligent, or voluntary because he assumed that a bench trial would be quicker than a jury trial. Pet. at 8. Defendant claims that the colloquy he entered into with the Court waiving his right to a jury trial did not provide him sufficient facts "to inform the defendant as to what all he is waiving." Id, 26. However, a review of the record would show that the Court in engaged in a lengthy colloquy with Defendant about his constitutional right to a jury trial. App. 4, 2-6. Court's colloquy included whether Defendant was of clear mind, engaging in the waiver of his own free will, and if Defendant had discussed his jury trial right with his attorney. App. 4, 2-3. Court went over the details of jury trial including the requirement of a unanimous decision, burden of proof, and that the maximum penalties do not change in jury trial. Id, 3-4. The Court even asked the Defendant if he had any questions regarding his right to a jury trial. Id, 4. Defendant did have a question, not about his jury trial right, but about arraignment. Id. After answering Defendant's questions, Court asked again if there were any questions about Defendant's right to a jury trial, to which Defendant responded that he did not. Id, 5. Based on the

lengthy colloquy, the Court found that Defendant knowingly, intelligently, voluntarily waived his right to a jury trial. App. 4, 6.

Prior courts have maintained that "[w]here it appears from the record that a defendant has waived a constitutional right, the defendant carries the burden of proof to show otherwise by a preponderance of the evidence." State v. Ibuos, 75 Haw. 118, 121 (1993). Defendant makes no new argument or showing within the record that would indicate that the Defendant did not make a knowing, intelligent, and voluntary waiver. Defendant merely, pointed to the lack of discussion between the court and defendant regarding the timing differences between a jury trial and bench trial during his waiver colloquy. Pet., 8 & 26.

During the hearing on Defendant's Motion to Dismiss Complaint for Violation of Due Process and Speedy Trial, Defendant admitted that he spoke to his attorney about his jury trial right prior to waiving that right on May 7, 2014. App. 7, 12. Per the Defendant, time was not a part of their discussion pertaining to the differences between a jury and bench trial. Id., 12-13. Defendant assumed that the timing and priority of a jury trial was the same as a bench trial, and that once a bench was started, the trial would have priority on the court' calendar. Id, 5. Defendant explained that his based this assumption on his prior experience in another state. Id at 5. Upon re-direct, Defendant elaborated that he believed that if the bench trial did not finish in one day, room would be made on the courts calendar; and that he did not anticipate the delays between the court dates of August to November and November to February. Id, 15.

The timing differences between a jury trial and bench trial would be different between jurisdictions. If timing was such an important factor to Defendant as to make a strategic determination between a bench trial and a jury trial, then Defendant would have consulted with his attorney. It would appear from the Defendant's own testimony that he did not. App. 7, 12-13. Even after his jury trial waiver, Defendant would have had to prepare for bench trial with his counsel, and theoretically discuss approximate length of times for testimony and the trial overall.

Defendant was made aware of the Court's own practice of continuance to the next available date being approximately two months out on the conclusion of the first trial date on August 27, 2014. See App. 5, 109-113. At that hearing, Defense counsel made no motions to advance the purposed court date, or request that multiple court dates be scheduled for the ultimate conclusion of trial. Why? The State argues that Defendant did not really hold the expedient disposition of his trial in that high of a regard.

Defendant's arguments in his Motion to Dismiss were centered on the claim that his right to a fair and speedy trial, not his waiver of jury trial. See App 15. In the Introduction, Defense states "[t]he Motion to Dismiss seeks dismissal of the case with prejudice on the grounds that there has been a prejudicial lapse of time between the date of the alleged offenses and the disposition of the charges." Id, 4. There was no other request for relief, only dismissal.

Defense did make comparisons between a jury trial and bench trial in his motion. In the section entitled "Impairment of Defense" Defense states in his motion:

> Maintaining the fact-finder's ability to assess witness credibility is a key facet of Defendant's right to a fair trial. It is the crux between Defendant's right to a fair trial and a speedy trial. It is the very reason – in addition to potential inconvenience – that a delay similar to what Defendant had suffered would not be tolerated in a jury trial. Had Defendant known disposition would be delayed to such a drastic extent, Defendant would not have waived his right to a jury trial. The prejudice Defendant has suffered to both his person and his ability to present a defense has been too great. Defendant's right to a fair trial, Defendant's right to a speedy trial, would have been better protected in a jury trial. The inequity between proceedings is unacceptable. At the very least, the potential for such delay due to the Court's calendar and the effect it may have upon his rights to both a speedy trial and fair trial should be addressed during the Court's colloquy with Defendant when he waived his right to jury trial.
> App. 15, 10-11.

However, defense counsel does not once argue in the Motion to Dismiss, or at the hearing on the motion, that his client's waiver of jury trial was invalid. He argues only that his client would have made a different strategic choice between a bench and jury trial. The argument he makes in his Motion to Dismiss comparing a jury trials and bench trials are based on scheduling, the passage of time, and it effects on his right to a "fair" trial.

The trial court had even offered to declare a mistrial and set the trial anew before a different judge to correct the Defendant's perceived violation of a "fair trial." App 7, 17-19. But Defendant declined that offer. Defense instead argued the

prejudice already suffered by the Defendant was fatal error, and that restarting the trial anew would only result in prejudice to the Defendant. Id, 19.

This would have been the perfect opportunity to address his waiver of jury trial, and any perceived inadequacies. But he didn't. Instead, it appears from the record that Defendant was not interest in a fair or speedy trial, only in a dismissal.

B. Petitioner's Right to Speedy Trial was Not Violated and His Motion to Dismiss was Properly Denied

Defendant previously acknowledged that his bench trial commenced within 180 days of his arrest in compliance with HRPP Rule 48. App 18, 23. Defendant's claim lies solely in that it took seven months to complete four days of trial. Pet., 8.

The ICA acknowledged that holding a relatively short trial over an extended period of time is not ideal, but none-the-less, the Defendant's constitutional right to a speedy trial was not violated. App. 1, 6. The ICA analyzed the Defendant's claim using the four-prong test set out in Barker v. Wingo; 1) length of delay; 2) the reasons for the delay; 3) the defendant's assertion of right to speedy trial; and 4) prejudice to the defendant. Id.

i. Length of Delay was Not Prejudicial

The ICA did not specifically find that the delay of the trial days was presumptively prejudicial, but assumed in *arguendo* so that the Court could weigh the remaining factors. Id. The ICA explained in a footnote, that "[t]ypically, a constitutional speedy trial claim focuses on pre-trial delay – the delay between arrest or charge and the commencement of trial." Id.

The case law in Hawaii is no different than the case law of the US Supreme Court in that the delay contemplated is that between the accusation and trial. In order "to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from "presumptively prejudicial" delay, since, by definition, he cannot complain that the government has denied him a "speedy" trial if it has, in fact, prosecuted his case with customary promptness." (internal quotation deleted) Doggett v. United States, 505 U.S. 647, 651-52 (1992). "Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." Baker v. Wingo, 407 U.S. 530 (1972). "[T]he length of the delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case." Id., at 530-531.

In this case, both the State and Defendant agreed that the commencement of trial was within the parameters of HRPP Rule 48. App. 19, 23; App. 20, 21. The only question was as to the progression of trial, namely the delays between trial days when testimony was heard. App. 19, 23. The U.S. Supreme Court found "no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months." Barker v. Wingo, 407 U.S. 514, 523 (1972). Instead, in terms of determining whether some delay is presumptively prejudicial and thus necessitate further inquiry is "dependent upon the peculiar circumstances of the case." Id., at 530-1. The State would argue that none of the delays during the progression of trial were "presumptively prejudicial" and was not "peculiar"

progression of any given bench trial in the circuit. In fact, Defendant's case was heard by the Family Court with customary promptness.

Bench trial started well within the period determined by HRPP Rule 48. App. 4, 6; Pet., 23. Trial was heard over a total of four days. The State's case was heard over two trial days, August 27, 2014 and November 26, 2014, and a short rebuttal on the final day of trial, April 4, 2015. Defendant's case was heard over the course of three trial days, November 26, 2014, February 25, 2015 and April 4, 2015.

Between the Defense's presentation of its case, which started on November 26, 2014, Defense filed two amended witness lists adding two additional witnesses. The Defense chose to call only one of the additional witnesses to testify on April 4, 2015. State argued before the ICA, that but-for the Defendant's Second and Third Amended Witness Lists and Motion to Dismiss for Speedy Trial, the trial would have concluded (even with the State's rebuttal testimony) on February 25, 2015.

Defendant's constitutional rights were upheld by the trial court. Defendant claims that he "wanted the quickest disposition of his case." App 12, 7. At the outset of trial, Defense made no queries with the court as to scheduling multiple trial dates to accommodate all anticipated witness for a faster disposition. App. 5, 111-113.

On November 26, 2014, after the completion of the second trial day, Defense asked if there were any earlier dates than February, there was one opening in the court's calendar but only two weeks prior. App. 6, 118. Again, Defense but did not inquire as to whether any additional dates should be scheduled in foresight of any

additional Defense witnesses. Id. In fact, Defense had not intended on calling any other witnesses besides the Defendant when the February date was being set. App. 6, 116.

Defendant argues that his trial lasted over the course of seven months. Pet., 8. What Defendant argues is "prejudicial delay" has been the customary promptness the Family Court has provided to all of its cases, unless there is a specifically requested accommodation.[2] In this case, Defendant did not make any specific requests regarding the setting of his individual trial dates, nor did he apparently speak to his attorney about them. See App. 7, 12-13.

Defendant did not make an assertion demanding of his speedy trial rights after the commencement trial until he filed of his Motion to Dismiss Complaint for Violation of Due Process and Speedy Trial a mere 19 days prior to his third trial day. Prior and subsequent to which, Defendant filed a Second and Third Amended Witness List, which would require the trial court to secure additional court days to hear this additionally offered testimony. App. 12 & App. 16.

By continuing the case for yet another trial day in April, the trial court was ensuring that Defendant received adequate due process, by allowing Defendant leeway to add last minute witnesses and time for them to be heard. But-for the

[2] The State is of the understanding that the Third Circuit District Courts handle and schedule their bench trials in a similar manner. Similar scheduling practices are also seen in the District and Family court in the other Circuits of Hawai'i. The trial court stated that if each bench trial was set separately, as the Defendant purposed, then it would be unable to set trials in a timely manner. Appx 7 at 21.

continuance between the November and February trial dates, it would appear that Defense would not have been able to identify and prepare its additional witnesses.

Just because the bench trial did not progress in the manner assumed by Defendant do not mean that he was denied his constitutional right to a speedy trial.

ii. Reason for Delay

The ICA noted that the Defendant "did not assert that the delay between trial days was attributable to any intentional attempt by the State to hinder his defense." App. 1, 6. ICA noted that the reason Defendant cited on the record was "congestion of the Court's calendar." App. 1, 6-7. The ICA found this to be "neutral reason that does not weigh heavily against the State," citing Hawaii Supreme Court case State v. Lau, 78 Hawai'i 54, 63 (1995). App. 1, 7.

When determining whether a "presumptively prejudicial" delay should weigh against the State, the court should determine the reason the government assigns to justify the delay. See Barker, 407 U.S. at 531. The Barker court found that the more neutral reason for a delay being attributed to "overcrowded courts" should weigh less heavily against the government then a deliberate attempt to delay trial to hamper the defense. Id., at 531. In this instance, there is no assertion that time the can be attributed to the State intentionally delaying any part of the proceedings. In fact, the delays between trial days were attributable to the Court's calendar and availability. App. 15, 3.

During the hearing on Defendant's Motion to Dismiss Complaint for Violation of Due Process and Speedy Trial, State recognized that Defense counsel was aware

of the general operating practice of bench trials before the District and Family Courts. App. 6, 20-21. The Defense counsel also recognized that jury waived trials customarily commence with continuances between trial days when he explained that he was aware that a judge has the use of transcripts and recordings to aid the Court's memory of the case. Id, 17. The Trial Court also noted its use of court's notes, transcripts, and tapes of the proceedings to facilitate the Court in rendering its decision for a bench trial that exceeds a single day. Id, 23. It's the Court's goal to conclude a trial once it starts but that the calendar does not always permit that. Id, 21. The Court also stated that if each matter was set separately then the court would be unable to set trials in a timely manner. Id. Thus, the Trial Court treated Defendant's case with customary promptness by providing the next available court date upon notice that a new/additional trial date would be necessary.

iii. Defendant's Assertion of Speedy Trial

The ICA found that the first time the Defendant raised a speedy trial claim was in his Motion to Dismiss filed on February 6, 2015. App. 1, 7. The ICA found that this did not constitute an assertion of the right to speedy trial for Barker purposes because the motion did not request that the trial be resumed sooner that February 25, 2015, only that the case be dismissed. Id. The ICA stated that even if the Motion to Dismiss could be considered an assertion of the right to speedy trial, the trial was concluded two months later. Id. Ultimately, the ICA found that this third factor weighed in favor of the State. Id.

Barker explained that the "[w]hether and how a defendant asserts his right is closely related to the other factors we have mentioned." 407 U.S. 531 (1972). "The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences." Id., at 531. "The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." Id., at 531-532.

The Hawai'i Supreme Court has found that a defendant's motion to dismiss on speedy trial grounds is "tantamount to an assertion of his or her constitutional right to a speedy trial." Wasson, 76 Hawai'i 421 (quoting Nihipali, 64 Haw. at 70). However, the Hawai'i Supreme Court determined that unless a motion to dismiss based on violations of HRPP Rule 48 is "accompanied by some way by an alternative demand, even if made implicitly, for a speedy trial, it does not necessarily indicate that the defendant actually wants to be tried immediately." Id.

In this case, Defendant filed a motion to dismiss on speedy trial and fair trial grounds, but when given the opportunity to have the entire trial reheard over a series of two to three conjoined days, Defense refused the suggestion by requesting only a dismissal. App. 15; App. 7, 9. This court could view this motion as Defendant's demand for a speedy trial, but his subsequent actions undermine that claim by 1) adding two additional witnesses near the end of trial necessitating an additional trial date, and 2) refusing the court's alternative that the trial be reset

before another judge with trial dates in quick succession to one another. App. 12; App. 16; App. 7, 17-19.

In *arguendo*, if the Defendant's motion to dismiss were considered his "demand" for a speedy trial, then the only continuance that was provided against Defendant's speedy trial assertion was the time between the February 25, 2015 and April 1, 2015 trial dates, a total of 35 days. After hearing the Defendant's motion and State Motion in Limine in response to Defendant's Second Amended Witness List, the trial court only had to enough time to hear the conclusion of Defendant's trial testimony. The defendant's newly proposed witness was ordered to return for the conclusion of the jury waived trial on April 1, 2015. App. 7, 93. In response to hearing the new court date of April 1, 2015, defense counsel replied "we'd like to place a record objection, [], an objection on the record." But no further argument was made by Defense Counsel stating, "we already filed a motion as to these arguments, and we know the court's already ruled." Id, 92.

The trial court continuance of 35 days for the conclusion of the trial does not necessarily violate the Defendant's speedy trial rights. Barker provided an example that if the State moves for a 60-day continuance, "granting that continuance is not a violation of the right to speedy trial unless the circumstances of the case are such that further delay would endanger the values the right protects." Barker, 407 U.S. 514, 522 (1972). The State argued that the 35 day continuance did not endanger the Defendant's rights. In fact, the Court provided a date in which it was

anticipated that there would be enough time in the Court's calendar to conclude the trial with the addition of Defense's witnesses. App. 7, 93.

iv. Prejudice to Defendant

The ICA found that the final factor weighed in favor of the State for the following reasons: 1) Defendant was released on bail throughout his trial; 2) the stress and concern he experienced was not usual; and 3) Defendant's case was not seemingly impaired by the passage of time. App. 1, 8.

"Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect." Barker, 407 U.S. at 532. "This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." Barker, 407 U.S. at 531. "Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." Id.

Defendant argued that the delays between the commencements of bench trial violated Defendant's right to due process in that the "opposition has multiple opportunities to coach the complainant," "memories of the witnesses are no longer fresh," and Defendant "was subject to undue stress of his reputation being affected." App. 19, 26. These arguments are similar to those brought by Defendant in his original Motion to Dismiss Complaint for Violation of Due Process and Speedy Trial. App. 15. The ICA found these arguments were speculative and unsubstantiated. App. 1, 8.

A review of the record shows that the Defense counsel did not confront the victim about this allegation of coaching during cross examination on November 26, 2014, nor during the rebuttal cross examination on April 1, 2015. Defense also chose not to address this allegation during the hearing on the Motion to Dismiss. App. 7, 5-11, 15-17.

Next, Defendant's claim before the ICA that "memories of the witnesses are no longer fresh" was unsupported. App. 19, 26. Defendant did not provide any indication or examples to how any of the witnesses' memories were detrimentally affected by the passage of time between trial dates. App. 7, 5-11, 15-17. In fact, the trial court noted "I frankly don't hear either of you arguing that the time has passed has [sic] impeded your ability to present the case you want to present." App. 7, 22. The trial court also mentioned just prior to this comment "[i]n fact, Mr. Lee, I think you have a minute that I'll hear right after this one is done to add yet another witness, [ ] to the defense side." App. 7, 22.

Last, Defendant claimed that he had "suffered anxiety and emotional distress as a result of the delay." App. 15, 3. However, Defendant did not provide any evidence to the trial court or the ICA as to how that "emotional distress" could be distinguished from the emotional strain experienced by any other criminal defendant. App. 7, 6-11 & 22; See State v. Wasson, 76 Hawai'i 415, 422 (1994) (something more than a bare assertion of disquietude is generally required before this form of prejudice will weigh in favor of the accused). During the hearing, Defense argued that his reputation in the community was being harmed due to the

delay in trial. App. 7, 9-11; App. 19, 26. The trial court found that "without anything in addition to [Defendant's] own description of the stress that is being impose on [him] is no more than the stress that all of us, [] experience in the course of a criminal trial." App. 7, 23. The trial court explained that:

> Were [Defendant] to bring an expert witness to explain that this has been debilitating stress that has had some impact on you that is [] unusual and [] would cause you [] distress to the point of being unable to participate in your own defense or [] engage in the things [] that you do every day in your life then the court might have a [] different opinion." App. 7, 23-24.

The trial court's reasoning was similar to that of the Hawaii Intermediate Court of Appeals ("ICA") in Ferraro. In State v. Ferraro, the ICA found that "[a] mere assertion that one had been upset or concerned about a pending criminal prosecution is not sufficient" to establish prejudicial anxiety." State v. Ferraro, 8 Haw.App. 284, 300 (1990).

The Ferraro Court further elaborated that "[t]he government will prevail unless the defendant offers objective, contemporaneous evidence of anxiety, such as prompt and persistent assertion of the desire for a speedy trial coupled with a demonstrable basis for the court's believing the delay is traumatic." Id. In this case, Defendant failed to provide any contemporaneous evidence of anxiety or a demonstrable basis for the court to believe that the delays between the trial days were traumatic.

Note, in all the arguments that Defendant puts forward about the prejudice that he endured during the continuances, none of those arguments asserted that the Defendant's presentation of his case was actually hindered in any way. Petition at

at 10-18. In fact, Defendant's case benefited from the passage of time as he was able to locate the two additional witness as provided in Defendant's Second and Third Amended Witnesses lists, filed December 24, 2014 and February 17, 2015 respectively. App. 12; App. 15. Therefore the ICA correctly found that this final factor weighed in favor of the State.

CONCLUSION

Even though the record indicated that the delay between trial days was not prejudicial, the ICA still exercised due diligence in evaluating Defendant's claim that his speedy trial right was violated. The ICA went through each and every factor found within Barker and applied Hawaii's case law in interpreting "the peculiar circumstances of the case." See Barker v. Wingo, 407 U.S. 514, 550-51 (1972). The ICA admitted that although the circumstances of continuing a bench trial over so many months was not ideal, ultimately, Defendant's right to speedy trial was not violated.

As for the Defendant's waiver of jury trial, the ICA found correctly that there is no case law in Hawaii that supports the Defendants claim that a trial court must advise him on how long a bench trial could take. The trial court in this case provided trial dates as the Court became aware an additional day was needed. The trial court had no foreknowledge as to how long the bench trial was going to take. And as the record indicates, neither did the State, since it was the Defense's late motions and additional witnesses that caused the need for the fourth trial day.

Defendant's first demand for speedy trial was in the form of a motion filed approximately two weeks prior to day three of his bench trial. App. 16. From a review of the record, it is quite clear that Defendant did not necessarily want a speedy trial, but merely wanted a dismissal of his case. App. 7, 17-19; App. 16. At a hearing on Defendant's motion, the trial court provided the Defendant with an alternative, declaring a mistrial and setting the case before another judge in successive trial days. App. 7, 17-18. Defendant declined such remedy and demanded only a dismissal. App. 7, 18. Even assuming that there a prejudicial delay, the Barker factors weigh against Defendant, and the ICA ruled correctly that there was no speedy trial violation.

Based on the foregoing arguments and authorities, the Respondents-State of Hawai'i respectfully request that the Supreme Court of the United States deny the Petition for Writ of Certiorari to the Intermediate Court of Appeals State of Hawaii.

Respectfully submitted.

MITCHELL D. ROTH
Prosecuting Attorney

SYLVIA WAN*
Deputy Prosecuting Attorney
County of Hawai`i
Office of the Prosecuting Attorney
655 Kīlauea Avenue
Hilo, Hawai`i 96720
Tel. No. 808-961-0466
Email: hilopros@co.hawaii.hi.us

Counsel for Respondents

APPENDIX 1

Intermediate Court of Appeals
of the State of Hawai'i
Memorandum Opinion
July 20, 2018

NO. CAAP-15-0000381

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee,
v.
STEPHEN L. PAULMIER, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE THIRD CIRCUIT
(FC-CR NO. 14-1-0101)

MEMORANDUM OPINION
(By: Ginoza, Chief Judge, Leonard and Reifurth, JJ.)

Plaintiff-Appellee State of Hawaiʻi (**State**) charged Defendant-Appellant Stephen L. Paulmier (**Paulmier**) by complaint with abuse of a family or household member. The complaining witness (**CW**) was Paulmier's wife.

Paulmier waived his right to a jury trial. The bench trial was held on four separate days -- August 27, 2014, November 26, 2014, February 25, 2015, and April 1, 2015 -- with breaks in between the trial days. Paulmier remained released on bail throughout the trial. On February 6, 2015, Paulmier filed a motion to dismiss the complaint for violation of his rights to due process and speedy trial (**Motion to Dismiss**). The Family Court of the Third Circuit (**Family Court**) heard the Motion to Dismiss on February 25, 2015, and denied it. On April, 1, 2015, at the conclusion of the trial, the Family Court found Paulmier guilty as charged. The Family Court sentenced Paulmier to two

years of probation, with a special condition of 30 days of imprisonment, with all but two days of imprisonment stayed. The Family Court entered its Amended Judgment on May 14, 2015.[1]

On appeal, Paulmier contends that: (1) the Family Court erred in denying his Motion to Dismiss because his right to speedy trial was violated; and (2) his waiver of his right to a jury trial was invalid because he was not informed "that a bench trial could be continued indefinitely." As explained below, we conclude that under the circumstances of this case, the length of time it took to complete Paulmier's trial did not violate his right to a speedy trial, and the Family Court did not err in denying Paulmier's Motion to Dismiss. We further conclude that Paulmier is not entitled to relief on his claim that his jury trial waiver was invalid. Accordingly, we affirm the Family Court's Judgment.

I. BACKGROUND

The CW is from Brazil. She came to Hawai'i in 2011, and she married Paulmier in May of 2012. About three weeks prior to the charged incident, the CW had asked Paulmier to move out of their duplex apartment and had changed the locks. However, about two days before the charged incident, she allowed Paulmier to return home.

According to the CW, on March 23, 2014, the day of the charged incident, the CW and Paulmier were at home. They had made plans to go out together, but began arguing after Paulmier said he would leave the house alone. The CW saw Paulmier doing something to the lock on the front door, which the CW had recently changed. The CW put her hand on the lock and asked Paulmier to stop. In response, Paulmier "very strongly" threw the CW to the floor. The CW fell over a bag of cans and bottles and felt extreme pain in her right shoulder. The CW got up and tried to leave the house through the front door, but Paulmier threw her down again, putting his hands around her chest area and

[1] The Honorable Lloyd Van De Car presided.

pushing forward. The CW fell down and hit her head on the tile floor with such force that she was concerned that she may have a skull fracture or possible hemorrhaging. Hitting her head was "very painful," and a bump immediately formed on her head.

The CW got up, tried to leave the house, and said she needed to call the police. Paulmier pushed the CW to the back of the kitchen and put his forearm against her neck. Paulmier grabbed his crotch, and with his face almost touching the CW's face, he said more than once, "You want my dick, you fucking bitch? You fuckin' bitch, you gonna call the cops. Call the cops, you fucking bitch." The CW screamed for help, and called out to her neighbor, Michael Thomas (**Thomas**). When Thomas arrived, Paulmier let the CW leave. The CW went to Thomas's house and called the police. The CW provided them with verbal and written statements. The police also took photographs of the CW, which were admitted in evidence at trial.

Thomas testified that he lived in the duplex unit that shared a wall with the CW and Paulmier's unit. On March 23, 2014, he heard a sound like a bookshelf had fallen and the CW scream, "Michael, Michael, help, help." Thomas called the police. He then went over to the CW's unit and found her screaming and crying with a big bump on her head. He described her facial features as "pain, fear, uh, tears." Thomas took the CW to his unit, while they waited for the police. The CW indicated to Thomas that she had sustained injuries to her head and shoulder. Thomas saw a bump on the CW's head and took pictures of it that day and "a couple days later, 'cause it had enlarged."

Officer Chere Rae Kalili (**Officer Kalili**) testified that she responded to a domestic violence call on March 23, 2014. Officer Kalili observed that the CW was "crying heavily . . . looked like she was scared[.] . . . was trembling." Officer Kalili felt a big lump and a depression on the CW's head. The CW also told Officer Kalili that the CW's right shoulder was

injured. The CW provided a written statement and Officer Kalili took photographs of the CW.

Paulmier began his case-in-chief by calling Daniel Li (**Li**). Li testified that he had been friends with both Paulmier and the CW. He stated that he "heard some people say that . . . she's not very truthful." Li testified that he would not take the things the CW said at face value and "would probably have to verify" them.

Paulmier testified in his own defense. Paulmier acknowledged that his relationship with the CW was "stormy" and that they "argued a lot." However, he denied ever hitting her.

According to Paulmier, on the day of the incident, he told the CW he wanted a key to the new lock on the door. Instead of providing Paulmier with the new key, the CW commented that since he had a key to the old lock, he could just put the old lock back on the door. Paulmier called the CW's bluff and began putting the old lock back on the door. Out of the corner of his eye, he saw the CW "lunge herself toward [him]." The CW put her full body weight on Paulmier's forearms. In response, Paulmier stood up, applied force to the CW, and lifted her up. The CW then lost her balance and fell against some boxes and luggage against the wall in the kitchen. Paulmier did not stop and check on the CW, but turned back to work on the lock.

Paulmier then felt the CW on his back with her full weight on him and her arms around his torso. He stood up, flexed his arms to break her hold on him, and watched the CW fall to the ground. The CW fell on her bottom, and her momentum continued and Paulmier heard the CW's head hit the tile of the kitchen floor. The CW "popped right back up" and "got right in [Paulmier's] face[,]" yelling that he had injured her. This made Paulmier very angry. Paulmier backed her up to the refrigerator with his finger "wagging in her face" in a "scolding position[.]" Paulmier again went back to fixing the lock. Later, their neighbor Thomas knocked on the door, and Paulmier let Thomas in.

On cross-examination, the State asked Paulmier about several incidents of alleged violence against the CW. Paulmier maintained that he had never hit the CW.

After Paulmier rested, the State called the CW in rebuttal. The CW testified to several incidents in which Paulmier had engaged in acts of physical violence against her, which caused her pain. The State then rested.

After closing argument by both parties, the Family Court found Paulmier guilty as charged. In support of its decision, the Family Court made extensive findings on the record, including that the version of events described by the CW was credible, the version of events described by Paulmier lacked credibility, and the testimony of Thomas and Officer Kalili was consistent with the CW's description of events and inconsistent with Paulmier's description.

II. DISCUSSION

A. Right to Speedy Trial

Paulmier argues that the length of time between the date of the alleged offense and the disposition of the charges violated his constitutional right to a speedy trial, and therefore, the Family Court erred in denying his Motion to Dismiss. We disagree.

Paulmier was arrested for the alleged offense on March 23, 2014, and he was charged by complaint the next day, March 24, 2014. On May 7, 2014, Paulmier waived his right to a jury trial. The bench trial began on August 27, 2014. The bench trial was conducted on four separate trial days -- August 27, 2014, November 26, 2014, February 25, 2015, and April 1, 2015. At the end of a trial day, the trial was recessed and continued to the next date determined by the Family Court to be available to hold the trial. This practice continued until the trial was concluded on April 1, 2015, with the Family Court finding Paulmier guilty as charged. The time period from the beginning of trial to the end of the trial was approximately seven months.

The time period from Paulmier's arrest until the conclusion of trial was approximately twelve and a half months.

Paulmier acknowledges that his bench trial was commenced within 180 days of his arrest and thus complied with the speedy trial time requirement of Hawai'i Rules of Penal Procedure Rule 48 (2000). The thrust of his claim is that the seven-month time period it took to complete his four days of trial violated his constitutional right to a speedy trial.

In analyzing whether a defendant's constitutional right to a speedy trial has been violated, we apply the four-part test articulated in Barker v. Wingo, 407 U.S. 514 (1972). See State v. White, 92 Hawaii 192, 201, 990 P.2d 90, 99 (1999). "The four Barker factors are: (1) length of delay; (2) the reasons for the delay; (3) the defendant's assertion of his or her right to speedy trial; and (4) prejudice to the defendant." Id. at 201-202, 990 P.2d at 99-100 (citation omitted).

Conducting a four-day trial over a seven month time period is not the ideal or preferred practice. We acknowledge that conducting a relatively short evidentiary trial over a prolonged time period understandably raises concerns. However, under the circumstances of this case, we conclude that Paulmier's speedy trial rights were not violated.

Assuming *arguendo* that the length of the delay in this case was long enough to be presumptively prejudicial and trigger inquiry into the other Barker factors,[2] we conclude that evaluation of the remaining factors support the Family Court's denial of Paulmier's speedy trial claim. As to the second Barker factor, Paulmier does not assert that the delay was attributable to any intentional attempt by the State to hinder his defense. Rather, the reason for the delay cited by Paulmier and indicated

[2] Typically, a constitutional speedy trial claim focuses on pre-trial delay -- the delay between an arrest or charge and the commencement of trial. For purposes of pre-trial delay, the Hawai'i Supreme Court has held that a pre-trial delay of six months was presumptively prejudicial and sufficient to warrant in inquiry into the other Barker factors. State v. Lau, 78 Hawai'i 54, 62-63, 890 P.2d 291, 299-300 (1995).

by the record was "congestion of the Court's calendar." Court congestion is a neutral reason that does not weigh heavily against the State. Lau, 78 Hawai'i at 63, 890 P.2d at 300.

With respect to the third Barker factor, Paulmier did not object when the Family Court recessed the trial after the first trial day on August 27, 2014, and continued the trial until November 26, 2014. At the end of the second trial day on November 26, 2014, Paulmier's counsel asked, "No sooner, Your Honor?" when the Family Court proposed February 25, 2015 as the next trial date, but counsel did not object when the Family Court confirmed that date for the resumption of trial. The first time Paulmier raised a speedy trial claim was in his Motion to Dismiss, which was filed on February 6, 2015. Although Paulmier sought dismissal based on his speedy trial claim in his Motion to Dismiss, he did not make a demand for a speedy trial; that is, he did not request that the trial be resumed sooner than the scheduled February 25, 2015 date. Thus, Paulmier's Motion to Dismiss did not constitute an assertion of the right to a speedy trial for Barker purposes. See Lau, 78 Hawai'i at 63-64, 890 P.2d at 300-01. Moreover, even assuming *arguendo* that the Motion to Dismiss filed on February 6, 2014 qualified as an assertion of the right to a speedy trial for Barker purposes, the trial was completed two months later on April 1, 2015. The third Barker, factor therefore weighs in favor of the State.

The fourth Barker factor, prejudice to the defendant, should be assessed in light of the interests the speedy trial right was intended to address. Barker, 407 U.S. at 532. The Court has identified three such interests:

> (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

Id. (footnote omitted).

Here, the record indicates that Paulmier was released on bail after his arrest and remained on bail throughout his trial. Paulmier asserted that the delay in completing his trial was very stressful and caused him distress, and that people had disparaged his reputation in the community while the trial was ongoing. The Family Court found that the stress described by Paulmier was not unusual, and noted that Paulmier had not presented evidence that he was unable to participate in his defense. We conclude that the Family Court did not err in this assessment.

Paulmier's contention that the breaks in trial were prejudicial because it gave the prosecution the opportunity to "coach" the CW was speculative and unsubstantiated. He also failed to provide any specific argument on how or why the breaks in trial impaired his ability to effectively cross-examine the CW. Finally, the Family Court disagreed with Paulmier's claim that the breaks in trial unfairly "blunted" its ability to assess the credibility of witnesses. The Family Court explained that it keeps notes of the witnesses' testimony, has transcripts and tapes of the proceedings available to refresh its recollection, and would make use of these materials in rendering its decision. In addition, the Family Court's detailed findings in support of its guilty verdict reflect a clear recollection of the trial evidence. Under these circumstances, we conclude that the fourth Barker factor weighs in favor of the State.

Having considered the Barker factors, we conclude that Paulmier's constitutional right to a speedy trial was not violated and that the Family Court properly denied his Motion to Dismiss.[3]

[3] We note that in his Motion to Dismiss, Paulmier argued that the length of time it was taking to complete his trial violated his due process right to a fair trial as well as his right to a speedy trial. Paulmier does not make a separate due process argument on appeal. In any event, Paulmier's due process and speedy trial claims in his Motion to Dismiss were based on the same arguments. Our rejection of Paulmier's speedy trial claim therefore also disposes of the due process claim he raised in the Family Court.

B. Waiver of Jury Trial

Paulmier contends that the waiver of his right to a jury trial was invalid because he was not informed "that a bench trial could be continued indefinitely." This contention is without merit.

First, Paulmier did not challenge the validity of his jury trial waiver in the Family Court. He did not seek to withdraw his jury trial waiver or argue that the waiver was invalid in the Family Court. Accordingly, he did not preserve the issue for appeal. See State v. Hoglund, 71 Haw. 147, 150, 785 P.2d 1311, 1313 (1990) ("Generally, the failure to properly raise an issue at the trial level precludes a party from raising that issue on appeal."); State v. Ildefonso, 72 Haw. 573, 584, 827 P.2d 648, 655 (1992) ("Our review of the record reveals that [the defendant] did not raise this argument at trial, and thus it is deemed to have been waived."); State v. Moses, 102 Hawai'i 449, 456, 77 P.3d 940, 947 (2003) ("As a general rule, if a party does not raise an argument at trial, that argument will be deemed to have been waived on appeal[.]").

In any event, we reject Paulmier's claim that his jury trial waiver was invalid. Paulmier does not cite any case holding that for a jury trial waiver to be valid, the trial court must advise the defendant on how long the bench trial will take. Indeed, it is not clear how a trial judge would know in advance the future contingencies that would affect how long the bench trial would take to complete. Nor does Paulmier cite a case holding that for a jury trial waiver to be valid, the trial court must advise the defendant on how the time to complete a bench trial compares with that of a jury trial. Hawai'i cases discussing jury trial waivers have not included advisement of the anticipated length of a bench trial or the comparison between the time to complete a bench trial and a jury trial as among the information that should or must be provided to a defendant for a jury trial waiver to be valid. See State v. Gomez-Lobato, 130 Hawai'i 465, 470-73, 312 P.3d 897, 902-05 (2013).

III. CONCLUSION

For the foregoing reasons, we affirm the Family Court's Amended Judgment.

DATED: Honolulu, Hawaiʻi, July 20, 2018.

On the briefs:

Gary C. Zamber,
for Defendant-Appellant.

Sylvia Wong,
Deputy Prosecuting Attorney,
County of Hawaiʻi,
for Plaintiff-Appellee.

Chief Judge

Associate Judge

Associate Judge

APPENDIX 2

Intermediate Court of Appeals
of the State of Hawai'i
Judgement on Appeal
August 16, 2018

NO. CAAP-15-0000381

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee,
v.
STEPHEN L. PAULMIER, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE THIRD CIRCUIT
(FC-CR NO. 14-1-0101)

JUDGMENT ON APPEAL

(By: Ginoza, Chief Judge, for the court[1])

Pursuant to the Memorandum Opinion of this court entered on July 20, 2018, the Amended Judgment entered by the Family Court of the Third Circuit on May 14, 2015 is affirmed.

DATED: Honolulu, Hawaiʻi, August 16, 2018.

FOR THE COURT:

Chief Judge

[1] Ginoza, Chief Judge, Leonard and Reifurth, JJ.

APPENDIX 3

Supreme Court of the State of Hawai'i
Order Rejecting Application For Writ of Certiorari
November 23, 2018

SCWC-15-0000381

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI,
Respondent/Plaintiff-Appellee,

vs.

STEPHEN L. PAULMIER,
Petitioner/Defendant-Appellant.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-15-0000381; FC-CR No. 14-1-0101)

ORDER REJECTING APPLICATION FOR WRIT OF CERTIORARI
(By: Recktenwald, C.J., Nakayama, McKenna, Pollack, and Wilson, JJ.)

Petitioner/Defendant-Appellant Stephen L. Paulmier's application for writ of certiorari filed on October 15, 2018, is hereby rejected.

DATED: Honolulu, Hawaiʻi, November 23, 2018.

/s/ Mark E. Recktenwald
/s/ Paula A. Nakayama
/s/ Sabrina S. McKenna
/s/ Richard W. Pollack
/s/ Michael D. Wilson

APPENDIX 4

Family Court of the Third Circuit
State of Hawai'i
Transcript of Proceedings on May 7, 2014

IN THE FAMILY COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

STATE OF HAWAII,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	FC-CR NO. 14-1-0101
	)	
STEPHEN PAULMIER,	)	
	)	
Defendant.	)	
	)	

TRANSCRIPT OF PROCEEDINGS FROM ELECTRONIC RECORDING

before the HONORABLE LLOYD VAN DE CAR, Judge presiding, on Wednesday, May 7, 2014.

APPEARANCES:

For the State: SYLVIA WAN
Deputy Prosecuting Attorney
County of Hawaii
655 Kilauea Avenue
Hilo, Hawaii 96720

For the Defendant: JUSTIN LEE
Deputy Public Defender
275 Ponahawai Street
Suite 201
Hilo, Hawaii 96720

Transcribed by: JENNIFER WHETSTONE, CSR 421, RMR
Official Court Reporter
Third Circuit Court, State of Hawaii

Wednesday, May 7, 2014 9:17 A.M.

--oOo--

THE BAILIFF: Your Honor, calling out of order from page 21, number 29, State of Hawaii versus Steven Paulmier, FC-CR 14-1-0101.

MS. WAN: Sylvia Wan for the state.

MR. LEE: Morning, Your Honor; deputy public defender Justin Lee on behalf of Steven Paulmier, who is present, to my right. Your Honor, at this time, Mr. Paulmier is prepared to waive his right to a jury trial. Uh, we would ask for a pretrial conference.

THE COURT: All right. Sir, before I can, um, rule on the jury trial waiver, there are some questions I need to ask you. How old are you now?

THE DEFENDANT, MR. PAULMIER: 58.

THE COURT: How many years of school have you completed?

THE DEFENDANT: Uh, I've completed a college degree.

THE COURT: Excuse me. Can you read and write English?

THE DEFENDANT: Yes, I can.

THE COURT: Are you presently under the influence of drugs, medications, or alcohol?

THE DEFENDANT: No, I'm not.

THE COURT: Are you now or have you ever been under treatment for any mental illness or emotional disability?

THE DEFENDANT: No.

THE COURT: Are you thinking clearly this morning?

THE DEFENDANT: Yes.

THE COURT: All right. Are you waiving your right to a jury trial because someone's threatening you or putting pressure on you?

THE DEFENDANT: No.

THE COURT: Okay. Uh, the charge is abuse. It's a misdemeanor. Carries with it a maximum penalty of a year in jail, and thus you have a constitutional right to a jury trial. Have you discussed that right with your attorney?

THE DEFENDANT: Yes.

THE COURT: You understand that if you had a jury trial, 12 members of the community would be selected to serve as the members of your jury, and those twelve people, not a judge, would decide whether you're guilty or not guilty?

THE DEFENDANT: I understand that.

THE COURT: You understand that you and your attorney would participate in the selection of the members

of your jury?

THE DEFENDANT: Yes, I do.

THE COURT: You understand that a jury verdict must be unanimous, in other words, before you could be convicted, every member of that jury would have to conclude, beyond a reasonable doubt, that you're guilty?

THE DEFENDANT: Yes.

THE COURT: You understand that if you waive your right to a jury trial, you will then have a bench trial, where a judge, and not a jury, would determine whether you're guilty or not guilty?

THE DEFENDANT: I understand that.

THE COURT: You understand that if you're found guilty following a jury trial, the maximum penalty you face in the circuit court is the same one-year maximum you face if found guilty in this court?

THE DEFENDANT: Yes.

THE COURT: Do you have any questions about your right to a jury trial?

THE DEFENDANT: Well, uh, one question I have is, will I be arraigned before I -- today?

THE COURT: You, I believe, have been arraigned. I'd have to look at the calendar to see when that occurred.

MR. LEE: Uh, I did speak to Mr. Paulmier, and I spoke to the prosecutor. Um, we would be asking for a

reading of the charge, but I was gonna wait till after the colloquy.

THE COURT: That's fine.

MS. WAN: Uh, Your Honor, the state will just note he -- he did receive an oral reading of the charge on March 24th, 2014.

THE COURT: All right. That's what the, uh, minutes reflect, that you were arraigned, um, on that date. Um, I -- I will tell you that if this goes to trial, you will be arraigned once again, before the trial commences. You wish to be arraigned again, and I don't see any reason not to but --

THE DEFENDANT: Will I -- will I get a chance to plea? I mean I'm not -- I'm -- I'm -- will -- will I have an opportunity to plead not guilty?

THE COURT: You --

MS. WAN: Oh, you can do that now.

THE COURT: That -- that -- you have. Just now. Okay.

MS. WAN: Okay.

THE COURT: Um, all right. So, any other questions about your right to a jury trial?

THE DEFENDANT: No, Your Honor.

THE COURT: Understanding those rights then do you still wish to waive your right to a jury trial?

THE DEFENDANT: I do, Your Honor.

THE COURT: The court will find defendant has knowingly, intelligently, voluntarily waived his right to a jury trial. The court will accept that waiver. With regard then to rule 48, Ms. Wan?

MS. WAN: Your Honor, the state's rule 48, at this time, is November 2nd, 2014.

THE COURT: Uh-huh.

MS. WAN: It's my understanding defense is asking for a pretrial conference. The state would ask for that pretrial conference to be set within six weeks.

THE COURT: All right, we'll see what we can do with regard to a pretrial conference.

THE CLERK: July 2nd, 2014, at 1:30.

THE COURT: All right, sir, you're ordered to appear here for a pretrial conference on July 2nd, 2014, at 1:30 in the afternoon, and the bailiff will give you a notice of that date and time.

THE DEFENDANT: Thank you, Your Honor.

THE COURT: Thank you.

(Whereupon an unrelated matter was called.)

MR. LEE: I -- I apologize, Your Honor, Mr. Paulmier requests, um, one moment.

(Discussion between defendant and his counsel, inaudible.)

MR. LEE: Respectfully request a lowering of his amount of bail.

THE COURT: Uh, one second. You know, Mr. Paulmier, the -- reducing your bail is not gonna accomplish anything in the sense that you paid a premium, I'm assuming, that the bondsman, um, and the bondsman will get back some a the money the bondsman posted, but no more dollars are gonna go into your pocket if the court reduces the bail.

MR. LEE: I -- I -- I apologize, Your Honor. Mr. Paulmier clarified with me, after I made the request, that he would actually like to be placed on his own recognizance so that his bail can be returned to him.

THE COURT: Um, do you have a, uh, well, bail -- once again, uh, the bail will be returned to the bondsman. The bondsman will be smiling, but I'm not sure what it will accomplish for you. Ms. Wan, the state's position?

MS. WAN: Your Honor, the state's gonna ask that bail be maintained as it is right now. It's my understanding that it's a standard bail amount for these type of offenses and, um, if he wants to work something out with his bail company, that's something completely different, but in the state's position, it's appropriate.

MR. LEE: Uh, another reason for Mr. Paulmier's request is so that he may not have to report to his

bondsman.

THE COURT: All right. Well, that doesn't convince me at all. So the, uh, oral motion is denied.

MR. LEE: Yes, Your Honor.

(Whereupon the proceedings were concluded.)

--oOo--

C E R T I F I C A T E

STATE OF HAWAII)
)
COUNTY OF HAWAII)
)

I, JENNIFER WHETSTONE, a Certified Shorthand Reporter in the State of Hawaii, do hereby certify that the foregoing pages, 1 through 8, inclusive, comprise a full, true, and correct transcript of the proceedings had on May 7, 2014, at 9:22 a.m., in connection with the above-entitled cause.

Dated: June 2, 2015.

OFFICIAL COURT REPORTER

/s/ Jennifer Whetstone_____
JENNIFER WHETSTONE, CSR 421

APPENDIX 5

Family Court of the Third Circuit State of Hawai'i
Transcript of Proceedings on August 27, 2014

IN THE FAMILY COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

STATE OF HAWAII,) FC-CR 14-1-0101

vs.)

STEPHEN PAULMIER,) **TRIAL**

Defendant.)

_____)

TRANSCRIPT OF ELECTRONIC RECORD PROCEEDINGS

before the HONORABLE LLOYD VAN DE CAR, presiding, Family Court Division, Courtroom 3-C on Wednesday, August 27, 2014.

APPEARANCES:

For the State: **SYLVIAN WAN, AAL**
Deputy Prosecuting Attorney
County of Hawai'i
655 Kilauea Avenue
Hilo, Hawai'i 96720

For the Defendant: **JUSTIN LEE, AAL**
Deputy Public Defender
State of Hawaii
275 Ponahawai Street
Hilo, Hawai'i 96720

BRAZILIAN PORTUGUESE INTERPRETER: **VIVIAN WELLS**

TRANSCRIBED BY: CAROL KANESHIGE, CSR 140

CAROL S. KANESHIGE, CSR, RPR, RDR
OFFICIAL COURT REPORTER, THIRD CIRCUIT COURT
STATE OF HAWAII

I N D E X

E X H I B I T S

CAROL S. KANESHIGE, CSR, RPR, RDR
OFFICIAL COURT REPORTER, THIRD CIRCUIT COURT
STATE OF HAWAII

Pages 3 through 107 intentionally removed.
Full transcript can be provided up request.

unlock the door before leaving?

A. No, on the contrary. I should -- since I -- I could not use my key from outside because I put a piece of wood to impeach my husband to do it I could not do it myself. So if I locked my door from inside I could not came -- come inside so I was -- I left couple of times without locking so I could come -- 'cause it's -- it's open.

But one time I did it but I forgot and I lock it. When I did it Michael help, uh, taught me how to do to come inside without key. We took out this piece of glass, put the hand and unlock it from inside. I did it.

Q. Okay. So this --

THE COURT: Mr. Lee, are you gonna conclude this in the next five minutes?

MR. LEE: No, Your Honor.

THE COURT: Then we're gonna recess now. I understand that you have a new date?

MS. WAN: Uh, Your Honor, actually I am gonna ask if the other witnesses can be ordered back.

THE COURT: We'll --

MS. WAN: I know that the date has been sort of decided by a clerk. It's my understanding that that might be a problem for one of my witnesses

so I'd --

THE COURT: All right.

MS. WAN: -- like to bring them in.

THE COURT: Um, and I'd like to release Vivian and, frankly I don't --

MS. WAN: Yes.

THE COURT: -- intend to call her again.

MS. WAN: No, it does appear that, um, Ms. Paulmier has a --

THE COURT: Thank you. Vivian --

MS. WAN: -- pretty sufficient --

THE COURT: -- if you're still there, and you don't need to respond, then you're released. Thank you very much.

THE INTERPRETER: Yes, I'm still here.

THE COURT: Okay.

MR. LEE: Uh, Your Honor, if I could retrieve --

THE INTERPRETER: Could you repeat the last thing they decided?

THE COURT: I'm sorry. We're gonna, uh, continue the trial and the witness is coming back, but it doesn't appear as if she needs your assistance so we're not going to ask you to do it again.

THE INTERPRETER: Okay. Well, thank you

so much.

THE COURT: Thank you.

UNIDENTIFIED SPEAKER: Thank you for your services.

THE COURT: Thank you for your assistance.

MR. LEE: And, Your Honor, if I could retrieve --

THE INTERPRETER: Bye-bye.

MR. LEE: -- uh, our defense witness?

THE COURT: Yes, if you still have an exhibit up there by all means.

MS. WAN: Uh, uh, he was saying --

THE COURT: I think he's got it.

MS. WAN: -- his witness.

THE COURT: Oh. Oh, you have witnesses you wanted ordered? All right. By all means.

THE WITNESS: Mmm-hmm.

THE COURT: And you can go -- well, I guess it's just as easy for you to sit there.

MS. WAN: Yes.

THE COURT: Or you can join your friends.

THE WITNESS: Should I stay here?

THE COURT: You can if you want but you can sit with your friends if you rather do that.

THE WITNESS: I prefer to go there.

THE COURT: Go ahead.

THE WITNESS: Thank you.

(The witness was excused at 4:24:37 p.m.)

MS. WAN: Okay. Um, in the contemplation of dates, Your Honor, the State will just note the State is gonna ask that the Court order back not, um, not only Miss Paulmier but also, um, Officer Chere Rae Lyons and, uh, Michael Thomas.

MR. LEE: And, Your Honor, defense witness, um, Mr. Danny Lee is present behind Mr. Paulmier.

THE COURT: All right. Officer, is your last name hyphenated or is it just "Lyons"?

OFFICER LYONS: Just "Lyons."

THE COURT: All right. Officer Lyons, Mr. Lee and Mr. --

MR. THOMAS: Thomas.

THE COURT: -- Thomas, um, we didn't finish so we're gonna do this again, and I think we selected December 3rd at 1:30? Um --

MS. WAN: Uh, yes, Your Honor. It's my understanding that, um, Miss Lyons may be on vacation and out of the State on December 3rd.

THE COURT: And, Ms. Lyons, um, certainly

your testimony is needed so we'll look for another date.

THE CLERK: Um, December 10th?

MS. WAN: Is that okay? Will you be back?

OFFICER LYONS: No.

MS. WAN: You'll still be gone?

THE CLERK: When is she coming back?

MS. WAN: When are you coming back?

OFFICER LYONS: Uh, I'm on vacation through the 17th.

THE COURT: So after the 17th? And we have nothing before that?

THE CLERK: We have nothing before that, Judge.

THE COURT: All right. So after the 17th then.

THE CLERK: 24th.

THE COURT: Christmas Eve, it sounds like. I mean if we're going from the 10th to the 17th the next one is the 20 -- we're not gonna do it though.

MS. WAN: I don't believe we're in session.

THE COURT: All right.

THE CLERK: We're here on the 24th. We can do it November 26 but --

THE COURT: We can on November -- what's -- what's up with November 26?

MS. WAN: It's the day before Thanksgiving, Your Honor.

THE CLERK: It's the day before Thanksgiving and prosecutor (Inaudible; low recording volume)

MS. WAN: That's okay

THE COURT: No, no.

MS. WAN: If that's the only date that we have.

THE COURT: Is everyone available? Miss Paulmier, Mr. Lee, Mr. Thomas, Officer Lyons, all available on November 26th?

THE CLERK: The 26th at 1:30 then.

THE COURT: All right. So you are all ordered to return -- as well as you, Mr. Paulmier -- ordered to return on November 26, 2014, uh, for the continuation of this trial, um, given today's -- I'm not gonna say conclusion. Let me just put it that way.

And, Mr. Paulmier, the -- the bailiff will give you a notice.

THE BAILIFF: Court is adjourned.

(End of recording at 4:26:50 p.m.)

--o0o--

CAROL S. KANESHIGE, CSR, RPR, RDR
OFFICIAL COURT REPORTER, THIRD CIRCUIT COURT
STATE OF HAWAII

CERTIFICATE FOR COURT-APPROVED TRANSCRIBER

STATE OF HAWAII)
COUNTY OF HAWAII)
_____)

I, CAROL KANESHIGE, approved transcriber for the Judiciary, State of Hawai'i, do hereby certify that the foregoing pages, numbered 1 through 114, contain a true and accurate transcript of the proceedings had in connection with the above-entitled cause and was transcribed by me to the best of my ability from the electronic recordings furnished to me identified as follows:

FTR Dated August 27, 2014 in Courtroom 3-C, Log Numbers 2:09:22 - 2:24:08, 2:24:18 - 3:38:43 and 3:53:41 - 4:26:50.

Dated at Hilo, Hawai'i, this 29th day of June, 2015.

Carol Kaneshige

CAROL KANESHIGE, CSR 140, TRANSCRIBER

CAROL S. KANESHIGE, CSR, RPR, RDR
OFFICIAL COURT REPORTER, THIRD CIRCUIT COURT
STATE OF HAWAII

APPENDIX 6

Family Court of the Third Circuit State of Hawai'i
Transcript of Proceedings on November 26, 2015

IN THE FAMILY COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

STATE OF HAWAII,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	FCCR NO. 14-1-101
	)	
STEPHEN PAULMIER,	)	
	)	
Defendant.	)	
	)	

TRANSCRIPT OF PROCEEDINGS FROM ELECTRONIC RECORDING

before the HONORABLE LLOYD VAN DE CAR, Judge presiding, Hilo Division, on Wednesday, November 26, 2014.

TRIAL (CONTINUED)

APPEARANCES:

For the State: SYLVIA WAN
Deputy Prosecuting Attorney
County of Hawaii
655 Kilauea Avenue
Hilo, Hawaii 96720

For the Defendant: JUSTIN LEE
Deputy Public Defender
275 Ponahawai Street
Suite 201
Hilo, Hawaii 96720

Transcribed by: JENNIFER WHETSTONE, CSR 421, RMR
Official Court Reporter
Third Circuit Court, State of Hawaii

INDEX

Wednesday, November 26, 2014

Pages 3 through 115 intentionally removed.
Full transcript available upon request.

negotiate a price around.
Q Okay. And you told Merli this?
A Yes.
Q Okay. And had you told her about, uh, your plans with regards to Kona?
A Only that it was a possibility, but I wasn't sure.
Q Okay. So you two returned home from the round-table discussion.
A Yes.
Q And, um, where were the two of you in the, uh, in the house?
A We -- we -- in the discussion on the way home it became clear that this -- there was a, uh, a difficulty about -- about this, uh --
THE COURT: This seems to be a little bit of a break and we are gonna -- we're not gonna finish today, so why don't I cut things off now. Uh, Mr. Lee, how many other witnesses, aside from your client, do you anticipate calling?
MR. LEE: No one other, Your Honor.
THE COURT: No other witnesses?
MR. LEE: No other witnesses.
THE COURT: All right then I'll --
MS. WAN: Uh, Your Honor --
THE COURT: I'll -- yes?

MS. WAN: -- based off of some of the testimony presented from the defendant, uh, the state just wants to reserve some time in case it is gonna call a rebuttal witness. It does appear that defendant has brought up some new information.

THE COURT: All right. Uh, that's --

MS. WAN: I'm not --

THE COURT: -- fine.

MS. WAN: I'm not definitely saying I'm gonna call a rebuttal, I just wanna --

THE COURT: I understand.

MS. WAN: -- contemplate the option.

THE COURT: Uh, and, sir, you can -- you can resume your seat. Thank you. So, uh, folks, we can -- as you know, we can take a shot at things or, uh, maybe, Ms. Wan, you don't have that luxury anymore in terms of your other responsibilities. Uh --

MS. WAN: Um, Your Honor, I have been assured by my supervisor that I will remain on all of the trials that I have started.

THE COURT: I understand but I -- I don't know if you're already committed. In other words, uh, I don't wanna set a date when you've already committed yourself to be somewhere else. And so I don't know how far out you are committed to doing trials in other courtrooms, is I guess

what I'm trying to say.

MS. WAN: Right now I don't have any -- I haven't started any other trials that I need to continue, at this point.

THE COURT: Okay. Then we'll look for our first available trial date and, um, reconvene at that time. Madam Clerk.

THE CLERK: (Inaudible.)

MS. WAN: I will just note --

THE COURT: Hmm?

MS. WAN: -- that I --

THE CLERK: February?

MS. WAN: -- I do have a vacation coming up at the end of January for the first two weeks of February.

THE COURT: All right.

THE CLERK: Okay.

THE COURT: So we won't do it immediately on the first day you return, so maybe the middle or late --

THE CLERK: February 25th --

THE COURT: February 25th?

THE CLERK: -- or February 8th?

THE COURT: February 25th, 1:30?

MS. WAN: That should be fine.

THE CLERK: 25th?

MR. LEE: No sooner, Your Honor?

THE COURT: Um, I'm afraid that if we set it sooner, one of the three of us will become unavailable, and that won't work for anyone. So February 25th.

THE CLERK: February 25th at 1:30.

THE COURT: At 1:30. Mr. Paulmier, you're ordered to return, um, at that time for what I hope is the conclusion of these proceedings. Um, and the bailiff will give you a notice of that date and time. Ms. Wan, do you have any witnesses you want the court to order back?

MS. WAN: Um, you know what? At this point in time, Your Honor, the state's witnesses are rather cooperative, and I would like to try to make that assessment. I will subpoena them if I'm going to bring them.

THE COURT: All right. Anything else then for today?

MS. WAN: Not from the state.

THE COURT: Okay. Thank you all.

THE BAILIFF: Court is adjourned.

(Whereupon the proceedings were concluded.)

--oOo--

C E R T I F I C A T E

STATE OF HAWAII)
)
COUNTY OF HAWAII)
)

I, JENNIFER WHETSTONE, a Certified Shorthand Reporter in the State of Hawaii, do hereby certify that the foregoing pages, 1 through 119, inclusive, comprise a full, true, and correct transcript of the proceedings had on November 26, 2014, at 1:56 p.m., in connection with the above-entitled cause.

Dated: June 2, 2015.

OFFICIAL COURT REPORTER

/s/ Jennifer Whetstone
JENNIFER WHETSTONE, CSR 421

APPENDIX 7

Family Court of the Third Circuit State of Hawai'i
Transcript of Proceedings on February 25, 2015

IN THE FAMILY COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

STATE OF HAWAII, Plaintiff, vs. STEPHEN PAULMIER, Defendant.	FCCR NO. 14-1-101

TRANSCRIPT OF PROCEEDINGS FROM ELECTRONIC RECORDING

before the HONORABLE LLOYD VAN DE CAR, Judge presiding, Hilo Division, on Wednesday, February 25, 2015.

HEARING ON MOTIONS AND

TRIAL (CONTINUED)

APPEARANCES:

For the State: SYLVIA WAN
Deputy Prosecuting Attorney
County of Hawaii
655 Kilauea Avenue
Hilo, Hawaii 96720

For the Defendant: JUSTIN LEE
Deputy Public Defender
275 Ponahawai Street
Suite 201
Hilo, Hawaii 96720

Transcribed by: JENNIFER WHETSTONE, CSR 421, RMR
Official Court Reporter
Third Circuit Court, State of Hawaii

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Wednesday, February 25, 2015

Wednesday, February 25, 2015 2:23 P.M.

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THE BAILIFF: Your Honor, calling from page one, number three, State of Hawaii versus Steven Paulmier, FC-CR 14-1-0101.

MS. WAN: Sylvia Wan for the state.

MR. LEE: Deputy public defender Justin Lee on behalf of Steven Paulmier, present, to my right.

THE COURT: Good afternoon. Please, folks, have a seat. Going to impose the witness -- you can have a seat -- the witness exclusionary rule. Anyone who, uh, is in the courtroom today will, guess with some exceptions, not be permitted to testify in this matter. So if, counsel, you have a witness or potential witness in the courtroom, it makes sense to make sure that they are aware that they must not be present unless and until they have completed their testimony. All right.

MS. WAN: Uh, Your Honor, the state will just note for the record it has checked the gallery and none of the state's potential witnesses are present.

THE COURT: Okay. Thank you. And, counsel, before we begin or, uh, resume testimony, there are motions before the court, is that correct?

MS. WAN: Yes, Your Honor.

MR. LEE: Yes, Your Honor.

THE COURT: What are those motions?

MR. LEE: Your Honor, at least on the defense's side, we did file a motion to dismiss for violation of speedy trial and due process rights.

THE COURT: All right, um, I have reviewed that and reviewed the opposition. Um, anything you wish to add, Mr. Lee?

MR. LEE: Uh, yes, Your Honor. My reading of the case law indicates that this motion is to be evidentiary. With that in mind, we would be asking to call Mr. Paulmier to the stand.

THE COURT: All right, sir, come on up here.

MS. WAN: Okay.

THE COURT: Remain standing, and raise your right hand.

THE CLERK: Will you raise your right hand, please. Do you solemnly swear that the testimony presented before this court is the truth, the whole truth, and nothing but the truth?

THE WITNESS: I affirm.

THE CLERK: Thank you. You may be seated.

THE COURT: Mr. Lee.

MR. LEE: Thank you, Your Honor.

STEPHEN PAULMIER,

called as a witness on his own behalf, having been duly and

regularly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LEE: Q Good afternoon, Mr. Paulmier.
A Good afternoon.
Q As you may be aware, this motion is with regards to the, uh, passage of time. Um, when you made your decisions with regards to trial, particularly your decision to, uh, waive your right to a jury trial, were you aware that waiving that right would, uh, potentially have the effect of delaying your trial if we were not able to finish on the first day?
A Actually quite to the contrary, I thought that, uh, I would have a -- a quicker disposition of my case, because I wouldn't have to pick a jury. I assumed that the calendar, uh, once my trial -- trial started, would be the same as if it was a jury trial.
Q And what informed that opinion?
A I'm sorry?
Q What informed you of that opinion?
A My experience in another state, uh, where -- where the practice was very clear that -- that, uh, once a trial began, it had priority as far as the calendar went.
Q Okay. And this knowledge affected your decision with regards to the type a trial you would have?
A Yes.

Q Okay, and how has that passage of time since your trial commenced in August affected you from an emotional standpoint?
A Well, it's been very stressful, of course, and -- and I've, uh, uh, it's -- it's been continued twice actually and -- and so the -- the further away from the actual time that it happened and -- and the more, uh, time that goes past, uh, the more distressing it is, um, for me and for my concern for the other people involved.
Q Okay. And how has it affected you with regards to your reputation in the community?
MS. WAN: Objection, Your Honor, as to relevance.
MR. LEE: Your Honor, with regards to, uh, this motion, uh, we would say it is relevant. It is one of the prejudices the defendant has suffered.
THE COURT: You mean the community does not believe in the presumption of innocence?
MR. LEE: That would be a matter of some debate, Your Honor, but it's more as to its effect upon Mr. Paulmier and how he's been prejudiced.
THE COURT: Mr. Paulmier doesn't believe in the presumption of innocence?
MR. LEE: No, I did not say that, Your Honor.
THE COURT: All right. Then I'm still wondering

then the relevance.

MR. LEE: Uh, this is with regards to the passage a time and how it affects defendant. I believe that with regards to, um, Mr. Paulmier's right to have a fair trial and that's -- that doesn't necessarily, uh, encompass the proceedings in this courtroom, but with the passage of time for any defendant, they shouldn't be unduly prejudiced by delays. And one a these delays is what happens --

THE COURT: And I'm not sure --

MR. LEE: -- in the community.

THE COURT: -- how a -- how the community's view of Mr. Paulmier has an impact on his fair, uh, receiving a fair trial. I think it's just me that's making the decision.

MR. LEE: Perhaps, um, rather than a fair trial, also his right to a speedy trial, which is distinct. Um, he has been affected with regards to a speedy disposition, Your Honor.

THE COURT: And how does his -- how he is viewed by members of the community impact on his right to a speedy trial?

MR. LEE: Well, with regards to the speedy trial, Your Honor, um, I think we would argue part of the -- the reason why there is a right to a speedy trial is to ease a defendant of the burdens imposed, uh, during, uh, pending

disposition of that case. So during disposition of that case, because time has been dragged on for so long, uh, his right to a speedy trial has been compromised and affected Mr. Paulmier, which I think was not intended and, in fact, intended to prevent through this right of a speedy trial. So if the writers of the constitutions were trying to in a -- by affecting the right to a speedy trial, protect a defendant from the, uh, inconveniences and the prejudice he may suffer during disposition, his reputation in the community would be one a them.

THE COURT: Okay, then if I understand you correctly, the reputation in the community doesn't have a direct impact on how quickly his trial goes but the quick -- how quickly his trial goes has an impact on the -- his reputation in the community.

MR. LEE: That's -- that's -- that would be the defense's argument, Your Honor.

THE COURT: All right, thank you. I understand that. Your objection is overruled.

MR. LEE: Thank you, Your Honor.

Q So, Mr. Paulmier, if you could -- uh, I'll recap the question for you. How has this delay of time affected your reputation within the community?

MS. WAN: Um, objection, Your Honor, as to speculation.

THE COURT: Overruled.

THE WITNESS: Uh, I've been contacted by a number of people in the intervening period about approaches that have been made to them by, uh, other people regarding, uh, my reputation in the community. Time -- the time has been spent, uh, in -- in excess of -- of the initial start of the trial by other people to disparage my reputation in the community and -- and, um, of course I would -- I want to get the trial through as quickly as possible so that that can be, uh, that -- that -- that -- that no longer can happen.

MR. LEE: Q Okay. Um, during the interim between the beginning of trial and the present day, uh, have you been subject to any unwanted contact because --

A Yes.

Q -- of this trial?

MS. WAN: Objection, Your Honor, as to relevance.

THE COURT: Overruled.

THE WITNESS: Yes. I've been contacted by the complaining witness on numerous occasions. I've been confronted and harassed by that person.

MR. LEE: Q Uh, how so?

MS. WAN: Uh, Your Honor, the state is going to object at this point in time. It appears that the defendant

is trying to bring in what could otherwise be seen as subsequent bad acts during a hearing that has nothing to do with the trial in order to try to prejudice this court as well as to try to throw, for lack of a better term, dirt.

THE COURT: It does appear that way to me, Mr. Lee. Um, how, um, is it relevant with regard to any particular person making contact with the defendant?

MR. LEE: Your Honor --

THE COURT: And how would the, um, duration of the trial have any impact on whether or not, uh, if, in fact, this occurred, the complaining witness was or was not contacting the defendant?

MR. LEE: Your Honor, it would be the defense's argument that, uh, because of this delay in the trial, um, it has caused Mr. Paulmier, again, inconvenience and damage. Um, this time may not necessarily to his reputation but by the complaining witness herself, um, because of the, uh, lack of a speedy disposition to this trial.

THE COURT: Well, you, or at least your client, is speculating that the reason this contact if, in fact, it occurred, is occurring because the trial continues?

MR. LEE: Yes, Your Honor. It would be our argument that if the trial was disposed of, uh, the nature of this contact and the -- the frequency of this contact would have, um, been --

THE COURT: That's --
MR. LEE: -- mitigated.
THE COURT: -- that's speculation, isn't it?
MR. LEE: I think Mr. Paulmier is only gonna report as to his experiences, Your Honor.
THE COURT: Your objection is sustained. The -- the statements are stricken.
MR. LEE: Okay.
Q Uh, if you knew of the delay that would, um, have occurred would -- did, uh, excuse me. The delay -- if you knew of the delay, would that have affected your decision to waive your right to a jury trial?
A Without a doubt.
MR. LEE: No further questions, Your Honor.
THE COURT: Okay, cross-examination?
MS. WAN: Yes, Your Honor.

CROSS-EXAMINATION

BY MS. WAN: Q Mr. Paulmier, don't you, in fact, have an attorney in this matter? And you have from almost the outset of these proceedings?
A I'm not sure I understand the question.
THE COURT: Do you have an attorney?
MS. WAN: Q Do you have an attorney?
A Yes.
Q For the abuse charges that have been filed against

you?
A Yes.
Q Okay. And you were, in fact, appointed a public defender?
A That is correct.
Q Okay. And, a public defender has appeared with you starting from May 7th, 2014?
MR. LEE: Objection, Your Honor. Relevance.
THE COURT: Overruled.
THE WITNESS: Yes.
MS. WAN: Q Okay. And at that point in time, you decided to waive your jury trial right?
A That's correct.
Q Did you get to talk to your attorney before that court date?
A Yes.
Q Okay. And you discussed your options between a bench trial and a jury trial with your defense attorney?
A Yes.
Q And that would include time?
A No. That wasn't part of the discussion, time. Except in that -- well, if I may, I -- I -- I would like to, um, the -- the word "time," of course, is a very broad category and -- and --
Q Would you like me to clarify my question?

A Please.
Q Okay. So when you talked about the differences between a jury trial and a bench trial, did you talk with your attorney about the possibility that it would not finish within the same day?
A Um, well, with relation to a jury trial, yes.
Q And with relation to a bench trial?
A We did not -- we did not go over a bench trial and dif -- as different from a jury trial in that way. We -- we -- my understand was that -- that -- that what -- what went for a jury trial, as far as time went, went for a bench trial.
Q I'm sorry, I don't quite understand. Are you saying it's the same amount a time, or are you saying one is longer than the other?
A I'm saying that my understanding was that there wasn't any difference. Except for picking a jury.
Q Okay. So are you trying to argue now that you had ineffective counsel in consulting and explaining to you the difference between a bench trial and a jury trial and the time that it would consume?
A I'm not trying to argue with you at all, counsel.
Q Well, it appears that you're providing this motion saying that you do not -- you had no idea that a bench trial would not be concluded within the same day. And therefore necessitate continuances.

A No, I don't think that's what I'm saying at all.
Q So what are you saying?
A I'm trying to answer your question.
MR. LEE: Your Honor, we would object to the last question as to improper form.
THE COURT: Well, why don't I state my understanding.
MS. WAN: Okay.
THE COURT: And, um, if it's incorrect, one or the other of you can clear that up with the witness. My understanding is that, based upon his prior experiences, whatever they might be, he concluded that a jury -- excuse me, a bench trial would be a one-day affair. That it would conclude on the day that it began. And, frankly, because of that assumption, because a that belief, um, that issue was not discussed when discussing his right to a jury trial or waiving a jury trial with his attorney. And I -- Mr. Lee, I don't -- and I'm not attempting to invade the attorney-client privilege, I'm just explaining to you the impression, uh, the belief that I've formed listening to the questions and answers that were provided here.
MR. LEE: Yes, Your Honor.
THE COURT: Okay.
MS. WAN: Q Uh, Mr. Paulmier, do you not agree at least that we have, on every hearing that we have

met for this trial date, testimony has been provided, and evidence has been provided at each and every hearing?
A I'm sorry, do I agree with that statement, are you saying?
Q Yes.
A Testimony has been provided at each, yes.
Q Okay. And, at this point in time, the trial has not concluded?
A That's correct.

MS. WAN: No further questions, Your Honor.

THE COURT: Anything else?

MR. LEE: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. LEE: Q Uh, Mr. Paulmier, was it your impression that trial would, um, finish in one day?
A No.
Q Okay. And if trial did not finish in one day, what was your, um, belief as to the disposition of your trial?
A That room in the calendar would be made appropriately.
Q Okay. But, um, with regards to the delay that you suffered between August and November and then from November into February, was that anticipated?
A No.

MR. LEE: No further questions.

THE COURT: Anything else?

MS. WAN: Not from the state.
THE COURT: Any other witnesses?
MR. LEE: No, Your Honor.
THE COURT: No expert witnesses with regard to stress or debilitation or anything of this sort?
MR. LEE: No, Your Honor.
THE COURT: All right. Mr. Paulmier, you can resume your seat. Argument, counsel?
MS. WAN: Uh, yes, Your Honor. This, uh, actually it's defense's motion so --
THE COURT: Yes, it is.
MS. WAN: -- defense's argument goes first.
THE COURT: Yes.
MR. LEE: Thank you, Your Honor. Um, our argument is simple. Uh, Mr. Paulmier has twofold rights, uh, that we're arguing today. Um, one would be the right to a speedy trial, the other would be a right to a fair trial. Um, speedy trial is of more relevance in, um, at this point with regards to the delays that Mr. Paulmier has suffered. Uh, we've talked about it briefly in the evidentiary portion, more so in our motion with regards to the prejudice he suffered with regards to the emotional, uh, damage as well as to damage to his reputation.
Um, with regards to his fair trial though, that, um, right intersects with his right to a speedy trial in,

um, the effects of time it would have upon the fact finder. And as argued in the motion, um, we argue that a similar delay would not occur of six months between evidentiary portions in a jury trial, because of the blunting that would have upon a jury's ability to determine facts, as well as to, uh, recall and make determinations as to the credibility of witnesses.

Uh, we understand that, in a jury waive trial, where the court is the finder of fact, the effects of time are not so affected, one, because of legal training, and, two, because a the use of transcripts, as well as recordings. Um, but our argument is simply that, um, even with such, um, rehabilitative uses, uh, the effects of determining credibility and memory, uh, do take their toll. Uh, such delays are prejudicial to Mr. Paulmier. They're prejudicial to other defendants who have come before this court with such delays.

That's the basis of our motion. That's why we ask the court to dismiss this case.

THE COURT: Are you --

MR. LEE: Nothing further.

THE COURT: -- suggesting that, in order for Mr. Paulmier to get a fair trial, that it must start once again before a different judge and sufficient time set aside so that can conclude within, I don't know, a day or two or a

week or something like that?

MR. LEE: Your Honor, we're suggesting that any proceeding, um, where there is a finding of fact must be disposed of in a timely manner.

THE COURT: You're not answering my question, are you, Mr. Lee?

MR. LEE: One moment, Your Honor.

(Discussion between the defendant and his counsel, not reported.)

MR. LEE: If I could, uh, rephrase the question to make sure I have a clear understanding, Your Honor.

THE COURT: Yes.

MR. LEE: Um --

THE COURT: In essence --

MR. LEE: -- the question posed --

THE COURT: -- declare a mistrial. Schedule this for a trial before another judge, if that's appropriate. Um, and schedule it for a time when, uh, two full days or what -- that can be discussed with counsel -- three full days, uh, can be set aside so that Mr. Paulmier's trial can, uh, proceed without interruption.

MR. LEE: My reading of the law is that any, um, violation of the right to speedy trial only result in a --

THE COURT: No, no.

MR. LEE: -- dismissal.

THE COURT: We're not talking about a speedy trial anymore. You -- you made a distinction between a speedy trial and a fair trial.

MR. LEE: Yes, Your Honor.

THE COURT: So go ahead.

MR. LEE: So your question is as to a fair trial?

THE COURT: That's correct.

MR. LEE: The defense argument would be that, um, prejudice suffered to, uh, Mr. Paulmier would be a fatal error and, uh, to simply restart the trial would not, um, result in a fair trial.

THE COURT: Then I don't understand the argument. If the argument is that the passage of time between hearing testimony and rendering a decision, um, renders the process unfair, then that can be cured, can it not?

MR. LEE: Not -- not completely, Your Honor, because it would -- it would lead to further delay. And, um, this incident happened almost a year ago. Um, to restart proceedings again would only result in prejudice to the defendant.

THE COURT: All right. Thank you. Any other argument?

MR. LEE: No, Your Honor.

THE COURT: Ms. Wan?

MS. WAN: Uh, Your Honor, the state would just note that, when it comes to the case law for speedy trial, it does allow for the court to have continuances between the commencement of trial and the continuation of trial. And the only -- basically the supreme court has not put down a firm rule as to what is too long of a time period in between those continuances. It has just said that if it is a six-month period of a continuance then they'll start looking at it, there's a presumptive prejudice. But they're not even saying that that's even too long.

So the state would just note, in this matter there has been two different continuances of this particular trial date; however, um, there has been movement in this trial, and I'm hoping that, with the time left, we could try to finish it again. I know it's all of the parties', um, goal is to finish this trial within as small, you know, short amount a time as possible.

Um, the state would just note that the prejudices that the defense is putting forth before this court is the same prejudice that the state and its -- the state's witnesses also face. So, Your Honor, there is no difference. Um, and it's my understanding, Your Honor, that Mr. Lee is a qualified, experienced public defender, who has also done trials before the district court. And what this

court has been doing as its common practice is also a common practice in district court. So those are the state's arguments at this point, Your Honor.

THE COURT: Thank you. Mr. Lee, you wish to rebut? Or reply?

MR. LEE: Yes, Your Honor, only as to two points. Uh, the first point with regards to the similar prejudice, I think the law has been clear that on the balance, uh, the -- it is the defendant that is prejudiced, um, even if, uh, there is similar inconveniences suffered by the state. Uh, with regards to similar delays in district court, um, that's neither here nor there, nor has it been my experiences for any delays in other court, um, to have lasted this long.

THE COURT: Thank you. All right. With regard then to the motion, uh, the court finds that, uh, each side, um, has been, even though the -- this, well, certainly, um, this trial has taken more than a day, it's the court's goal in every case to conclude a trial once it starts. The calendars, uh, doesn't permit that. Uh, and as counsel well knows, the reason that matters are set -- more than one matter is set at a time is because frequently those matters go off. And if we weren't setting them that way, then we would have to set each one separately and then, uh, end up with being unable to set trials in a timely manner.

And so while this case has taken some time, it doesn't appear to the court that either side has been prejudiced in the terms of presentation of its evidence. In fact, Mr. Lee, I think you have a motion that I'll hear right after this one is done to add yet another witness, um, to the defense side, a witness that wasn't listed in the beginning, and frankly a witness that presents some issues, because the witness was present in the courtroom, um, during the presentation of some of the evidence.

So, um, I don't see, and I frankly don't hear, either of you arguing that the time that has passed has impeded your ability to present the case you want to present. With regard to its impact on the defendant, um, while I understand that these matters are stressful -- and frankly, Mr. Paulmier, they're stressful for everyone involved -- for your attorney, for the prosecuting attorney, for the court, the court staff, and for the people who come to testify, and even for the people that are here who have, um, an interest in you and an interest in the complaining witness. Um, these are stressful proceedings. And frankly without anything, uh, without anything in addition to your own description of the stress that is being imposed upon you, I find that it is no more than the stress that all of us, uh, experience in the course of a criminal trial.

Were you to bring an expert witness to explain

that this has been debilitating stress that has had some impact on you that is, um, unusual and, uh, and would cause you, uh, distress to the point of being unable to participate in your own defense or, uh, engage in the things, uh, that you do every day in your life then the court might have a, uh, a different opinion. The court does not find then that your speedy trial rights have been impaired.

With regard to a fair trial, uh, Mr. Lee, you're correct, the court, uh, maybe unfortunately, but the court is used to doing trials this way. The court keeps notes. The court has available, as you know, um, transcripts or, even more importantly, because I need to refresh my recollection with regard to what people look like, how they sound, how they act, uh, tapes of these proceedings. So the court makes use of those in order to render its decision.

So your motion to dismiss for those reasons is denied. And, Ms. Wan, you'll prepare an order?

MS. WAN: Uh, yes, Your Honor, the state will prepare an order.

THE COURT: Okay. And, Mr. Lee, you have one other motion, is that correct?

MR. LEE: Your Honor, I believe it's, um, a response to the state's motion in limine.

THE COURT: All right. That's correct, you

listed a -- a witness, Mr. Belsky. The state filed a motion in limine. Um, anything you want to add to that motion, Ms. Wan?

MR. LEE: Uh, Your Honor, um, no, Your Honor, I believe that, um, I'll just kind of summarize my arguments.

THE COURT: Mm-hmm.

MS. WAN: It's my understanding that Mr. Belsky was present in the courtroom throughout the majority, if not the entire presentation, of the case up until thus far. Uh, the state would note the witness exclusionary rule was invoked at the beginning of this -- of this trial.

Um, the reasons that the defense has put forth as to why they want to call Mr. Belsky now were foreseeable, from defense's standpoint, because all of the matters that they were asking about, um, they were questioning the complaining witness about were not matters that the state had, as far as its information goes. So none of that information was provided by the state, and it was only provided by defense when he was questioning Ms. Merli in her responses. So if defense had that particular information ahead of time, which it appears that he did, um, he would have been able to know and understand that there was a possibility he would need to bring Mr. Belsky, um, forward as a witness.

So for that, Your Honor, the state would, um,

state that its prejudicial. It does appear that he would be able to shape and fabricate his particular testimony to conform with, uh, the needs of this trial, as he was able to hear the entire trial. Uh, the state would also note that, um, rule 615, I believe, is the governing rule in this matter, and there are cases that say is that exclusion of witnesses within the sound, um, discretion of the court, and the state is asking for the court to use that discretion.

THE COURT: So you agree that this is a 403 discussion or decision with, um, for the court?

MS. WAN: Yes, Your Honor.

THE COURT: All right. Thank you. Mr. Lee.

MR. LEE: Yes, Your Honor. Briefly, we'll reiterate our arguments and our response. Um, first of all, the concern of the state of Mr. Belsky shaping or altering testimony was not, uh, an influential reason for the appellate courts. They said so as much in our cited case law. Uh, they indicated there are other ways to rehabilitate witness, such as through cross-examination. In fact, a supreme court decision referencing the case, which the state is citing, uh, indicated that, in a criminal case where it's resulting in a defendant being able to present his case effectively or his defense effectively, exclusion of a witness is not a remedy, um, allowed. So for those reasons, we would oppose the state's motion in limine.

THE COURT: All right. Thank you. Anything else, Ms. Wan?

MS. WAN: Uh, Your Honor, the state would just argue that Mr. Belsky is not necessary for an effective, um, presentation of defense's case, nor is Mr. Belsky the defense's loan witness, as, um, those are the two distinguishing cases, um, presented not only in my memorandum but also mentioned in defense counsel's. So for that matter, Your Honor, the state would still say that it is within the court's discretion to exclude Mr. Belsky.

THE COURT: All right. Ms. Wan, while I agree that the, um, cases cited in the memos, uh, and the witnesses discussed in those cases seem to be more, um, crucial to the presentation of defendant's case than Mr. Belsky is to the presentation of Mr. Paulmier's case. The court, um, frankly is going to, if it errs, errs on the side -- err on the side of allowing the defendant to present the case he believes is important and for him to present. So the motion in limine is denied, and, Mr. Lee, you can write an order denying that motion.

MR. LEE: Yes, Your Honor.

THE COURT: Thank you. All right, are there any other motions before the court?

MR. LEE: Not to my understanding, Your Honor.

THE COURT: Okay, then we can resume testimony,

is that correct?

MR. LEE: Yes, Your Honor.

THE COURT: Okay, and your client was testifying on direct, is that the situation?

MR. LEE: That's correct, Your Honor.

THE COURT: Is that who you want to resume with?

MR. LEE: Yes, Your Honor.

THE COURT: All right. Mr. Paulmier, come on up here. You're already sworn.

MS. WAN: And, I'm sorry, Your Honor, before we proceed with the trial, the state's just gonna ask court's permission to remain without my jacket on since --

THE COURT: Oh, I --

MS. WAN: -- it is unbearably --

THE COURT: It is very, very, warm in here, and I don't know why exactly. What?

THE CLERK: The AC is not working.

THE COURT: AC is not working?

THE CLERK: (Inaudible.)

THE COURT: Oh, well, that's why.

MS. WAN: Okay. So --

THE COURT: Then by all means.

MS. WAN: -- I'm just asking the court's permission --

THE COURT: And, Mr. Lee, I'll extend the same,

Pages 28 through 91 intentionally removed.
Full transcript available up request.

minute break so that I can get some water --

THE COURT: Yes.

MS. WAN: -- and cool off, with just a second?

THE COURT: Yes.

MS. WAN: Okay, thank you.

THE COURT: We'll take a short recess.

(Recess taken.)

THE BAILIFF: Back on the record. Recalling case number FC-CR 14-1-0101, State of Hawaii versus Stephen Paulmier.

MS. WAN: Sylvia Wan for the state.

MR. LEE: Deputy public defender Justin Lee on behalf of Mr. Stephen Paulmier, present, to my right.

THE COURT: Counsel, we're going to suspend proceedings today, continue this matter for the conclusion of this jury waived trial until April 1st, 2015, at 1:30. Mr. Paulmier, you are ordered to return at that time. We have a witness in the courtroom you want me to order back for the trial?

MR. LEE: Yes, Your Honor. Um, and prior to that, we'd just like to place a record objection, um, well, an objection on the record. Uh, we don't wanna get into -- we already filed a motion as to these arguments, and we know the court's already ruled but --

THE COURT: All right.

MR. LEE: Thank you.

THE COURT: (Inaudible) Mr. Belsky, you're here to testify today, is that correct?

MR. BELSKY: Uh, it's correct, sir.

THE COURT: And, as you can see, we're not gonna get to you today, so you're ordered to come back on April 1st, 2015, at 1:30. The plan is that we're gonna start with you as a witness and hopefully get you concluded (inaudible).

MR. BELSKY: Sounds good.

THE COURT: All right (inaudible).

MS. WAN: Uh, no, Your Honor, but the state will note it does intend to call a rebuttal witness.

THE COURT: (Inaudible.)

MS. WAN: At least one, maybe two.

THE COURT: Well, um, Mr. Paulmier, given your motions (inaudible), the court doesn't anticipate the conclusion of this trial taking any more than an hour, and I believe we have that amount of time available (inaudible).

MS. WAN: And, Your Honor, the state is under that belief as well.

THE COURT: All right. Thank you all.

MR. LEE: Thank you, Your Honor.

THE BAILIFF: Court is adjourned.

(Whereupon the proceedings were concluded.)

--oOo--

C E R T I F I C A T E

STATE OF HAWAII)
)
COUNTY OF HAWAII)
)

I, JENNIFER WHETSTONE, a Certified Shorthand Reporter in the State of Hawaii, do hereby certify that the foregoing pages, 1 through 93, inclusive, comprise a full, true, and correct transcript of the proceedings had on February 25, 2015, at 2:23 p.m., in connection with the above-entitled cause.

Dated: June 2, 2015.

OFFICIAL COURT REPORTER

/s/ Jennifer Whetstone
JENNIFER WHETSTONE, CSR 421

APPENDIX 8

Hawai'i Rules of Penal Procedure Rule 5

Approved forms may be reproduced through photocopiers, computers, or other means. A reproduced form shall be similar in design and content to the approved form. Any person filing a form that is not identical in content to an approved form shall advise the court of the differences by attaching a short explanatory addendum to the document. The court may impose sanctions upon the filing person for failure to comply with this rule. The approved forms or any reproduction thereof permitted by this rule shall not be subject to the format requirements of this rule.

(Added February 4, 2000, effective July 1, 2000; further amended April 23, 2012, effective June 18, 2012.)

Rule 2.3. DEFINITIONS.

See Rule 1 of the Hawaiʻi Electronic Filing and Service Rules for definitions.

(Added April 23, 2012, effective June 18, 2012.)

II. INITIATION OF THE CASE

Rule 3. APPLICATION FOR ARREST WARRANT.

(a) Form. An application for the issuance of a warrant of arrest may be in the form of: (1) declaration(s); (2) affidavit(s); (3) an information supported by declaration(s) or affidavit(s); or (4) a complaint supported by declaration(s) or affidavit(s). The application shall contain a written statement of the essential facts constituting the offense being alleged. No warrant of arrest shall issue unless it appears from the application that there is probable cause to believe that an offense has been committed by the person(s) named therein. More than one warrant may issue on the same application. The issuance and execution of warrants shall be as provided in Rule 9 of these Rules.

(b) To Whom Presented.

(1) An application for the issuance of a warrant of arrest in the form of declaration(s) or affidavit(s), or a complaint supported by declaration(s) or affidavit(s), shall be presented to a district court judge within the circuit in which the offense is alleged to have been committed or who otherwise by law has jurisdiction to issue a warrant of arrest on the application.

(2) An application for the issuance of a warrant of arrest in the form of an information supported by declaration(s) or affidavit(s) shall be presented to a judge within the circuit in which the offense is alleged to have been committed or who otherwise by law has jurisdiction to issue a warrant of arrest on the application.

(c) Warrant issuance on oral statements. In lieu of the written declaration(s) or affidavit(s) required under section (a) of this Rule, a sworn oral statement, in person, may be received by the judge, which statement shall be recorded and transcribed, and such sworn oral statement shall be deemed to be an affidavit for the purposes of this Rule. Alternatively to receipt by the judge of the sworn oral statement, such statement may be recorded by a court reporter who shall transcribe the same and certify the transcription. In either case, the recording and the transcribed statement shall be filed with the clerk.

(d) Duplicate warrants on oral authorization. The judge may orally authorize a police officer to sign the signature of the judge on a duplicate original warrant, which shall be deemed to be a valid arrest warrant for the purposes of this rule. The judge shall enter on the face of the original warrant the exact time of issuance and shall sign and file the original warrant and, upon its return, the duplicate original warrant with the clerk.

(Amended December 7, 2006, effective January 1, 2007; further amended October 20, 2016, effective January 1, 2017; further amended December 8, 2017, effective January 1, 2018.)

Rule 4. ELIGIBILITY; REGISTRATION REQUIRED.

As provided by Rule 4 of the Hawaiʻi Electronic Filing and Service Rules, unless exempted by the court, each attorney representing a party to a case maintained in JIMS shall register as a JEFS user and file all documents electronically.

(Added April 23, 2012, effective June 18, 2012.)

Rule 5. PROCEEDINGS FOLLOWING ARREST.

(a) In general.

(1) UPON ARREST. An officer making an arrest under a warrant shall take the arrested person without unnecessary delay before the court having

jurisdiction, or, for the purpose of admission to bail, before any judge or officer authorized by law to admit the accused person to bail.

(2) PROBABLE CAUSE DETERMINATION UPON ARREST WITHOUT A WARRANT. As soon as practicable, and, Rule 45 notwithstanding, not later than 48 hours after the warrantless arrest of a person held in custody, a district judge shall determine whether there was probable cause for the arrest. No judicial determination of probable cause shall be made unless there is before the judge, at the minimum, an affidavit or declaration of the arresting officer or other person making the arrest, setting forth the specific facts to find probable cause to believe that an offense has been committed and that the arrested person has committed it. If probable cause is found as aforesaid, an appropriate order shall be filed with the court as soon as practicable. If probable cause is not found, or a proceeding to determine probable cause is not held within the time period provided by this subsection, the arrested person shall be ordered released and discharged from custody.

(3) CONSOLIDATION WITH OTHER PROCEEDINGS. The probable cause determination may, in the discretion of the judge, be combined with a bail hearing under subsection (a)(1) of this rule, an arraignment, a preliminary hearing or any other preliminary proceeding in the criminal case so long as the probable cause determination takes place in the time period provided under subsection (a)(2) of this rule. A probable cause determination shall not constitute an initial appearance unless it is combined with another preliminary proceeding in the same case.

(b) Offenses other than felony.

(1) ARRAIGNMENT. In the district court, if the offense charged against the defendant is other than a felony, the complaint shall be filed and proceedings shall be had in accordance with this section (b). A copy of the complaint, including any affidavits in support thereof, and a copy of the appropriate order, if any, shall be furnished to the defendant. If a defendant is issued a citation in lieu of physical arrest pursuant to Section 803-6(b) of the Hawaiʻi Revised Statutes and summoned to be orally charged as authorized by Rule 7(a) of these rules, a copy of the citation shall be filed and proceedings shall be had in accordance with this section (b). When the offense is charged by complaint, arraignment shall be in open court, or by video conference when permitted by Rule 43. The arraignment shall consist of the reading of the complaint to the defendant and calling upon the defendant to plead thereto. When the offense is charged by a citation and the defendant is summoned to be orally charged, arraignment shall be in open court or by video conference when permitted by Rule 43. The arraignment shall consist of a recitation of the essential facts constituting the offense charged to the defendant and calling upon the defendant to plead thereto. The defendant may waive the reading of the complaint or the recitation of the essential facts constituting the offense charged at arraignment, provided that, in any case where a defendant is summoned to be orally charged by a citation as authorized by Rule 7(a), the recitation of the essential facts constituting the offense charged shall be made prior to commencement of trial or entry of a guilty or no contest plea. In addition to the requirements of Rule 10(e), the court shall, in appropriate cases, inform the defendant of the right to jury trial in the circuit court and that the defendant may elect to be tried without a jury in the district court.

(2) PLEA. The plea shall be entered in accordance with the provisions of Rule 11. The defendant shall not be entitled to a preliminary hearing; provided that if a defendant, having been arrested without a warrant, is held in custody for a period of more than 48 hours, Rule 45 notwithstanding, after the defendant's initial appearance in court without a commencement of trial, the defendant shall be released to appear on the defendant's own recognizance unless the court finds from a sworn complaint or from an affidavit or affidavits filed with the complaint or pursuant to subsection (a)(2) of this rule that there is probable cause to believe that an offense has been committed and that the defendant has committed it; provided further that if the defendant demands a jury trial under subsection (b)(3) of this rule, the court shall, upon the defendant's motion, discharge the defendant unless probable cause is found as aforesaid.

(3) JURY TRIAL ELECTION. In appropriate cases, the defendant shall be tried by jury in the circuit court unless the defendant waives in writing or orally in open court the right to trial by jury. If the defendant does not waive the right to a trial by jury

at or before the time of entry of a plea of not guilty, the court shall commit the defendant to the circuit court for trial by jury. Within 7 days after the district court's oral order of commitment

(i) the district court shall sign its written order of commitment,

(ii) the clerk shall enter the district court's written order, and

(iii) the clerk shall transmit to the circuit court all documents in the proceeding and any bail deposited with the district court; provided, however, that if trial by jury is waived in the circuit court, the proceedings may be remanded to the district court for disposition.

(4) TRIAL. A defendant who pleads not guilty and is not entitled to or has waived the right to trial by jury shall be tried in the district court.

(5) SENTENCE. If the defendant is adjudged guilty after trial or plea, sentence shall be imposed without unreasonable delay.

(c) Felonies. In the district court, a defendant charged with a felony shall not be called upon to plead, and proceedings shall be had in accordance with this section (c).

(1) INITIAL APPEARANCE; SCHEDULING OF PRELIMINARY HEARING. At the initial appearance the court shall, in addition to the requirements under Rule 10(e), furnish the defendant with a copy of the complaint and affidavits in support thereof, if any, together with a copy of the appropriate order of judicial determination of probable cause, if any, and inform the defendant of the right to a preliminary hearing. If the defendant waives preliminary hearing pursuant to subsection (c)(2) of this rule, the court shall forthwith commit the defendant to answer in the circuit court. If the defendant does not waive such hearing, the court shall schedule a preliminary hearing, provided that such hearing shall not be held if the defendant is indicted or charged by information before the date set for such hearing.

(2) WAIVER OF PRELIMINARY HEARING. The defendant may in open court waive preliminary hearing, provided that the court shall accept such waiver only after the defendant has signed a written statement acknowledging:

(i) The defendant is aware of the defendant's constitutional right to require the State to establish probable cause before the State can begin formal felony prosecution in circuit court;

(ii) That in order to establish probable cause the State must offer sufficient evidence to "lead a person of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion" that the defendant has committed the felony charged or an included felony;

(iii) That the State has the choice of establishing probable cause at a public preliminary hearing in front of a judge, at a closed proceeding before the grand jury, or through an information with supporting exhibit(s) presented to a judge;

(iv) That if a judge or the grand jury concludes that the State has established probable cause and if formal charges are then filed in circuit court, a defendant then has the right to obtain written transcripts of the grand jury proceeding or preliminary hearing, or a copy of the exhibit(s) supporting the information and the transcript or exhibit(s) that might help the defendant in preparing for trial;

(v) That if a defendant waives preliminary hearing, the State may then prosecute the defendant immediately in circuit court, without waiting for a grand jury indictment or finding of probable cause by a judge based on an information and supporting exhibit(s); and

(vi) By waiving a preliminary hearing, the defendant is giving up the right to a probable cause determination and is also giving up the right to obtain written transcripts of the preliminary hearing or grand jury proceeding and exhibit(s) supporting the information.

(3) TIME FOR PRELIMINARY HEARING; RELEASE UPON FAILURE OF TIMELY DISPOSITION. The court shall conduct the preliminary hearing within 30 days of initial appearance if the defendant is not in custody; however, if the defendant is held in custody for a period of more than 2 days after initial appearance without commencement of a defendant's preliminary hearing, the court, on motion of the defendant, shall release the defendant to appear on the defendant's own recognizance, unless failure of such determination or commencement is caused by the request, action or condition of the defendant, or occurred with the defendant's consent, or is attributable to such compelling fact or circumstance which would preclude such determination or commencement within the prescribed period, or unless such compelling fact or circumstance would

render such release to be against the interest of justice.

(4) EVIDENCE. The prosecution and the defendant may introduce evidence and produce witnesses, who shall be subject to cross-examination. The defendant may testify, subject to cross-examination. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary hearing. Motions to suppress must be made to the trial court as provided in Rule 12.

(5) DURATION OF HEARING; CONTINUANCE. Once the preliminary hearing has commenced, the court, for good cause shown, may continue it.

(6) DISPOSITION. If from the evidence it appears that there is probable cause to believe that the felony charged, or an included felony, has been committed and that the defendant committed it, the court shall commit the defendant to answer in the circuit court; otherwise, the court shall discharge the defendant. The finding of probable cause may be based in whole or in part upon hearsay evidence when direct testimony is unavailable or when it is demonstrably inconvenient to summon witnesses able to testify to facts from personal knowledge. If the defendant is held to answer in the circuit court, the court shall transmit to the circuit court all papers and articles received in evidence at the preliminary hearing and any bail received by it.

(7) TIME FOR COMMITMENT TO CIRCUIT COURT. Within 7 days after the district court's oral order of commitment

(i) the district court shall sign its written order of commitment,

(ii) the clerk shall enter the district court's written order, and

(iii) the clerk shall transmit to the circuit court all documents in the proceeding and any bail deposited with the district court.

(8) BAIL. The district court, as authorized by Hawaiʻi Revised Statutes, chapter 804, may admit the defendant to bail or modify bail any time prior to the filing of the written order committing the case to circuit court.

(Amended February 28, 1983, effective February 28, 1983; amended effective September 2, 1988; further amended November 22, 1994, effective December 5, 1994; further amended April 11, 1995, effective April 26, 1995; further amended September 5, 1996, effective October 1, 1996; further amended effective September 17, 1997; further amended February 4, 2000, effective July 1, 2000; further amended November 17, 2000, effective January 1, 2001; further amended December 7, 2006, effective January 1, 2007; further amended December 17, 2007, effective July 1, 2008; further amended December 21, 2007, effective January 1, 2008; further amended April 23, 2012, effective June 18, 2012; further amended January 31, 2014, effective July 1, 2014.)

Rule 6. GRAND JURY.

(a) Summoning grand juries. Each circuit court shall order one or more grand juries to be summoned at such times as the public interest requires. The grand jury shall consist of 16 members. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement.

(b) Objections to grand jury and grand jurors.

(1) CHALLENGES. The prosecutor may challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be heard by the court.

(2) MOTION TO DISMISS. A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to section (c) of this rule that, after deducting the number not legally qualified, not less than three-fourths but in no event less than 8 of the jurors present concurred in finding the indictment.

(c) Foreperson and Deputy Foreperson. The court shall appoint one of the jurors to be foreperson and another to be deputy foreperson and may remove either of them for cause. The foreperson shall have the power to administer oaths and affirmations and shall sign all indictments. The foreperson or another juror designated by the foreperson shall keep a record of the number of jurors concurring in the

APPENDIX 9

Hawai'i Rule of Penal Procedure Rule 48

shall identify the insurer, provide the agent's and insurer's license numbers, attest the agent and the insurer are currently licensed and in good standing with the Insurance Commissioner of the State of Hawaiʻi, and attest the agent and the insurer are in compliance with Hawaiʻi law governing bail bonds.

(Amended April 20, 2011, effective July 1, 2011.)

Rule 47. MOTIONS, AFFIDAVIT OR DECLARATION, AND RESPONSES.

(a) Form. An application to the court for an order shall be by motion. A motion other than one made during a trial or hearing shall be in writing unless the court permits it to be made orally. It shall state the grounds upon which it is made and shall set forth the relief or order sought. A motion involving a question of law shall be accompanied by a memorandum in support of the motion. If a motion requires the consideration of facts not appearing of record, it shall be supported by affidavit or declaration. Written motions, other than ex parte motions, shall be noticed as provided by Rule 2.2(d)(3)(iii) of these rules.

(b) Required notice of no opposition. A party who does not oppose or who intends to support a motion shall promptly give written notification to the court and opposing counsel.

(c) Filings in opposition. An opposing party may serve and file counter affidavits, declarations or memoranda in opposition to the motion, which shall be served and filed in accordance to Rules 45 and 49 of these rules, except as otherwise ordered by the court.

(d) Declaration in lieu of affidavit. In lieu of an affidavit, an unsworn declaration may be made by a person, in writing, subscribed as true under penalty of law, and dated, in substantially the following form:

> "I, _____, declare under penalty of law that the foregoing is true and correct to the best of my knowledge and belief.
>
> Dated:
>
> _____
> (Signature)"

(Amended February 4, 2000, effective July 1, 2000.)

Rule 48. DISMISSAL.

(a) By prosecutor. The prosecutor may by leave of court file a dismissal of a charge and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

(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 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.

Clauses (b)(1) and (b)(2) shall not be applicable to any offense for which the arrest was made or the charge was filed prior to the effective date of the rule.

(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; or

(ii) the continuance is granted to allow the prosecutor additional time to prepare the prosecutor's case and additional time is justified because of the exceptional circumstances of the case;

(5) periods that delay the commencement of trial and are caused by the absence or unavailability of the defendant;

(6) the period between a dismissal of the charge by the prosecutor to the time of arrest or filing of a new charge, whichever is sooner, for the same offense or an offense required to be joined with that offense;

(7) a reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance; and

(8) other periods of delay for good cause.

(d) Per se excludable and includable periods of time for purposes of subsection (c)(1) of this rule.

(1) For purposes of subsection (c)(1) of this rule, the period 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, for voluntariness hearing heard before trial, to sever counts or defendants, for disqualification of the prosecutor, for withdrawal of counsel including the time period for appointment of new counsel if so ordered, for mental examination, to continue trial, for transfer to the circuit court, for remand from the circuit court, for change of venue, to secure the attendance of a witness by a material witness order, and to secure the attendance of a witness from without the state.

(2) For purposes of subsection (c)(1) of this rule, the period of time, from the filing through the prompt disposition of the following motions or court papers, shall be deemed not to be excluded in computing the time for trial commencement: notice of alibi, requests/motions for discovery, and motions in limine, for voluntariness hearing heard at trial, for bail reduction, for release pending trial, for bill of particulars, to strike surplusage from the charge, for return of property, for discovery sanctions, for litigation expenses and for depositions.

(3) The criteria provided in section (c) shall be applied to motions that are not listed in subsections (d)(1) and (d)(2) in determining whether the associated periods of time may be excluded in computing the time for trial commencement.

(Amended November 22, 1994, effective December 5, 1994; further amended February 4, 2000, effective July 1, 2000.)

Rule 49. SERVICE OF DOCUMENTS ON PARTIES AND PROOF THEREOF; NOTICE OF ENTRY OF ORDERS AND JUDGMENTS; FILING OF DOCUMENTS.

(a) Service: When required. All written submissions to the court, including ex parte motions, shall be served upon each of the parties promptly after filing, unless otherwise ordered by the court.

(b) Service: How made. Whenever under these Rules or by an order of the court service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the court.

(1) SERVICE OF COMPLAINT, INDICTMENT, INFORMATION, BENCH WARRANT, SUMMONS, OR SUBPOENA. Service of the complaint, indictment, information, bench warrant, or summons shall be governed by Rule 9 of these Rules. Service of a subpoena shall be governed by Rule 17 of these Rules.

(2) SERVICE OF OTHER DOCUMENTS. Unless served in accordance with Rule 6 of the Hawaiʻi Electronic Filing and Service Rules, service of documents other than complaint, indictment, information, bench warrant, summons or subpoena shall be made (a) by delivering a copy to the attorney or party; (b) by mailing it to the attorney or party at the attorney's or party's last known address; (c) if no address is known, by leaving it with the clerk of the court; or (d) if service is to be upon the attorney, by

APPENDIX 10

Hawai'i Family Court Rules Rule 1

HAWAIʻI FAMILY COURT RULES

PART A. GENERAL RULES

I. SCOPE OF RULES - ONE FORM OF ACTION

Rule 1. SCOPE: CONSTRUCTION AND APPLICATION OF RULES.

(a) Scope. These rules govern the procedure in the family courts of the State in all suits of a civil nature with the exceptions stated in Rule 81 of these rules.

(b) Construction and Application. These rules shall be construed and applied in such manner as will advance the fair, equitable, speedy and inexpensive determination of every action.

Rule 1.1. CLASSIFICATION OF ACTIONS.

Actions in the Family Court are classified as follows and shall be assigned case numbers preceded by the prefix indicated:

(1) Actions for divorce, separation, and annulment (FC-D)

(2) Actions for civil union divorce, separation, and annulment (FC-CU)

(3) Actions for paternity (FC-P)

(4) Actions for an Order for Protection (FC-DA)

(5) Actions for Orders under the Child Protective Act (FC-S)

(6) Criminal Prosecutions of Adults (FC-CR)

(7) Adjudication of Juvenile Offenders (FC-J)

(8) Guardianships of the Person of Minors or Incapacitated Adults (FC-G)

(9) Actions under the Dependent Adult Protective Services Act (FC-AA)

(10) Actions under the Uniform Interstate Family Support Act (UIFS)

(11) Actions under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)

(12) Appeals to the Family Court from the Decisions and Orders of the Office of Child Support Hearings (FC-AP)

(13) Actions for adoption (FC-A)

(14) Any other miscellaneous action over which the Family Court has jurisdiction (FC-M)

Rule 2. CIVIL ACTION.

Any case over which the family courts have exclusive, original jurisdiction, except a case against an adult charged with a criminal offense, shall be a "civil action" for the purpose of these rules.

Rule 2.1. COMPLIANCE WITH THESE RULES.

The court may impose sanctions for non-compliance with these rules, including but not limited to the sanctions authorized in Rule 37(b)(2) and 89 of these rules.

II. COMMENCEMENT OF ACTION: SERVICE OF PROCESS, PLEADINGS, MOTIONS AND ORDERS

Rule 3. COMMENCEMENT OF ACTION.

A civil action is commenced by filing a complaint with the court. "Complaint" includes any initial pleading required by statute.

Rule 4. PROCESS.

(a) Summons: Issuance. Upon the filing of the complaint, the clerk shall forthwith issue a summons and deliver it to the plaintiff for service by a person authorized to serve process. Upon request of the plaintiff, separate or additional summons shall issue against any defendant, cross-defendant, or cross-plaintiff.

(b) Summons: Form. The summons shall

(1) be signed by the clerk under the seal of the court,

(2) contain the name of the court, and the names of the parties, and the date when issued,

(3) be directed to the defendant or cross-defendant,

(4) state the name and address of the plaintiff's or cross-plaintiff's attorney, if any, otherwise the plaintiff's or cross-plaintiff's address,

APPENDIX 11

Hawai'i Family Court Rules Rule 81

commence preparation of the transcript until the required prepayment or deposit has been made.

(b) Request for an audio or video recording. Upon the request of any person for an audio or video recording of the evidence or other court proceeding, the court clerk or other designated official court personnel shall furnish such audio or video recording in the regular order of cases tried or in such order as the court administrator directs. The court clerk or other designated official court personnel shall not furnish an audio or video recording of a confidential proceeding without the court's written approval, unless otherwise authorized by law. No such audio or video recording shall be provided until appropriate fees are prepaid or a deposit is made. The provisions of the Hawaiʻi Rules of Appellate Procedure relating to transcripts shall govern requests for audio or video recordings for purposes of appeal. Each request for the audio or video recording of a confidential proceeding shall be in writing and contain a reason for the request. If a request is accompanied by a deposit with the clerk, the deposit shall be further accompanied by direction to the clerk of the court to use it to pay for the appropriate fees when the audio or video recording is complete. The court clerk or other designated official court personnel need not commence preparation of the audio or video recording until the required prepayment or deposit has been made.

(c) Stenographic report or transcript as evidence. Whenever the testimony of a witness at a trial or hearing which was stenographically reported or electronically recorded is admissible in evidence at a later trial, it may be proved by the transcript thereof duly certified by the person who reported the testimony if reported stenographically, or by such person as provided by law or by rule if reported electronically.

XI. MISCELLANEOUS PROVISIONS

Rule 81. APPLICABILITY.

(a) Generally. Part A of these rules, together with the designated supplements, shall apply to the following proceedings in any family court:

(1) Matrimonial actions under HRS chapter 580, supplemented by Part B (Rules 90 to 101);

(2) Adoption proceedings under HRS chapter 578, supplemented by Part C (Rules 102 to 120);

(3) Child Protective Act proceedings under HRS chapter 587;

(4) Uniform Interstate Family Support Act proceedings under HRS chapter 576B;

(5) Uniform Parentage Act proceedings under HRS chapter 584;

(6) Termination of Parental Rights proceedings under HRS chapter 571, part VI;

(7) Involuntary hospitalization proceedings under HRS chapter 334;

(8) Guardianship of Person of Minors and Incapacitated Persons under HRS chapter 560, article V;

(9) Domestic Abuse Protective Order proceedings under HRS chapter 586;

(10) Uniform Child Custody Jurisdiction Enforcement Act proceedings under HRS chapter 583A;

(11) Dependent Adult Protective Services proceedings under HRS chapter 346, part X;

(12) Name Changes under HRS chapter 574;

(13) Appeals from the Administrative Process for Child Support Enforcement under HRS section 576E-13;

(14) Any other civil cases over which the family court has jurisdiction.

(b) Juvenile cases. Proceedings under HRS sections 571-11(1) and 571-11(2) shall be governed by Part D (Rules 121 to 158).

(c) Criminal cases. Cases for adults charged with the commission of a crime coming within the jurisdiction of the family courts shall be governed by the Hawaiʻi Rules of Penal Procedure.

(d) Reserved.

(e) Conflict. To the extent that there is any conflict between these rules and the Hawaiʻi Rules of Civil Procedure, or the Rules of the Circuit Courts, these rules shall prevail.

(f) Appeals. Rule 4 of the Hawaiʻi Rules of Appellate Procedure shall apply to appeals from a family court in proceedings listed in subdivision (a) of this Rule 81.

(g) Depositions and discovery. Chapter V of Part A of these rules, relating to depositions and discovery, shall apply to proceedings listed in subdivision (a) of this Rule 81 except that in any such proceedings:

(1) the court may by order direct that said Chapter V shall not be applicable to the proceeding if the court for good cause finds that the application thereof would not be feasible or would work an injustice; and

(2) if the proceedings be ex parte any deposition therein upon oral examination or upon written questions shall be pursuant to motion and order of court after entry of default pursuant to Rule 55 of these rules, rather than pursuant to notice as set forth in subdivision (a) of Rule 30 or subdivision (a) of Rule 31 of these rules, and in any such case the order of court shall, for all purposes relating to said Chapter V, take the place of said notice.

(h) Reserved.

(i) Applicability in general. These Rules shall apply to all actions and proceedings of a civil nature in any family court and to all appeals to the appellate courts in all actions and proceedings of a civil nature in any family court; and for that purpose every action or proceeding of a civil nature in the family court shall be a "civil action" within the meaning of Rule 2 of these rules.

(j) Reserved.

Rule 81.1. RESERVED.

Rule 82. JURISDICTION AND VENUE UNAFFECTED.

These Rules shall not be construed to extend or limit the jurisdiction of the family courts or the venue of actions therein.

Rule 83. RULES.

The board of family court judges may recommend, for adoption by the supreme court, from time to time, rules of court governing practices and procedure in the family courts and amendments of rules. Copies of rules and amendments, when promulgated by the supreme court, shall be made available to each attorney licensed to practice law in the State. In all cases not provided for by rule, the family courts may regulate their practice in any manner not inconsistent with these rules.

Rule 84. FORMS.

Judges of the family courts may prescribe forms from time to time consistent with these rules and law.

Rule 85. TITLE.

These Rules shall be known and cited as the Hawai'i Family Court Rules (HFCR).

Rule 86. WITHDRAWAL OF PAPERS AND EXHIBITS.

The clerk shall permit no pleading or paper to be taken from his or her custody except as otherwise provided in these rules, or as ordered by the judge. Exhibits may be withdrawn on the written approval of a judge against a written receipt therefor, and the party shall file a copy of the receipt in its place unless otherwise ordered. Unless otherwise ordered by the court, the parties shall withdraw all exhibits not attached to the pleadings, and depositions within one year after final judgment. If not so withdrawn, they shall be deemed abandoned and may be disposed of by the clerk.

Rule 87. ATTORNEYS.

(a) Withdrawal of counsel unnecessary. After entry of a judgment finally determining all issues in the judgment and after the expiration of the time for taking an appeal which lies from such judgment, the attorney shall no longer be considered attorney of record for this purpose. No withdrawal as counsel of record need be filed for this purpose. If any issue is specifically reserved in any judgment for further hearing or future determination (as distinguished from reviews of a judgment where no issue is reserved for future

APPENDIX 12

Petitinor Defendant-Appellant Application for Writ of Certiorari From the
Memorandum Opinion, Filed on July 20, 2018
filed on October 15, 2018
in the Supreme Court of the State of Hawai'i

SCWC-15-0000381

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Respondent / Plaintiff-Appellee, vs. STEPHEN L. PAULMIER Petitioner / Defendant-Appellant	FC-CR No. 14-1-0101 APPLICATION FOR WRIT OF CERTIORARI FROM THE MEMORANDUM OPINION, FILED ON JULY 20, 2018 INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI'I HON. LISA M. GINOZA Presiding Judge HON. LAWRENCE M. REIFURTH HON. KATHERINE G. LEONARD Associate Judges

APPLICATION FOR WRIT OF CERTIORARI

and

APPENDIX "A"

GARY C. ZAMBER 8446
Law Office of Gary Zamber
21 Waianuenue Avenue, Suite 3
Hilo, Hawaii 96720
Telephone: (808) 969-3600

ATTORNEY FOR
PETITIONER/DEFENDANT-APPELLANT
STEPHEN L. PAULMIER

(SERVICE BY NOTICE OF ELECTRONIC FILING GENERATED BY JEFS)

APPLICATION FOR WRIT OF CERTIORARI

Petitioner/Defendant-Appellant STEPHEN L. PAULMIER in the Intermediate Court of Appeals ("ICA"), pursuant to Hawai'i Rules of Appellate Procedure ("HRAP") Rule 40.1, respectfully prays that a writ of certiorari be issued by this Court to review the ICA's Memorandum Opinion filed July 20, 2018 in this case. (*See* Appendix "A"). The ICA's Judgment on Appeal was filed on August 16, 2018, and upon Petitioner's timely request under Rule 40.1(a)(2),(3), HRAP, the Appellate clerk extended the time for filing the Application to the sixtieth day after entry of the ICA Judgment, October 15, 2018. This Court has jurisdiction to entertain this Application pursuant to Hawai'i Revised Statutes ("HRS") §§ 602-5 and 602-59.

Petitioner qualifies *in forma pauperis* under HRAP, Rule 24(b), he was appointed counsel during his FC-CR case as well as for the appeal, and nothing material or substantial has changed with his finances.

I. QUESTION PRESENTED FOR DECISION

1. Whether the ICA erred in failing to recognize Stephen Paulmier's constitutional rights to due process were violated and/or find his waiver of a jury trial to be invalid where he was not informed of a substantive procedural distinction that a jury trial would never be continued like a bench trial and thereby resulting in subjecting a Defendant to multiple months delay in resolution of the case after commencement of trial such that without this information it was not possible for the Defendant to make a knowingly, voluntarily and intelligently waiver?

II. STATEMENT OF PRIOR PROCEEDINGS

On 3/23/2014, Petitioner Stephen L. Paulmier was arrested and charged with the violation of HRS 709-906(1), Abuse of Family or Household Members. The State filed its Complaint on 3/24/2014[Record on Appeal ("RA"): p 7].

On May 7, 2014 Defendant Paulmier wanting to take care of this matter in an expedited manner, made a not-guilty plea and requested a bench trial instead of a jury trial, and was given colloquy by the court [OB; Para II (2), pg 20][TR5/7/2014;pp2-6].

Defendant filed Notice of Intent to Provide Discovery pursuant to Rule 16(E) on 5/12/2015. On 6-27-2014 the State of Hawaii filed Motion for Protective Order regarding Public Defender's motion to provide discovery [RA pp. 23-28]. On 7-1-2014, Defendant Paulmier filed Notice of Intent To Rely Upon Other Crimes, Wrongs, Acts [RA 37-39].

Defendant-Appellant Stephen Paulmier's jury-waived bench trial with Judge Van De Car was held beginning 8/27/2014 [RA2; PP 40-41], continued to 11/26/2014 [RA2; pp. 42-44], continued again to 2/25/2015 [RA2; pp. 45-47], and continued again to 4/1/2015 [RA2; pp 48-42]. Defendant was convicted and found guilty on 4/1/12015 of Abuse Of Family Or Household Member and sentenced to Probation for a term of 2 years, with Special Conditions of all but 48 hours jail stayed upon successful completion.

Defendant-Appellant's ICA Opening Brief was filed December 7, 2015, Respondent/ Amended Answering Brief was filed March 1, 2016. The ICA's Memorandum Opinion was filed July 20, 2018, and the Judgment on Appeal was filed August 16, 3018. A Clerk's Extension of Time to file Application for Writ of Certiorari provides Petitioner until October 15, 2018 to file his Writ.

The Petitioner/Defendant-Appellant is not in custody, bail was cancelled, and his sentence is stayed pending appeal after hearing of Motion for Defendant's Release On Own Recognizance Pending Appeal filed June 9, 2015 [RA2; pp2-10].

II. STATEMENT OF THE FACTS

Petitioner was charged on March 24, 2014 with abuse of a family/household member in violation of HRS § 709-906(1). On May 7, 2014, wishing to expedite the matter, Defendant entered his not-guilty plea and waived his right to a jury trial.[1]

During jury trial waiver colloquy, the Family Court 1) questioned if Defendant was being threatened to waive a jury trial, 2) asked if he understood he had a right to a jury trial made out of 12 peers, that he would be assisting in the selection of the jury, and they would have to unanimously find him guilty, or 3) if he had a bench trial the judge, and not the jury, would decide his guilt, and the sentencing upon finding of guilt would be the same whether jury or bench trial, and 4) asked if Mr. Paulmier had any other questions about the right to jury trial. [OB; pg 21][TR; 5/7/2014,pp2-6].

The colloquy between the Family Court and Mr. Paulmier was held May 7, 2014 [TR; 5/7/2014, pp 2-6] as follows:

> MR. LEE: Morning, Your Honor; deputy public defender Justin Lee on behalf of Steven Paulmier, who is present, to my right. Your Honor, at this time, Mr. Paulmier is prepared to waive his right to a jury trial. Uh, we would ask for a pretrial conference. THE COURT: All

[1] At the time of the waiver he was not informed that he would be subject to trial on non-continuous schedule, with several months between trial dates, and the trial could continue on over an indefinite period of time (in this case 7 months to complete a 4 day bench trial).

right. Sir, before I can, um, rule on the jury trial waiver, there are some questions I need to ask you. How old are you now? THE DEFENDANT: 58. THE COURT: How many years of school have you completed? THE DEFENDANT: Un, I've completed a college degree. THE COURT: Excuse me. Can you read and write English? THE DEFENDANT: Yes, I can. THE COURT: Are you presently under the influence of drugs, medications, or alcohol? THE DEFENDANT: No, I'm not. THE COURT: Are you now or have you ever been under treatment for any mental illness or emotional disability? THE DEFENDANT: No. THE COURT: Are you thinking clearly this morning? THE DEFENDANT: Yes. THE COURT: l right. Are you waiving your right to a jury trial because someone's threatening you or putting pressure on you? THE DEFENDANT: No. THE COURT: Okay. Uh, the charge is abuse. It's a misdemeanor. Carries with it a maximum penalty of a year in jail, and thus you have a constitutional right to a jury trial. Have you discussed that right with your attorney? THE DEFENDANT: Yes. THE COURT: You understand that if you had a jury trial, 12 members of the community would be selected to serve as the members of your jury, and those twelve people, not a judge, would decide whether you're guilty or not guilty? THE DEFENDANT: I understand that. THE COURT: You understand that you and your attorney would participate in the selection of the members of your jury? THE DEFENDANT: Yes, I do. THE COURT: You understand that a jury verdict must be unanimous, in other words, before you could be convicted, every member of that jury would have to conclude, beyond a reasonable doubt, that you're guilty? THE DEFENDANT: Yes. THE COURT: You understand that if you waive your right to a jury trial, you will then have a bench trial, where a judge, and not a jury, would determine whether you're guilty or not guilty? THE DEFENDANT: I understand that. THE COURT: You understand that if you're found guilty following a jury trial, the maximum penalty you face in the circuit court is the same one-year maximum you face if found guilty in this court? THE DEFENDANT: Yes. THE COURT: Do you have any questions about your right to a jury trial? THE DEFENDANT: Well, uh, one question I have is, will I be arraigned before I -- today? THE COURT: You, I believe, have been arraigned. I'd have to look at the calendar to see when that occurred. MR. LEE: Uh, I did speak to Mr. Paulmier, and I spoke to the prosecutor. Um, we would be asking for a reading of the charge, but I was gonna wait till after the colloquy. THE COURT: That's fine. MS. WAN: Uh, Your Honor, the state will just note he -- he did receive an oral reading of the charge on March 24th, 2014. THE COURT: All right. That's what the, uh, minutes reflect, that you were arraigned, um, on that date. Um, I -- I will tell you that if this goes to trial, you will be arraigned once again, before the trial commences. You wish to be arraigned again, and I don't see any reason not to but -- THE DEFENDANT: Will I -- will I get a chance to plea? I mean I'm not -- I'm -- I'm -- will -- will I have an opportunity to plead not guilty? THE COURT: You -- MS. WAN: Oh, you can do that now. THE COURT: That -- that -- you have. Just now. Okay. MS. WAN: Okay. THE COURT: Um, all right. So, any other questions about your right to a jury trial? HE DEFENDANT: No, Your Honor. THE COURT: Understanding those rights then do you still wish to waive your right to a jury trial? THE DEFENDANT: I do, Your Honor. THE COURT: The court will find defendant has knowingly, intelligently, voluntarily waived his right to a jury trial. The court will accept that waiver. With regard then to rule 48, Ms. Wan? MS. WAN: Your Honor, the state's rule 48, at this time, is November 2nd, 2014. THE COURT: Uh-huh.

Defendant, through trial counsel, filed "Motion to Dismiss Complaint for Violation of Due Process and Speedy Trial" on February 6, 2015. (Attached as Appendix "A"). On February 25, 2015 the court heard testimony from Defendant in support of the motion [TR 2/25/2015; pg 4, ln 1 - pg. 23, ln 20] whereupon the trial judge orally denied the motion (Id. pg. 23, ln 17-18) and filed signed Order denying Defendant's Motion to Dismiss Complaint on March 5, 2015 (RA; pp. 91-92). Mr. Paulmier specifically testified he did not have knowledge that a bench trial would be an extended affair: "Actually quite to the contrary, I thought that, uh, I would have a -- quicker disposition of my case, because I wouldn't have to pick a jury. I assumed that the calendar, uh, once my trial -- trial started, would be the same is if it was a jury trial." [TR 2/25/2025; pg 5, ln 12-16].

IV . ARGUMENT

THE ICA GRAVELY ERRED BY FAILING TO RECOGNIZE AN INVALID WAIVER TO THE FUNDAMENTAL CONSTITUTIONAL RIGHT OF JURY TRIAL BY DENIAL OF DUE PROCESS AFFORDED TO STEPHEN PAULMIER BY THE TRIAL COURT'S COLLOQUY WHICH WAS INADEQUATE NOTICE FOR MR. PAULMIER TO MAKE A KNOWING, VOLUNTARY, INTELLIGENT WAIVER OF HIS RIGHT TO TRIAL BY JURY.

The ICA in its Memorandum Opinion recognized the problem. "*Conducting a four-day trial over a seven month time period is not the ideal or preferred practice. We acknowledge that conducting a relatively short evidentiary trial over a prolonged time period understandably raises concerns*." (MO p. 6, Italics added).

Under no circumstances did the Family Court, prosecutor or defense counsel ever inform Mr. Paulmier that a bench trial was not given the same calendar preference as a jury trial, even when he made the statement he was choosing a bench trial because it would be quicker than picking a jury. [OB; pg 14][TR 2/25/2015;pg 5, ln 6 - pg 6, ln 9; emphasis added].

This appears as a case of first impression, there are no statutes or caselaw precedent located for the issue of a knowing, voluntary, intelligent waiver which includes a statement of the length of time a bench trial could take – in this case over the course of 7 months on 4 non-consecutive days. Without such knowledge presented to the Defendant, the Defendant is therefore unable to make a voluntary, knowing and intelligent waiver of the right to trial by jury. The ICA therefore erroneously concluded that Mr. Paulmier is not entitled to relief on this claim that his jury trial waiver was invalid.

The Defendant Paulmier made due process arguments on the original appeal, Opening Brief, page 20. In its Memorandum Opinion, the ICA contends Mr. Paulmier did not raise the issue of a proper waiver at the trial court level. However, Mr. Paulmier did make such objections to the trial court as to the differences he was encountering during the drawn-out process on 2/25/15 at hearing on his Motion to Dismiss Complaint for Violation of Due Process and Speedy Trial. Mr. Paulmier explained to the court that counsel had not informed him that a bench trial would be protracted over several months or that a jury trial would not be protracted over several months [TR 2/25/15; pg 11, ln 18 to pg 15, ln 14-23] [OB; pg 14-16].

An essential criteria for Mr. Palmier to know, and plain error in its omission, and for which the trial court did not address, was the fact that a bench trial in this matter, unlike a jury trial, would result in such a long and drawn out, extended proceedings – this is a critical difference in the way trials are held that was not disclosed to Mr. Paulmier. He had no other way of ensuring knowledge of this crucial information but by the trial court in colloquy making certain of his awareness of relevant facts of the distinction in trial calendars in order that he could make an intelligent waiver of the right to jury trial where the reasonable expectation would otherwise be that jury trial and bench calendars are similar in that a Defendant would be tried in a set and certain manner. A jury trial would never result in such a troublingly uncertain and long process as the bench trial and this distinction was not evident by the colloquy given Mr. Palmier by the trial court. Such omission of such essential difference affects the substantive and fundamental consideration and ability to make an actual knowing, voluntary and intelligent waiver of the constitutional right to trial by jury.

The *Barker* balancing factors (*Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182 (1972)) are for speedy trials and do not address the issue of the knowing, intelligent and voluntary waiver of the right to jury trial. Mr. Paulmier wanted the quickest disposition of his case and he was misled to believe that by waiving jury his case would be handled that much more quickly. This case is not one of weighing countterbalancing factors of *Barker*, rather is about whether on the record there was sufficient evidence of a knowing, voluntary, intelligent waiver was ever made given bench trial was chosen over jury trial based upon insufficient colloquy provided the Defendant.

Hawaii Family Court Rules provide a separate calendar for trials, and also note that any continuances in the trial date must be agreed to by the parties. Mr. Paulmier did not agree to the

constant continuation of his bench trial and filed a Motion to Dismiss during his trial for the exact reason that he did not want to continue his trial indefinitely.

Hawaii Family Court Rules, Rule 40 provides:

> ASSIGNMENT OF CASES FOR TRIAL; CONTINUANCE OF TRIAL
>
> (a) Assignment of case for trial. The family courts shall provide by order for the placing of actions upon the trial calendar,
> (1) without request of the parties, or
> (2) upon request of a party and notice to the other parties, or
> (3) in such other manner as the courts deem expedient. Precedence shall be given to actions entitled thereto by statute.
>
> (b) Motions for continuance. If a date has been assigned for trial of an action, a motion for continuance of the trial shall include on the first page of the notice of motion the trial date assigned and any previously assigned trial dates.
>
> (c) Consent of party to continuance of trial. **A motion for continuance of any assigned trial date, whether or not stipulated to by respective counsel, shall be granted only upon a showing of good cause, which shall include a showing that the client-party has consented to the continuance**. Consent may be demonstrated by the client-party's signature on a motion for continuance or by the personal appearance in court of the client-party. However, consent is not required if the client-party is a government agency. **(emphasis added)**

Additionally, the Rules of the Circuit Courts of the State of Hawaii Rule 13(a) provides in pertinent part for Trial Calendars**:**

> (a) Trial Calendars. The court shall prepare and maintain a trial calendar for jury trials and a separate trial calendar for jury-waived trials of all civil cases which may require hearing or trial. All such cases placed on the trial calendars shall be called and assigned to any available judge for hearing or trial during the week the same shall be set unless continued for good cause. When any action on the ready calendar is called during a calendar call or when any action is called for a pretrial or settlement conference after timely notice to all attorneys or parties not represented by counsel, the court, may, on its own motion or on the motion of any party, dismiss such action or hold the defendant in default, as the case may be, if any of the parties fails to appear.
>
> Any case at issue, whether on the ready calendar or not, may be advanced and set for a pretrial or settlement conference or be immediately placed on the trial calendar for hearing or trial. All civil cases appealed to the circuit court, when docketed, shall be placed on the appropriate trial calendars of civil cases.

It appears both the Family Court and Circuit Court rules provide for separate trial calendars, presumably apart from the regular congested court calendar of hearings and motions, and presumably held on consecutive days.

The jury trial right is deemed so essential that an on the record meaningful waiver must be evidenced prior to proceeding by bench trial. It is reversible error should the waiver be insufficient.

> The right to trial by jury is a fundamental right protected by the sixth amendment to the United States Constitution[10], article I, section 14 of the Hawai‘i Constitution[11], and by statute. *See* Hawai‘i Revised Statutes (HRS) § 806–60 (1993) ("Any defendant charged with a serious crime shall have the right to trial by a jury of twelve members. 'Serious crime' means any crime for which the defendant may be imprisoned for six months or more.")[12] ; *see also* *477 **909 *State v. Ibuos*, 75 Haw. 118, 120, 857 P.2d 576, 577 ("In Hawai‘i, a statutory right to a jury trial arises whenever a criminal defendant can be imprisoned for six months or more upon conviction of the offense.") (citing HRS § 806–60). Hawai‘i Rules of Penal Procedure (HRPP) Rule 5(b)(1) requires that "the court shall in appropriate cases inform the defendant that he has a right to a jury trial in the circuit court or may elect to be tried without a jury in the district court." *See Ibuos*, 75 Haw. at 120, 857 P.2d at 577. "[A]ppropriate cases" are those cases where the defendant has a constitutional right to a jury trial. *See Friedman*, 93 Hawai‘i at 68, 996 P.2d at 273 (2000) (citing *Ibuos*, 75 Haw. at 120, 857 P.2d at 577).
>
> "A defendant may, orally or in writing, voluntarily waive his or her right to trial by jury[,]" but for a valid waiver, "the trial court has a duty to inform the accused of that constitutional right." *Id.* (citing *Ibuos*, 75 Haw. at 120, 857 P.2d at 577) (citation omitted)). The colloquy preceding any waiver of the right to jury trial serves several functions: " '(1) it more effectively insures voluntary, knowing and intelligent waivers; (2) it promotes judicial economy by avoiding challenges to the validity of waivers on appeal; and (3) it emphasizes to the defendant the seriousness of the decision [to waive a jury trial].' " *Id.* (quoting *United States v. Cochran*, 770 F.2d 850, 851–52 (9th Cir.1985)) (alterations omitted) (other citations omitted)).
>
> HRS § 806–61 (1993) provides that "[t]he defendant in a criminal case may, with the consent of the court, waive the right to a trial by jury either by written consent filed in court or by oral consent in open court entered on the minutes." (Emphasis added.) This is reiterated in Hawai‘i Rule of Penal Procedure (HRPP) Rule 23(a), which provides that "[c]ases required to be tried by jury shall be so tried unless the defendant waives a jury trial with the approval of the court. The waiver shall be either by written consent filed in court or by oral consent in open court entered on the record." While the foregoing rule and statute seem to indicate a written form would suffice to effect a waiver, a colloquy between the court and the

> defendant in open court and on-the-record would appear necessary in waiving a constitutional right to a jury trial. This court has required an oral waiver in the context of entrance of a guilty plea, *see State v. Vaitogi*, 59 Haw. 592, 585 P.2d 1259 (1978), and the waiver of the right to counsel, *see Wong v. Among*, 52 Haw. 420, 477 P.2d 630 (1970). *Ibuos*, 75 Haw. at 121 n. 1, 857 P.2d at 576 n. 1. Similarly, the constitutional nature of the right to trial by jury requires that a waiver of that right be made on-the-record. *See* Haw. Const. art. I, § 14. The Hawai‘i Constitution controls over any inconsistent language permitting waiver by written consent alone.
>
> While a defendant may waive his or her right to a jury trial, the waiver must be made knowingly, intelligently, and voluntarily. *Id.*; *see also State v. Han*, 130 Hawai‘i 83, 89, 306 P.3d 128, 134 (2013) (noting that the waiver of a fundamental right must be made knowingly, intelligently, and voluntarily). “The failure to obtain a valid waiver of this fundamental right constitutes reversible error.” *Friedman*, 93 Hawai‘i at 68, 996 P.2d at 274 (citing *Ibuos*, 75 Haw. at 120, 857 P.2d at 577).

State v. Gomez-Lobato, 130 Hawai`i 465, 476–77, 312 P.3d 897, 908–09 (2013).

> The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards….In Carnley v. Cochran, 369 U.S. 506, 516, 82 S.Ct. 884, 890, 8 L.Ed.2d 70, we dealt with a problem of waiver of the right to counsel, a Sixth Amendment right. We held: ‘Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.’

Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969).

Here, Petitioner / Defendant-Appellant argues that there must be a showing on the record of a knowing, intelligent waiver of the right to have a jury trial which ought include knowing that bench trial could be continued over several trial dates separated by lengthy periods of time.

As the Petitioner’s case went on and on, the violation became more apparent as he had to then contend with reputation issues, emotional distress including anxiety and worry, loss of memory, as a result of unreasonably lengthy trial period given the rather paucity of issues.

IV. CONCLUSION

Mr. Paulmier continues to maintain his innocence and has a right to expect to be informed of essential facts that bear upon the waiver of the right to a jury trial. He was misled to believe the only difference in a jury trial and a bench trial was the time saved seating a jury. In in contrast to receiving a trial that would save time, anxiety and fading of memories, Mr.

Paulmier was subjected to multiple trial dates over a period of seven (7) months for which he was not advised and for which ought to have been disclosed to him in order for him to make a knowing, intelligent, voluntary waiver of his fundamental constitutional right to trial by jury.

The ICA states in its' Memorandum Opinion filed July 20, 2018, that Paulmier's trial counsel did not object when the Family Court recessed trial the first day, and that he did not object when Family Court continued the second day of the trial for another three months. That is inaccurate, as the counsel for the Defendant did ask for a sooner date and argued bias against him and why his waiver was unknowing [OB pg 13-17] but the Court said there was no earlier court date available, so in good faith they took the February 25th date and filed the Motion to Dismiss in protest.

Mr. Paulmier did request a speedy trial and address of due process considerations in his Motion to Dismiss filed 2/6/2015 [TR 2/25/2015; pg 20, ln 19-23], where the Family Court sided with the State who told the Court and the Defendant all parties were prejudiced with a trial that continues on and on over a lengthy time frame. Defendant agrees that all parties suffer by such a process of multiple trial dates over several months and so presents this Writ upon position he was misled by an inadequate waiver of jury trial colloquy adversely impacting his personal and fundamental constitutional right to trial by jury.

Although Mr. Paulmier raised the issue to the trial court, as his substantial rights were affected by not having advance knowledge in colloquy of the substantive procedural distinction between jury and bench trial calendars, even if his raising of the issue was insufficiently presented at trial, plain error appears due to the seriousness of the omission in the colloquy proceedings and which would otherwise result in manifest injustice.

For the above stated reasons Petitioner / Defendant-Appellant, Stephen L. Paulmier respectfully requests that this Honorable Court grant this application and accept this writ of certiorari and review the ICA opinion that Stephen Paulmier knowingly, intelligently and voluntarily gave up his right to a jury trial (which would be placed on a trial calendar and handled on several consecutive days) in order to have a bench trial which could be continued on indefinitely.

DATED: Hilo, Hawaii, October 15, 2018

/s/ Gary C. Zamber
GARY C. ZAMBER, Court-Appointed
Counsel for Stephen L. Paulmier

APPENDIX 13

Defendant's Second Amended Witness List
filed December 27, 2014
in the Family Court of the Third Circuit

FILED
FAMILY COURT OF
THE THIRD CIRCUIT
STATE OF HAWAII

2014 DEC 24 AM 7:53

CLERK S. MURANAKA

OFFICE OF THE PUBLIC DEFENDER
JOHN M. TONAKI 3915
PUBLIC DEFENDER
BY: JUSTIN C. LEE 9908
DEPUTY PUBLIC DEFENDER
275 PONAHAWAI STREET SUITE 201
HILO, HAWAII 96720
PHONE (808) 974-4571

ATTORNEYS FOR THE DEFENDANT

IN THE FAMILY COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff, vs. STEPHEN PAULMIER, Defendant.	**CASE. NO.: FCCR-14-1-0101** ABUSE OF FAMILY OR HOUSEHOLD MEMBER HRS § 709-906(1); DEFENDANT'S SECOND AMENDED WITNESS LIST; CERTIFICATE OF SERVICE HONORABLE JUDGE PRESIDING TRIAL DATE: 8/27/14 HEARING TIME: 1:30 p.m. COURTROOM 3C

DEFENDANT'S SECOND AMENDED WITNESS LIST

Defendant, STEPHEN PAULMIER, by and through counsel, Deputy Public Defender JUSTIN C. LEE, pursuant to Rules 2.2 and 16 of the Hawaii Rules of Penal Procedure, hereby presents Defendant's Witness List for trial and gives notice to the State of Hawaii that Defendant intends to call these persons to testify in his defense.

Defendant may rely on the following witnesses for trial:

1. Defendant STEPHEN PAULMIER
2. DANNY LI – 808-[redacted](H); 808-[redacted]©; Defendant will testify that he changed the locks at the Puueo Street residence.

3. TOMAS BELSKY – 808-[redacted]; [redacted], Hilo, HI 96720; Defendant will rebut testimony of the Complaining witness. Witness was present in the courtroom during earlier testimony. Witness was not previously disclosed or contemplated but became necessary due to the unanticipated testimony of the complaining witness.

4. Any witness necessary to introduce evidence.

5. Any witness listed or mentioned in discovery provided by State of Hawai'i in the above-referenced case.

6. Any other police personnel on scene or assisting with the investigation of the instant case.

7. Any rebuttal witnesses.

DATED: Honolulu, Hawai'i, December 16, 2014.

OFFICE OF THE PUBLIC DEFENDER

JOHN M. TONAKI
PUBLIC DEFENDER

BY: _____

JUSTIN C. LEE
DEPUTY PUBLIC DEFENDER
ATTORNEYS FOR THE DEFENDANT

APPENDIX 14

State's Motion in Limine
filed February 2, 2015
in the Family Court of the Third Circuit

MITCHELL D. ROTH 6012
Prosecuting Attorney

SYLVIA WAN 9586
Deputy Prosecuting Attorney
County of Hawai'i
655 Kilauea Avenue
Hilo, HI 96720
(808) 961-0466

Attorneys for State of Hawaii

IN THE FAMILY COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

STATE OF HAWAII, vs. STEPHEN L. PAUMIER, Defendant	FC CR 14-1-0101 STATE'S MOTION IN LIMINE NO.1; MEMORANDUM OF LAW; CERTIFICATE OF SERVICE HEARING DATE: FEBRUARY 25, 2015 TIME: 1:30 PM JUDGE: LLOYD VAN DE CAR

STATE'S MOTION IN LIMINE

Comes now the State of Hawaii, by and through SYLVIA WAN, Deputy Prosecuting Attorney, County and State of Hawaii, and hereby moves this Honorable Court for an Order in Limine preventing Defendant from calling witness, Tomas Belsky to testify.

This request is based pursuant to the Hawaii Rules of Penal Procedure Rule 12(b) and 47, Hawaii Rules of Evidence Rule 615, the attached Memorandum of Law, the record and files, and any evidence to be presented at the hearing of this matter.

Dated: Hilo, Hawaii, JAN 29 2015

STATE OF HAWAII

By _____
SYLVIA WAN
Deputy Prosecuting Attorney

IN THE FAMILY COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

STATE OF HAWAII, vs. STEPHEN L. PAUMIER, Defendant	FC CR 14-1-0101 MEMORANDUM OF LAW

MEMORANDUM OF LAW

I. INTRODUCTION

The State seeks to preclude the Defendant from calling Tomas Belsky as a witness. Tomas Belsky was present during the entire proceedings of the trial and has heard all of the testimony presented thus far. The Witness Exclusionary Rule pursuant to Hawaii Rules of Evidence Rule 615 was invoked at the outset of the trial. Defense claims that Tomas Belsky would be used to rebut the Complaining Witnesses testimony. However, all testimony proferred by the Complaining Witness regarding Tomas Belsky was elicited by Defense counsel on cross examination. Therefore, Defense should have anticipated that Tomas Belsky would have been a potential rebuttal witness. Defense should have excluded Tomas Belsky's presence from the courtroom during the trial proceedings. Such evidence is irrelevant and should be excluded from introduction at trial.

II. ARGUMENT

Defendant should be precluded from calling Tomas Belsky as a witness.

Defendant seeks to introduce testimony through Tomas Belsky to rebut the testimony of the State's Complaining Witness, Merli Paulmeir. Defendant now claims that the testimony from Merli Paulmier was "unanticipated." However, all testimony proferred by the Complaining

Witness regarding Tomas Belsky was elicited by Defense counsel on cross examination. Therefore, Defense should have anticipated that Tomas Belsky would have been a potential rebuttal witness. Defense should have excluded Tomas Belsky's presence from the courtroom to preserve the integrity of the trial proceedings.

The Hawaii Rules of Evidence Rule 615 states in is in entirety:

> Rule 615 Exclusion of witnesses:
> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

"The purpose for the order excluding a witness from a courtroom is to prevent him from listening to testimony of other witnesses and then 'shaping' or fabricating his testimony accordingly." State v. Leong, 51 Haw. 581, 583 (1970) citing United States v. Leggett, 326 F.2d 613 (4th Cir. 1964); Witt v. United States, 196 F.2d 285 (6th Cir. 1952); see also State v. Moriwaki, 71 Haw. 347, 352-53 (1990). The appropriate sanction for the violation is left to the sound discretion of the trial court. State v. Moriwaki, 71 Haw. 347, 352-53 (1990); Hawaiian Ocean View Estates v. Yates, 58 Haw. 53, 57 (1977); See Yoshitomi v. Kailua Tavern, Ltd., 39 Haw. 93 (1951); Harkins v. Ikeda, 57 Haw. 378 (1976); see also Commentary on HRE Rule 615. In the absence of an affirmative showing of injury, [the appellate court] will not review an act which lay within the sound discretion of the trial court. Hawaiian Ocean View Estates v. Yates, 58 Haw. 53, 57 (1977).

The Hawaii Supreme Court has found that the exclusion of a Defense witness was error when the witness was 1) the only witness excluded was the only witness to be presented besides the Defendant, and/or 2) the witness had viewed only a portion of the testimony provided at trial. See also State v. Sequin, 73 Haw. 331, 338, 832 P.2d 269, 273 (1992) (excluded witness did not "did not observe or hear anything which would be relevant or material to the testimony he would later have given" thus should have been allowed.); See State v. Leong, 51 Haw. 581, 465 P.2d 560 (1970)(court should allowed defendant's singular witness to testify because by excluding the witness "it denied defendant this constitutional right to have witnesses testify in his favor").

Defendant has not shown how the presence and testimony of Tomas Belsky is "essential to the presentation" of the Defendant's case in his proffer to the court. Moreover, Tomas Belsky was present during the entirety of the presented trial thus far. Thus, there nothing to prevent this witness from 'shaping' or fabricating his testimony according to the testimony he has already listened to, including the Defendant's testimony. Defendant has already brought other witnesses testify to address matters brought up during the Complaining Witnesses cross-examination. Therefore, there is no harm to Defendant as he has other means to rebut the Complaining Witness's testimony.

IV. CONCLUSION

For the reasons stated herein, the State requests the Defendant be precluded from calling Tomas Belsky as a rebuttal witness.

Dated: Hilo, Hawaii, JAN 29 2015

STATE OF HAWAII

By _____
SYLVIA WAN
Deputy Prosecuting Attorney

APPENDIX 15

Defendant's Motion to Dismiss Complaint for
Violation of Due Process and Speedy Trial
filed on February 6, 2015
in the Family Court of the Third Circuit

FILED

OFFICE OF THE PUBLIC DEFENDER
JOHN M. TONAKI 3915
PUBLIC DEFENDER
BY: JUSTIN C. LEE 9908
DEPUTY PUBLIC DEFENDER
275 PONAHAWAI STREET SUITE 201
HILO, HAWAII 96720
PHONE (808) 974-4571

ATTORNEYS FOR THE DEFENDANT

2015 FEB -6 PM 4:21
L. RICHARDS, CLERK
FAMILY COURT OF
THE THIRD CIRCUIT
STATE OF HAWAII

IN THE FAMILY COURT OF THE THIRD CIRCUIT

HILO/PUNA DIVISION

STATE OF HAWAI'I

STATE OF HAWAI'I, vs. STEPHEN L. PAULMIER, Defendant.	CASE NO. FCCR 14-1-101 ABUSE OF FAMILY OR HOUSEHOLD MEMBER (HRS §709-906(1)) MOTION TO DISMISS COMPLAINT FOR VIOLATION OF DUE PROCESS AND SPEEDY TRIAL; DECLARATION OF COUNSEL; MEMORANDUM IN SUPPORT OF MOTION; CERTIFICATE OF SERVICE THE HONORABLE JUDGE LLOYD X. VAN DE CAR HEARING DATE: February 25, 2015, 1:30 p.m. NEXT COURT DATE: February 25, 2015, 1:30 p.m.

MOTION TO DISMISS COMPLAINT FOR VIOLATION OF DUE PROCESS AND SPEEDY TRIAL

Defendant, STEPHEN L. PAULMIER, by and through counsel undersigned, moves this Honorable Court for an Order dismissing the Complaint on the grounds that there has been a prejudicial lapse of time between the date of the alleged offenses and the disposition of the charges in violation of Defendant's rights to due process of law and speedy trial, as

guaranteed by the Fifth and Fourteenth amendments of the U.S. constitution and Article 1, Sections 5, 8, and 14, of the Hawai`i State Constitution.

This Motion is brought pursuant to Rule 47 of the Hawai`i Rules of Penal Procedure, the Hawaii State Constitution, and the United States Constitution. This Motion is based upon the records and files of the instant case, the Declaration of Counsel, included herein, and such evidence and argument as may be presented at a hearing on this motion.

DECLARATION OF COUNSEL

The Office of the Public Defender represents STEPHEN L. PAULMIER in the above entitled matters and, upon information and belief, I declare the following:

1. I am the Deputy Public Defender assigned to represent Defendant in the above-captioned case.
2. The State alleges that the offense listed above occurred on or about March 23, 2014.
3. A complaint was filed on March 24, 2014.
4. On March 24, 2014, Defendant appeared in court and was referred to the Office of the Public Defender. Defendant was ordered to return on May 7, 2014.
5. On May 7, 2014, Defendant appeared in court, entered a plea of not guilty, waived his right to a trial by jury, and demanded a jury-waived trial. Trial was set for August 27, 2014.
6. On August 27, 2014, trial commenced.
7. On August 27, 2014, a Brazilian Portuguese interpreter was procured by the Judiciary at the State's request but was not utilized.
8. On August 27, 2014, Defense was unable to complete its cross-examination of the State's complaining witness, and trial was continued to November 26, 2014.

9. On November 26, 2014, trial was resumed. Trial proceedings failed to conclude with the Defendant on the witness stand. Trial was continued to February 25, 2014.

10. Based on the above information, I am further informed and of the belief that:

    a. The delay from the commencement of trial on August 27, 2014 until the next scheduled trial date of February 25, 2014 is six (6) months.

    b. The purported reason for delay in disposition is congestion of the Court's calendar.

    c. The lengthy delay in disposition of the charges against Defendant has resulted in prejudice to Defendant;

        c.i. Defendant has suffered anxiety and emotional distress as a result of the delay through the disruption of employment, drain on financial resources, limitations on his ability to travel, and the attacks on his reputation by the complaining witness in the community during the pendency of proceedings.

        c.ii. Defendant's ability to mount a sufficient defense has suffered as a result of the blunting of his ability to effectively cross-examine his accuser.

            c.ii.1. Due to the delay, the State has been given the ability to coach its complaining witness between appearances on the witness stand.

            c.ii.2. Furthermore, the ability of the fact-finder to assess the credibility of witnesses is blunted by the passage of time.

d. Therefore, this Honorable Court should enter an Order dismissing the Complaint with prejudice on the ground that there was an unreasonable and prejudicial lapse of time between the date of the offense and the disposition of the charges, in violation of Defendant's right to due process of law.

11. I declare under penalty of law that the foregoing is true and correct to the best of my knowledge and belief.

DATED: Hilo, Hawaii, February 6, 2015.

OFFICE OF THE PUBLIC DEFENDER
JOHN M. TONAKI
PUBLIC DEFENDER

BY: _____
JUSTIN C. LEE
DEPUTY PUBLIC DEFENDER
ATTORNEYS FOR THE DEFENDANT

MEMORANDUM OF LAW IN SUPPORT OF MOTION

I. INTRODUCTION

The Motion to Dismiss seeks dismissal of the case with prejudice on the grounds that there has been a prejudicial lapse of time between the date of the alleged offenses and the disposition of the charges.

II. FACTS

In this case, the alleged offense occurred on March 23, 2014. Defendant was identified as a suspect immediately thereafter. A complaint was filed on March 24, 2014. Trial commenced on August 27, 2014. Testimony was taken and trial was continued to November 26, 2014. On November 26, 2014, further testimony was taken and trial was continued to February 25, 2015.

Further relevant facts are set out in the Declaration of Counsel, and as will be developed at a hearing on the motion.

III. ARGUMENT

Defendant is denied due process of law in the continued prosecution of this case. The excessive delay between the commencement of trial and disposition presents similar, if not greater prejudice to the Defense as a pre-trial delay would. Defendant's right to a speedy trial is not satisfied by simply commencing trial proceedings. In order for Defendant's right to a speedy trial to have any meaning, trial must not only commence within a reasonable time, but reach its conclusion in a reasonable time. Otherwise, the effect of continuing trial for excessive periods of time robs Defendant of the right to a speedy trial by delaying disposition.

A. SPEEDY TRIAL

Defendant's right to a Speedy Trial constitutes a separate and independent basis to dismiss the above-captioned charge(s), apart from HRPP Rule 48, which deals exclusively with the **commencement** of trial. Defendant's right to a speedy trial provides a greater scope of protection. In State v. Nihipali, the Hawai'i Supreme Court stated that: "The [S]ixth [A]mendment to the United States Constitution and article I, section 14 of the Constitution of the State of Hawai[']i guarantee an accused in all criminal prosecutions the right to a speedy trial. The right attaches the moment a person becomes an 'accused.' In this jurisdiction, 'accused' denotes the point at which a formal indictment or information has been returned against a person or when he becomes subject to actual restraints on his liberty imposed by arrest, whichever first occurs." State v. Nihipali, 64 Haw. 65, 67, 637 P.2d 407, 410 (1981). The remedy for a violation of a defendant's right to a speedy trial is a dismissal with prejudice.

In State v. Almeida, 54 Haw. 443, 447, 509 P.2d 549, 551-52 (1973), the Hawai'i Supreme Court adopted the balancing test promulgated by the United States Supreme Court in Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182 (1972), to determine whether a defendant has been deprived of the right to a Speedy Trial. The court weighs four factors on an ad hoc basis: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right to Speedy Trial; and (4) the prejudice to the defendant. State v. Almeida, 54 Haw. at 447; 509 P.2d at 552. See State v. English, 61 Haw. 12, 16-17, 594 P.2d 1069, 1072-73 (1979).

1. LENGTH OF DELAY

Although the United States Supreme Court in Barker v. Wingo ruled that there must usually be some prima facie showing that the length of delay is presumptively prejudicial before further inquiry is made into the other factors in the balancing test, that Court did not set a fixed time at which delay becomes presumptively prejudicial. The Hawaii Supreme Court has stated that "[t]he precise length of the delay that will be considered 'presumptively prejudicial' depends upon the facts of each case." State v. Lau, 78 Haw. 54, 62, 890 P.2d 291, 299 (1995). In Lau, the Hawaii Supreme Court noted that delays of at least six months were "sufficient to warrant an inquiry into the other Barker factors." Id., at 63, 890 P.2d at 300.

In the immediate case, there was approximately a five (5) month delay between the filing of the complaint, March 24, 2014, and the commencement of Defendant's jury-waived trial on August 27, 2014. Since the commencement of Defendant's trial, however, there will be at least a six (6) month delay from the commencement of trial on August 27, 2014, until February 25, 2015, when trial is scheduled to resume. Even then, a speedy disposition is not guaranteed on that date, as it is unclear whether trial will conclude on that date.

2. REASONS FOR DELAY

In Barker, the United States Supreme Court noted that the primary responsibility for bringing a defendant to trial lies with the court and the prosecutor: "[D]ifferent weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. The Hawaii Supreme Court has applied the same analysis. See State v. Dwyer, 78 Haw. 367, 893 P.2d 795 (1995) (although State did not attempt to deliberately delay defendant's trial, the second factor weighs in favor of Defendant); State v. Lau, 78 Haw. 54, 890 P.2d 291 (1995) (when court congestion is reason for delay and not deliberate delay by state, second factor weighs slightly in favor of defendant.); State v. Wasson, 76 Haw. 415, 879 P.2d 520 (1994) (predominant reason for delay was court congestion, thus second factor weighs slightly in favor of defendant.)

In the instant case, Defendant requested the setting of trial upon his first appearance with counsel. The intervening court appearances -- Defendant's Motion to Amend Terms and Conditions of Bail and two pre-trial conferences -- did not occasion delay in the commencement of trial. Upon commencement, however, Defendant was subject to a number of delays occasioned by the State and the Court.

On August 27, 2014, Defendant's initial trial date, the commencement of trial was delayed by the court's attempts to establish a connection with a standby Portuguese interpreter for the complaining witness. This interpreter was procured at the request of the State -- a request that ultimately proved frivolous, as the interpreter was never utilized. This delay contributed to

the Defense's inability to conclude its cross-examination of the complaining witness, causing the Court to continue Defendant's trial. Initially, the Court considered a setting in late December. However, the Court settled on a late November date. On November 26, 2014, the State rested its case and the Defense began its direct examination of Defendant. However, trial was unable to conclude and the case again continued, this time to February 25, 2015.

While the delays between trial dates were likely due to congestion of the Court's calendar, the Hawaii Supreme Court has noted that such reasons weigh in favor of the Defendant, however slightly. Thus, when considering the entirety of the facts and circumstances of the delays in Defendant's trial, the second factor -- reasons for delay -- weigh in favor of Defendant.

3. ASSERTION OF RIGHT TO SPEEDY TRIAL

As previously noted, Defendant requested the setting of trial upon his first appearance with counsel. Furthermore, Defendant's lone pre-trial motion -- Defendant's Motion to Amend Terms and Conditions of Bail -- had no effect upon the disposition of the case, and as such occasioned no delay upon the commencement of trial.

4. PREJUDICE TO DEFENDANT

As to the factor of prejudice, the Hawai'i Supreme Court noted several interests of a defendant that the Speedy Trial guarantee was designed to protect.

> (i) to prevent oppressive pre-trial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.

State v. Almeida, 54 Haw. at 448, 509 P.2d at 552.

a. ANXIETY AND CONCERN OF THE ACCUSED

Disruption of employment, drain on financial resources, public obloquy, and anxiety ot the person, family and friends are appropriately considered. State v. Lau, 78 Haw. at 65, 890

P.2d at 302. In the present case, the excessive delay in the disposition of Defendant's case has caused prejudice to Defendant in all of the above areas.

The continued proceedings have demanded enormous time commitment by Defendant – not only with regards to the time spend in court, but also regarding the time spent with counsel preparing a Defense and reviewing prior proceedings. This has limited the time Defendant would be able to spend seeking and securing employment opportunities. Naturally, this has drained Defendant's financial resources.

Additionally, Defendant's ability to travel has been limited during the pendency of his case. Notwithstanding the effect commitment of time has had upon Defendant's ability to travel, Defendant's continued bail status has also hampered Defendant's ability to travel. Defendant has had to negotiate his travel with his bond company; on one occasion, Defendant was compelled to come before the Court to request permission to travel to his son's wedding.

But perhaps most prejudicial to Defendant has been the harm his reputation has suffered due to the delayed disposition of his case. Not only has the stigma of the accused been allowed to fester within the community, but Defendant's reputation has also been actively attacked by the complaining witness during the interim. The complaining witness has taken the opportunity between trial dates to attempt to garner sympathy for herself and incite malice against Defendant within the small circle of friends and acquaintances shared by the parties. This endeavor was aided by the large gap of time between the complaining witness' testimony and the Defendant's first opportunity to defend himself on the stand. In effect, by delaying proceedings, the Court has inadvertently aided the complaining witness' ability to publicly defame Defendant by failing to provide Defendant with a timely opportunity to address those accusations.

These factors have taken a tremendous toll upon Defendant's emotional state. The travails of being accused of a crime are burdensome enough. To be unable to present a defense for months at a time after the State has presented even a portion of its case lends itself to extreme prejudice by members of the community. As a result, Defendant has begun psychological counseling to help cope with the strain.

b. IMPAIRMENT OF DEFENSE

The delay in disposition has only served to aid the State in its prosecution and harm the Defense. Through its continuances, the State has been able to coach and rehabilitate its complaining witness. This was demonstrated by the contrast in the complaining witnesses' demeanor between her first occasion on the stand on August 27, 2014, and her second, on November 26, 2014. Whereas the complaining witness was emotional and effusive on the first day of cross-examination, she was very nearly the opposite on her second day, three months later. The State's ability to coach its witnesses and prepare them over such an extended period of time blunts Defendant's ability to effectively confront and cross-examine his accuser.

Furthermore, by delaying disposition, the inevitable fade of memory affects not only the witnesses to be called in the case, but also the participants in the proceedings – the attorneys and the fact-finder. The affect upon the fact-finder is most damning, as testimony taken months prior eventually decays to vague impressions. Transcripts and recordings, purported cures to some of the effects of the passage of time, neuters the salient distinction between fact-finder and appellate court – the ability to determine the credibility of witnesses by "actually being there."

Maintaining the fact-finder's ability to assess witness credibility is a key facet of Defendant's right to a fair trial. It is the crux between Defendant's right to a fair trial and a speedy trial. It is for this very reason – in addition to potential inconvenience – that a delay

similar to what Defendant has suffered would not be tolerated in a jury trial. Had Defendant known disposition would be delayed to such a drastic extent, Defendant would not have waived his right to a jury trial. The prejudice Defendant has suffered to both his person and his ability to present a defense has been too great. Defendant's right to a fair trial, Defendant's right to a speedy trial, would have been better protected in a jury trial. The inequity between proceedings is unacceptable. At the very least, the potential for such delay due to the Court's calendar and the effect it may have upon his rights to both a speedy trial and fair trial should have been addressed during the Court's colloquy with Defendant when he waived his right to jury trial.

B. FUNDAMENTAL FAIRNESS

The Hawai'i State Constitution, article VI, section 1 vests the "judicial power of the State" in the Courts. The Hawai'i Supreme Court has held that the "inherent power of the courts is the power to protect itself; the power to administer justice whether any previous form of remedy has here granted or not . . ." State v. Mageo, 78 Hawai'i 33, 889 P.2d 1092 (1995); State v. Moriwake, 65 Haw. 47, 647 P.2d 705 (1982) (citing In re Bruen, 172 P.2d 1152 (Wash. 1981)). The court in Moriwake acknowledged that the power and responsibility of the court is paramount, and the balance made is that of the interest of the State against fundamental fairness to a defendant with consideration as well to the orderly functioning of the Court.

The considerations behind promulgation of HRPP Rule 48 are relevant here. The purpose of HRPP Rule 48 is to ensure an accused a procedural right to speedy trial, separate and distinct from the constitutional protection. It is based upon certain policy considerations of our judiciary: (1) to relieve congestion in the trial court; (2) to promptly process all cases reaching the courts; (3) to advance the efficiency of the criminal justice process. State v. Estencion, 63 Haw. 264, 268, 625 P.2d 1040 (1981). One of the primary reasons for enactment of HRPP Rule

48 was to provide a strong incentive for the State to commence trial within a reasonable, prescribed time period, so as to prevent the evils associated with "stale" prosecutions.

> The government and, for that matter, the trial court are not without responsibility for the expeditious trial of criminal cases . . . The United States Attorney has a duty to press criminal cases to trial, to give them any necessary priority, and to prevent, whenever possible, even the suggestion of staleness . . . (A) **staleness suggestion, which has any justification for its utterance, reflects on the court itself and on the administration of federal justice.**

See A.B.A. Project on Minimum Standards for Criminal Justice, Standards Relating to Speedy Trial, §1.2 (1967), as quoted in Hodges v. United States, 408 F.2d 543, 551 (8th Cir. 1969) (emphasis added).

These same considerations are applicable to the exercise of a court's inherent power to dismiss for lack of speedy disposition. The Court should dismiss this case to provide incentive for timely disposition and to insure the integrity of the judicial process.

IV. CONCLUSION

If the State is allowed to commence prosecution, yet delay disposition, the practical result is prejudice to the Defendant, and any notion of the right to speedy trial rings hollow. Based on the arguments presented and the authorities cited above, Defendant respectfully requests this Motion to Dismiss be granted with prejudice.

DATED: Hilo, Hawaii, February 6, 2015.

OFFICE OF THE PUBLIC DEFENDER
JOHN M. TONAKI
PUBLIC DEFENDER

BY: _____
JUSTIN C. LEE
DEPUTY PUBLIC DEFENDER

ATTORNEYS FOR THE DEFENDANT

APPENDIX 16

Defendant's Third Amended Witness List
filed on February 17, 2015
in the Family Court of the Third Circuit

OFFICE OF THE PUBLIC DEFENDER
JOHN M. TONAKI 3915
PUBLIC DEFENDER
BY: JUSTIN C. LEE 9908
DEPUTY PUBLIC DEFENDER
275 PONAHAWAI STREET SUITE 201
HILO, HAWAII 96720
PHONE (808) 974-4571

ATTORNEYS FOR THE DEFENDANT

IN THE FAMILY COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff, vs. STEPHEN PAULMIER, Defendant.	**CASE. NO.: FCCR-14-1-0101** ABUSE OF FAMILY OR HOUSEHOLD MEMBER HRS § 709-906(1); DEFENDANT'S THIRD AMENDED WITNESS LIST; CERTIFICATE OF SERVICE HONORABLE JUDGE PRESIDING TRIAL DATE: 8/27/14 HEARING TIME: 1:30 p.m. COURTROOM 3C

DEFENDANT'S THIRD AMENDED WITNESS LIST

Defendant, STEPHEN PAULMIER, by and through counsel, Deputy Public Defender JUSTIN C. LEE, pursuant to Rules 2.2 and 16 of the Hawaii Rules of Penal Procedure, hereby presents Defendant's Witness List for trial and gives notice to the State of Hawaii that Defendant intends to call these persons to testify in his defense.

Defendant may rely on the following witnesses for trial:

1. Defendant STEPHEN PAULMIER
2. DANNY LI – 808-[redacted] (H); 808-[redacted] ©; Defendant will testify that he changed the locks at the Puueo Street residence.

3. TOMAS BELSKY – 808-[redacted]; [redacted], Hilo, HI 96720; Defendant will rebut testimony of the Complaining witness. Witness was present in the courtroom during earlier testimony. Witness was not previously disclosed or contemplated but became necessary due to the unanticipated testimony of the complaining witness.

4. CINDY TAYLOR – 808-[redacted]; Potential Character Witness

5. Any witness necessary to introduce evidence.

6. Any witness listed or mentioned in discovery provided by State of Hawai'i in the above-referenced case.

7. Any other police personnel on scene or assisting with the investigation of the instant case.

8. Any rebuttal witnesses.

DATED: Honolulu, Hawai'i, February 17, 2015.

OFFICE OF THE PUBLIC DEFENDER

JOHN M. TONAKI
PUBLIC DEFENDER

BY: _____

JUSTIN C. LEE
DEPUTY PUBLIC DEFENDER
ATTORNEYS FOR THE DEFENDANT

APPENDIX 17

Defense's Memorandum in Opposition to State's Motion in Limine
filed February 17, 2015
in the Family Court of the Third Circuit

OFFICE OF THE PUBLIC DEFENDER
JOHN M. TONAKI 3915
PUBLIC DEFENDER
BY: JUSTIN C. LEE 9908
DEPUTY PUBLIC DEFENDER
275 PONAHAWAI STREET, SUITE 201
TELEPHONE: (808) 974-4571
FACSIMILE: (808) 974-4574

ATTORNEYS FOR THE DEFENDANT

IN THE FAMILY COURT OF THE THIRD CIRCUIT
HILO/PUNA DIVISION
STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff, vs. STEPHEN PAULMIER, Defendant.	Case No. FC-CR NO. 14-1-0101 ABUSE OF FAMILY OR HOUSEHOLD MEMBER (HRS § 709-906(1)) DEFENSE'S MEMORANDUM IN OPPOSITION TO STATE'S MOTION IN LIMINE; DECLARATION OF COUNSEL; MEMORANDUM OF LAW; CERTIFICATE OF SERVICE HON. JUDGE LLOYD X. VAN DE CAR HEARING DATE: February 25, 2015 HEARING TIME: 1:30 p.m.

DEFENSE'S MEMORANDUM IN OPPOSITION TO STATE'S MOTION IN LIMINE

Defendant, STEPHEN PAULMIER, by and through counsel undersigned, submits to this Honorable Court a Memorandum in Opposition to State's Motion in Limine, filed on February 2, 2015. This memorandum is submitted pursuant to Hawaii Rules of Penal Procedure (HRPP) Rule 47. This memorandum is supported by the attached Declaration of Counsel, records and files herein, and upon such further evidence and argument adduced at the hearing on this matter.

DECLARATION OF COUNSEL

The Office of the Public Defender represents STEPHEN PAULMIER in the above-entitled matters and, upon information and belief, I declare the following:

1. I, JUSTIN C. LEE, am the Deputy Public Defender assigned to represent Defendant in the above-captioned case.
2. Trial began on August 27, 2014.
3. The testimony of the complaining witness (CW) in this case, MERLI PAULMIER concluded on November 26, 2014.
4. Based upon the testimony of Ms. Palmier, Defendant found it necessary to call TOMAS BELSKY to rebut some of Ms. Paulmier's claims.
5. As it was not anticipated that Ms. Paulmier would deny, refute, and/or possess a different recollection of events, Mr. Belsky was heretofore not contemplated as a witness.
    1. The events in question regard (1) the circumstances of Ms. Paulmier's relationship with Defendant prior to their marriage; and (2) the circumstances under which Defendant and Ms. Paulmier reconciled shortly before the date in question.
6. Mr. Belksy's testimony would be offered to rebut Ms. Paulmier's testimony in regards to these above-mentioned circumstances.
7. Mr. Belsky's testmony would be offered to attack Ms. Paulmier's credibility in regards to these above-mentioned circumstances.
8. Denying Defendant with the opportunity to present evidence to rebut the State's witnesses and/or question their credibility would infringe upon Defendant's right to compulsory process as provided in the Hawaii State Constitution, Article I, § 14 and the Sixth Amendment to the United States.

9. I declare under penalty of law that the foregoing is true and correct to the best of my knowledge and belief.

DATED: Hilo, Hawai`i, February 17, 2015.

OFFICE OF THE PUBLIC DEFENDER
JOHN M. TONAKI
PUBLIC DEFENDER

BY _____
JUSTIN C. LEE
DEPUTY PUBLIC DEFENDER
ATTORNEYS FOR THE DEFENDANT

MEMORANDUM OF LAW

I. DEFENDANT MAY CALL WITNESSES TO REBUT THE CLAIMS OF THE STATE'S WITNESSES

A. PARTIES UNDER NO OBLIGATION TO DISCLOSE REBUTTAL WITNESSES

Rule 16(b)(1)(i) of the Hawaii Rules of Penal Procedure (HRPP), governing disclosure of matters in the Prosecution's possession, as well as Rule 16 (c)(2)(i), HRPP, governing disclosure of materials by Defendant, requires disclosure of information only with regards to witnesses each side intends to call in presentation of the evidence in chief.[1]

In State v. Cordeiro, Defendant claimed that the prosecutor failed to provide him with the names of its rebuttal witnesses. The Hawaii Supreme Court noted that it was not aware of any rule or authority that required said disclosure. State v. Cordeiro, 99 Haw. 390, 427, 56 P.3d 692, 729 (2002).

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[1] Rules 16(b)(1)(i) and 16(c)(2)(i) also require disclosure of information regarding alibi witnesses in accordance with Rule 12.1, HRPP. Such requirements are immaterial in the case at hand.

B. HOW TESTIMONY TO BE REBUTTED IS ELICITED IS IMMATERIAL

In its Motion in Limine, the State claims that the Defense should have known that a rebuttal witness would have been necessary, as the testimony that the Defense seeks to rebut was elicited on cross-examination. While the Defense is flattered by the State's estimation of its prognostic ability, the State's logic in this matter appears to be flawed. Had Defendant questioned the complaining witness (CW) regarding (1) her early relationship with Defendant and (2) her reconciliation with Defendant prior to the incident (the two matters that Defendant seeks to rebut) solely that it may rebut her testimony, the State may have a point. However, that is not the case.

In questioning the CW regarding her early relationship with Defendant, particularly her immigration status and how it was improved by said relationship, Defendant was attempting to elicit a potential motive for the CW to be untruthful regarding the allegations, among other reasons. In questioning the CW regarding their reconciliation just prior to the alleged incident, Defendant was attempting to point out contradictions with the CW's earlier testimony regarding how upset she was Defendant, among other reasons.

Both points in and of themselves were relatively minor. As such, they elicited no cause for concern or need for potential rebuttal. This was especially the case, since (1) another individual -- Tomas Belsky, Defendant's rebuttal witness -- could easily refute CW's claims if she did not testify truthfully; and (2) both points are proximate to the question of whether Defendant is guilty, thus giving little motivation for the CW to lie as to these minor points. However, once contradicted, and viewed in light of the CW's credibility, the necessity to rebut and question the CW's credibility became paramount.

Surely the State is not arguing that Defendant must anticipate every juncture wherein a State's witness may lie, much less notice the State of every witness that could testify to the

contrary. Such a task would be impossible. This may shed light on why neither side as a duty to disclose rebuttal witnesses.

II. DEFENDANT'S RIGHT TO COMPULSORY PROCESS IS TO BE LIBERALLY CONSTRUED, REGARDLESS OF A WITNESS' PRESENCE DURING EARLIER TESTIMONY.

Article I, Section 14 of the Hawaii State Constitution states: "In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in the accused favor. ... " Haw. Const. Art. I, § 14.

In State v. Leong, 51 Haw. 581, 465 P.2d 560 (1970), the Hawaii Supreme Court was presented the question of how to reconcile this fundamental right of the accused with the fact that one of the Defendant's witnesses had been present in the courtroom during the trial, even after the witness exclusionary rule had been invoked.

In arriving at its conclusion that the Defense witness should be permitted to testify, the Court noted that "[t]he general principle of law is that in construing constitutional provisions guaranteeing fundamental rights, they are to be liberally construed so that the purpose to be attained, or the evil to be remedied, is accomplished." Id., at 584, 465 P.2d at 562. With regards to the purpose to be attained, the Court stated:

> What right of an accused is protected by the provision? To hold that the provision merely gives an accused the right to the issuance of subpoenas to compel attendance of witnesses who may testify in his favor, but that it does not entitle an accused to the testimony of witnesses so subpoenaed because of their actions or behavior in court, we believe, would make this right hollow and worthless.

Id.

With regards to the evil to be remedied, the Court noted that "[t]he purpose for the order excluding a witness from a courtroom is to prevent him from listening to testimony of other witnesses and then "shaping" or fabricating his testimony accordingly." Id., at 583, 465 P.2d at

562 (citations omitted). However, the Court then went on to state that the stated purpose of excluding witnesses appeared to "not be a very sound reason because there are other ways in which testimonies may be 'shaped' or fabricated." Id.

Thus, on the balance, the Hawaii Supreme Court held that "even accepting the soundness of the reason for the [witness exclusionary] rule on its face value", the trial court erred in invoking the order to prevent a defense witness from testifying in this case. Id.

Defendant's rebuttal witness, Tomas Belsky, should be allowed in the instant case. Defendant's right to present a defense, including his right to compulsory process to call witnesses in his favor, is paramount.

III. THE COURT'S REMEDIES ARE LIMITED IN CRIMINAL CASES.

While the Hawaii Supreme Court has held that the appropriate sanction is discretionary with the Court where the witness exclusionary rule has been invoked and clearly violated, the Court has placed an important caveat on said discretion:

> The court's discretion is limited in a criminal case if the rule has been violated by a defense witness. Because of sixth amendment concerns and the dictates of article I, § 14 of the Constitution of the State of Hawaii, we have held it to be error for a trial court to refuse to permit a defense witness to testify as a penalty for violating the rule.

State v. Sequin, 73 Haw. 331, 338, 832 P.2d 269, 273 (1992) (citations omitted).

Furthermore, the proposed remedy in Leong -- contempt proceedings -- would be inappropriate, as Mr. Belsky was not aware that he would be called as a rebuttal witness in earlier proceedings. As discussed *supra*, the need to call Mr. Belsky was not anticipated, as it was not expected that the CW's credibility would need to be rebutted to such an extent.

While it would appear clear that refusal to permit Defendant's rebuttal witness to testify is NOT the appropriate remedy, the State would still be able to cure any concerns it may have as to Mr. Belsky's presence during prior proceedings through cross-examination.

E. CONCLUSION

Based upon the foregoing memorandum and authorities cited, Defendant respectfully requests that the State's Motion in Limine, filed February 2, 2015, be denied.

DATED: Hilo, Hawai`i, February 17, 2015.

OFFICE OF THE PUBLIC DEFENDER
JOHN M. TONAKI
PUBLIC DEFENDER

BY: _____
JUSTIN C. LEE
DEPUTY PUBLIC DEFENDER

ATTORNEYS FOR THE DEFENDANT

APPENDIX 18

Defendant-Appellant Opening Brief Appeal Filed From the Judgement,
Guilty Conviction, and Sentance Entered on April 1, 2015
filed on December 7, 2015
in the Intermediate Court of Appeals

CAAP-15-0000381

IN THE INTERMEDIATE COURT OF APPEALS

STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee	FC-CR No. 14-1-0101
	APPEAL FILED FROM THE JUDGMENT, GUILTY CONVICTION AND SENTENCE ENTERED ON APRIL 1, 2015
vs.	FAMILY COURT OF THE THIRD CIRCUIT
STEPHEN L. PAULMIER, Defendant-Appellant	HONORABLE LLOYD VAN DE CAR

OPENING BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF RELATED CASES

APPENDIX "A"

(SERVICE BY NOTICE OF ELECTRONIC FILING GENERATED BY JEFS)

GARY C. ZAMBER 8446
Attorney at Law
21 Waianuenue Ave. Suite 3
Hilo, Hawai'i 96720
Telephone: (808) 969-3600

Court-Appointed Attorney for
Defendant-Appellant Stephen L. Paulmier

SUBJECT INDEX

TABLE OF AUTHORITIES

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CAAP-14-0000454

IN THE INTERMEDIATE COURT OF APPEALS

STATE OF HAWAII

STATE OF HAWAII, Plaintiff, vs. STEPHEN L. PAULMIER, Defendant.	3DTC-12-000266 APPEAL FILED FROM THE JUDGMENT, GUILTY CONVICTION AND SENTENCE ENTERED ON APRIL 1, 2015 FAMILY COURT OF THE THIRD CIRCUIT HONORABLE LLOYD VAN DE CAR

OPENING BRIEF OF DEFENDANT-APPELLANT

I
STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On 3/23/2014, Defendant-Appellant Stephen L. Paulmier was arrested and charged with the violation of HRS 709-906(1), Abuse of Family or Household Members. The State filed its Complaint on 3/24/2014[Record on Appeal ("RA"): p 7]. The Bail Bond Receipt, Acknowledgment and Notice to Appear ($1,000 paper bond) filed by Surety on 3-31-2014, gave standard terms and conditions for Defendant to remain in State of Hawaii, unless prior agreement from the Court, not commit any crimes, and attend all court hearings in person [RA pp. 8-10].

The Defendant-Appellant filed Motion to Amend Terms and Conditions of Bail on 5-12-2014, requesting permission to travel and attend son's wedding. [RA pp. 12-15].On 5-28-14 Judge Van De Car grants Defendant-Appellant leave to travel to son's wedding, Order filed 6-6-2014 [RA pp. 20-21].

Defendant filed Notice of Intent to Provide Discovery pursuant to Rule 16(E) on 5/12/2015. On 6-27-2014 State of Hawaii files Motion for Protective Order regarding Public Defender's motion to provide discovery [RA pp. 23-28]. On 7-1-2014, Defendant Paulmier files Notice of Intent To Rely Upon Other Crimes, Wrongs, Acts [RA 37-39].

Defendant-Appellant Stephen Paulmier's bench trial begins on 8/27/2014. Trial is continued to 11/26/2014, and again until 2/25/2015. The State of Hawaii files Motion in Limine No. 1 on 2/2/2015 regarding prevention of calling particular witness [RA pp. 59-64].

Defendant Paulmier filed Motion to Dismiss Complaint for Violation of Due Process and Speedy Trial on 2/6/2015 [RA; pp 65-77], with a hearing scheduled for 2/25/2015, and Memorandum in Opposition to State's Motion in Limine [RA pp 81-88].

On 3/5/2015 Court files Order Denying Defendant's Motion to Dismiss Complaint filed [RR pp. 91-92]. An Order Denying State's Motion in Limine, was filed by Court on 3/6/2015 [RA pp. 93-94].

Jury-waived trial with Judge Van De Car was held beginning 8/27/2014 [RA2; PP 40-41], continued to 11/26/2014 [RA2; pp. 42-44], continued again to 2/25/2015 [RA2; pp. 45-47], and continued again to 4/1/2015 [RA2; pp 48-42]. Defendant was convicted and found guilty on 4/1/12015 of Abuse Of Family Or Household Member and sentenced to Probation for a term of 2 years, with Special Conditions of all but 48 hours jail stayed upon successful completion. Judgment was filed 4/1/2015 [RA;pp 115-119]. A copy of Judgment is attached herein as Exhibit "A". On 5/14/2015, an Amended Judgment Guilty Conviction and Sentence was filed by the Family Court of the Third Circuit

Notice of Appeal was timely filed electronically with Intermediate Court of Appeals on 4/30/2015, generating CAAP-15-000381 [RA pp. 126-139]. On 5/9/2015, Motion to Remand for Hearing On Motion for Withdrawal on Substitution of Counsel was filed in CAAP 15-0000381 by Public Defender's Office [JEFS; Docket No. 7]. The Intermediate Court of Appeals ("ICA") filed Order for Temporary Remand on 6/19/2015 [JEFS; Docket No. 12; RA2; pp. 29-30].

On 6/9/2015 Defendant Paulmier filed in Third Circuit Family Court his Motion To Reconsider and/Or Amend Sentence [Record on Appeal 2 ("RA2"); pp. 2-10]. Simultaneously filed on 6/9/2015 was Motion For Defendant's Release on Own Recognizance Pending Appeal [RA2; pp. 11-20].

On 7/8/2015, Family Court heard Defendant's Motion for Withdrawal and Substitution of Counsel, and continued the hearing on Motion to Amend or Reduce Sentence and for Reconsideration and Release on Own Recognizance. On 7/28/2015, Family Court of the Third Circuit filed Order Granting Counsel's Motion For Withdrawal and Substitution of Counsel, appointing undersigned counsel [RA2; pp. 31-32].

On 8/8/2015 the Jurisdictional Statement was filed [JEFS; Dkt # 32]. On 8/19/2015, the Family Court of the Third Circuit granted Mr. Paulmier's motion for Release on Own Recognizance, staying pending Appeal.

On 9-1-2015, a Rule 29(a) telephonic Clerks Extension of Time was sought and received, extending due date for filing Opening Brief from 9-8-2015 to 10-8-2015, Notice of Clerk's Extension of Time for Briefs was filed [JEFS; dkt # 37].

On 10-1-2015, a Motion for Correction and Supplementation of Record on Appeal and Request for Additional Time to Request Transcript was filed, as successor-counsel discovered no transcript had been ordered for the final day of Mr. Paulmier's bench trial. This request was denied as moot, due to Transcript being filed with JEFS on 10-2-2015.

On 10-1-15, Defendant-Appellant filed a Motion for Extension of Time to File Opening Brief [JEFS; Dkt# 42], which was granted on 10/7/2015, extending the due date to file Opening Brief to 11/8/2015 [JEFS; Dkt # 46]. A second Motion For Extension of Time to File Opening Brief was filed on 10/28/2015 [JEFS; Dkt# 50], and this Honorable Court approved the extension to 12/8/2015, with no further extensions barring extraordinary circumstances [JEFS; Dkt# 52].

Defendant-Appellant is not in custody, bail was cancelled and his sentence is stayed pending appeal after hearing of Motion for Defendant's Release On Own Recognizance Pending Appeal filed June 9, 2015 [RA2; pp2-10].

II

EVIDENCE AT TRIAL

THE STATE'S CASE

The Defendant was orally arraigned on the first day of trial, 8-27-14:

The State called Merli Alves Paulmier (complainant), Michael Thomas, and officer Chere Rae (Lyons) Kalili as witnesses.

MERLI ALVES PAULMIER

The State called the complainant Merli Alves Paulmier on [TR 8/27/15; pg 11; line 24-25 Ms. Paulmier testified she had been married to Mr. Paulmier for three years, they had lived together [TR; 8/27/15; pg 18, lines 1-18] but were separated for almost 2 weeks [TR; 8/27/15; pg 21, line 20], or but separated for almost 3 weeks [TR; 8/27/15, pg 22, line 7]. She testified that on 3/23/14 at her home in downtown Hilo, Hawaii, Ms. Paulmier was present with Mr. Paulmier [TR; 8/27/14, pg 18, lines 24;]. She testified that she was going to spend time with Mr. Paulmier at the beach [TR 8/27/15; pg 20, lines 8-9] but he decided he was going to go alone [TR 8/27/15; pg 21; lines 5-7]. Ms. Paulmier testified she was disturbed [TR 8/27/15; pg 21; line 8] and felt disrespected TR 8/27/15; pg 21; line 13-14].

The witness testified that she felt Mr. Paulmier was vocally aggressive [TR; 8/27/15; pg 19, lines 21-23]. When asked by the Prosecutor to describe what he "looked like" [[TR; 8/27/15 pg 22, lines 19-22], she stated that Mr. Paulmier was speaking loudly and stated that he did not wish to live away, he wished to resume living in the marital house [TR; 8/27/15; pg 23, lines 1-3]. She further testified she she was scared by his facial expression and body movements [[TR; 8/27/15; pg 22, lines 23-25] pg 23 lines 5-6]. Ms. Paulmier testified that Mr. Paulmier began to change the lock to the front door of the house that she had previously changed [TR; 8/27/15; pg 23, lines 7-14]. She then tried to insist that he leave the house and not destroy the lock [TR; 8/27/15; pg 24, lines 7-8].

As Mr. Paulmier was apparently working to change the lock, Ms. Paulmier testified she physically blocked him from doing so by putting her hand in the way [TR; 8/27/15; pg 24, ln 16-18; pg 25 ln 1-3]. She admitted she had an unreasonable, "stupid" fear around why he was changing the lock, testifying: " I don't know why it came through my mind that he was trying to lock me in the house..."[TR; 8/27/15; pg 24, ln 8-9] "And I put the hand in the locking door trying to impeach [sic] him to do what he was trying to do. I was not understanding what he was doing, just afraid that he was trying to lock me inside the house, uh, what is stupid but I --the fear I had and when I did it he -- he throw me on the floor" [TR; 8/27/15; pg 24, ln 16-21].

The witness testified she did not make contact with Mr. Paulmier [TR; 8/27/15; pg 25, lines 22-24] but that he supposedly then just turned and threw her to the floor [TR; 8/27/15; pg 25, ln 6-7] and that she felt "extreme pain" in her right shoulder [TR; 8/27/15; pg 27, ln 22-23] where she already had prior problem [TR; 8/27/15; pg 28, ln 2-3]. She stated that when she tried to leave the house he again threw her to the floor [TR; 8/27/15; pg 29, lines 1-6] allegedly hitting

her head causing more pain [TR; 8/27/15; pg 32, lines 1-3]. Finally, the witness testified she tried to leave the house again whereupon Defendant allegedly pushed her with his left arm to the back of the kitchen and immobilized her there [TR; 8/27/15; pg 34, lines 4-9].

The State offered Exhibit "2" which was admitted by the court [TR 8-27-14; pg 47,ln 17-18] a photograph of the Complainant as a "fair and accurate depiction" of how the witness looked on the day of the incident after it occurred, [TR 8/27/14; pg 46, ln 2-25; pg 47,ln 17-18]. State's Exhibit "3" - a picture showing the middle top portion of the witnesses's chest showing a "lesion" was also admitted. [TR 8/27/14; pg 48-50]. Ms. Paulmier stated she didn't have the lesion before [TR 8-27-14; pg 51, ln 17-19]. State's Exhibit "4," a picture of Ms. Paulmier's head showing where she [TR 8-27-14; pg 47,ln 17-18]had her "head bump" [TR 8-27-14; pg 53, ln 14-16] was admitted by the court [TR 8-27-14; pg 56,ln 20-21].

State's Exhibit "5" - another picture of the complainant's head where she stated she had the "head bump" was admitted [TR 8-27-14; pg 59, ln 3], as was State's Exhibit "6," a picture of the Complainant's right arm, where she testified she hit her right shoulder upon the floor was also admitted [TR 8-27-14; pg 61, ln 5-6]. State's Exhibit "7," a picture of the kitchen [TR 8-27-14; pg 62, ln 21] was admitted by the court, [TR 8-27-14;pg 63, ln 24-25]. Exhibit "8" another picture of the kitchen from another angle purportedly showing where complainant had been pushed and held by Defendant [TR 8-27-14; pg 65-66] and also purporting to show where she had struck the floor [TR 8-27-14; pg 67,ln 20-25] was admitted [TR 8-27-14; pg 67,ln 13].

On cross-examination by Defense counsel whether the memory of the witness was better right after the incident happened, Ms. Paulmier stated "maybe" [TR 8-27-14; pg 6 ,ln 15-17]. Upon further examination of the witness about facts she testified to and agreed were important details that she did not inform police of, she indicates "I hope I can do it, but I -- I'm not sure I remember details because details, the emotion, the fear I was experiencing ---." [TR 8/27/2014; pg 72, ln13-15].

MICHAEL THOMAS

In November, 2015, three months from the initial trial date, the case reconvened and after continued cross-examination of Ms. Paulmier by the defense, the prosecution called Michael Thomas to testify [TR 11/26/2014; pg 55] Mr. Thomas is the neighbor in the duplex where the Paulmier's resided [*Id.* pg 56, ln 4-5]. He described the March 23, 2014 incident, recalling that he was sleeping that morning [*Id.* pg 57, ln 4-5] a scream of his name [*Id.* ln 7-8] he testified he

called the police and walked into the Paulmier house as the door was open [*Id.* pg 57, ln 25 to pg 58 ln 1-9]. He stated he recalled Mr. and Ms. Paulmier in the kitchen when he arrived and then Mr. Paulmier went on to continue working on the keyhole in the door [*Id.*. pg 58, ln 15-19, pg 59 ln 3-5]. Mr. Thomas testified that Mrs. Paulmier had a bump on her head that he could see [*id.* pg 63, ln 14-16] and that he took pictures of it some days later as it had enlarged [*Id.* ln 21-22].

On cross-examination Mr. Thomas testified that he recalled previously having to help Ms. Paulmier when she was locked out of the house [*Id.* pg 68, ln 1-25]. He further testified that on the date of the incident in question, he observed that it appeared the door handle had been messed with [*Id.* pg 69, ln 21-22] and that he did not notice any extra door handles that day [*Id.*. pg 70, ln 1-9].

CHERE RAE LYONS (KAILILI):

The prosecution then called the police officer who responded to the scene, Chere Rae Lyons (Kailili) [TR 11/26/2014; pg 71] who testified Merli Paulmier showed the officer places where she claimed injury [TR 11/26/2014; pp. 74-75]. The officer testified as to the photographs the state introduced as exhibits ## 2-8 and showing an abrasion upon the complainant's chest she herself noted [*Id.*, pg. 78, ln. 17-18]. The officer stated that she herself did not see any visible injury to the complainant's head as claimed. [TR 11/26/2014; pg 80, ln 9-12].

THE DEFENDANT'S CASE

The court heard and considered the testimony of defense witnesses Daniel Li and Stephen Paulmier. Tomas Belsky had been called as a witness and testimony taken [TR 4/1/2015; pp 4-38] but was then stricken in entirety by agreement without reason stated upon the record [TR 4/1/2015; pg 39; ln 3-7].

DANIEL LI

The defense called Daniel Li [TR 11/26/2014; pg. 92]. Mr. Li had been asked by Ms. Paulmier to fix the lock on the residence door [*Id.*, ln 19-21], that the key would not work from the outside but the lock was working fine from the inside [*Id.*, pg. 94, ln 3-11].

Mr. Li testified that he had known Ms. Paulmier for about three years [TR 11/26/2014; pg 95, ln 9-10], that he had been approached once by another if he would marry her "for immigration purposes" [*Id.*, pg. 96, ln 7-17]. When about Ms. Paulmier's reputation in the community for truthfulness [*Id.*, pg.96, ln 24 to Id., pg. 98, ln 6], Mr. Li testified "Well, I've

heard some people say that, you know, she's not very truthful" [*Id.*, p. 98, ln 7-8] and further, "Well, at this point I would -- the things that she would tell me, I would probably have to verify. I -- I wouldn't take it at -- face value" [*Id.*, pg. 99, ln. 1-3].

STEPHEN PAULMIER

The defendant Stephen Paulmier commenced testimony on 11/26/2014 [TR 11/26/2014; pg 102] and continued again three months later on 2/25/2015 [TR 2/25/15; pg 28]. Mr. Paulmier testified he and Ms. Paulmier met through mutual friend, Tomas Belsky [TR 11/26/2014; pg 103, ln 10-11] and that they lived together starting 2011 [*Id.*, pg. 104, ln 14] and were married in May, 2012 [*Id.*, pg. 104, ln 15-16].

Mr. Paulmier testified that over the course of relationship he and Ms. Paulmier were "both very passionate people" and "experienced problems [*Id*; pg 105, ln 11-12], had "argued a lot," [*Id*; pg 105, ln 15] but that he had never hit Ms. Paulmier [*Id.*, ln 20]. He further testified that they would "get in each other's face sometimes" [*Id*; ln 25] and that Ms. Paulmier had previously touched him inappropriately [*Id*; pg. 106, ln 1-10].

As regards the incident of March 23, for which the matter was charged and before the court, Mr. Paulmier testified he and Ms. Paulmier were having an argument regarding accusations of Ms. Paulmier and denials of Mr. Paulmier [*Id*; pg 108, ln 15-17] and regarding the fact that both of them shared the lease and that he deserved to have a key to the home [*Id.*, ln 18-20] as he only had a key to an old lock that was no longer in the door [*Id.*, pg 109, ln 6-7] whereupon Ms. Paulmier told him to put the old lock back in the door [*Id.*, ln 7-8] despite the fact both of them knew it was inoperable [*Id.*, ln 9-10]. The discussion over the lock turned belligerent. [*Id.* pg. 110, ln9-14]. The witness testified further that Ms. Paulmier went from sitting down to following him [*Id;* ln 17-19] and as he was bent over and starting to work on the lock with door halfway open [*Id;* pgs. 109 ln 22 - pg. 110, ln 4], Ms. Paulmier came at him. "At this point, out of the corner of my eye, I saw Merli come at me. And she threw her entire weight on my hands as they were holding the lock and the -- and the screwdriver and -- and, um, removing the, uh the screws." [*Id.*, pg. 110, ln 5-8].

Mr. Paulmier testified he had previously moved out of the household and "determined to obey her -- her request" [*Id.*, pg 111, ln 11-12] not to "come near the house" [*Id.*, ln 11] for two or three weeks [*Id.*, ln 16-17] until he received a text from Merli asking "Is this enough," [Id., pg 112, ln 9] in the context of staying apart [*Id.*, ln 18], "[a]nd she then came over to -- to Tomas's

house and implored me to come back, sitting in my lap, kissing me on the lips, in front of the household" [*Id.* 11-13] and specifically asking him to come back to her [*Id.*, ln 20-22]. The evening he was returning home with Ms. Paulmier he brought up the lock with her but she didn't want to discuss it and he did not press the issue [*Id.*, pg. 113, ln 6-11]. The next morning the Paulmiers went to a round-table discussion together [*Id.*, ln 19-21]. Mr. Paulmier had mentioned a job estimate he was going to give later that day for a female whom he could only recall the first name of and that Ms. Paulmier became very jealous [*Id.*, pg. 114, ln 4-20]. He noted in testimony that she "had expressed jealousy many times. And -- and in fact what -- this talk about the prostitution was one a those jealous, it seemed to me, irrational things." [*Id.* pg 114, ln 25 - pg 115, ln 2]. Though Ms. Paulmier expressed desire to go to Kona and Mr. Paulmier stated it was a possibility, there were no definite plans [*Id.*, pg. 115, ln 8-14], and Mr. Paulmier did not wish to bring Ms. Paulmier to the potential job as he was going to negotiate a price and felt it difficult to do so with a third party present [*Id.*, pg 115, ln 19-25 - pg 115, ln 1].

The court recessed 11/26/2014 for further proceedings and appeared to accommodate the vacation schedule of the prosecutor in determining the next trial date some three months later.

THE CLERK: (Inaudible.)
MS. WAN: I will just note --
THE COURT: Hmm?
MS. WAN: -- that I --
THE CLERK: February?
MS. WAN: -- I do have a vacation coming up at
the end of January for the first two weeks of February.
THE COURT: All right.
THE CLERK: Okay.
THE COURT: So we won't do it immediately on the
first day you return, so maybe the middle or late --
THE CLERK: February 25th --
THE COURT: February 25th?
THE CLERK: -- or February 8th?
THE COURT: February 25th, 1:30?
MS. WAN: That should be fine.
THE CLERK: 25th?
MR. LEE: No sooner, Your Honor?
THE COURT: Um, I'm afraid that if we set it
sooner, one of the three of us will become unavailable, and
that won't work for anyone. So February 25th.

[TR; 11/26/2014; pg 118, ln 8-25, pg 119, ln 1-3]

At the commencement of the third of four days of trial, 2/25/15 (continued from 8/27/14 to 11/26/14 to 2/25/15), testimony on defendant's motion to dismiss for violation of speedy trial and due process rights was heard. The court permitted the taking of testimony and argument for evidentiary purposes on the motion prior to making its ruling [TR 2/25/2015; pp 4-23].

Relevant testimony of Stephen Paulmier upon questioning of his counsel is as follows:

Q ... when you made your decisions with regards to trial, particularly your decision to, uh, waive your right to a jury trial, were you aware that waiving that right would, uh, potentially have the effect of delaying your trial if we were not able to finish on the first day?
A Actually quite to the contrary, I thought that, uh, I would have a – a quicker disposition of my case, because I wouldn't have to pick a jury. I assumed that the calendar, uh, once my trial – trial started, would be the same as if it was a jury trial. ...
Q What informed you of that opinion?
A My experience in another state, uh, where – where the practice was very clear that – that, uh, once a trial began, it had priority as far as the calendar went.
Q Okay. And this knowledge affected your decision with regards to the type a trial you would have?
A Yes.
Q Okay, and how has that passage of time since your trial commenced in August affected you from an emotional standpoint?
A Well, it's been very stressful, of course, and – and I've, uh, uh, it's – it's been continued twice actually and – and so the – the further away from the actual time that it happened and – and the more, uh, time that goes past, uh, the more distressing it is, um, for me and for my concern for the other people involved.
[TR 2/25/15; pg 5, ln 6 - pg 6, ln 9]

Defense counsel then asked:

Q Okay. And how has it affected you with regards to your reputation in the community?
[TR 2/25/15; pg 6, ln 10-11] whereupon Ms. Wan objected as to relevance [*Id* at ln 12-13].

Defense counsel Mr. Lee argued the passage of time affects the defendant's ability to have a fair trial and the community's view of the defendant and creates inconvenience and prejudice he may suffer during disposition - including the reputation in the community. [*Id* pg 7-8]. Defense counsel specifically argued:

> ... the reason why there is a right to a speedy trial is to ease a defendant of the burdens imposed, uh, during, uh, pending disposition of that case. So during disposition of that case, because time has been dragged on for so long, uh, his right to a speedy trial has been compromised and affected Mr. Paulmier, which I think was not intended and, in fact, intended to prevent through this right of a speedy trial. So if the writers of the constitutions were trying to in a – by affecting the right to a speedy trial, protect a defendant from the, uh, inconveniences and the prejudice he may suffer during

disposition, his reputation in the community would be one a them. [TR; 2/25/2015; pg 7, ln 24 - pg 8, ln 10].

The Court overruled the objection of Ms. Wan [*Id*. pg 8, ln 19]. Mr. Paulmier testified further, then, as regards how his reputation had been affected:

A Uh, I've been contacted by a number of people in the intervening period about approaches that have been made to them by, uh, other people regarding, uh, my reputation in the community. Time – the time has been spent, uh, in – in excess of – of the initial start of the trial by other people to disparage my reputation in the community and – and, um, of course I would – I want to get the trial through as quickly as possible so that that can be, uh, that – that – that – that no longer can happen. [TR; 2/25/2015; pg 9, ln 2-11] (emphasis added).

Q Uh, if you knew of the delay that would, um, have occurred would -- did, uh, excuse me. The delay -- if you knew of the delay, would that have affected your decision to waive your right to a jury trial?
A Without a doubt.
[Id., pg. 11, ln 9-13 (emphasis added)]

Cross-examination
Q Do you have an attorney?
A Yes.
Q For the abuse charges that have been filed against you?
A Yes.
Q Okay. And you were, in fact, appointed a public defender?
A That is correct.
Q Okay. And, a public defender has appeared with you starting from May 7th, 2014?
Objection, relevance. Overruled.
A Yes.
Q Okay. And at that point in time, you decided to waive your jury trial right?
A That's correct.
Q Did you get to talk to your attorney before that court date?
A Yes.
Q Okay. And you discussed your options between a bench trial and a jury trial with your defense attorney?
A Yes.
Q And that would include time?
A No. That wasn't part of the discussion, time. Except in that – well, if I may, I – I – I would like to, um, the – the word "time," of course, is a very broad category and – and –
Q ... So when you talked about the differences between a jury trial and a bench trial, did you talk with your attorney about the possibility that it would not finish within the same day?
A Um, well, with relation to a jury trial, yes.
Q And with relation to a bench trial?
A We did not – we did not go over a bench trial and dif – as different from a jury trial in that way. We – we – my understand was that – that – that what – what went for a jury trial, as far as time went, went for a bench trial.

Q I'm sorry, I don't quite understand. Are you saying it's the same amount a time, or are you saying one is longer than the other?
A I'm saying that my understanding was that there wasn't any difference. Except for picking a jury.
Q Okay. So are you trying to argue now that you had ineffective counsel in consulting and explaining to you the difference between a bench trial and a jury trial and the time that it would consume?
A I'm not trying to argue with you at all, counsel.
Q Well, it appears that you're providing this motion saying that you do not – you had no idea that a bench trial would not be concluded within the same day. And therefore necessitate continuances.
would object to the
A No, I don't think that's what I'm saying at all
Q So what are you saying?
A I'm trying to answer your question.
Objection, improper form.
Court My understanding is that, based upon his prior experiences, whatever they might be, he concluded that a jury – excuse me, a bench trial would be a one-day affair. That it would conclude on the day that it began. And, frankly, because of that assumption, because a that belief, um, that issue was not discussed when discussing his right to a jury trial or waiving a jury trial with his attorney. And I – Mr. Lee, I don't – and I'm not attempting to invade the attorney-client privilege, I'm just explaining to you the impression, uh, the belief that I've formed listening to the questions and answers that were provided here.
...
Q Uh, Mr. Paulmier, do you not agree at least that we have, on every hearing that we have met for this trial date, testimony has been provided, and evidence has been provided at each and every hearing?
A I'm sorry, do I agree with that statement, are you saying?
Q Yes.
A Testimony has been provided at each, yes.
Q Okay. And, at this point in time, the trial has not concluded?
A That's correct.

Redirect by Mr. Lee
Q Uh, Mr. Paulmier, was it your impression that trial would, um, finish in one day?
A No.
Q Okay. And if trial did not finish in one day, what was your, um, belief as to the disposition of your trial?
A That room in the calendar would be made appropriately.
Q Okay. But, um, with regards to the delay that you suffered between August and November and then from November into February, was that anticipated?
A No.
[TR 2/25/15; pg 11, ln 18 to pg 15, ln 14-23 (Emphasis added)]

Defense counsel's further argues Mr. Paulmier has twofold rights, one would be right to a speedy trial, the other right to a fair trial, speedy trial in regards to the delays suffered by

Defendant and fair trial as regards prejudice suffered emotionally and damage to his reputation [*Id.* pg 16, ln 14-23] including the effects of time it would have upon the fact finder [*Id.* ln 24 - pg 18, ln 1]. Counsel argued the motion contained additionally as regards prejudice, emotional damage, and damage to reputation [*Id.*, ln 20-23] and that "a similar delay would not occur of six months between evidentiary portions in a jury trial, because of the blunting that would have upon a jury's ability to determine facts, as well as to, uh, recall and make determinations as to the credibility of witnesses" [*Id.* ln 2-7].

The prosecutor then argued that "the state would just note that the prejudices that the defense is putting forth before this court is the same prejudice that the state and its -- the state's witnesses also face. So, Your Honor, there is no difference." [*Id;* pg 20, ln 19-23].

The motion was then denied with the judge stating his reasoning on the record:

> THE COURT: Thank you. All right. With regard then to the motion, uh, the court finds that, uh, each side, um, has been, even though the -- this, well, certainly, um, this trial has taken more than a day, it's the court's goal in every case to conclude a trial once it starts. The calendars, uh, doesn't permit that. Uh, and as counsel well knows, the reason that matters are set -- more than one matter is set at a time is because frequently those matters go off. And if we weren't setting them that way, then we would have to set each one separately and then, uh, end up with being unable to set trials in a timely manner.
>
> And so while this case has taken some time, it doesn't appear to the court that either side has been prejudiced in the terms of presentation of its evidence. In fact, Mr. Lee, I think you have a motion that I'll hear right after this one is done to add yet another witness, um, to the defense side, a witness that wasn't listed in the beginning, and frankly a witness that presents some issues, because the witness was present in the courtroom, um, during the presentation of some of the evidence.
>
> So, um, I don't see, and I frankly don't hear, either of you arguing that the time that has passed has impeded your ability to present the case you want to present. With regard to its impact on the defendant, um, while I understand that these matters are stressful -- and frankly, Mr. Paulmier, they're stressful for everyone involved -- for your attorney, for the prosecuting attorney, for the court, the court staff, and for the people who come to testify, and even for the people that are here who have, um, an interest in you and an interest in the complaining witness. Um, these are stressful proceedings. And frankly without anything, uh, without anything in addition to your own description of the stress that is being imposed upon you, I find that it is no more than the stress that all of us, uh, experience in the course of a criminal trial.
>
> Were you to bring an expert witness to explain that this has been debilitating stress that has had some impact on you that is, um, unusual and, uh, and would cause you, uh, distress to the point of being unable to participate in your own defense or, uh, engage in the things, uh, that you do every day in your life then the court might have a, uh, a different opinion. The court does not find then that your speedy trial rights have been impaired.

> With regard to a fair trial, uh, Mr. Lee, you're correct, the court, uh, maybe unfortunately, but the court is used to doing trials this way. The court keeps notes. The court has available, as you know, um, transcripts or, even more importantly, because I need to refresh my recollection with regard to what people look like, how they sound, how they act, uh, tapes of these proceedings. So the court makes use of those in order to render its decision. So your motion to dismiss for those reasons is denied.[TR2/25/15 pg 21, ln 15 to pg 23, ln 18]

After the judge ruled on 2/25/2015 the Defense continued direct examination of Stephen Paulmier after the judge denied the Defense Motion to Dismiss for Violation of Speedy Trial and Due Process Rights. The continued direct examination commenced [TR 2/25/2015; pg 28, ln 9] with Mr. Paulmier testifying in recap that when Ms. Paulmier returned from Brazil she had been suspicious of the witness being unfaithful, had kicked him out the house at which time he did not have access to his belongings and that two nights prior to the alleged incident the two reconciled [*id.* pg 28, ln 12-22]. A disagreement ensued about a job he had as she wanted to go and he did not want her to go, at which point Ms. Paulmier became jealous as the client was a woman [*id.* pg 30, ln 6-18].

The discussion turned toward the key and lock in the door that he could not get his personal items as he did not have a key to the door [*id*. pg 31, ln 1-5] and her response that he already had a key to the door [*id,* pg 32, ln 7-8] and again, his testimony that the key he had was to a lock that was not in the door but on the kitchen table [*id*. ln 12-13] to which she told him he knew how to put that lock back and he said he would do so [*id.* ln 13-14]. Mr. Paulmier testified that he interpreted her statement with regards to the old lock as a bluff, that emotions were high, and he would attempt to take her bluff by going to change the lock *[id*. pg 33, ln 8-17] in an effort to "convince her of the unreasonableness of her position" [*id*. pg 33, ln 18-19]. Mr. Paulmier believed his position changing the lock was also more reasonable in that the landlord should have changed the lock so as to have a key as well, and that if he installed the old lock the *** [*id.* pg 34, ln 21-25 - pg 35, ln 1-7].

He further clarified that while he was changing the lock he saw out of the corner of his eye Merli to lunge toward him [*id*. pg 36, ln 17-21]. In describing Ms. Paulmier's actions, " she put the full weight of her body, taking her feet off the ground, on to my -- my forearms as I was bent over" [id. pg 39, ln 6-7] which he described as enough pressure to pull him over [*id*. ln 8-10], that he was concerned about falling and also concerned about Merli falling [*id.* ln 13-14]

such that he bent his knees and pivoted with his hands underneath his weight, and her weight and stood up [*Id*. ln 19-20]. As a result of this he testified that Ms. Paulmier lost her balance [*Id.* ln 25 - pg 40, ln 1]. He testified he lifted her up with his legs in an effort to prevent himself from falling over and prevent her from falling through his arms [*Id*. pg 40 ln 11-16].

Mr. Paulmier testified that he was upset at this point [*id*. pg 41, ln 17-18] though he was not out of control [*Id* pg 42, ln 2-3]. Mr. Paulmier indicated that after she lost her balance, Merli had fallen against some boxes and luggage which were against the wall in the kitchen [*Id.* pg 43, ln 6-8] and then he turned back to the door to work on the lock [*Id.* ln 8-11]. Mr. Paulmier testified that based upon his previous experience with Merli in their relationship that he did not feel that he could do anything to help her [*Id.* ln 18-20, pg 44, ln 1] stating that in his opinion such was the best course of action for the situation such that it would not be harmful to her or to himself [*Id*. ln 2-5].

Mr. Paulmier testified he was very close to finishing the work on the lock when he felt Ms. Paulmier's arms around him and the entirety of her weight upon him [*Id.* ln 9-14], testifying "she grabbed me around my torso, clamping my arms together" *[Id.*, ln 20-21]. He had not seen her coming and in response to his being off-balance he stood up, broke Merli's hold and shrugged her off himself [*Id.*, pg. 45, ln 1-15] whereupon she fell to her bottom and then hit her head on the kitchen floor [*Id.*, pg. 45 ln 9-14].

The remaining testimony of Mr. Paulmier upon cross-examination by the prosecutor centered around defendant's belief the old lock and key were property of the landlord [*Id*., pg. 53, ln 21-22] and prior bad acts (physical altercations involving the complainant) [e.g., *Id.*, pg. 74, ln 11-25 describing she biting him while he driving a car] and further clarification by both parties regarding such instances [*Id.*, pg 82-91]. The court then again suspended proceedings until 4/1/15 [*Id.*, p 92, ln 14-19].

On April 1, 2015, the final testimony of witnesses was held and the trial concluded and oral findings of fact and conclusions of law were issued [TR 4/1/2015]. Tomas Belsky testified but his testimony was stricken in entirety by agreement of the parties [*Id*, pg 39, ln 3-7]. Ms. Paulmier provided additional testimony in effort to rebut prior testimony of Mr. Paulmier [*Id.*, pp 40-78]. The judge orally entered his ruling upon the record and finding the

defendant guilty of the offense as charged and denying defendant's justification of use of force for self-protection [*Id.* pg. 100, ln 3 - pg. 104, ln. 4].

II
STATEMENT OF THE POINTS OF ERROR

1. THE LOWER COURT ERRED IN DENYING MR. PAULMIER'S MOTION TO DISMISS COMPLAINT FOR VIOLATION OF DUE PROCESS AND SPEEDY TRIAL

Defendant, through counsel, filed "Motion to Dismiss Complaint for Violation of Due Process and Speedy Trial" on February 6, 2015. (Atta On February 25, 2015 the court heard testimony from Defendant in support of the motion [TR 2/25/2015; pg 4, ln 1 - pg. 23, ln 20] whereupon the trial judge orally denied the motion (Id. pg. 23, ln 17-18) and filed signed Order denying Defendant's Motion to Dismiss Complaint on March 5, 2015 (RA; pp. 91-92).

On 11/26/2014, the second of four days of trial, and some three months after the commencement of trial on 8/27/2014, when the court again suspended proceedings for a next trial date some three months out again to 2/25/2015, counsel for Mr. Paulmier requested a sooner date [TR 11/26/2014; pg 118, ln 25]. The clerk suggested a date that was not significantly earlier, of 2/8/15 [Id; ln 21], though the prosecutor was scheduled for vacation [Id; ln 13-14].

Defense counsel again made objection after the 2/25/2015 hearing to a further continuance after the court continued again until April 1, 2015 [TR 2/25/2015; pg. 92, ln 14].

2. THE LOWER COURT ERRED BY PROVIDING INSUFFICIENT INFORMATION TO THE DEFENDANT IN ORDER FOR HIM TO MAKE A KNOWING, INTELLIGENT, VOLUNTARY WAIVER OF RIGHT TO JURY TRIAL BY NOT INFORMING DEFENDANT THAT A BENCH TRIAL COULD BE INDEFINITELY CONTINUED

The colloquy between Mr. Paulmier and the court occurred on May 7, 2014 [TR; 5/7/2014, pp 2-6] as follows:

MR. LEE: Morning, Your Honor; deputy public defender Justin Lee on behalf of Steven Paulmier, who is present, to my right. Your Honor, at this time, Mr. Paulmier is prepared to waive his right to a jury trial. Uh, we would ask for a pretrial conference.
THE COURT: All right. Sir, before I can, um, rule on the jury trial waiver, there are some questions I need to ask you. How old are you now?
THE DEFENDANT: 58.
THE COURT: How many years of school have you completed?
THE DEFENDANT: Un, I've completed a college degree.
THE COURT: Excuse me. Can you read and write English?
THE DEFENDANT: Yes, I can.

THE COURT: Are you presently under the influence of drugs, medications, or alcohol?
THE DEFENDANT: No, I'm not.
THE COURT: Are you now or have you ever been under treatment for any mental illness or emotional disability?
THE DEFENDANT: No.
THE COURT: Are you thinking clearly this morning?
THE DEFENDANT: Yes.
THE COURT: l right. Are you waiving your right to a jury trial because someone's threatening you or putting pressure on you?
THE DEFENDANT: No.
THE COURT: Okay. Uh, the charge is abuse. It's a misdemeanor. Carries with it a maximum penalty of a year in jail, and thus you have a constitutional right to a jury trial. Have you discussed that right with your attorney?
THE DEFENDANT: Yes.
THE COURT: You understand that if you had a jury trial, 12 members of the community would be selected to serve as the members of your jury, and those twelve people, not a judge, would decide whether you're guilty or not guilty?
THE DEFENDANT: I understand that.
THE COURT: You understand that you and your attorney would participate in the selection of the members of your jury?
THE DEFENDANT: Yes, I do.
THE COURT: You understand that a jury verdict must be unanimous, in other words, before you could be convicted, every member of that jury would have to conclude, beyond a reasonable doubt, that you're guilty?
THE DEFENDANT: Yes.
THE COURT: You understand that if you waive your right to a jury trial, you will then have a bench trial, where a judge, and not a jury, would determine whether you're guilty or not guilty?
THE DEFENDANT: I understand that.
THE COURT: You understand that if you're found guilty following a jury trial, the maximum penalty you face in the circuit court is the same one-year maximum you face if found guilty in this court?
THE DEFENDANT: Yes.
THE COURT: Do you have any questions about your right to a jury trial?
THE DEFENDANT: Well, uh, one question I have is, will I be arraigned before I -- today?
THE COURT: You, I believe, have been arraigned. I'd have to look at the calendar to see when that occurred.
MR. LEE: Uh, I did speak to Mr. Paulmier, and I spoke to the prosecutor. Um, we would be asking for a reading of the charge, but I was gonna wait till after the colloquy.
THE COURT: That's fine.
MS. WAN: Uh, Your Honor, the state will just note he -- he did receive an oral reading of the charge on March 24th, 2014.
THE COURT: All right. That's what the, uh, minutes reflect, that you were arraigned, um, on that date. Um, I -- I will tell you that if this goes to trial, you will be arraigned once again, before the trial commences. You wish to be arraigned again, and I don't see any reason not to but --
THE DEFENDANT: Will I -- will I get a chance to plea? I mean I'm not -- I'm -- I'm -- will -- will I have an opportunity to plead not guilty?

THE COURT: You --
MS. WAN: Oh, you can do that now.
THE COURT: That -- that -- you have. Just now. Okay.
MS. WAN: Okay.
THE COURT: Um, all right. So, any other questions about your right to a jury trial?
HE DEFENDANT: No, Your Honor.
THE COURT: Understanding those rights then do you still wish to waive your right to a jury trial?
THE DEFENDANT: I do, Your Honor.
THE COURT: The court will find defendant has knowingly, intelligently, voluntarily waived his right to a jury trial. The court will accept that waiver. With regard then to rule 48, Ms. Wan?
MS. WAN: Your Honor, the state's rule 48, at this time, is November 2nd, 2014.
THE COURT: Uh-huh.

Defendant, through counsel, filed "Motion to Dismiss Complaint for Violation of Due Process and Speedy Trial" on February 6, 2015. (Attached as Appendix "A"). On February 25, 2015 the court heard testimony from Defendant in support of the motion [TR 2/25/2015; pg 4, ln 1 - pg. 23, ln 20] whereupon the trial judge orally denied the motion (*Id*. pg. 23, ln 17-18) and filed signed Order denying Defendant's Motion to Dismiss Complaint on March 5, 2015 (RA; pp. 91-92). Mr. Paulmier specifically testified he did not have knowledge that a bench trial would be an extended affair: "Actually quite to the contrary, I thought that, uh, I would have a -- quicker disposition of my case, because I wouldn't have to pick a jury. I assumed that the calendar, uh, once my trial -- trial started, would be the same is if it was a jury trial." [TR 2/25/2025; pg 5, ln 12-16].

III
STANDARD OF REVIEW

A. Conclusions of Law:

Conclusions of law are reviewed *de novo* under the right/wrong standard. In re Doe, 84 Hawaii 41, 46, 928 P.2d 883,888 (1996). The interpretation of a statute is a question of law that we review *de novo*. Similarly, a trial court's conclusions of law are reviewable *de novo* under the right/wrong standard. Under the *de novo* standard, this court must examine the facts and answer the pertinent question of law without being required to give any weight or deference to the trial court's answer to that question. In other words, we are free to review a trial court's conclusion of law for correctness.

B. Clearly erroneous:
A finding of fact or a mixed determination of law and fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding or determination, or (2) despite

substantial evidence to support the finding or determination, the appellate court is left with the definite and firm conviction that a mistake has been made. *Jou v. Schmidt*, 184 P.3d 792, 184 P.3d 817 (2008).

C. Plain error:
Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention to the trial court. *State v. Rodriguez*, 6 Hawaii App. 580, 733 P.2d 1222 (1987); see also, Hawaii Rules of Penal Procedure 52(b); Hawaii Rules of Evidence 103(d).

D. Conduct of Trial in General
The appellate court reviews the validity of a defendant's waiver of his or her right to a jury trial under the totality of the circumstances surrounding the case, taking into account the defendant's background, experience, and conduct. U.S.C.A. Const.Amend. 6; Const. Art. 1, § 14.

E. Estoppel - Nature and Elements of Waiver
"Waiver" is the knowing, intelligent, and voluntary relinquishment of a known right; thus, to determine whether a waiver was voluntarily and intelligently undertaken, the appellate court will look to the totality of facts and circumstances of each particular case. The validity of a criminal defendant's waiver of his or her right to a jury trial presents a question of state and federal constitutional law.... 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. Friedman*, 93 Hawai'i 63, 67, 996 P.2d 268, 272 (2000) (citations and quotation marks omitted). *State v. Baker*, 132 Haw. 1, 5, 319 P.3d 1009, 1013 (2014).

"The only remedy for the violation of an accused's [constitutional] right to speedy trial is dismissal with prejudice" *State v. Nihipali*, 64 Haw,. 65,67, 637 P.2d 407, 410 (1981).

IV
ARGUMENT

THE LOWER COURT ERRED IN DENYING MR. PAULMIER'S MOTION TO DISMISS COMPLAINT FOR VIOLATION OF DUE PROCESS AND SPEEDY TRIAL

The Complaint was filed 3/24/2014 [RA; pg. 7]. Trial commenced 8/27/2014 and concluded 4/1/2015. Mr. Paulmier does not dispute that the trial *commenced* within the 180 days as contemplated by Rule 48 of the Hawaii Rules of Penal Procedure, rather that the trial portion alone was 218 days and the entire time from Complaint to decision after numerous hearings was 374 days.

The Hawaii Supreme Court has noted that delay of 7 months between indictment and service of bench warrant was "presumptively prejudicial" thus adopting the balancing test promulgated by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.

Ct. 2182 (1972), to determine whether a defendant has been deprived of the right to a Speedy Trial. The court weighs four factors on an ad hoc basis: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right to Speedy Trial; and (4) the prejudice to the defendant. Speedy Trial guarantee was designed (i) to prevent oppressive pre-trial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. *State v Almeida*, 54 Haw 443, 448, 509 P.2d 549, 552 (1973). In *State v. Lau*, 78 Haw. 54, 63, 890 P.2d 291, 300 (1995) delays of at least six months were sufficient to warrant the *Barker* inquiry.

In *Almeida*, the court was of the opinion that though oppressive incarceration nor anxiety were suffered by the public charge, the defendant-appellee had alleged by affidavit that his memory of facts in support of his defense had been "substantially dimmed" by the State's delay. [54 Haw 443 at 448, 509 P. 2d 549 at 553].

In the instant case Mr. Paulmier similarly provided substantiation by sworn testimony of anxiety and worry as well as effects to his reputation. When asked specifically about how he has been affected emotionally, Mr. Paulmier testified:

> Well, it's been very stressful, of course, and – and I've, uh, uh, it's – it's been continued twice actually and – and so the – the further away from the actual time that it happened and – and the more, uh, time that goes past, uh, the more distressing it is, um, for me and for my concern for the other people involved.
> [TR 2/25/15; pg 5, ln 6 - pg 6, ln 9]

And in response to how the delay in proceedings has affected his reputation:

> Uh, I've been contacted by a number of people in the intervening period about approaches that have been made to them by, uh, other people regarding, uh, my reputation in the community. Time – the time has been spent, uh, in – in excess of – of the initial start of the trial by other people to disparage my reputation in the community and – and, um, of course I would – I want to get the trial through as quickly as possible so that that can be, uh, that – that – that – that no longer can happen. [TR; 2/25/2015; pg 9, ln 2-11].

On February 6, 2105, Mr. Paulmier filed a motion to dismiss the complaint "on the grounds that there has been a prejudicial lapse of time between the date of the alleged offenses and the disposition of the charges in violation of Defendant's rights to due process of law and speedy trial" (Appendix "A", R1 65). A sworn declaration of Mr. Paulmier's public defender counsel in support of the motion said, in relevant part (R1 66-67):

5. On May 7, 2014, Defendant appeared in court, entered a plea of not guilty, waived his right to a trial by jury, and demanded a jury-waived trial. Trial was set for August 27, 2014.

6. On August 27, 2014, trial commenced.

7. On August 27, 2014, a Brazilian Portuguese interpreter was procured by the Judiciary at the State's request but was not utilized.

8. On August 27,2014, Defense was unable to complete its cross-examination of the State's complaining witness, and trial was continued to November 26, 2014.

9. On November 26, 2014, trial was resumed. Trial proceedings failed to conclude with the Defendant on the witness stand. Trial was continued to February 25, 201[5].

10. Based on the above information, I am further informed and of the belief that:

a. The delay from the commencement of trial on August 27, 2014 until the next scheduled trial date of February 25, 201[5] is six (6) months.

b. The purported reason for delay in disposition is congestion of the Court's calendar.

c. The lengthy delay in disposition of the charges against Defendant has resulted in prejudice to Defendant;

c.i. Defendant has suffered anxiety and emotional distress as a result of the delay through the disruption of employment, drain on financial resources, limitations on his ability to travel, and the attacks on his reputation by the complaining witness in the community during the pendency of proceedings.

c.ii. Defendant's ability to mount a sufficient defense has suffered as a result of the blunting of his ability to effectively cross-examine his accuser.

c.ii.l. Due to the delay, the State has been given the ability to coach its complaining witness between appearances on the witness stand.

c.ii.2. Furthermore, the ability of the fact-finder to assess the credibility of witnesses is blunted by the passage of time.

In support of the motion, Mr. Paulmier's counsel correctly argued, in relevant part (R1 69-70):

Defendant's right to a speedy trial is not satisfied by simply commencing trial proceedings. In order for Defendant's right to a speedy trial to have any meaning, trial must not only commence within a reasonable time, but reach its conclusion in a reasonable time. Otherwise, the effect of continuing trial for excessive periods of time robs Defendant of the right to a speedy trial by delaying disposition... "The [S]ixth [A]mendment to the United States Constitution and article I, section 14 of the Constitution of the State of Hawai[`]i guarantee an accused in all criminal prosecutions the right to a speedy trial. The right attaches the moment a person becomes an 'accused.' In this jurisdiction, 'accused' denotes the point at which a formal indictment or information has been returned against a person or when he becomes subject to actual restraints on his liberty imposed by arrest, whichever first occurs." *State v. Nihipali*, 64

> Haw. 65,67,637 P.2d 407, 410 (1981). The remedy for a violation of a defendant's right to a speedy trial is a dismissal with prejudice.

II. THE LOWER COURT ERRED BY PROVIDING INSUFFICIENT INFORMATION TO THE DEFENDANT IN ORDER FOR HIM TO MAKE A KNOWING, INTELLIGENT, VOLUNTARY WAIVER OF RIGHT TO JURY TRIAL BY NOT INFORMING DEFENDANT THAT A BENCH TRIAL COULD BE CONTINUED INDEFINITELY

There can be no voluntary, knowing, intelligent waiver of a jury trial right without the facts sufficient to inform the defendant as to what all he is waiving. Nowhere in the record does it appear that Mr. Paulmier was informed of the fact that if he waived his right to a jury trial that he would also be waiving his ability to have a trial completed in a timely fashion.

On May 7, 2014 Defendant-Appellant Paulmier entered into colloquy with the court about intelligently, knowingly and voluntarily waiving his right to a jury trial [TR; 5-7-14; pp 2-6]. When the court inquired as to Rule 48 (HRPP), the prosecutor declared at that time their Rule 48 (to commence trial) was November 2, 2014, and the pretrial conference was set for July 2, 2014 [TR 5-7-14; p 6, lines 4-18].

Mr. Paulmier began his trial on August 27, 2014, it was continued to November 26, 2014, and then again to February 25, 2015, and then again to April 1, 2015; due to time restrictions of the court on each of the trial dates the trial was completed over the course of seven months.

The Defendant's waiver was given as the Defendant assumed a bench trial would be quicker than a jury trial, And where it is not explained to the Defendant that a trial before a judge could potentially take place over months of time, rather than a jury trial which resolves the matter in a week or so. These delays are prejudicial to Mr. Paulmier inasmuch as it violated his rights of due process and a knowing, voluntary and intelligent waiver of the right to a trial where the opposition has multiple opportunities to coach the complainant before each continuation of trial, and memories of the witnesses are no longer fresh. Further prejudice occurred where the defendant himself was subject to undue stress of his reputation being affected and of having the trial continued over and over again for several months at a time.

It is unfair to say that the State and the court staff suffer the same stresses as the criminal defendant. Both the Prosecutor stated these stresses were the same, as did the Court in its ruling.

> Um, the state would just note that the prejudices that the defense is putting forth before this court is the same prejudice that the state and its -- the state's witnesses also face. So, Your Honor, there is no difference.

[TR; 2/25/2015, pg 20 ln 19-23]

> With regard to its impact on the defendant, um, while I understand that these matters are stressful -- and frankly, Mr. Paulmier, they're stressful for everyone involved -- for your attorney, for the prosecuting attorney, for the court, the court staff, and for the people who come to testify, and even for the people that are here who have, um, an interest in you and an interest in the complaining witness. Um, these are stressful proceedings. And frankly without anything, uh, without anything in addition to your own description of the stress that is being imposed upon you, I find that it is no more than the stress that all of us, uh, experience in the course of a criminal trial.

[*Id.* pg 22, ln 13-24]

On 11/26/2014, the second of four days of trial, and some three months after the commencement of trial on 8/27/2014, when the court again suspended proceedings for a next trial date some three months out again to 2/25/2015, counsel for Mr. Paulmier requested a sooner date [TR 11/26/2014; pg 118, ln 25]. The clerk suggested a date that was not significantly earlier, of 2/8/15 [Id; ln 21], though the prosecutor was scheduled for vacation [Id; ln 13-14]. Defense counsel again made objection after the 2/25/2015 hearing to a further continuance after the court continued again until April 1, 2015 [TR 2/25/2015; pg. 92, ln 14-24].

It appears the delay is purposeful where the Court does not have a specific trial schedule for the accused bench trial. It is the congested trial calendar does not constitute good cause for delay where the difficulty is neither attributable to the accused or beyond the physical possibility of control by the system of criminal justice. Mere inability of the criminal justice system to cope with the problems it has been established to regulate to be seen as good cause for delay would be unconstitutionally at the expense of the purpose of the guarantees of due process of law and speedy trial.

If the problem is blamed upon the state legislature for failing to provide the funds necessary to solve the problem then it fails to meet its constitutional obligation to provide the accused his/her constitutional rights. Irregardless, the lower court failed to inform Mr. Paulmier that his trial could be continued several court dates over a period of months and months. Without this information, the accused was unable to make a knowing, intelligent and voluntary waiver of the right to jury trial.

Numerous cases discuss the fundamental importance of obtaining a valid waiver of right to jury trial. In State v. Gomez-Lobato, 130 Hawai'i 465, 312 P.3d 897 (2013), the Hawaii Supreme Court reiterated the importance of ensuring proper understanding a jury waiver and

even though the accused had a language interpreter and counsel present and stated he understood what he was agreeing to, the lower court had not made certain he knew he had right to a jury trial specifically and thus reversed and remanded the matter. Although in the instant case Mr. Paulmier spoke English, it was nonetheless explained to him that a bench trial could take some extra time due to court congestion or its scheduling procedures or for any other reason.

In other contexts, it has been likewise held essential to make certain that the accused understands the consequences of waiving fundamental rights, e.g., to a trial and entering a plea must be knowing and voluntary and which cannot be presumed from a silent record (*Boykin v. Alabama*, 395 U.S. 238 (1969); see also, *Tachibana v. State*, 79 Hawai'i 226, 900 P.2d 1293 (1995) (requiring on-the-record waiver of defendant's right to testify).

While Mr. Paulmier's case appears to present one of first impression, it logically holds that an accused is unable to waive the fundamental right to jury trial unless he/she also understands the concomitant phenomena that naturally accompany such waiver. As has been previously expressed:

> "For a valid waiver of the right to a jury trial, the trial court has a duty to inform the accused of that constitutional right. The colloquy in open court informing a defendant of his right to a jury trial at arraignment serves several purposes: (1) it more effectively insures voluntary, knowing and intelligent waivers; (2) it promotes judicial economy by avoiding challenges to the validity of waivers on appeal; and (3) it emphasizes to the defendant the seriousness of the decision. The failure to obtain a valid waiver of this fundamental right constitutes reversible error."

State v. Valdez, 98 Haw. 77, 78 42 P.3d 654,655 (2002) quoting *State v. Friedman*, 93 Haw, 63, 68, 996 P.2d 268, 273 (2000).

> The right to trial by jury is a fundamental right protected by the sixth amendment to the United States Constitution[10], article I, section 14 of the Hawai'i Constitution [11], and by statute. *See* Hawai'i Revised Statutes (HRS) § 806–60 (1993) ("Any defendant charged with a serious crime shall have the right to trial by a jury of twelve members. 'Serious crime' means any crime for which the defendant may be imprisoned for six months or more.")[12] ; *see also* *477 **909 *State v. Ibuos*, 75 Haw. 118, 120, 857 P.2d 576, 577 ("In Hawai'i, a statutory right to a jury trial arises whenever a criminal defendant can be imprisoned for six months or more upon conviction of the offense.") (citing HRS § 806–60).
>
> Hawai'i Rules of Penal Procedure (HRPP) Rule 5(b)(1) requires that "the court shall in appropriate cases inform the defendant that he has a right to a jury trial in the circuit court or may elect to be tried without a jury in the district court." *See Ibuos,* 75 Haw. at 120, 857 P.2d at 577. "[A]ppropriate cases" are

> those cases where the defendant has a constitutional right to a jury trial. *See Friedman*, 93 Hawai‘i at 68, 996 P.2d at 273 (2000) (citing *Ibuos*, 75 Haw. at 120, 857 P.2d at 577).
>
> *State v. Gomez-Lobato*, 130 Haw. 465, 312 P.3d 897 (2013).

It is interesting to note the State of Hawaii Circuit Courts have made special rule regarding Trial Calendars for Civil Cases, Rule 13 of the Circuit Courts of the State of Hawaii, but not for criminal cases, except for Hawaii Rules Penal Procedure, Rule 12.2 for trials involving "special circumstances". There does not appear to be an analogous trial setting provision as regard criminal cases.

As such, for the unfortunate accused who does not have benefit of a special trial calendar as in civil cases, once a jury trial is unwittingly waived, without knowledge of the potential for months of trial ahead - even for a rather modest amount of testimony - the result is in effect the denial of rights to speedy trial that the state and federal constitutions contemplated as well as our own HRPP Rule 48. As the majority stated in *State v. Jackson*, 81 Hawai'i 39, 52, 912 P.2d 71, 84 (1996):

> "The current version of HRPP Rule 48 is derived from the ABA Standards of Criminal Justice ...
>
> Its purposes are to ensure speedy trial for criminal defendants, ... to relieve congestion in the trial court, to promptly process all cases reaching the courts, and to advance the efficiency of the criminal justice process." (internal quotes and citations omitted)

Yet, then, if the courts deny speedy trial by commencing trial with 180 days but then extend the trial itself for an even longer time than contemplated by the rule and without notifying an accused that such a bench trial would take place over an extended time frame beyond what a jury trial would entail, then the very federal and state constitutional protections and purposes of Rule 48 itself would be vitiated.

/////

V
CONCLUSION

Based on the foregoing points and authorities, Defendant-Appellant Stephen L. Paulmier, respectfully requests that his Honorable Court reverse the lower court's conviction of Abuse of Family or Household Member, and remand for dismissal with prejudice.

DATED: Hilo, Hawaii, December 7, 2015.

/s/ Gary C. Zamber

Gary C. Zamber, court-appointed attorney
For Defendant-Appellant
Stephen L. Paulmier

STATEMENT OF RELATED CASES

There are no related cases.

APPENDIX 19

Plaintiff-Appellee Amended Answering Brief Appeal from
the Judgement Entered on April 1, 2015
filed on March 1, 2016
in the Intermeidate Court of Appeals

No. CAAP-15-0000381

IN THE INTERMEDIATE COURT OF APPEALS

STATE OF HAWAI'I

STATE OF HAWAI`I	) FC CR 14-1-0101
	)
Plaintiff-Appellee,	) APPEAL FROM THE JUDGMENT
	) ENTERED ON APRIL 1, 2015;
vs.	)
	)
STEPHEN L. PAULMIER,	)
	) FAMILY COURT OF THE THIRD CIRCUIT
	)
Defendant-Appellant.	)
	) HONORABLE LLOYD VAN DE CAR,
_____	) JUDGE

AMENDED ANSWERING BRIEF OF PLAINTIFF-APPELLEE

STATE OF HAWAI`I

MITCHELL D. ROTH 6012
Prosecuting Attorney

SYLVIA WAN 9586
Deputy Prosecuting Attorney
County of Hawai`i
655 Kīlauea Avenue
Hilo, Hawai`i 96720
Tel. No. 808-961-0466
Email: hilopros@co.hawaii.hi.us
Attorneys for State of Hawai`i,
Plaintiff-Appellee

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SUBJECT INDEX

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RULES

No. CAAP-15-0000381

IN THE INTERMEDIATE COURT OF APPEALS

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	) FAMILY COURT OF THE THIRD CIRCUIT
	)
Defendant-Appellant.	)
	) HONORABLE LLOYD VAN DE CAR,
_____	) JUDGE

AMENDED ANSWERING BRIEF OF THE STATE OF HAWAI'I,

PLAINTIFF-APPELLEE

I. PROCEDURAL HISTORY

On March 23, 2014, STEPHEN L. PAULMIER, Defendant-Appellant ("Defendant") was arrested under suspicion for Abuse of a Family or Household member. TR Later the same day, STEPHEN L. PAULMIER bailed out of custody using a bond obtained through 4Freedom LLC, bail company. ROA Vol.1, 8. On March 24, 2014, State files a complaint against Defendant, alleging one count of Abuse of a Family or Household member. ROA Vol. 1, 7. On March 24, 2014, Defendant has his first appearance before the Family Court, with special appearance of Georgette Yaindl, Esq., as his counsel. ROA Vol. 2, 33. During the hearing, Defendant is referred to the public defender for representation and matter is continued to May 7, 2014. ROA Vol. 2, 33.

On April 9, 2014, public defender, Justin Lee, Esq. files a Notice of Appearance and Demand for Discovery, in the instant case. ROA Vol.1, 11. On May 7, 2014, Defendant appears

with public defender, Justin Lee, Esq. ("Defense Counsel"). ROA Vol. 2, 34. Defendant waives his right to a jury trial after colloquy with the court, enters a plea of not guilty, and requests a pretrial conference. ROA Vol. 2, 34; TR 05.07.14, p 2-9. Court asks State for its Rule 48 calculation. TR 05.07.14, p 6, ln 4-5. State provided a Rule 48 date of November 4, 2015. TR 05.07.14, p 6, ln 6-7. Court sets pretrial conference for July 2, 2014. TR 05.07.14, p 6, 14-18.

On May 12, 2014, Defense Counsel files Defendant's Motion to Amend Terms and Conditions of Bail, with a hearing date of May 28, 2014 @ 1:30pm. ROA Vol.1, 12-16. On May 12, 2014, Defense Counsel also files a Notice to Provide Discovery to Defendant Pursuant to HRPP Rule 16(E). ROA Vol.1, 16-18. On May 28, 2014, Court grants Defendant's request to travel outside of the jurisdiction for his son's wedding. ROA Vol. 2, 35. Defendant also requests the pretrial conference set for July 2, 2014 be stricken and requests instead a setting of a bench trial. Id. Court denies the request to strike the pretrial conference set for July 2, 2014, and set bench trial for August 27, 2014. Id. State also makes an oral motion for protective order in response to Notice to Provide Discovery to Defendant Pursuant to HRPP Rule 16(E). Id.

On June 27, 2014, State file written Motion for Protective Order with a hearing date set at the same time as the pretrial conference, July 2, 2014. ROA Vo1.1, 23-28. On July 1, 2014, Defense filed Defendant's Witness List and Notice of Intent to Rely Upon Other Crimes, Wrongs, Acts. ROA Vol.1, 34-39. During the motion hearing on July 2, 2014, Defense Counsel informed the court that he has been in talks with the State about stipulation to Protective Order, but needs more to time to decide whether to agree to a stipulation. ROA Vol.2, 36; TR 07.02.15, pg 2. Based on other unresolved matters regarding Defendant's case and Defense Counsel's request for an extension of pretrial motion deadlines, Court set a second pretrial conference for

August 6, 2014. ROA Vol.2, 36; TR 07.05.14, p 3, ln 10-14. Court also extended the pretrial motions deadline to the same date. Id.

On July 25, 2014, Defense filed Defendant's Amended Witness List. ROA Vol. 1, 41-43. On August 6, 2014, State filed its Witness and Exhibit List. ROA Vol. 1, 44-49. At the pretrial conference on August 6, 2014, Defendant withdrew his request to have a copy of the discovery and decided he was fine going to the public defender's office to review the discovery. ROA Vol.2, 38; TR 08.06.14. p 4, ln 20-24. The Court declined to specifically rule on Defendant's 404(b) notice, but did tell Defense Counsel about his concerns regarding admissibility. ROA Vol.2, 39; TR 08.06.14, p 3 & 6.

Bench trial commenced on August 27, 2014. ROA Vol. 2, 40. After the arraignment of Defendant, immigration and Tachibana advisement by the court, witness exclusionary rule invocation, both State and Defense provided Opening statements. ROA Vol. 2, 40; TR 08.27.14, p 7-11. State started the presentation of its case with the complaining witness, Merli Paulmier. TR 08.27.14, p 11-68. On the same date, Defense Counsel started his cross examination of Merli Paulmier, but ran out of time. TR 08.27.14, p 68-108. After some discussion about witness's and the court's availability, a new trial date was provided for the continuation of trial on November 26, 2014. TR 08.27.14, p 109-113. On November 26, 2014, the court heard the remaining testimony of Merli Paulmier, the neighbor Michael Thomas and the testimony of Officer Cheri Lyons (Kalili), the resting of the State's case. TR 11.26.14, p 4-85. Defense present testimony of Danny Li, and the being portion of Defendant's testimony. TR 11.26.14, p 92-116.

On the contemplation of the next trial date, Court asked the Deputy Prosecutor if there were any dates where she was unavailable and/or previously committed to other courts. TR

11.26.14, p 117-118. State noted that did not have any other trials in other courts, but that the State's deputy prosecutor would not be available for the first two weeks in February. TR 11.26.14, p 118, ln 17-18. The court clerk gave a date of February 8th or February 25th. TR 11.26.14, p 118, ln 19-21. The court chose February 25, 2015 and the State agreed. TR 11.26.14, p 118, ln 22. When the Defense requested if there was an earlier date, the court replied "I'm afraid that if we set it sooner, one of the three of us will become unavailable, and that won't work for anyone." TR 11.26.14, p 117-118, ln 25, ln 1-3.

On December 24, 2015, Defense filed a Second Amended Witness List that added Witness, Tomas Belsky. ROA Vol. 1, 55-57. State filed a response to the Defense's Second Amended Witness List in the form of a Motion in Limine. ROA Vol. 1, 59-64. The State requested that the trial court exclude Tomas Belsky's testimony because he was present in the gallery for the entirety of the bench trial up to that point. ROA Vol. 1, 61-63. On February 6, 2014 Defendant filed a Motion to Dismiss Complaint For Violation of Speedy Trial Right. ROA Vol. 1, 65-77. On February 17, 2014, Defense filed a Third Amended Witness List, adding yet another defense witness, Cindy Taylor. ROA Vol. 1, 78-81. Defense also filed a Memorandum in Opposition to State's Motion in Limine on the same date. ROA Vol. 1, 81-88.

On February 25, 2015, the court held hearings on Defendant's Motion to Dismiss Complaint For Violation of Speedy Trial Right and State's Motion in Limine, prior to proceeding the scheduled bench trial. TR 02.25.15, p 2-26. Court denied Defendant's motion to dismiss and State's motion to preclude the testimony of defense witness, Tomas Belsky. TR 02.25.15, p 23 & 26. Defendant's testimony was concluded on February 25, 2015, without enough time to start the testimony of defense witness, Tomas Belsky. TR 02.25.15 p 92. The court continue the bench trial until April 1, 2015. TR 02.25.15 p 93. In response to hearing the

new court date of April 1, 2015, defense counsel replied "we'd like to place a record objection, [], an objection on the record." But no further argument was made by Defense Counsel stating, "we already filed a motion as to these arguments, and we know the court's already ruled." TR 02.25.15, p 92, ln 20-25. On April 1, 2015, testimony of Tomas Belsky was heard and then stricken by agreement of both the Defense and the State. TR 04.01.2015, p 4-38 & 39. Then, State provided rebuttal testimony of Merli Paulmier. TR 04.01.15, p 40-78. Both the State and Defense provided closing arguments. TR 04.01.15, p 79-100. Court found beyond a reasonable doubt that the Defendant and Merli Paulmier were in fact family or household member. TR 04.01.15, p 100, ln 5-10. Court found beyond a reasonable doubt that Meril Paulmier sustained injuries at the hand of Defendant. TR 04.01.15, p 100, ln 17-23. Court also found that the actions were done intentionally on Defendant part. TR 04.01.15, p 100-101. Court noted that even if it were to believe Defendant's version of the events, his actions would still have resulted in reckless action. TR 04.01.15, p 101, ln 6-18. Sentencing of the defendant commenced on the same day. TR 04.01.15, 105-111. Defendant requested a stay of the sentencing pending appeal. TR 04.01.15, p 106, ln 7-8. Court sentenced the Defendant, but stayed the mittimus of jail pending appeal. TR 04.01.15, p 107, ln 18-25. On April 30, 2015, Defendant filed his Notice of Appeal.

II. STATEMENT OF THE CASE

Bench trial for the instant case commenced on August 27, 2014. See TR 02.27.15. Testimony was heard by the Honorable Judge Lloyd Van De Car over four days on August 27, 2014, November 26, 2014, February 25, 2015 and April 1, 2015. The State presented testimony of three witnesses: Merli Paulmier, Michael Thomas, and Officer Chere Rae Lyons (also known as Chere Rae Kalili). See TR 08.27.2014; TR 11.26.2014; and TR 04.01.2015. The Defense

presented testimony of three witnesses: Daniel Li, Defendant, and Tomas Belsky. See TR 11.26.14; TR 02.25.15; and TR 04.01.2015. After hearing all the testimony and evidence presented, Honorable Judge Lloyd Van De Car found Defendant guilty beyond a reasonable doubt of Abuse of a Family or Household member and sentenced Defendant the same day. TR 04.01.15, p 102-103 & 106-111.

Bench Trial Day One – August 27, 2015

The initial bench trial date was set for August 27, 2014. ROA Vol. 2, 35. On August 27, 2015, the Court heard the direct and partial cross-examination of the State's complaining witness, Merli Paulmier ("Merli"). TR 08.27.14, p 17-108. Merli's first language was Brazilian Portuguese and an interpreter appeared by phone to assist Merli if translation was needed. TR 08.27.14, p 12-14.

Merli testified that Defendant is her husband, married since November 2011, but at the time of trial they were separated. TR 08.27.2014, p 17-18, ln 23-23; ln 1-10. Merli identified Defendant in the courtroom. TR 08.27.2014, p 18-19, ln 19-25; ln 1-11. Merli stated that on March 23, 2014 at approximately 11:30am, she was at her home in downtown Hilo with Defendant. Id. at 19, ln 12-25. She and Defendant had returned to her home after going to the Unitarian Sunday meeting. Id. at 20, ln 1-3. Per Merli, they were waiting at home before they were going to leave for Defendant to do a job in Pepe'ekeo to fix a car, and then they were going to the beach. Id. at 20, ln 3-9. Before noon, Defendant received a call and Defendant left the house for a bit talking on the phone. Id. at 20, n17-23. When Defendant returned he aggressively stated to Merli that he was leaving and that she was not coming with him. Id. at 21, 5-8. While Merli tried to talk to Defendant about it, Defendant started yelling and becoming more aggressive, scaring Merli. Id. at 21, 15-23. Merli told Defendant to leave the house; that

she felt it was a mistake to let him back in the home after being separated for almost three weeks; and that she didn't think they could stay together. Id. at 21-22.

Per Merli, Defendant then stated he would not leave and became more aggressive. Id. at 22-23. Defendant then went to the door and started to do something to the lock, which Merli had changed in the three weeks that they were separated. Id. at 23. Merli stated to Defendant "Please leave the house. Don't destroy my lock. What are you doing? Are you trying to lock me inside the house?" Id. at 24, ln 5-10. Defendant did not answer Merli, but kept working on the lock, so Merli put her hand on the lock. Id. at 24, ln 11-17. When Merli put her hand on the lock, Defendant turned towards her and pushed her on the floor. Id. at 24-27. Merli landed on a bag of cans and bottles and the floor, hurting her right shoulder. Id. at 27-28. Merli described the pain as excruciating. Id. at 28, ln 10-11. She told Defendant that he had hurt her shoulder while she was on the floor trying to move. Id. at 28, ln 14-16. Merli then stood up, stated "I need to leave," went to the door, and tried to leave the house. Id. at 29.

Defendant was still at the door working on the lock, where the door was open about forty centimeters. Id at 29. When Merli approached to leave through the space, Defendant "threw" her again by placing his two hands around her chest area and pushing forward. Id. at 31. Merli hit the ground a second time hitting her head on the tile floor, making a loud sound upon impact. Id. at 31-32. Immediately, the impact started to create a "head bump." Id. at 32, ln 11-14. Merli remembers being a bit confused and trying to stand up, and she felt that she may have a fracture or hemorrhage in her skull. Id. at 33, ln 4-9. Merli stands up and tries to leave again saying to Defendant "I need to call the police. I need to call the police. You --- you hurt my head. You hurt my head." Id. at 33, 11-15.

Upon trying to leave the house once more, Defendant pushed Merli back to between the counter and the refrigerator with his left arm against her neck, immobilizing her. Id. at 34-35. Defendant then grabbed his crotch area with his right hand and yelled "You want my dick, you fucking bitch? You fuckin' bitch, you gonna call the cops. Call the cops, you fucking bitch," repeating himself several times. Id at 36-38. Merli was terrified and started screaming for help, and called for her neighbor Michael to help. TR 08.27.14 at 36 & 38. Defendant only stopped and left Merli, when Michael came to the door. Id. at 38. When Defendant left Merli, Defendant went back to the lock on the door. Id at 39, 8-12. Merli followed Michael by the hand to his home, which was right next door in the duplex. Id. at 39-40.

Police were called and arrived approximately fifteen to twenty minutes later. Id. at 40, ln 14-24. Merli spoke with the officer, provided a written statement, and pictures were taken. Id. at 41-45. Merli authenticated each of the photos, explained where her injuries were present, and the scene of where each part of the incident occurred. Id. at 46-68.

Defense Counsel then cross-examined Merli to the extent that time would allow on August 27, 2014. Defense Counsel questioned Merli about her memory of the incident and leaving out details in her written statement. Id. at 68-76. Defense Counsel then questioned Merli about whether she left out details in her verbal account to the officer. Id. at 77-83. Defense Counsel then questioned Merli as to whether her marriage to Defendant was for the purpose of her obtaining legal residency in the United States. Id. 83-85. During this exchange, Defense Counsel brought Merli's friendship with Tomas Belsky, as the person that introduced Merli and Defendant. Id. at 85, ln 18-25. State objected to questions along this subject as it had been provided discovery or notice of these alleged bad acts. Id. at 88, ln 9-24. The Court overruled

State's objection, stating "with these questions you will have notice. … [W]e're gonna have to recess, and you can prepare for redirect." Id. at 89, 1-3.

Defense Counsel then questioned Merli about being suspicious and jealous about Defendant's activities while she was in Brazil for about two months. Id. at 91, ln 16-17. Merli has responded that she was not suspicious but rather upset that she found out that Defendant has exchanged in excess of 200 messages with other women requesting sex. Id. at 91, ln 18-21 and p 94-95. Upon Merli confronting Defendant about the 200 messages, she asked that he leave the house. TR 08.27.14, p 95, ln 15-19. Defendant became very upset, and aggressive stating "I'll come back. You see." Id. at 95, ln 20-23. Merli had asked for the key to the house back and changed the lock to the house. Id. at 95, ln 20-23, p 98-99. This confrontation happened about three weeks prior to the incident on March 23, 2014. Id. at 96-97.

Before Merli let the defendant return home, she was so afraid about Defendant returning home that she put a piece of wood in the lock so that Defendant could not open it with the key. Id. at 100, 103. The next day, Merli contacted a mutual friend Danny Li to help her replace the lock on the door. Id at 100-101.

After about two weeks of Defendant being out of the house, Defendant started complaining to Merli about his living conditions as he was living in a tent and asking to return home and sleep on the coach. Id. at 97, ln 22-25. Merli allowed Defendant to return home about two days prior to the March 23, 2014 incident. Id. at 98, ln 2-16. Danny Li told her that it would cost the same to fix the lock as to replace it. Id. at 100. Merli bought a new lock and Danny Li installed it. Id. at 100-101. Merli did not tell Danny Li the reason why the lock was broken at this time because she didn't want to harm Defendant's reputation. Id. at 102, ln 2-10.

Bench Trial Day Two – November 26, 2014

Second day of the bench trial commenced on November 26, 2014. TR 11.26.2014. On November 26, 2014, the Court heard the remaining cross-examination of the State's complaining witness, Merli Paulmier ("Merli"), the testimony of State's witnesses Michael Thomas, and Officer Chere Rea (Lyons) Kalili; and Defense witness Daniel Li and partial direct examination of Defendant. TR 11.27.2014, p 2.

On November 24, 2014, Defense Counsel continued its cross-examination of Merli. Defense Counsel questioned Merli about her occupational background as a medical doctor in Brazil. Id. at 5-7. Defense Counsel again asked Merli about the circumstances that led to Defendant's initial removal from Merli's home upon her return from Brazil and subsequent invitation to stay at her home just prior to the March 23, 2014 incident. Id. at 9-13. Defense Counsel asks about the nature of Merli's interaction with Defendant at Tomas Belsky's home two day prior to the March 23, 2014 incident. Id. at 14-15. Defense Counsel questioned Melri about the state of Defendant having or not having a key to her home. Id. at 17-19, 24. Defense Counsel questioned Merli about what happened at the church meeting, and Defendant and Melri's plans for the rest of the day. Id. at 19-24.

Defense Counsel questioned Merli about the location of the old broken lock during the March 23, 2014 incident and if Merli asked Defendant to place it once more in the door. Id. at 24-27. Merli stated that the old lock was located in a drawer in the kitchen and that she did not ask Defendant to change the lock. Id. at p 26 and p 27, ln 5. Defense Counsel questioned Merli about the specifics of the March 23, 2014 incident, and again about the differences between the officer's report and Merli's testimony. Id. at 28-50.

Defense Counsel then turned his questioning again towards Merli's immigration status. Defense Counsel asked Merli if she had ever asked Danny Li to marry her before she married Stephen. Id. at 50, ln 22-25. Merli denied ever asking Danny Li to marry her or having anyone else ask him on her behalf. Id. at 51.

At the conclusion of Merli's testimony, the State called Michael Thomas ("Michael") to the stand. TR 11.27.2014, p 54, ln 2-3. Michael was the neighbor to Merli and Defendant in a duplex unit in Hilo that shares a thin wall. Id. at 55-56. Michael identified the Defendant in court. Id. at 56, ln 11-20. Michael relates that he was sleeping on March 23, 2014 in the late morning and that he was awoken by what had sounded like a bookcase had fallen and Merli's screams of "Michael, Michael, help, help." Id. at 56-57, 62. Michael described the screams as sounding as someone that was in danger. Id. at 57, ln 12-16. Upon hearing the screams, Michael stated that he called the police and then went next door, went to Merli, and asked Merli if she was ok. Id. at 57-58. Michael described Merli as screaming, crying, and with a big bump on her head. Id. at 58, 22-23. Defendant did not look Michael in the eye, and went right to the door with tools doing something to the key hole and handle. Id. at 58-59. Michael pointed out in photo of Merli's kitchen where Merli and Defendant were located when he arrived at their home. Id. at 59-61.

Michael had Merli return to his home to await the arrival of the police. Id. at 58, 61. At his home, Merli had pointed out to him that she was injured on her head and on her shoulder. Id. at 62, ln 20-21. Michael could visibly see the bump on her head, looked at it in detail, and took a couple of pictures of it that day and a few days later. Id. at 63, ln 14-22.

Defense counsel questioned Michael about an instance where he helped Merli get into her house after being locked out about two weeks prior to March 23, 2014 incident. Id. at 68.

Defense counsel questioned Michael about the specifics of his observations, including whether he observed was an extra handle at Merli's residence (which he did not). Id at 68-69, 70.

Last, the State called lead Officer Chere Rae (Lyons) Kalili ("Officer") to testify. Id. at 71-85. Officer testified that she responded to a domestic violence call at 86 Puueo Street in the late morning where she knocked on the first door to a duplex and made contact with Michael Thomas. TR 11.27.2014, p 71-72. When Officer entered Michael's home she made contact with Merli. Id. at 73-74. Officer described Merli as crying heavily, shaking, and looked like she was scared, trembling. Id. at 74, ln 12-14. Immediately upon making contact, Merli had grabbed Officer's hands and placed them on the back of Merli's head, where Officer felt a big bump about an inch high and depression. Id. at 74-75. Merli has also pointed out to Officer that her right shoulder was injured. Id. at 75, ln 16-17. Officer proceeded to take a verbal and written statement from Merli, as well as taking photographs of Merli and the apartment. Id. at 75-76. Officer also noted that she prepared a report summarizing the information received from the witnesses interviewed and evidence collected. Id. at 81-83. Defense Counsel cross examined Officer in relation to her report and photographs taken. Id. at 83-85.

After the presentation of the State's case, Defense Counsel moves for a judgment of Acquittal. Id. at 85-89. State responds. Id. at 89-91. Court denied Defense Counsel's request and Defense's case proceeds. Id. at 91.

Defense Counsel presented the testimony of Daniel Li ("Daniel") first. Id. at 92-102. Daniel remembers that Merli asked him to help her get back into her house as she was locked out by Steve. Id. at 92-93. When Daniel arrived, the Merli's door was open. Id. at 93, ln 21-25. Daniel described the lock as being stuck and unable to get a key in from the outside. Id. at 94. Merli decided to buy a new lock set and Daniel installed it. Id. at 94-95. Daniel explained that

he knew Merli for about three years, and that he was friends with both Defendant and Merli. Id. at 95, ln 9-16. Daniel testified that Merli never asked to marry him, but that his other friend Tomas asked him if he would marry "this Brazilian woman" for immigration purposes. Id. at 96, ln 7-17. Defense Counsel asked Daniel if he thought Merli was a truthful person and then about her reputation about truthfulness. Id. at 97-98. Daniel stated that he has heard things from various people, and his personal opinion was that she hasn't been truthful at least on one instance that being about the lock. Id. at 98, ln 1-16. Daniel state that in relation to the lock, Merli never told him that she jammed something in the door. Id. at 98, ln 19-22. Daniel concluded that at the point of trial he would have to verify things she told him and not take them at face value. Id. at 99, ln 1-3.

On cross, the State asked Daniel to clarify who is "Tomas" that asked him if he would marry Merli. Id. at 99, ln 9-11. Daniel identified "Tomas" as Tomas Belsky, but that he never talked to Merli personally about marriage or whether or not she had any problems with immigration. Id. at 99-100. The State asked Daniel about other specific instances or individuals that have claimed that Merli was untruthful. Id. at 101. Daniel mentioned that Tomas has mentioned on occasion that Merli was untruthful, and vaguely "other people too." Id. at 101, ln 4-9. But when pressed for specifics instances of conduct, Daniel stated "nothing that really stands out" and "nothing that I could recall that is, you know, real significant."

The last witness for Defense on November 24, 2014 was the Defendant. Defendant started his direct testimony, was unable to conclude before the day ended. TR 11.24.14, p 102-116.

Defendant describes that he met his wife, Merli, through a mutual friend, Tomas Belsky. Id. at 103, ln 11. They started seeing each and moved in together in July of 2011, into

Defendant's tent, and they married in May of 2012. Id. at 104, 3-16. Per Defendant, Merli was looking for a way to get a green card from the very beginning and was a factor in their marriage. Id. at 104, 19-21. Defendant stated that he and Merli has a stormy relationship and experienced problems. Defendant stated they "had physical experienced together" but "Never hit, I never hit Merli" under any circumstances. Id. at 105, 16-22.

Per Defendant, on March 23, 2014, he and Merli were having an argument "about trust and integrity in the relationship." Id. at 108, ln 1-10. The subject being Merli accusing Defendant of infidelities, Defendant denying, and Defendant expressing to Merli that she needs to have trust in him and give him a key to the house. Id. at 108, ln 14-20. Defendant explained that after Merli let him return to the home two days before March 23, 2014, Merli had not given Defendant a key to the new lock. Id. at 113. Per Defendant, the plan for that day was that he was going to Pepe'ekeo to do an estimate and repair on a car, and going to the beach together with Merli was only a possibility. Id at 113-116. Defendant stated that Merli got jealous when she heard that the car repair was supposed to be for a woman. Id at 114, ln 15-20.

According to Defendant, Merli told Defendant during the argument to put the old lock back into the door, even though both of them knew that the lock was inoperable. Id. at 109, 5-10. Defendant stated that he was trying to "bluff" Merli, by walking past Merli into the kitchen, took his tools, and began to unscrew the new lock to put in the old lock that he had a key to. Id. at 109, ln 16-22. Defendant stated that while he was crouched down unscrewing the faceplate, he saw Merli come at him and she threw her full weight on his hands hold the lock. Id. at 110, 1-8.

Motions Hearing and Bench Trial Day Three – February 25, 2015

On February 25, 2015, the Court held a hearing on Defense and State's motions that were filed between the November 24, 2014 and February 25, 2015 court dates. TR 02.25.15, p 4-26.

At the end of the hearing, Court authorized the addition of Defense witness, Tomas Belsky. Id. at 26. The Defense continued and concluded the February 25, 2015 trial day with Defendant's testimony. TR 02.25.15, p 28-91.

Defendant reiterated that during their argument about the key on March 24, 2014, Merli told him that he had a key to the old lock and he knew how to put the old lock back. Id. at p 32. Per Defendant, he interpreted Merli's statement regarding the lock as a bluff and that he was acting out on her bluff by replacing the lock. Id. at 33.

Defendant admitted that when he went to change the lock, he and Merli began to debate the issue, Merli told him "you should leave," and then Defendant saw Merli "lunge herself toward" him. Id. at 36, 16-21. Per Defendant, in response to Merli putting her "full weight of her body," "feet off the ground, onto his forearms," he bent his knees pivoted his hands under both of their weights and stoop up, putting Merli back on her heels. Id. at 39. Merli was unsuccessful at maintaining her balance and fell against some boxes against the kitchen wall. Id. at p 39-40, 43. Defendant then returned back to the door and continues working on the lock because he "wanted to get it done in time to leave." Id. at 43, ln 11-13.

Per Defendant, Merli then grabbed Defendant from behind around his torso, clamping my arms together, putting her entire weight on him again. Id. at 44, ln 13-23. In response, Defendant stood up, flexed and shrugged his arms to break her hold on him. Id. at 45, ln 3-15. This caused Merli to fall away from him and strike the ground, where her head hit the tile floor. Id. at 45-46. Then Merli "popped right back up and got right in my face, yellin' at me that I had injured her in some way." Id. at 46, ln 18-20. Defendant stated that he walked towards Merli confronting her. Merli was scolding him, then Defendant went back to finish installing the old lock. Id. at 47-48. Per Defendant, Merli was behind him pacing, crying, "she may have calling

to Michael," while he finished with the lock. Id. at 49. Defendant then closed the door and turned back to the kitchen, when Michael knocked on the door and Defendant let Michael in. Id. at 49-50.

State cross examines Defendant on the details of what Merli said to him during the argument and the specifics of his actions in relation to Merli's. TR 02.25.15, 50-62. The State cross Defendant on his role in petitioning Merli for permanent resident status. Id. at 62-68. Defendant confirmed that he and Merli had a legitimate marriage. Id. at 66, ln 12-22. State then crossed Defendant regarding his statement "Never hit, I never did hit Merli." Id. at 69- . On cross, Defendant clarified that he meant "I'd never raised by hand against her in – in, uh, in a way to – to harm her." Id. at 71 ln 14-16. The State then confronted Defendant with four separate incidents where Defendant allegedly harmed Merli. Id. at 71-82. Defendant admitted to harming Merli on two of the four confronted incidents. Id at p 73-74 &75, ln 7-9. On redirect, Defendant claimed he married Merli for love, and explained his reasoning for his two admissions on cross, and relayed broad instances where Merli was violent with him and herself. Id. at 83-87. Defendant's testimony concluded without enough time for Defense to call their additional witness, Tomas Belsky. Id. at 92-93.

Bench Trial Day Four – April 4, 2015

Defense provided the testimony of Tomas Belsky. TR 04.01.15, p 4-39. Afterward, State provided the rebuttal testimony of Merli to address points brought up by Defense's case. Id. at 40-79. State and Defense Counsel provided closing arguments, Court rendered its verdict and proceeded with sentencing. Id. at p 79-99, 100-104, & 106-111.

Defense provided direct testimony of Tomas Belsky. TR 04.01.15, p 4-22. State started but did not conclude its cross examination of Tomas Belsky. Id. at 22-38. Defense called for a

recess in the middle of State's cross examination when it became apparent that Tomas Belsky's further testimony may implicate Tomas against his own penal interest, and thus, Tomas may have a right to counsel. 04.01.15, p 38, ln 5-18. After the recess, both Defense and the State agreed to have Tomes Belsky's testimony entirely stricken. Id. at 39, ln 2-8.

Merli provided rebuttal testimony of the State. Id. at 40-79. Merli testified about the four separate incidents where Defendant had harmed her. Id. at 40-61. Upon objection by Defendant, State noted that the evidence was being provided to go the Defendant's credibility in his previous statements about the incidents. Id. at p 47, ln 9-11. Merli then testified as the circumstances in how she let Defendant back into her home prior to March 23, 2015. Id. at 61-65. Defense cross examined Merli in regards the circumstances Defendant returned to Merli's home, about Merli's explanations two of the prior incidents of harm by Defendant, and Defendant's allegation that she previously harmed Defendant and herself. Id. at 65-78.

After closing arguments, the Court rendered its findings of fact and verdict. Id. at 100-104. Court found beyond a reasonable doubt that Defendant and Merli were family or household members, Id. at 100, ln 6-16, that the injuries Merli sustained were the result of Defendant's actions, Id., ln 17-23, and that the acts done by Defendant were done intentionally, Id. at 101-102. The Court found that the version of events provided by Merli were credible and consistent with events as described by the neighbor, and officer. Id. at 102, ln 2-13. Court also found Defendant's version of the events to lack credibility. Id., ln 11-13. Court concluded that it found the Defendant guilty as charged of Abuse of a Family or Household Member. Id. at 102-103.

III. STANDARD OF REVIEW

Defendant has brought before this court two questions concerning questions of constitutional law. The questions raised by Defendant go the United States and Hawai'i

constitutional right to a speedy trial and waiver of jury trial right, and the appellate courts review questions of constitutional law under the right/wrong standard by apply its own independent constitutional judgment based on the facts of the case. State v. Friedman, 93 Hawai'i 63, 67 (2000). Claims affecting substantial rights are reviewed under the plain error standard of review. Id., at 68; State v. White, 92 Hawai`i 192, 201 (1999).

A. Speedy Trial Right

Both the Unites States and Hawai'i Supreme courts have found that the right to a speedy trial, is "unlike other rights guaranteed by the United States and Hawai'i Constitutions, is unusually amorphous and serves to protect the separate, often conflicting interests of the accused and of the public in the speedy disposition of cases." State v. Wasson, 76 Hawai`i 415, 419 (1994)(citing Nihipali, 64 Haw. 65, 67-68 (1981)); Barker v. Wingo, 407 U.S. 514, 522 (1972). The U.S. Supreme Court noted that "[t]he States, of course, are free to prescribe a reasonable period consistent with constitutional standards, but our approach must be less precise." Barker, 407 U.S. at 523.

In our state, the reasonable period for holding a speedy trial was codified in Hawai'i Rules of Penal Procedure ("HRPP") Rule 48. See HRPP. Rule 48. Rule 48 set out that the court shall dismiss a charge that is not commenced within six months from date of arrest or filing of the charge, whichever is sooner. Id. Rule 48 allows for delays to be excluded from the calculation of the period required by the rule based on delays attributable to both the prosecution and defense. Id.

Our courts have found instances in which Rule 48 was violated, but the constitutional right to a speedy trial was not. See State v. Dwyer, 78 Hawai'i 367, 372 (1995); State v. Jackson, 81 Hawai'i 39, 55(1999). The State was not able to find any published court decision

where the defendant's right to speedy trial was violated but not there was no violation of HRPP Rule 48.

Most assessments of speedy trial violations start at the point of accusation until the commencement of trial. See Dwyer, 78 Hawai'i at 367, 371-72 (finding that defendant was not deprived of his speedy trial right, despite 32 month delay between arrest and commencement of trial); State v. Nihipali, 64 Haw. 65, 58 (1981)(finding that a trial that did not commence until one year and three weeks since defendant's incarceration was not a violation of speedy trial rights); State v. Wasson, 76 Hawai'i 415, 422 (1994)(finding that when 605 days had elapsed since the filing of the complaint to the commencement of trial did not violate defendant's speedy trial right); State v. White, 92 Hawai'i 192, 204 (1999)(finding that an 11 month delay between indictment of defendant and commencement of trial did not violate his speedy trial rights). The courts have been clear that the right to speedy trial "attaches the moment a person becomes an "accused"", Wasson, 76 Hawai'i at 418, but the courts have not been as clear as to when the speedy trial right definitively ends. Therefore, the State will follow the guidance provided by the U.S. Supreme Court.

In Barker v. Wingo, the United States Supreme Court stated that there is "no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months." Barker, 407 U.S. at 523. The U.S. Supreme Court described the right to a speedy trial as relative, as "[i]t secures the rights to a defendant", but it also "does not preclude the rights of public justice." Barker, 407 U.S. at 522. The right to a speedy trial "is consistent with delays and depends upon circumstances." Barker, 407 U.S. at 523; United States v. Ewell, 383 U.S. 116, 120 (1966). "A requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect

itself." Ewell, 383 U.S. at 120. "The essential ingredient is orderly expedition and not mere speed." Id., quoting Smith v. United States, 360 U.S. 1, 10 (1959); also quoted by U.S. v. Baillie, 316 F.Supp. 892, 894 (D. Haw. 1970).

The U.S. Supreme Court approached the question of speedy trial with a balancing test weighing the actions of the prosecution and the defendant. Barker v. Wingo, 407 U.S. 523 (1972). "A balancing test necessarily compels courts to approach seedy trial cases on an ad hoc basis." Barker, 407 U.S. at 530; see also State v. Wasson, 76 Hawai`i 415, 419 (1994). The factors of that balancing test are: 1) length of delay, 2) reason for delay, 3) the defendant's assertion of his right, and 4) the prejudice to the defendant. Barker, 407 U.S. at 523. However, the Barker Court cautioned that:

> [w]e regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant." Id. at 531. "In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. Id.

B. Waiver of Jury Trial

The validity of a defendant's waiver of jury trial is a federal constitutional law question, and therefore will be reviewed by an appeal courts under a right/wrong standard. State v. Friedman, 93 Haw. 63, 67 (2000). A defendant may, orally or in writing, voluntarily waive his or her right to trial by jury. Id. at 68 (citing HRPP Rule 5(b)(3)). The waiver of a jury trial right must come from the defendant. Id.; State v. Ibuos, 75 Haw. 118, 121 (1993). In determining the validity of a defendant's waiver of jury trial, the Hawai'i Supreme Court "will look to the totality of facts and circumstances of each particular case." Id., citing Friedman, 93 Hawai'i at 63, 68–69. "[W]here it appears from the record that a defendant has waived a constitutional right, the

defendant carries the burden of proof to show otherwise by a preponderance of the evidence." Ibuos, 75 Haw. at 18, 121.

IV. ARGUMENT

A. SPEEDY TRIAL

In our state, the reasonable period for holding a speedy trial was codified in HRPP Rule 48. See HRPP Rule 48. Rule 48 allows for delays to be excluded from the calculation of the period required by Rule 48 based on delays attributable to both the prosecution and defense. Id. The defendant does not argue that Rule 48 was violated, nor that the State's calculated Rule 48 date of November 4, 2014 was incorrect. TR 05.07.14, ln 6-7; App't Brief, p 23. Bench trial commenced on August 27, 2014, a total of 69 days prior to State's calculated Rule 48 date. TR 08.27.14, TR 05.07.14, ln 6-7.

At the conclusion of the trial day on August 27, 2014 there had been only the testimony of the complaining witness, Merli Paulmier, which had not concluded. See TR TR 8.27.14. At this point in the trial, three witnesses for the State and two more witnesses for the Defendant were purposed to be called. ROA Vol. 1, 41-42, 44-46. When contemplating dates for the next schedule continuation of trial, the date provided by the court was originally December 3, 2014. TR 8.27.14 p 111-12. The State requested a different date due to the unavailability of a witness during that period. TR 8.27.14 p 111-13. The court went back and forth with dates and landed on November 26, 2014, which was suitable for all witnesses. TR 8.27.14 p 111-13. During the discussion of the next trial date, neither the Defendant nor Defense Counsel objected or insisted on a date sooner than November 26, 2014. On the November 26, 2014 date, the trial court heard the conclusion of the State's case, as well as from the defense witness, Danny Li, and partial testimony from the Defendant. TR 11.26.14.

On the contemplation of the next trial date, Court asked the Deputy Prosecutor if there were any dates where she was unavailable and/or previously committed to other courts. TR 11.26.14, p 117-118. State noted that did not have any other trials in other courts, but that the State's deputy prosecutor would not be available for the first two weeks in February. TR 11.26.14, p 118, ln 17-18. The court clerk gave a date of February 8th or February 25th. TR 11.26.14, p 118, ln 19-21. The court chose February 25, 2015 and the State agreed. TR 11.26.14, p 118, ln 22. When the Defense requested if there was an earlier date, the court replied "I'm afraid that if we set it sooner, one of the three of us will become unavailable, and that won't work for anyone." TR 11.26.14, p 117-118, ln 25, ln 1-3.[1] After the response by the court, neither Defendant nor Defense Counsel made any further requests or assertions regarding a sooner trial date. See TR 11.26.14, p 118.

On December 24, 2015, Defense filed a Second Amended Witness List that added Witness, Tomas Belsky. ROA Vol. 1, 55-57. State filed a response to the Defense's Second Amended Witness List in the form of a Motion in Limine. ROA Vol. 1, 59-64. The State requested that the trial court exclude Tomas Belsky's testimony because he was present in the gallery for the entirety of the bench trial up to that point. ROA Vol. 1, 61-63. On February 6, 2014, Defendant filed a Motion to Dismiss Complaint For Violation of Speedy Trial Right. ROA Vol. 1, 65-77. On February 17, 2014, Defense filed a Third Amended Witness List, adding yet another defense witness, Cindy Taylor. ROA Vol. 1, 78-81. Defense also filed a Memorandum in Opposition to State's Motion in Limine on the same date. ROA Vol. 1, 81-88.

[1] What was not on the record, was that the presiding judge would be unavailable for a few weeks prior to February 8, 2015 and a pre diem judge would be presiding instead.

In the interim from the trial date of November 26, 2014 and February 25, 2015, Defense added two witnesses and filed a motion to dismiss based on speed trial grounds. ROA 55-57, 65-77, 78-81. Defendant alleged speedy trial violations in his February 6, 2014 motion was based on the time between the commencements of trial to the purposed end would be about 6 months, a total of 182 days. ROA Vol. 1, 67. The Defense motion acknowledged that the reason for the delay between the court dates was congestion of the Court's calendar. ROA Vol. 1, 67. The Defense motion claimed that Defendant was prejudiced, in that Defendant suffered anxiety and emotional distress, and his ability to put on a defense because the passage of time gave opportunity for the State to "coach its complaining witness" and the court's ability to assess credibility was "blunted." ROA Vol. 1, 67. The hearing date for the defendant's Motion to Dismiss Complaint for Violation of Due Process and Speedy Trial was placed on the same date and time as the continued bench trial. ROA Vol.1 65; TR 02.25.15, p 3-23.

On February 25, 2015, the court held a hearing on the various motions filed by Defense and the State, as well as the continuation of the bench trial. TR 02.25.15. After hearing testimony by the defendant and discussion with Defense counsel on record, the court found that the amount of stress that Defendant had described appeared to be no greater stress than the stress all others experience in the course of a criminal trial. TR 02.25.15 p 22-23, ln 13-25 & ln 1-8. The Court found that the passage of time did not impede the ability of Defendant to present his defense, partially based on his request to add an additional witness. TR 02.25.15, p 22, ln 1-13. The Court remarked that it is common practice for the court to have continuances between trial dates and as a matter of course the Court keeps notes, has transcripts available, and even video to refresh its recollection of the proceedings. TR 02.25.15, p 21, ln 15-25 and 22, 9-16. In his arguments to the court, Defense counsel conceded that in a jury waived trial where the judge is

the finder of fact, the passage of time does not have the same effect as it would on a jury. TR 02.25.15, p 17, ln 8-12.

Moreover, it would appear from Defense's own arguments that Defendant was not interested in a "fair trial" but more in a dismissal with prejudice. The Court questioned if the Defendant's position for arguing that the trial taking too long could be remedied by the Court declaring a mistrial and rescheduling the trial before another judge with two to three full days devoted to the trial proceedings without interruption. TR 02.25.15, p 17-18, ln 20-25 & ln 1-25. Defense responded not by suggesting that the trial be rescheduled to ensure a "fair trial" but instead by insisting that the situation required a dismissal. TR 02.25.15, p 18-19, ln 22-25 and ln 1-12. The Court suggested that to cure the Defendant's "unfair trial" argument the Court could call a mistrial and have the trial start over anew. TR 02.25.15 p 19, ln 13-17. The Defense argued it would be fatal error to restart a trial as it would not result in a "fair trial" and would cause only further delay and would only result in prejudice to the defendant. TR 02.25.15, p 19, 9-22. At this point, the Defense appears to equate the mere passage of time with the reasoning that Defendant would not receive a "fair trial." See TR 02.25.15, p19, 18-22.

1. Length of Delay

In order "to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from "presumptively prejudicial" delay, since, by definition, he cannot complain that the government has denied him a "speedy" trial if it has, in fact, prosecuted his case with customary promptness." (internal quotation deleted) Doggett v. United States, 505 U.S. 647, 651-52 (1992). "Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." Baker v. Wingo, 407 U.S. 530 (1972). "[T]he length of the delay that

will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case." Id., at 530-531.

Both the State and Defendant agree that the commencement of trial was within the parameters of HRPP Rule 48. App't Brief at 23. The only question was as to the progression of trial, namely the delays between trial days when testimony was heard. App't Brief at 23. The U.S. Supreme Court found "no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months." Barker v. Wingo, 407 U.S. 514, 523 (1972). Instead, in terms of determining whether some delay is presumptively prejudicial and thus necessitate further inquiry is "dependent upon the peculiar circumstances of the case." Id., at 530-1. The State would argue that none of the delays during the progression of trial were "presumptively prejudicial" and was not "peculiar" progression of any given bench trial in the circuit. If fact, Defendant's case was heard by the Family Court with customary promptness.

Trial was heard over a total of four days. The State's case was heard over two trial days and a short rebuttal on the final day of trial. TR 08/27/2014, 11/26/2014, 4/01/2015. Defendant's case was heard over the course of three trial days. TR 11/26/14, 2/25/2015, 4/01/2015. Between the Defense's presentation of its case, which started on November 26, 2014, Defense filed two amended witness lists adding two additional witnesses. The Defense chose to call only one of the additional witnesses to testify on April 4, 2015. That State would argue, that but-for the Defendant's Second and Third Amended Witness Lists and Motion to Dismiss for Speedy Trial, the trial would have concluded (even with the State's rebuttal testimony) on February 25, 2015.

2. Reason for Delay

When determining whether a "presumptively prejudicial" delay should weigh against the State, the court should determine the reason the government assigns to justify the delay. See Barker, 407 U.S. at 531. The Barker court found that the more neutral reason for a delay being attributed to "overcrowded courts" should weigh less heavily against the government then a deliberate attempt to delay trial to hamper the defense. Id., at 531. In this instance, there is no assertion and time that can be attributed to the State intentionally delaying any part of the proceedings. In fact, the delays between trial days were attributable to the Court's calendar and availability. ROA Vol. 1, 67.

During the hearing on Defendant's Motion to Dismiss Complaint for Violation of Due Process and Speedy Trial, State recognized that Defense counsel was aware of the general operating practice of bench trials before the District and Family Courts. TR 02.25.15, p 20-21, ln 23-25 & ln 1-2. The Defense counsel also recognized that jury waived trials customarily commence with continuances between trial days when he explained that he was aware that a judge has the use of transcripts and recordings to aid the Court's memory of the case. TR 02.25.15, p 17, 8-17. The Trial Court also noted its use of court's notes, transcripts, and tapes of the proceedings to facilitate the Court in rendering its decision for a bench trial that exceeds a single day. TR 02.25.15, p 23, ln 9-16. It's the Court's goal to conclude a trial once it starts but that the calendar does not always permit that. TR 02.25.15, p 21 ln 18-20. The Court also stated that if each matter was set separately then the court would be unable to set trials in a timely manner. TR 02.25.15, p 21 ln 23-25. Thus, the Trial Court treated Defendant's case with customary promptness by providing the next available court date upon notice that a new/additional trial date would be necessary.

3. Defendant's Assertion of Speedy Trial

"Whether and how a defendant asserts his right is closely related to the other factors we have mentioned." Barker v. Wingo, 407 U.S. 531 (1972). "The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences." Id., at 531. "The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." Barker v. Wingo, 407 U.S. 531-532 (1972).

The Hawai'i Supreme Court has found that a defendant's motion to dismiss on speedy trial grounds is "tantamount to an assertion of his or her constitutional right to a speedy trial." Wasson, 76 Hawai'i 421 (quoting Nihipali, 64 Haw. at 70). The Supreme Court determined that unless a motion to dismiss based on violations of HRPP Rule 48 is not "accompanied by some way by an alternative demand, even if made implicitly, for a speedy trial, it does not necessarily indicate that the defendant actually wants to be tried immediately." Id. In this case, Defendant filed a motion to dismiss on speedy trial and fair trial grounds, but when given the opportunity to have the entire trial reheard over a series of two to three conjoined days, Defense refused the argument only requesting a dismissal. ROA Vol.1 65-77, TR 02.25.15, p 19, 9-22. This court could view this motion as Defendant's demand for a speedy trial, but his subsequent actions undermine that claim by 1) adding two additional witnesses near the end of trial necessitating an additional trial date, and 2) refusing the court's alternative that the trial be reset before another judge with trial dates in quick succession to one another. ROA Vol. 1 55-57, 78-80, TR 02.25.15, p 17-19.

In arguendo, if the Defendant's motion to dismiss is to be considered his "demand" for a speedy trial, then the only continuance that was provided by the court against Defendant's speedy trial assertion was the time between the February 25, 2015 and April 1, 2015 trial dates, a total of 35 days. After hearing the Defendant's motion and State Motion in Limine in response to Defendant's Second Amended Witness List, the court only had to enough time to hear the conclusion of Defendant's trial testimony. TR 02.25.15, 91-95. The defendant's newly proposed witness, Tomas Belsky, was ordered to return for the conclusion of the jury waived trial on April 1, 2015. TR 02.25.15, 93. In response to hearing the new court date of April 1, 2015, defense counsel replied "we'd like to place a record objection, [], an objection on the record." But no further argument was made by Defense Counsel stating, "we already filed a motion as to these arguments, and we know the court's already ruled." TR 02.25.15, p 92, ln 20-25.

The trial court continuance of 35 days for the conclusion of the trial does not necessarily violate the Defendant's speedy trial rights. Barker provided an example that if the State moves for a 60-day continuance, "granting that continuance is not a violation of the right to speedy trial unless the circumstances of the case are such that further delay would endanger the values the right protects." Barker v. Wingo, 407 U.S. 514, 522 (1972). The State would argue that the 35 day continuance did not endanger the Defendant's rights. In fact, the Court provided a date in which it was anticipated that there would be enough time in the Court's calendar to conclude the trial with the addition of Defense's witness, Tomas Belsky. TR 02.25.15, p 93.

4. Prejudice to Defendant

"Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect." Barker, 407 U.S. at 532. "This Court

has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." Id., at 531. "Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." Barker v. Wingo, 407 U.S. 531 (1972).

Defendant argues that the delays between the commencements of bench trial violated Defendant's right to due process in that the "opposition has multiple opportunities to coach the complainant," "memories of the witnesses are no longer fresh," and Defendant "was subject to undue stress of his reputation being affected." App't Brief at 26. These arguments are similar to those brought by Defendant in his original Motion to Dismiss Complaint for Violation of Due Process and Speedy Trial. ROA Vol.1 65-77.

First, Defendant's claim that "opposition has multiple opportunities to coach the complainant," is unsubstantiated. Defense counsel did not confront the complaining witness about this allegation of coaching during his continue cross examination on November 26, 2014, nor during the rebuttal cross examination on April 1, 2015. See TR 11.26.14 4-55 and TR 04.01.15 67-78. In fact, although Defense counsel made a similar allegation during its original Motion to Dismiss Complaint for Violation of Due Process and Speedy Trial (ROA Vol.1 65-77), Defense chose not to address this allegation during the motion's hearing. TR 02.25.15, p 16-19.

Second, Defendant claims that "memories of the witnesses are no longer fresh" is unsupported. App't Brief at 26. Defendant did not provide any indication or example to how any of the witnesses' memories were detrimentally affected by the passage of time between trial dates. In fact, the Court noted "I frankly don't hear either of you arguing that the time has

passed has [sic] impeded your ability to present the case you want to present." TR 02.25.15, p 22, ln 10-13. The trial court also mentioned just prior to this comment "[i]n fact, Mr. Lee, I think you have a minute that I'll hear right after this one is done to add yet another witness, [ ] to the defense side." TR 02.25.15, p 22, ln 3-6.

Third, Defendant claimed that he "was subject to undue stress of his reputation being affected." App't Brief at 26. Defendant did not provide any evidence to the trial court or this court how that "undue stress" that would distinguish the emotional strain experienced by the any other criminal defendant. See State v. Wasson, 76 Hawai'i 415, 422 (1994) (something more than a bare assertion of disquietude is generally required before this form of prejudice will weigh in favor of the accused). During the hearing, Defense argued that his reputation in the community was being harmed due to the delay in trial. TR 02.25.15 p 9-11. The Court found that "without anything in addition to [Defendant's] own description of the stress that is being impose on [him] is no more than the stress that all of us, [] experience in the course of a criminal trial." TR 02.25.15, p 23, ln 20-23. The Court explained that:

> Were [Defendant] to bring an expert witness to explain that this has been debilitating stress that has had some impact on you that is [] unusual and [] would cause you [] distress to the point of being unable to participate in your own defense or [] engage in the things [] that you do every day in your life then the court might have a [] different opinion." TR 02.25.15 p 23-24, ln 25 & ln 1- 6.

The trial court's reasoning was similar to that of the Intermediate Court of Appeals ("ICA") in Ferraro. In State v. Ferraro, the ICA found that "[a] mere assertion that one had been upset or concerned about a pending criminal prosecution is not sufficient" to establish prejudicial anxiety." State v. Ferraro, 8 Haw.App. 284, 300 (1990). The ICA further elaborates that "[t]he government will prevail unless the defendant offers objective, contemporaneous evidence of anxiety, such as prompt and persistent assertion of the desire for a speedy trial coupled with a

demonstrable basis for the court's believing the delay is traumatic." Id. In this case, Defendant failed to provide any contemporaneous evidence of anxiety or a demonstrable basis for the court to believe that the delays between the trial days were traumatic.

Note, in all the arguments that Defendant puts forward about the prejudice that he endured during the continuances, none of those arguments asserts that the Defendant's presentation of his case was actually hindered in any way. App't Brief at 23-26. In fact, Defendant's case benefited from the passage of time as he was able to locate the two additional witness as provided in Defendant's Second and Third Amended Witnesses lists, filed December 24, 2014 and February 17, 2015 respectively. ROR 55-57, 78-80.

B. WAIVER OF JURY TRIAL WAS KNOWING, INTELLIGENT, AND VOLUNTARY

Defendant claims that his waiver of jury trial was not knowing, intelligent, or voluntary because he assumed that a bench trial would be quicker than a jury trial. App't. Brief at 26. Defendant claims that the colloquy he entered into with the Court waiving his right to a jury trial did not provide him sufficient facts "to inform the defendant as to what all he is waiving." Id. at 26. However, a review of the record would show that the Court in engaged in a lengthy colloquy with Defendant about his constitutional right to a jury trial. TR 05.04.14 p 2-6. Court's colloquy included whether Defendant was of clear mind, engaging in the waiver of his own free will, and if Defendant had discussed his jury trial right with his attorney. TR 05.04.14, p 2-3. Court went over the details of jury trial including the requirement of a unanimous decision, burden of proof, and that the maximum penalties do not change in jury trial. TR 05.04.14, 3-4. The Court even asked the Defendant if he had any questions regarding his right to a jury trial. TR 05.04.14, p 4, ln 18-19. Defendant did have a question, not about his jury trial right, but about arraignment. TR 05.04.14, p 4, ln 22-23. After answering Defendant's questions, Court asked again if there

were any questions about Defendant's right to a jury trial, to which Defendant responded that he did not. TR 05.04.14, p 5, ln 21-23. Based on the lengthy colloquy, the Court found that Defendant knowingly, intelligently, voluntarily waived his right to a jury trial. TR 05.04.14, p 6, ln 2-4.

Prior courts have maintained that "[w]here it appears from the record that a defendant has waived a constitutional right, the defendant carries the burden of proof to show otherwise by a preponderance of the evidence." State v. Ibuos, 75 Haw. 118, 121 (1993). Defendant makes no new argument or showing within the record that would indicate that the Defendant did not make a knowing, intelligent, and voluntary waiver. But merely, points to the lack of discussion between the court and defendant regarding the timing differences between a jury trial and bench trial during his waiver colloquy. App't. Brief at 26.

During the hearing on Defendant's Motion to Dismiss Complaint for Violation of Due Process and Speedy Trial, Defendant admitted that he spoke to his attorney about his jury trial right prior to waiving that right on May 7, 2014. TR 02.25.15, p 12, ln 11-19. Per the Defendant, time was not a part of their discussion pertaining to the differences between a jury and bench trial. TR 02.25.15, 12-13. Defendant assumed that the timing and priority of a jury trial was the same as a bench trial, and that once a bench was started, the trial would have priority on the court' calendar. TR 02.25.15, p 5. Defendant explained that his based this assumption on his prior experience in another state. TR 02.25.15, p 5, ln 20-22. Upon re-direct, Defendant elaborated that he believed that if the bench trial did not finish in one day, room would be made on the courts calendar; and that he did not anticipate the delays between the court dates of August to November and November to February. TR 02.25.15, p 15, ln 14-23.

The timing differences between a jury trial and bench trial would be different between jurisdictions. If timing was such an important factor to Defendant as to make a strategic determination between a bench trial and a jury trial, then Defendant would have consulted with his attorney. It would appear from the Defendant's own testimony that he did not. TR 02.25.15, 12-13. Even after his jury trial waiver, Defendant would have had to prepare for bench trial with his counsel, and theoretically discuss approximate length of times for testimony and the trial overall. Defendant was made aware of the court's own practice of continuance to the next available date being approximately two months out on the conclusion of the August 27, 2014 trial date. At that hearing, Defense counsel made no motions to advance the purposed court date, or request that multiple court dates be scheduled for the ultimate conclusion of trial. Why? The State would argue that Defendant did not really hold the expedient disposition of his trial in that high of a regard.

Defendant's constitutional rights were upheld by the trial court. Bench trial started well within the period determined by HRPP Rule 48. TR 05.07.14, p 6, ln 6-7; App't Brief at 23. Trial was continued and commenced over four separate trial days. At each point of continuance, Defense had an opportunity to request either sooner dates or an accommodation by the court. At the outset of trial, Defense made no queries with the court as to setting of multiple trial dates to accommodate all anticipated witness in a faster setting of time. TR 08.27.15, p 111-113. Defense did not request an earlier trial setting on August 27, 2014. Nor did Defense request that multiple dates be set within quick succession of one another. On November 26, 2014, Defense asked if there were any earlier dates then February, there was one opening in the court's calendar but only two weeks prior. Again, Defense but did not inquire as to whether any additional dates should be schedule in foresight of any additional Defense witnesses.

Defendant argues that his trial lasted over the course of seven months. App't Brief at 26. What Defendant argues is "prejudicial delay" has been the customary promptness the Family Court has provided to all of its cases, unless there is a specifically requested accommodation. In this case, Defendant did not make any specific requests regarding the setting of his trial dates, nor did he apparently speak to his attorney about them. See TR 07.05.14, p 2-3; TR 02.25.15, 12-13. Defendant did not make an assertion a demanding of his speedy trial rights until the filing of his Motion to Dismiss Complaint for Violation of Due Process and Speedy Trial a mere 19 days prior to his third trial day. Prior and subsequent to which, Defendant filed a Second and Third Amended Witness List, which would require the trial court to secure additional court days to hear this additionally offered testimony. ROA 55-57, 78-80.

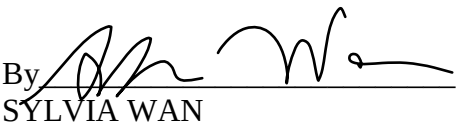
Defendant argues not that his speedy trial rights were violated, but by his own actions it would appear that he did not want a speedy trial. Defense did not request a sooner setting on any of the trial dates, except for one mentioned request concerning the setting of the third trial date in February. The fourth trial date in April was necessary due to Defendant's own request that the court hear witnesses identified in Defense's Second and Third Amended Witness Lists. Just because the bench trial did not progress in the manner assumed by Defendant do not mean that he was denied his constitutional right to a speedy trial.

V. CONCLUSION

Based on the foregoing arguments and authorities cited, the State-Appellee respectfully requests this Honorable Court to affirm the conviction of Defendant.

Dated at Hilo, Hawai‘i, February 26, 2016.

Respectfully submitted,

By 
SYLVIA WAN
Deputy Prosecuting Attorney
For the State of Hawai‘i, Plaintiff-Appellee